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**The Conditions of Just Return:
State Responsibility and Restitution for Refugees**

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INTRODUCTION

Certain crimes lie beyond the reach of repair. From torture and systematic rape to enslavement and ethnic cleansing, many of the violations experienced by refugees count amongst those injustices for which it is impossible to truly make amends. During the Cold War, many refugees were resettled in western countries, diffusing the explosive question of how refugees may be reconciled with their states of origin. Today, however, permanent resettlement is evaporating as a solution to refugee crises. For millions of refugees, return is no longer an option but an imperative (Hathaway 1997: 553). This raises some critical questions: What should refugees expect from return? Are they entitled to anything more than a haphazard journey back to ruined or re-occupied homes in communities where their livelihoods are uncertain and their welcome lukewarm at best? If so, what are the conditions of *just* return? Who is obliged to ensure these conditions are met? While a fierce public and academic debate probes the obligations that states of asylum have to those harboured within their borders, the issue of what states of origin owe to returning refugees is often overshadowed. Yet experiences from Mozambique to the Balkans indicate that identifying the state of origin's responsibilities to returnees and ensuring these duties are met is integral to a safe, sustainable repatriation process, and a stable political future.

Drawing on international law and social contract theory, I will argue that the state of origin has a fundamental responsibility to provide restitution to repatriating refugees with a view to creating just conditions of return. Rather than a 'one-size-fits-all' solution to the challenges of return, restitution is a negotiated process involving modalities such as property restoration, financial compensation and trials, and aims to recast the fragmented relationship between refugees and their states of origin into a rights-based framework (Ellis and Hutton 2002: 334). Albeit an invariably imperfect process, I will contend that it is through restitution that the state re-establishes its legitimacy by acknowledging and attempting to make good on the moral and legal responsibilities it abrogated by forcing its citizens into exile.

In Section One, I will ground this argument in a discussion of the moral and legal roots of state responsibility and just return. I will focus on the International Law Commission (ILC) Articles on State Responsibility and classical social contract theory, as well as the distinctive insights Shacknove's analysis of social contract theory offers into issues of refugeehood and return. Briefly, Shacknove suggests that states and citizens are bound by a minimal relation of rights and duties, the breakdown of which engenders refugees. When the state fails to respect citizens' rights, the bond between the citizen and the state is severed. I will argue that the state has a moral and legal duty to attempt to remedy this rift by creating just conditions for return, and will apply the tenets of social contract theory and human rights law to develop a picture of the minimum conditions a state is obliged to guarantee for repatriating citizens.

Section Two addresses the state's responsibility to use restitution to accomplish this task. Before identifying the characteristics of an effective restitution initiative for returnees, I will set out legal and political definitions of restitution, and will briefly discuss refugees' place in the modern restitution movement. I shall respond to Barkan's theory of restitution and Benvenisti's 'adequate compensation' model, and will argue that although remedies for refugees have typically been limited to the return of real property, the state is obliged to provide 'full restitution', which addresses property issues, but also speaks to non-material human rights violations through mechanisms such as apologies, reconciliation commissions and criminal tribunals.

Section Three will probe the practical and theoretical limits to restitution as an expression of state responsibility and a tool for reconciling returnees and their states of origin. In particular, I will address weak legal structures and lack of resources for reparations, as well as the difficulties of navigating complex historical claims and competing rights. This abstract explanation of state responsibility and just return naturally cannot capture all the complexities inherent in actual restitution and return processes, but I will support my argument with examples drawn from the experiences of Palestinian and Kosovar refugees, and Jews who fled the Nazis. Through a short case study, I will highlight the challenges associated with providing restitution for Bosnian refugees through the Commission for Real Property Claims and the International Criminal Tribunal for the Former Yugoslavia.

States of asylum and those with internally displaced persons (IDPs) may also have legitimate claims to restitution. However, for simplicity I will limit my discussion to restitution for returning refugees. While there are numerous competing and compelling definitions of the term ‘refugee’, I will focus particularly on people who have fled their countries because of persecution and the state’s unwillingness to offer protection. Cases where the state is in principle willing but in practice unable to offer protection raise challenging questions for any theory of state responsibility, but remain largely outside the scope of my analysis.

1. THE MORAL AND LEGAL FOUNDATIONS OF STATE RESPONSIBILITY AND JUST RETURN

‘Rights talk’ pervades the refugee regime. But to discuss the right to restitution and just return meaningfully, it is first necessary to ask where the state’s responsibilities to its citizens come from, and what becomes of these responsibilities when a citizen is made a refugee. While there are numerous ways to explain the origins of state responsibility and the state’s duty to make amends for violations of individual rights, the account offered by international law is the most explicit, while that provided by social contract theory one of the most compelling.

1.1. State Responsibility: Legal Views

The doctrine of state responsibility is one of the core tenets of international law. Legally speaking, state responsibility is ‘simply the principle which establishes an obligation to make good any violation of international law producing injury’ (Lee 1986: 537). State responsibility arises out of the legal maxim stated by Grotius in 1646 that ‘every fault creates the obligation to make good the loss’ (Lee 1986: 536). As states are the conventional subjects of international law, technically the principle of state responsibility applies only on the state-to-state level. Duties owed to citizens are left out. The ILC Articles on State Responsibility affirm this traditional, state-centric definition of state responsibility; crystallise customary international law on state responsibility; and set out reparation, restitution, compensation, satisfaction and guarantees of non-repetition as the basic legal tools states have to remedy injuries. Although the ILC Articles took forty years to negotiate, ‘the greatest relevance of the... articles may ultimately lie outside the scope of the project’ as many states have now taken on new legal obligations that are ‘unilateral or vertical, in the sense that they concern duties owed by states to individuals... Breach of these duties is unlikely to injure another state directly or give rise to a classic claim for reparations’ (Shelton 2002: 834). Nonetheless, many jurists argue that the principles underlying the ILC Articles also pertain to the obligations states owe their citizens, and the Articles have been referenced in the judgements of influential human rights bodies such as the Inter-American Court of Human Rights.

These developments reflect the relatively recent but fundamental shift in international law towards recognition of the rights and duties of individuals (Ellis and Hutton 2002: 352). Agreements including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights clearly delineate individual human rights the state is bound to respect, if not for moral reasons then because by signing these conventions, states have created binding legal responsibilities for themselves. The progress made in codifying the state's responsibilities to individuals has prompted some progressive scholars and governments to argue that a state's claim to sovereignty is dependent upon the state effectively shouldering its primary responsibilities, including safeguarding human rights (Slaughter 2003). Deng (1995) captures this idea in his discussion of 'sovereignty as responsibility'. According to Deng, when a state grievously fails to behave responsibly towards its citizens, the state temporarily forfeits its claim to sovereignty and the international community is permitted to intervene.

Although morally compelling and legally innovative, the notion of sovereignty as responsibility has unfortunately not translated into the development of strong enforcement mechanisms to curtail the sovereignty of irresponsible states and guarantee respect for individual rights. The judges at Nuremberg famously concluded that 'international wrongs are committed by individuals and not by abstract entities' (Echeverria 2002: 1). In the modern context the International Criminal Tribunals for Rwanda and the Former Yugoslavia and the International Criminal Court help ensure individual criminals are held responsible for egregious human rights violations. While the importance of individual accountability cannot be underestimated, it is equally crucial that *states* be held liable for abuses, particularly as an individual, no matter how far beyond the moral pale, cannot shoulder sole responsibility for large-scale crimes such as genocide. Individual leaders may mastermind atrocities, but both the individual and the institution must be held accountable for state-sanctioned crimes if only because the duty to make amends for these crimes cannot be discharged by an individual. Even if a war criminal had extensive financial resources that could be appropriated to fund the reconstruction and restitution programs necessary to remedy their crimes, it would be profoundly inappropriate for that person to be responsible for the delivery of these programs. This duty rightfully falls upon the more abstract political entity of the state. Yet states can often evade this duty because although the principle of state responsibility 'is well established in law and functions reasonably well in practice' on an inter-state level, '...with regard to individual victims of violations of human rights law...the position remains much more uncertain' and needs to be enhanced through more robust enforcement mechanisms (Gillard 2003: 530).

1.2. Contracted Responsibility: A Theoretical Perspective

Feeble as legal instruments for ensuring state responsibility may be, moral arguments often hold even less sway over states. Nonetheless, social contract theory offers a compelling explanation of the origins of the state's responsibilities to its citizens and may be used in concert with international law to mount a forceful case for the state's obligation to establish just conditions of return. Philosophers including Hobbes, Locke, Rousseau, Kant and Rawls appeal to the idea of a social contract to justify the institution of the state and illuminate what qualities political institutions should have. In its most basic form, social contract theory suggests that individuals sacrifice a significant degree of their personal liberty to the state in return for increased security and well-being, which individuals could not guarantee for themselves if acting alone. Thus the social contract creates mutual obligations between the citizen, who promises to respect the rule of the sovereign, and the state, which pledges to protect its citizens. Part of the appeal of the social contract for theorists such as Rawls is that it

conceives of the individual as conceptually prior to political or social units, and is therefore compatible with notions of individual rights (Audi 1995: 746).

Albeit a powerful explanatory device, classical social contract theory struggles to address the problem of consent. 'There is no denying the attractiveness of the doctrine of personal consent (and of the parallel thesis that no government is legitimate which governs without the consent of the governed)', as the notion of consent highlights the reciprocal nature of the contract and the individual agency of the 'signatories' (Simmons 1976: 274). Yet the contract is a fiction. At best, consent is therefore tacit or hypothetical, but 'a hypothetical promise is no promise at all, for no one has undertaken an obligation' (Kymlicka 1991: 187). Furthermore, 'the nature and consequences of... expressing dissent [to the contract], namely emigration, seem to be far too severe' for it to be maintained that the contract was undertaken voluntarily (Simmons 1976: 280-281).

Ironically, however, it is in addressing cases of forced migration that social contract theory is most persuasive: when the state transforms from a protector to a persecutor, it is difficult if not impossible to forward a convincing moral justification for the state's existence. If the state fails in its primary duty to guarantee the people's well-being, the contract is void. Yet the significance of the contract is illustrated by its very invalidation: although the contract between citizen and state is only a 'moral artifice', the citizen turned refugee soon discovers that this link is ironclad compared to the ephemeral relationship the refugee has with foreign states, a relationship based on little more than unenforceable international laws and fleeting compassion (Kymlicka 1991: 189).

1.3. Breaking the Bond and the Imperative of Repair

How is the social contract broken? Shacknove's discussion of the refugee definition illuminates the contractual relationship between the citizen and the state, and provides a starting point for examining the distinctive implications of social contract theory for state responsibility and just return. Shacknove (1985: 275) argues that the refugee definition offered in the 1951 Refugee Convention is predicated on the assumption that 'a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society' and that 'in the case of the refugee, this bond has been severed'. Persecution, conflict and alienage are physical manifestations of this severed bond. 'It is the absence of state protection', the state's core obligation under the social contract, 'which constitutes the full and complete negation of society and thus the basis of refugeehood' (Shacknove 1985: 277). Shacknove (1985: 281) insightfully notes that 'in exchange for their allegiance, citizens can minimally expect that their government will guarantee physical security, vital subsistence, and liberty of political participation and physical movement. No reasonable person would be satisfied with less. Beneath this threshold the social compact has no meaning'. The consequence of Shacknove's argument is that if every state subverted its responsibilities by creating refugees, the justification for the state system itself would crumble.

Although this outcome seems extreme, owing to scarce resettlement opportunities, millions of refugees are denied the chance to forge new bonds of citizenship with another state and so are left outside the logic of the state system. These refugees are compelled either to continue in limbo with only limited rights in their country of asylum, or to return to their state of origin. This reality forces the question of rectifying the relationship between states and their exiled citizens onto the political and moral agenda. The implications of this question are ethically and politically significant, because in the repatriation process the terms of the social contract, typically tacit, can be made explicit. Those refugees who gain the opportunity to

become citizens of a new state also effectively enter into an explicit social contract, albeit one they do not get to negotiate. For instance, refugees who find permanent asylum in Canada participate in citizenship ceremonies during which they are required to swear allegiance to the state but in so doing have conferred upon them the special rights enshrined in the Canadian Charter of Rights and Freedoms.

In comparison to refugees who resettle in affluent democracies, returnees face much more serious obstacles in re-establishing themselves as 'signatories' to a just social contract. Refugees are often members of minority groups which the dominant powers prefer to remain estranged from the state. This discrimination runs counter to the principle of equality that lies at the heart of both Hobbesian and Kantian versions of social contract theory. Hobbes focuses on the physical equality that exists between individuals insofar as virtually every individual can harm another, especially as the weak may use technology to augment their power. In contrast, Kant's contractual defence of political obligation highlights the natural equality of moral status between individuals (Kymlicka 1991: 188). While the state and majority groups may prejudicially prefer to de-legitimise the social contract that links them to minorities, this choice is ill-conceived given the compelling reasons offered by Hobbesians and Kantians to open the social contract to everyone by virtue of their physical or moral equality.

Essentially, both international law and social contract theory conceive of the state as 'constituted by a set of duties owed to its citizens that are integral to its authority to act' (Gibney 1999: 175). When these duties have been violated through the creation of refugees, the state must repair the broken bond between itself and its exiled citizens if it is to regain legal and moral legitimacy. Indeed, Principle 1 of the Cairo Declaration of Principles of International Law on Compensation to Refugees affirms, 'The responsibility for caring for the world's refugees rests ultimately upon the countries that directly or indirectly force their own citizens to flee'. Establishing just conditions for return is one of the principle ways in which the state of origin makes good on its obligations towards its refugees, thereby beginning the reconciliation process.

1.4. The Conditions of Just Return: A Minimum Account

International law offers only a vague account of what just return entails. Nonetheless, a clear picture of the minimum conditions of just return may be developed by fusing codified international law and 'soft law' such as General Assembly Resolutions with moral arguments on rights and state responsibility. I will argue that broadly speaking, the conditions of just return match the citizen's minimum entitlements under the social contract. The key conditions of just return therefore include security; the restoration of property; and protection of and accountability for human rights. However, there is no standard mould for just return. Returnees should be given choice in the process, and be empowered to negotiate fair terms of return that reflect their particular circumstances. Yet a logical examination of the conditions of just return must first address the refugee's right to return.

The right to return highlights the state's ongoing responsibilities towards its citizens, even when the state-citizen relationship has been fractured by refugeehood. Although the right to return is set out in numerous General Assembly Resolutions and Article 13(2) of the Universal Declaration of Human Rights, 'the right of return has not figured prominently in general discussions of refugee rights. The major thrust of these discussions has been on the right *not* to be returned' (Dowty 1994: 26, italics added). *Non-refoulement* is enshrined in the 1951 Refugee Convention, but given the popularisation of temporary protection measures and the fact that permanent resettlement opportunities have 'largely withered away', innumerable

refugees are now compelled to exercise their right to return (Hathaway 1997: 533). However, just as there are conditions such as access to legal counsel and an impartial judiciary that must be met before a defendant can be said to enjoy their right to a fair trial, there are conditions that govern the just implementation of the refugee's right to return. Chief amongst the conditions of just return is security.

UNHCR notes that return threatens not only physical security, but potentially also psychological, economic and legal security (Badil 1999). Impossible as it may be to eliminate all the risks associated with return, a minimum requirement is the cessation of the conditions that led to the exodus in the first place. This may imply an end to armed conflict, the creation of new constitutional provisions to uphold the rights of minorities, or a full regime change (Dowty 1994: 28). The rights recognised in the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities Resolution 1998/26 are tantamount to a checklist of many other aspects of just return. The resolution acknowledges:

the right of all returnees to the free exercise of their right to freedom of movement and to choose one's residence, including...their right to privacy and respect for the home, their right to reside peacefully in the security of their own home and their right to enjoy all necessary social and economic services, in an environment free of any form of discrimination.

Resolution 1998/26 and many contemporary peace agreements espouse the increasingly predominant view that the right to return involves not only the right to repatriate, but also to re-occupy one's original home (Leckie 2003b: 4). Indeed, regaining lost property is a core component of just return because many returnees' economic well-being hinges on recovering their properties. Furthermore, 'few things are as sacred to people as their homes, properties and lands' (Van Boven 2003: x). Enabling return to original homes may go further to creating a sense of justice for repatriating refugees than any other initiative.

Essential as property restoration is to just return, it cannot compensate for the state of origin accepting accountability for its role in the violations that created refugees. Whether it comes in the form of trials, truth commissions, apologies or compensation, the state's acceptance of responsibility for past abuses should involve a revived commitment to upholding the terms of the social contract. This should help restore to returnees at least a degree of confidence in their state of origin. As Vedsted-Hansen (1997: 559) writes, 'effective respect for and protection of the human rights of returnees is indeed a *sine qua non* to repatriation'.

The appropriate approach to expressing accountability, restoring property and building security will depend on logistical and resource limitations and, more importantly, on the particular experiences, needs and desires of returnees. This raises the fiercely debated question of whether return can be both just and involuntary. Is 'mandated repatriation' simply a euphemism for *refoulement* (Hathaway 1997: 554)? UNHCR EXCOM Conclusion No. 40 (XXXVI) notes that 'the repatriation of refugees should only take place at their freely expressed wish and the voluntary and individual character of repatriation of refugees...should always be respected'. Hathaway (1997: 551, 553), however, maintains that refugees are entitled to 'dignified and rights-regarding protection *until and unless* conditions in the State of origin permit repatriation without the risk of persecution'. Chimni (1993: 454) counters that 'to substitute the judgement of States and institutions for that of refugees, is to create space for repatriation under duress, and may be tantamount to *refoulement*'.

Given the dearth of firm legal guidance on the permissibility of mandated return, a normative analysis may help guide practice. Clearly part of what makes the creation of refugees so heinous is that it strips citizens of much of their capacity to make free decisions about their lives. Individuals bring this capacity for choice with them to the social contract, and it should be augmented, not eroded, by the state. A just return process should counteract this coercive experience by empowering returnees to choose between as wide a range of options as possible regarding their repatriation. Although the crucial choice of whether or not to repatriate may ultimately be made by the state of asylum, the state of origin can and should put other important choices into the refugee's hands. These choices may include whether to return to original homes or relocate to a new community; whether to participate in trials and truth commissions; and what sort of re-integration, development and compensation programs would be acceptable. While the state of origin must respect and attempt to accommodate returnees' opinions, returnees are also obliged to recognise the state's legitimate constraints. The state of origin owes it to repatriating refugees to create just conditions of return, but states have only limited resources, and must also uphold their obligations towards those citizens who were not exiled. Minimally, the state should guarantee to returnees the same rights that other citizens enjoy under the social contract. However, because refugees have been estranged from the state, special initiatives such as truth and reconciliation commissions and reintegration programs may be necessary before returnees can truly be back on equal footing with their fellow citizens. The legally and morally problematic nature of involuntary return underlines the importance of international cooperation to create the best possible conditions of return. If just conditions of return are established, more refugees are likely to make the choice to return voluntarily, thereby sidestepping the difficult question of forced repatriation.

In short, social contract theory and international law affirm that creating just conditions of return is a primary legal and moral responsibility for states of origin. The pillars of a just return process are security; property restoration; and accountability for human rights abuses. Transforming abstract notions of state responsibility and just return into a reconciliation and repatriation process that reflects the specific needs of each refugee situation is a complex challenge to be navigated through restitution.

2. THE TOOLS OF REPAIR: RESTITUTION, REPARATION AND COMPENSATION FOR REFUGEES

'A right without a remedy,' Lord Denning famously remarked, 'is no right at all' (Zegveld 2003: 498). As applied to refugees, restitution aims to repair the relationship of mutual rights and duties that normally binds citizens and states, and affirms the inalienability of human rights, including the right to return in conditions of security, dignity and justice. My examination of restitution for returnees will begin with a discussion of legal and political definitions of restitution and reparation, followed by a historical overview of the modern restitution movement, focusing on restitution for Holocaust survivors and Palestinian refugees, and the United Nations Compensation Commission. I will assess Barkan's theory of restitution, as well as the 'adequate compensation' approach forwarded by Benvenisti. Contrary to Benvenisti, I will argue that returnees have a right to 'full restitution', which addresses both material losses and accountability for human rights violations.

2.1. *The Refugee's Right to Restitution: Legal and Theoretical Definitions*

Like state responsibility, the right to a remedy is affirmed by both international law and moral arguments rooted in the human rights tradition. The right to a remedy is a secondary right that follows from the breach of primary rights, such as the right not to be tortured, or to be made a refugee (Zegveld 2003: 503; Artz 1999). Judge Hurber maintains that 'responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation' (Redress 2002: 9). The 1928 Permanent Court of International Justice *Chorzów Factory* ruling lay down the basic remedial norms for violations of international law. The court ruled that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed' (Shelton 2002: 835). Legal definitions are set out in the ILC Articles on State Responsibility and the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (Draft Principles on Reparation), which were prepared under the auspices of the UN Special Rapporteur on the Right to Restitution. Legally speaking, reparation encompasses three main types of remedy: restitution, compensation and satisfaction. Restitution aims to restore the conditions that existed prior to the violation, and often involves the return of homes, artefacts or land (Du Plessis 2003: 630). The 'first form of reparation', restitution is 'required of the responsible state unless it is materially impossible' or 'involves a burden out of all proportion to the benefit deriving from restitution instead of compensation' (Shelton 2002: 849; Artz 1999). It is often impossible to restore the conditions that existed prior to the human rights violations that cause citizens to seek asylum, such as torture. In these cases remedy is often achieved through compensation, which involves monetary payment for material and moral injury. Satisfaction addresses non-material injuries and may involve official apologies; assurances of non-repetition of the offence; and judicial proceedings or truth and reconciliation commissions (Gillard 2003: 531-532).

Scholars differ over whether the international legal framework is sufficiently well-developed to provide meaningful redress to victims of human rights violations. While Lee (1986) is optimistic about the ability of international law to remedy abuses, Garry (1998) questions whether current enforcement mechanisms are strong enough to secure compensation for refugees and deter future crimes. Echeverria (2002: 2-3) compellingly argues that owing to the piecemeal development of human rights law, there is an uneven proliferation of domestic and international standards and mechanisms to remedy human rights violations. This increases the salience of the Draft Principles on Reparation, which clarify current international legal principles and emerging norms on reparation. The Draft Principles have two main goals. Firstly, they aim to provide effective and enforceable remedies to victims of human rights abuses. Secondly, the Draft Principles strive to uphold the public interest by deterring future violations of international law. They discuss the scope of the state's obligations to prevent, investigate, punish and remedy infractions of human rights, and represent a significant contribution to the codification of norms on the right to reparation (Echeverria 2002: 2).

International law on remedies for human rights violations is evolving rapidly, but 'the fact that these principles are not "hard law" in all their aspects... does not mean that they do not constitute obligations' for the state (Mendez 1997: 4). Indeed, reparation and restitution are not simply legal principles. In addition these concepts are found in political, ethical and religious discourse (Redress 2002: 7). Because legal developments are influenced by contemporary normative debates, it is especially important to discuss not only legal definitions but also moral and political conceptions of restitution and reparation.

The most comprehensive normative discussion of restitution is presented by Barkan (2001: xii-xvii), who writes that restitution ‘represents the historical bridging of animosity between enemies’ and argues that ‘the novelty in the discourse of restitution is that it is a discussion between the perpetrators and their victims... Instead of categorizing all cases according to a certain universal guideline, the discourse depends upon the specific interactions in each case’. Barkan (2001: xviii) contends that the legal tools of remedy, that is, restitution, compensation and satisfaction, ‘are all different levels of acknowledgement that together create a mosaic of recognition by perpetrators for the need to amend past injustices’. For this discussion, I will adopt Barkan’s (2001: xix) comprehensive notion of restitution as the ‘entire spectrum of attempts to rectify historical injustices’. Although broad, this definition is salient because it encompasses the diverse yet interrelated approaches available to remedy injustice, including legal initiatives such as trials and property restitution, and political efforts such as apologies and truth commissions.

Clearly not only refugees but all victims of serious human rights violations have a right to restitution. However, restitution for refugees is particularly crucial because restitution helps create just conditions of return and therefore has important implications for fostering security and development in post-conflict states. Given that restitution is morally and legally well-grounded and has positive practical effects, why have so many refugees been denied it? States resist negotiating restitution with returnees because restitution is a time consuming, politically contentious, costly process that challenges the view that state responsibility does not apply to individuals. Furthermore, although restitution is crucial in cases of large-scale post-conflict return, macro-level approaches have traditionally dominated the peace-building process. Consequently, high-level political agreements have typically received greater attention than individual-oriented processes such as restitution.

2.2. *Refugees in the Modern Restitution Movement*

Despite staunch opposition to the notion that states are obliged to provide restitution to returnees, refugees have had a significant if overshadowed role in the modern restitution movement. Barkan points to Germany’s efforts to compensate Holocaust survivors as the first example of modern restitution, which is nonvindictive in character and motivated by a sense of responsibility for injustice. Germany’s restitution for Holocaust victims was negotiated with international Jewish organisations and the newly founded Israeli government, and, since 1952, has involved the transfer of over 60 billion dollars from Germany to Israel and individual survivors (Bazyler 2002: 38). During the fraught negotiation process, the norms underpinning the restitution project were tested by fire, as the wounds West Germany sought to address were both deep and fresh. In the final German-Jewish agreement, Jewish negotiators acknowledged Germany’s attempt to atone for its crimes, but did not forgive them. This compromise entrenched the place of accountability and atonement in the restitution process, but pragmatically recognised that forgiveness and true reconciliation cannot be compelled. Through this process, ‘the Holocaust was not undone, but as in mourning, restitution provided a mechanism for dealing with pain and recognising loss and responsibility, while enabling life to proceed’ (Barkan 2001: xxiii; Hoffman 2002).

The fledgling restitution movement largely stagnated until the early 1990s when class action suits were filed in American courts against three prominent Swiss banks for their complicity in the Holocaust. This sparked renewed interest in the question of amending historical injustices, and launched several complex restitution cases onto political agendas worldwide, including compensation for Japanese and Korean ‘comfort women’ and Japanese

North Americans interned during the Second World War, and apologies and the return of sacred lands for indigenous peoples in Canada and New Zealand (Bazyler 2002: 15). The longstanding debate on reparations for slavery was also reinvigorated in the United States. Numerous pressing restitution cases remain sidelined the world over, however, Barkan (2001: xvii) compellingly argues that the growing trend towards restitution ‘provides a new threshold for morality in international politics’.

From the start, refugees have been intertwined with the law and politics of restitution. In 1939, Jennings argued for refugees’ legal right to reparations, and in 1952, a reluctant Israel engaged in restitution negotiations with West Germany because it was financially crippled and needed US\$1.5 billion to resettle Jewish refugees from Europe (Garry 1998: 98). Germany paid for two thirds of the resettlement costs (Bazyler 2002: 38). Under the Swiss banks’ Holocaust settlement, which was negotiated and financed by both the banks and the Swiss state, five classes of eligible claimants were identified, including a ‘Refugee Class’. This class consisted of individuals who attempted to gain asylum in Switzerland from the Nazis and were either denied entry or, after gaining entry, were refouled or mistreated (Bazyler 2002: 15). This little-known case is one of the only examples of a state of asylum acting on their responsibility to provide restitution for refouled refugees.

In a cruel moment of political irony, just as Holocaust survivors were negotiating the compensation agreement that enabled them to build a strong Israeli state, another group of refugees in need of restitution was created. Some of the most important, precedent-setting political statements on restitution for refugees arose after 726,000 Palestinians were displaced through the establishment of the Israeli state (Fischbach 2003: xxi). In 1948, the UN Mediator on Palestine, Count Bernadotte, identified the ‘twin rights of repatriation and compensation’ as essential to the settlement of the Palestinian question (Lee 1986: 534). Bernadotte wrote,

The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the UN, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the UN (UN Doc. A/648).

UN Member States echoed Bernadotte’s recommendations in General Assembly Resolution 194 of 1948, which resolves 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 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.

Although never implemented, these provisions have been repeated in numerous General Assembly resolutions. While these resolutions are oft-cited pieces of political rhetoric, the conception of restitution they outline is limited insofar as they set out an ‘inverse relationship’ between repatriation and compensation (Lee 1986: 566). That is, according to Resolution 194, only non-returnees are entitled to compensation. Rights-based normative arguments and progressive interpretations of international law indicate that returnees have valid claims to restitution not only for housing and property, but also for other harms including loss of income and human rights violations. As Rempel (1999: 41) maintains, ‘return and compensation are by no means mutually exclusive’.

Whereas efforts to provide restitution for Palestinian refugees have not moved beyond the level of rhetoric, returnees' right to restitution has been incorporated into peace agreements in Tajikistan, Georgia, Burundi, Rwanda, Liberia, Sierra Leone, Mozambique, Cambodia, Guatemala and the former Yugoslavia (Al Majdal 2003: 37). In particular, the UN Compensation Commission (UNCC) has set a crucial precedent for securing the individual's right to restitution. Established by Security Council Resolution 674, the UNCC addresses harms inflicted on individuals, corporations and states as a result of Iraq's 1991 invasion of Kuwait. Although Iraqis whose rights were violated through the war cannot appeal to the UNCC for redress, the standard set is progressive because through the Commission's work, 'for the first time in the history of international compensation institutions and procedures, the interest of the individual was given priority over that of businesses or even governments' (Wooldridge and Elias 2003: 564). The UNCC is not a court but a political organ that aims to process claims promptly and efficiently, with maximum objectivity, transparency and fairness (Wooldridge and Elias 2003: 557). It blends classic restitution principles with innovative, streamlined decision-making procedures to offer remedy to large numbers of claimants, with an emphasis on the needs of individuals. The Commission provides fixed amounts of compensation for death and serious personal injuries, including, notably, mental pain and anguish arising from sexual assault, torture, hostage taking and illegal detention. Providing compensation for mental pain and anguish is a major innovation, and should bolster restitution claims raised by survivors of similar abuses elsewhere. The Commission specifically strives to compensate the millions forced to flee Iraq and Kuwait during the Gulf War, and represents an important example of large-scale, institutionalised restitution for refugees (Crook 1993: 147-153). By July 2003, the Commission had resolved nearly 2.6 million claims, and awarded US\$46 billion in compensation (Wooldridge and Elias 2003: 579). The UNCC is funded through Iraqi oil sales, and it is doubtful whether future restitution initiatives based on the UNCC model could succeed without access to comparable resources. Nonetheless, 'the Commission is a concrete manifestation of the international community's commitment to the principles of state responsibility', and is a source of important lessons on providing timely, comprehensive financial restitution to refugees (Crook 1993: 157).

2.3. *A Voluntary Duty?*

While these historical examples do not directly involve restitution from the states of origin to repatriating citizens, they are based on similar principles of rights and responsibility, principles that are at odds with Barkan's characterisation of restitution as a voluntary process. Barkan's (2001: xvii) analysis insightfully recognises that restitution must address both individual rights and the rights of victimised groups, but his argument stumbles because he attempts to conflate this rights-based account of restitution with his view that states engage in restitution voluntarily, as part of an increasing 'willingness of nations to embrace their own guilt'. Although it may be descriptively true that some states are motivated by repentance or charitable sentiments, it is legally and theoretically misled to construe restitution as anything other than a duty. Equally, it is essential to develop mechanisms to ensure that restitution is not simply left to the discretion of the state of origin, but is an enforceable right for returnees.

If tenable, Barkan's view would be a dangerous one for refugees, as it is unlikely that goodwill alone could prompt recalcitrant states to launch costly, complex restitution processes. However, Barkan's position is factually and theoretically implausible. Barkan (2001: ix) asserts that the restitution cases he examines in *The Guilt of Nations* 'involve no coercion but rather evolve from the perpetrators' willingness to acknowledge, and choice to compensate, their victims or their descendents'. Although there is no mechanism that consistently compels states to provide restitution for past wrongs, Barkan overlooks the persuasive influence of

rights-based arguments on states. The state does not freely choose restitution, but rather recognises that restitution is a duty it owes to victimised groups and individuals. Sceptics may question whether moral arguments could possibly impel states to offer billions of dollars in compensation, or humbling apologies. However, arguments about duty are undoubtedly more likely to achieve this outcome than a malleable sense of goodwill. Many of the states that first embarked on restitution negotiations, such as Switzerland, Canada and New Zealand, take rights-based arguments seriously and have integrated respect for human rights into the national identity.

Of Barkan's twelve purportedly voluntary restitution cases, his factual interpretation is mostly clearly flawed in his treatment of the Swiss banks' compensation for Holocaust victims. While Barkan writes that the banks voluntarily extended US\$1.25 billion in compensation, Bazylar (2002: 15) tells a more convincing story: under threat of litigation, the banks attempted to settle out of court and in June 1998 made their 'first and last offer' of US\$600 million. This offer was rejected, and pressure for a better settlement mounted as the US Senate Banking Committee held hearings on the issue; the US government issued a report sharply criticising the Swiss for their Nazi-era dealings; and state and local governments threatened to stop doing business with the Swiss banks unless an appropriate settlement was negotiated. In August 1998, the offer was doubled, and the case settled for US\$1.25 billion, the largest settlement in a human rights case in US history (Bazylar 2002: 15-17). Asked why the banks doubled their offer, Rabbi Marvin Heir responded, 'It was for only one reason: they were pressured into it. Without the pressure... without the threat of sanctions, the Holocaust survivors would have gotten nothing' (Bazylar 2002: 17). Even the establishmentarian *Financial Times* declared, 'The clearest lesson from the Swiss banks' 1.25 billion settlement with the Holocaust survivors is this: threatening to impose sanctions can work' (Authers and Wolfe 1998). Undoubtedly, the Swiss banks' restitution was not truly voluntary: the banks were impelled to provide compensation because they had a duty to the Holocaust survivors as bearers of human rights, which the threat of sanctions forced the banks to recognise. Although the legal, moral and political pressures that prompt states to provide restitution are not always as apparent as they were in the Swiss banks case, this example demonstrates that Barkan's depiction of restitution as voluntary is certainly ill-conceived.

2.4. *The Adequate Compensation Model: An Inadequate Remedy for Returnees*

Unfortunately, most refugees do not have access to the political levers and litigation system that enabled Holocaust victims to obtain a fair settlement from the Swiss banks. Given most refugees' limited bargaining power, what would just, effective restitution look like for returnees, and how could it be achieved? Arguing from a legal perspective, Echeverria (2002: 2) asserts that the right to a remedy consists of the procedural right to a fair hearing, judicial or non-judicial, as well as the right to material reparations. Remedies must be effective, prompt, and proportional to the gravity of the harm suffered. Providing a more detailed response to this question, in 1981 the General Assembly discussed the notion of 'adequate compensation', which was subsequently elaborated upon by Benvenisti (1999) and the UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees. The concept was developed with a view to resolving the issue of property restitution for Palestinian refugees, but has significant implications for other restitution and return processes.

Adequate compensation takes into account both parties' interests and constraints. As it relates to the Palestinian-Israeli issue, calculations of adequate compensation factor in Israel's financial limitations; the time elapsed since the Palestinians were displaced; refugees' ability to prove property ownership; and the massive and growing number of Palestinian claimants

(Rempel 1999: 42). The adequate compensation framework rejects the *Chorzów Factory* ruling that restitution must fully eliminate the consequences of a harmful act on the grounds that it is not pragmatic when dealing with large refugee communities. Proponents of adequate compensation argue that even if realistic valuations of refugees' property could be made, paying full compensation could drain state resources, creating instability during delicate transition periods. Because adequate compensation attempts to balance the parties' interests and constraints, it could result in compensation levels below full market value. However, adequate compensation also strives to promote the development of refugee communities, and if rehabilitation will require more money than refugees' properties are worth, adequate compensation rates may exceed the market value of their property. As Benvenisti (1999) writes, 'These principles are not just backward looking; they are also, and not less importantly, forward looking'. Concerned that ambitious restitution negotiations may spark controversy and heighten tensions between the parties, Benvenisti further suggests that compensation schemes take on limited mandates inspired by consequential considerations and distributive justice rather than a more wide-ranging rights-based approach aimed at effecting corrective justice.

Albeit practical and adaptable, the adequate compensation framework fails to model the type of restitution process that could enable just conditions of return or even resettlement for refugees. 'The success of any strategy will be weakened by unrealistic demands for unworkable forms of reparation', however, if restitution is to promote justice for refugees, it must involve not only compensation for lost property, but also the return of property and accountability for the human rights violations that led to and exacerbated displacement (Du Plessis 2003: 659). Perhaps because of its connection to the Israeli-Palestinian dispute, the adequate compensation model assumes that compensation will play a greater role in the restitution process than property return. However, while 'compensation may in certain circumstances be a favourable alternative to restitution it is by no means a panacea' (Bagshaw 2000: 214). Amongst restitution advocates, there is concern that compensation may be seen as a means of legitimising human rights violations, particularly ethnic cleansing, as compensation may inadvertently imply that money can substitute for the protection of human rights (Goodwin-Gill 1996: 269). Benvenisti tacitly admits a further problem with adequate compensation: compensation releases the state from any further obligations towards refugees, usually without admitting responsibility for any wrong-doing. This undermines what the former UN Special Rapporteur on the Right to Restitution identified as the purpose of restitution, which is 'relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations' (Redress 2002: 5). Because it addresses only property issues and does not actually ensure state accountability, adequate compensation cannot achieve this goal.

2.5. Full Restitution: Material Aspects

If neither Barkan's voluntary approach to restitution nor the adequate compensation model can secure the minimum conditions of just return, what avenue should be pursued? The ILC Articles on State Responsibility are telling: they attest that states are obliged to provide 'full reparation' for 'material or moral damage' by applying the legal tools of restitution, compensation and satisfaction (Shelton 2002: 845). Full reparation or restitution involves restoring the conditions that existed prior to the violation, to the greatest extent possible. In terms of the social contract, this means re-establishing the returnee as an equal signatory to the social contract, and ensuring that returnees can enjoy their entitlements as 'signatories', especially security and respect for human rights. Although it may be counter-intuitive to suggest that *full* restitution is necessary to guarantee the *minimum* conditions of just return, this approach is superior to Barkan and Benvenisti's models because it recognises that the state must

make good on returnees' right to restitution in order to preserve its legitimacy. The full restitution approach acknowledges that in order to repair the bond between the refugee and the state of origin, the restitution process must address both material and moral damages. While property restitution and compensation may be used to repair material harms and promote physical security and well-being, moral damages are better addressed through apologies, trials and truth commissions designed to uphold state accountability. Developing stronger mechanisms for protecting human rights is also crucial to rebuilding returnees' trust in the state.

Restitutio in integrum is increasingly accepted as the 'normative baseline' in restitution cases for the displaced (Leckie 2003b: 4). In terms of real property, this usually implies that returnees regain the homes they inhabited before displacement. Restoring property rights is certainly not unproblematic. It generally involves complex ownership determination and eviction procedures, and raises difficult questions about the rights of secondary occupants, who often have nowhere to go after being dispossessed from returnees' properties. In addition, after living in urban centres many young refugees are hesitant to return to rural life, and may not have the skills to sustain themselves in an agrarian economy (UNHCR 2004: 8; Hovey 2000: 10). Yet housing and property restitution is essential insofar as it helps meet returnees' immediate need for shelter and can also reaffirm identity and foster a stronger sense of security (Smit 2004b: 31). Important economic interests are also at play. For many returnees, property is a crucial financial asset and source of livelihood, while financial compensation may also significantly affect development. For example, Germany's restitution payments to Jewish refugees resettling in Israel 'helped to rehabilitate one country morally and to set another one up economically' (Woollacott 2001: 1). Similarly, compensation from Israel may eventually play a key role in enabling Palestinian refugees to return to and prosper in a future Palestinian state (Zweig 1993). The Durban Declaration from the World Conference Against Racism embraces this development-based vision of restitution. Although the debate in Durban mostly pertained to reparations for slavery, the conference insightfully concluded that restitution should be used not only to *redress* historical injustices, but also to *address* the legacies of injustice. That is, where harms such as exile have spanned generations, compensation should be used as 'a vehicle for rectifying the social and economic problems that underpin today's victims' continuing marginalisation' (Du Plessis 2003: 652-654).

Real property restitution has almost entirely dominated current discussions of remedies for refugees, although in some critical cases property restitution and material compensation have been almost entirely sidelined in favour of programs focusing on justice and community reconciliation. For example, after the Rwandan genocide land restitution was paltry, and living conditions amongst returnees are often abysmal. Meanwhile, the US\$177 million budget of the International Criminal Tribunal for Rwanda equals almost one third of the country's entire operating budget, infuriating genocide survivors (Nolen 2004). By local standards, the accused in Arusha are held in luxurious conditions while survivors struggle in poverty, without the relief that land restitution and financial compensation programs might bring. Athanasie Mukarwego, who survived months of sexual enslavement by Hutu *genocidaires*, laments, 'Don't talk to me about justice... they're like men living in paradise. It's as if they've been rewarded for what they did' (Nolen 2004).

2.6. Full Restitution: Human Rights and Accountability Aspects

There is no question that a balance must be struck between the material and non-material aspects of restitution if just conditions of return are to be reached. Straddling both aspects of restitution, compensation provides a monetary remedy for materially assessable

harms, which are often deeply personal, morally charged injuries such as torture or rape. Difficult as it may be to assess the value of refugees' property, it is undoubtedly even more challenging to affix a dollar value to their suffering. However, acknowledging and attempting to account financially for this suffering may be essential to creating a sense of justice for returning refugees, and a willingness to re-invest trust in the state. As the top US official involved in the Holocaust restitution effort commented, 'there is a certain symbolic quality that only money can convey to repair injustices' (Bazyler 2002: 41). Domestic rulings have enabled lawyers to estimate the cost of compensating refugees for psychological suffering caused by human rights violations. For example, in 1994, Kubursi (1996) estimated that it would cost Israel US\$132 billion to compensate Palestinian refugees for lost land instead of returning it to them. Adding damages for injury and psychological suffering would double this figure (Badil 1999). Although the figures will vary widely in each case, for many governments the cost of compensating victims for their suffering would be crippling. There are precedents for such compensation, and this approach is sometimes vital to affirming state responsibility and enabling just return. However, compensation for human rights abuses is still not a standard component of recent agreements to facilitate return. Given a positive atmosphere for return, refugees may be willing to forego financial compensation, especially if the state undertakes in-kind restitution efforts such as truth commissions or tribunals (Badil 1999). Indeed,

violations of human rights and humanitarian law are by their very nature irreparable, and any remedy will fail to be truly proportional to the gravity of the injury inflicted, particularly when the violations have been committed on a massive scale. Remedies must therefore concentrate on the accountability of the wrong-doers and on the restoration of the rights and dignity of victims (Echeverria 2002: 2).

Mendez (1997: 3-4) argues that emerging international norms on accountability underline the offending state's obligation to provide remedy not only through financial compensation, but also through trials and the reform of state institutions. 'The primary aims of trials after mass atrocity', Humphrey (2002: 125) writes, 'is to re-establish the rule of law by establishing truth and justice about the past. Trials are an important mechanism to re-establish the authority of law and thereby engender people's trust and confidence in national institutions'. As refugees are perhaps above all those with the least confidence in their state of origin, trials may serve to assure returnees that the state has reformed. Through involving returnees in the prosecution of the crimes that forced them to flee, trials publicly affirm the state's commitment to protecting the rights of returnees. 'By redressing the rights of individual victims, trials seek to reconstitute state political and legal authority by demonstrating that no one', whether a dictator or a refugee, 'is above (or below) the law' (Humphrey 2002: 126).

As an expression of state responsibility, however, trials are slightly problematic. Firstly, international tribunals may be interpreted as externally-imposed institutions that do not betoken real state accountability. Secondly, trials individualise responsibility for crimes. 'Legal proceedings cannot... convict an entire society', even when the majority of citizens and the entire machinery of the state were complicit in atrocities, such as the Rwandan genocide (Humphrey 2002: 129). Although some regional courts now accept petitions from individuals regarding state-sponsored abuses, typically citizens cannot put the state in the dock. Nonetheless, establishing domestic tribunals to address the abuses that forced citizens into exile is a significant expression of state responsibility even after a regime change. During the trial the 'democratic legitimacy of the new government is established on the stigmatisation of the predecessor's programme and not just individual accountability for crimes... Put another way, reconciliation can only be based on justice which reconstitutes everyone as members of the same political community' (Humphrey 2002: 132).

Like trials, truth commissions and apologies may serve as valuable expressions of the state's acceptance of responsibility for creating refugees. By guaranteeing that the abuses will not be repeated and constitutionally enshrining returnees' rights, states may demonstrate both accountability for past injuries and a commitment to respecting returnees' rights in the future. Although legal experts debate whether restitution can technically take place without this sort of acknowledgment of wrong-doing, 'it is difficult to imagine restitution and reparations without accountability... a state must demonstrate that it accepts moral responsibility for its past. Restitution and reparation must, at a minimum, be integrated with the distinct concepts of acknowledgement and accountability' (Ellis and Hutton 2002: 344). Various attempts to remedy state-sponsored injustices illustrate the centrality of accountability to successful 'full restitution' processes. For example, in Chile the Rettig Commission was founded to pursue 'reconciliation, truth and justice' by investigating allegations of human rights abuses committed by the Pinochet regime, publishing the results of the investigations, and compensating those wronged. However, for many victims the offer of compensation was insulting because neither individual leaders nor the state actually accepted responsibility for the violations (Garry 1998: 116). Similarly, the Japanese government offered financial compensation to the *ianfu*, or 'comfort women', who were sexually enslaved by the Imperial Army during World War II. Although many *ianfu* endured ostracism and impoverishment as a result of their experiences, they refused to accept the compensation because it was not accompanied by full acknowledgement of Japan's complicity in the atrocity of sexual slavery. More than money, the women sought accountability in the form of an official state apology and the inclusion of their story in Japanese history curricula. In the absence of such gestures, the last *ianfu* are dying unreconciled, a clear testimony to the inextricability of accountability from restitution.

2.7. Restitution, Rehabilitation and Deterrence

While the focus here has been on what restitution means for the returnee, the state also stands to gain from the restitution process. Beyond being a legal responsibility, a political challenge and a budgetary strain, restitution presents a valuable opportunity for state self-rehabilitation. For both longstanding democracies and states in the process of democratic transition, admitting responsibility for injustices and engaging in restitution has become a 'liberal marker of national political stability and strength rather than shame' (Barkan 2001: xxix). Indeed, the right to a remedy is a 'pillar of the rule of law and democracy' (Echeverria 2002: 2). By providing restitution, the state demonstrates that it takes its responsibilities to its citizens seriously, and legitimises its claim to sovereignty under Deng's theory of 'sovereignty as responsibility'.

Restitution negotiations 'help the state purge its own guilt and create a new national identity through atonement' (Ellis and Hutton 2002: 345; Moser 2002). If the state acknowledges its responsibility for human rights violations, citizens are more likely to evaluate their own complicity in injustice. In turn, this may stimulate public discussion that challenges nationalised accounts of history and builds a more tolerant atmosphere for return (Hoffman 2002). For West Germany, providing restitution for Holocaust survivors was a way of facilitating the country's moral rehabilitation, a process that had direct political pay-offs as West Germany's efforts were recognised by world leaders, and the country was eventually welcomed back into the international community (Barkan 2001: xxiii-xxviii).

A further positive aspect of restitution is its potential to deter repetition of the violations that turn citizens into refugees. On an individual level, restitution can only address the

consequences of violations. Yet at a more general level, there is growing determination to see refugees' right to restitution realised, even though restitution is a costly, time consuming and controversial process. This prospect may give states reason to pause before they pursue or permit actions that would give rise to refugees in need of restitution (Gillard 2003: 530).

3. BEYOND REPAIR?: OBSTACLES AND LIMITS TO RESTITUTION FOR REFUGEES

Its strengths notwithstanding, restitution is no panacea for the all difficulties of return. If just conditions of return are to be established, restitution must be complemented by efforts to ensure returnees' physical security, and restitution's practical and theoretical constraints must be addressed. Restitution for refugees is limited by structural obstacles including feeble enforcement mechanisms; lack of resources; and insufficient political will and capacity. On the theoretical front, proponents of restitution must grapple with conflicting rights and complex, competing historical claims. Whereas the theoretical limits of restitution must be recognised so that realistic expectations may be developed, the structural challenges must be confronted to hone the tool of restitution for the benefit of returning refugees.

3.1. *Structural Challenges*

For countless returnees, the right to restitution 'has often been as unavailable in practice as it is unassailable in principle' (Dowty 1994: 28). This is partially due to the lack of strong mechanisms to ensure compliance with international norms on restitution. In the absence of such mechanisms, it is difficult to preserve the notion that restitution is not charity but a duty states owe to returnees. Important progress was recently made with the inclusion of reparation rights in the Rome Statute of the International Criminal Court (ICC). Initially there was strong resistance to calls for the ICC to have reparative powers, as many negotiators were concerned that the inclusion of restitution provisions in the Statute might evoke principles of state responsibility while the ICC has a clear focus on individual responsibility (Ferstman 2002: 1-2). While the inclusion of reparations in the Rome Statute should spur on the evolution of jurisprudence on restitution and state and individual responsibility, presently most refugees have no way to ensure that their restitution rights are respected, and have no recourse for complaint when the conditions of their return are not just.

Looking to the long term, Lee (1986: 546) contends the right to restitution is best upheld by giving states incentives to comply. Lee argues that development aid ought to be conditional on states providing restitution for returning refugees, a conclusion echoed in Principle 6 of the Cairo Declaration on Compensation to Refugees. While this would no doubt increase adherence to restitution norms, is it fair to punish impoverished communities for their state's intransigence by withholding development assistance? Furthermore, if strong incentives were created to promote restitution for refugees, would this inadvertently encourage states to try to prevent their citizens from seeking asylum abroad, so that they could not claim compensation upon return? (Garry 1998: 116). These concerns cast serious doubt on the practical and ethical viability of Lee's suggestion.

An additional structural obstacle is the shortage of resources for restitution programs, and the associated the lack of political will and capacity to promote restitution for refugees. Most refugee-creating states already lack sufficient resources to provide essential services to all their citizens. Is it acceptable to divert resources away from education and health programs

to finance restitution for returnees? In cases of massive refugee flows from developing countries, many forms of restitution, especially compensation, will not be economically practicable (Garry 1998: 113). Even for wealthier states such as Israel, the price of full restitution may be prohibitive, particularly when political constraints are figured in. Compensating Palestinian refugees simply for lost property at full market value would cost approximately US\$250 billion (Leckie 2003a: 42). However, estimates show that only US\$5.7-27.3 billion in compensation is economically feasible for Israel, while a mere US\$1-5 billion would be acceptable to the Israeli electorate (Rempel 1999: 45). Civil society initiatives promoting restitution push the limits of public and political will, and successfully shaped restitution processes in countries including Canada and South Africa. Bleak as the political climate in Israel and the Palestinian Territories may be, similar efforts can still help build momentum for a future restitution process in the region (Al Majdal 2003: 38).

The cost of restitution will depend on what it seeks to achieve. Although expenses may be minimised by returning property instead of compensating for lost land, for example, any attempt at full restitution, however managed, will not come cheaply (Cowen 1997: 171-172). In the Israeli-Palestinian case, it has been suggested that western states should help foot the restitution bill, as part of the 'price of peace' in the Middle East (Barakat 1999). This suggestion is politically improbable and morally problematic, as it undercuts the idea that restitution should be an expression of the offending state's responsibility for past injustices by shifting the financial burden to third parties (Rempel 1999; Brynen 1999). Yet many states may be too weak to institute restitution without support from the international community, and may question why their limited capacities should be directed towards the restitution issue in particular. As difficult as it is to implement restitution, particularly in conditions of post-conflict disarray, this is an essential investment in long-term stability because

'there can be no prospect of a workable peace agreement until the return and ...restitution question is properly addressed. Indeed, this is a major lesson of all post-conflict situations throughout the world: address restitution issues head on, and more likely than not peace will hold. Ignore it, and the war that was so hard to stop in the first place will be much more likely eventually to re-ignite' (Leckie 2003a: 43).

3.2. *Insurmountable Limits?*

Many of these structural challenges hint at the more complex theoretical limits to the restitution project. First among these difficulties is the issue of fairness and competing rights. Owing to resource scarcity, privileging returnees' right to restitution may compromise the state's ability to uphold other citizens' rights to essential services such as health care and education. Is this fair, especially as refugees are often already better off than average members of the population in developing countries? Individual financial compensation may exacerbate economic cleavages, particularly if women are not given equal access to restitution mechanisms (Bagshaw 2000: 219; Farha 2000). In light of these concerns, Waldron encourages reparationists to consider whether justice is relative to circumstances: a returnee may have a clear entitlement to property restitution, for example, but is this entitlement weakened if upholding the returnee's rights will have a disproportionately negative impact on the secondary occupants who will be evicted? Waldron (1992: 27) effectively argues that refugees' rights to restitution and just return must be balanced against the claims of other citizens, as 'the only thing that can trump the enterprise [of repairing historical injustice] is an honest and committed resolve to do justice for the future, a resolve to address present circumstances in a way that respects the claims and needs of everyone'.

In conditions of ‘new sovereignty’, where a new regime has made a radical break with the past, leaders may question why they should be held responsible for the transgressions of another government (Humphrey 2002: 135). A new regime may not feel directly responsible for the ‘deeds and misdeeds of the “old” state’, nevertheless, the legal principle of state continuity affirms the constancy of the institution of the state, irrespective of political changes (Garry 1998: 110). State continuity has noteworthy moral implications, as it means victims’ claims against the state can persist across generations. Indeed, the strength of a victim’s claim may grow as time passes and injustices compound along with interest rates. Yet for refugees, ‘over time the possibility and relevance of a complete return to the *status quo ante* continues to decline; original homes may no longer exist, former sources of livelihood may have disappeared, and precise reversal of the initial dislocation could only be achieved at the cost of an even greater new dislocation’ (Dowty 1994: 29). This confirms the salience of the idea of ‘full restitution’ as the re-establishment of the terms of the social contract rather than the restoration of the exact *status quo ante*.

When evaluating the state’s liability for past injustices, the principle tension is between the view that no matter how long ago a harm occurred, its legitimisation only encourages other wrongs, and the counterargument that as circumstances change over time, perceived injustices may be erased even without any formal acceptance of responsibility from the state (Barkan 2001: xxxiii). For refugees who have been in exile for multiple generations, this counterargument does not hold much sway. It is widely accepted that some rights ‘fade’ in their moral importance as time passes; this idea underlies the use of statutes of limitations, which annul the right to due process following certain crimes if they are not promptly prosecuted. Yet is there a statute of limitations on the state’s responsibilities to its citizens? It certainly seems harsh to use the fact of refugees’ longstanding dispossession as a way of weakening their claim to restitution (Waldron 1992: 15).

Ideally, the dilemmas raised by inter-generational restitution should be avoided by providing expedient remedies to repatriating refugees. Belief in the right to prompt remedies and outrage at the marginalisation of victims’ interests when restitution is bogged down by bureaucracy and political wrangling has generated considerable international dedication to delivering reparation to returnees without delay. A commitment to timeliness drives the property restoration process underway in Kosovo, which will wrap up by 2006, only seven years after the cessation of fighting. Efficiency is laudable, but it is naïve to hope that the restitution process can be rushed without compromising the original goal of the process, the facilitation of minority returns (Smit 2004b). Decisions on claims filed with the Kosovo Housing and Property Directorate are made with remarkable expediency, and returnees are obliged to take up residency in their original homes almost immediately after the resolution of their claim. However, efforts to establish other conditions of just return, including security and accountability for human rights, cannot keep pace with the property restitution process. Sporadic violence and ongoing ethnic antagonism continues to trouble many communities in Kosovo, leaving returnees feeling profoundly insecure, despite the restoration of their property rights. As a result, many returnees sell their properties, thereby shutting the door on the possibility of return to their home communities (Smit 2004a; Leckie 2000). Amidst pressure from donors to produce results and close the restitution file, a simple and unsurprising fact is often forgotten: restitution and reconciliation take time. Over fifty years after the end of Nuremberg and the signing of the German-Israeli restitution agreement, overlooked cases continue to surface. It should not come as a shock, then, if questions of justice for refugees from Rwanda, the Balkans and Chechnya cannot be neatly answered according to a donor’s timeline (Finci 2002: 357). The challenge is to meet returnees’ need for prompt remedies while

ensuring that sufficient political commitment is sustained to see the restitution project through in the long term.

In contrast to the dilemmas the state faces when trying to make good on its duty to provide fair and timely restitution to returnees, refugees themselves may have serious qualms about accepting restitution from a state that seriously violated their rights. Particularly following ethnically-charged conflicts, there is concern that financial compensation is tantamount to blood money. Survivors face a 'Faustian predicament': should they accept much-needed compensation and use it to rebuild their lives, or turn restitution down on the grounds that taking money demeans the memory of the dead and may allow the state to rest easy in the belief that its moral guilt has been extinguished (Barkan 2001: 24)? During the Swiss banks restitution process, debate was rife over the propriety of accepting money as atonement for the Holocaust. Abraham Foxman (1998: 18), head of the US Anti-Defamation League and himself a Holocaust survivor, argued that accepting compensation is 'undignified' because it makes money 'the last sound bite' of the Holocaust. 'It is', Foxman (1998: 18) maintains, 'a desecration of the victims, a perversion of why the Nazis had a Final Solution, and too high a price to pay for justice we can never achieve'. On the other side of the debate, Rabbi Israel Singer, leader of the World Jewish Congress, perhaps more convincingly wrote,

I don't want to enter the next millennium as the victim of history... Himmler said you have to kill all the Jews because if you don't kill them, their grandchildren will ask for their property back. The Nazis wanted to strip Jews of their human rights, their financial rights, and their rights to life. It was an orderly progression. I want to return to them all their rights (Wolffe 1999: 15).

While the decision to accept restitution is ultimately for returnees to make for themselves, it is important to note the symbolic value of money as an expression of responsibility and repentance. As Waldron (1992: 7) writes, 'payment is a method of putting oneself out, or going out of one's way to apologise. It is no objection to this that the payments are purely symbolic. Since identity is bound up with symbolism, a symbolic gesture may be as important to people as any material compensation'. Reflecting on Germany's Holocaust restitution efforts, German President Johannes Rau echoed Waldron's view: 'It is not really the money that matters. What they want is for their suffering to be recognised as suffering and for the injustice done to them to be named injustice' (Finci 2002: 356).

Intuitively, the greatest limitation to restitution must be the fact that some violations are simply too heinous to remedy. Even the most comprehensive restitution processes may be unable to restore the 'bond of trust, loyalty, protection, and assistance between the citizen and the state' (Shacknove 1985: 275). Given the extensive inherent theoretical limits to restitution, does the practical experience of restitution provide countervailing reasons for optimism?

3.3. Case study: Restitution for Bosnian Returnees

Efforts to provide restitution to Bosnian returnees illustrate the difficulty of bridging the typically 'grotesque gap between norms and facts', and have generated key lessons for future restitution and return processes (Leckie 2003b: 24). My analysis of the Bosnian case will begin with a brief discussion of the Dayton Peace Agreement's provisions for restitution and return, followed by an examination of the contributions to the restitution process made by the Commission for Real Property Claims and the International Criminal Tribunal for the Former Yugoslavia (ICTY). In conclusion I will reflect on the obstacles to providing full restitution and just return for Bosnian refugees, and the theoretical implications of this case.

Restitution in Bosnia started from no easy position: due to a zealously systematic campaign of ‘ethnic cleansing’ through murder, torture, enslavement and rape, over half of Bosnia’s 4.4 million people were displaced between 1992 and 1995 (Phuong 2000: 5). Known as the Dayton Agreement, the General Framework Agreement for Peace in Bosnia and Herzegovina was signed in December 1995, and laid the ground for a restitution process that addresses both property return and human rights concerns. A ‘unique conclusion’ to the conflict, the Dayton Agreement goes beyond the scope of most modern peace treaties in both its complexity and detail (Garlick 2000: 64). The Dayton Agreement created the sovereign state of the Republics of Bosnia and Herzegovina, which contains the Bosniak-Croat governed Federation of Bosnia and Herzegovina and the Bosnian Serb-controlled Republika Srpska. Although this political arrangement institutionalises the ethnic power divisions that arose during the conflict, the Dayton Agreement also reflects the international community’s desire to reverse the tide of ethnic cleansing by promoting minority returns throughout Bosnia and Herzegovina (Phuong 2000: 5).

The architects of the Dayton process understood that basic conditions, namely security, property restoration and protection of and accountability for human rights, would have to be in place before large-scale return could happen in an organised, humane manner. Security was primarily addressed through military measures outlined in Annex 1-A of the Dayton Agreement. The second condition of just return, property restitution, was broached in Annex 7 on Refugees and Displaced Persons, which 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... and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.

Through this ambitious provision, property restitution was placed at the heart of efforts to promote return and build peace in Bosnia. The first peace treaty to recognise refugees’ specific right to return to their pre-war homes, the Dayton Agreement established the Commission for Real Property Claims (CRPC) to facilitate housing and property restitution. During the conflict, half of the region’s housing was destroyed, and the homes refugees left behind were often taken over by secondary occupants. ‘One of the most innovative elements of the peace settlement’, the CRPC received property claims from refugees and IDPs, and issues binding rulings on ownership (Cox and Garlick 2003: 72). A temporary, ‘quasi-international’ structure in operation from 1996-2003, the CRPC worked with domestic courts and administrative bodies, and was composed of three international and six national commissioners. Although the commission had a slow start, by the end of 1999 the CRPC had over 400 personnel working at 22 claims collection facilities (Garlick 2000: 67-75). By the end of the CRPC mandate in December 2003, over 215,000 claims had been received, of which more than 200,000, or 93 percent were decided in favour of the displaced claimant, and the decision enforced (Williams 2004). For many returnees, CRPC decisions significantly improved conditions for return. For minority returnees in particular, commission rulings ‘carried important symbolic and psychological as well as legal value’, as other domestic remedies were often denied to them (Garlick 2000: 75). Seeing their complaints taken seriously by local and international authorities bolstered confidence in national institutions amongst returnees (Bagshaw 2000: 222). By entrenching property rights, restitution also helped lay a secure foundation for economic regeneration (Garlick 2000: 67).

Property restitution in Bosnia was hardly a smooth, seamless process. Because the CRPC was Dayton-mandated and donor-funded, the Bosnian property restitution process has sidestepped many of the financial and organisational obstacles that typically confound efforts to provide remedies to returnees. However, the CRPC was beleaguered with problems of its own, from lack of telephones and electricity to entrenched ideological opposition. Garlick (2000: 66) identifies three main obstacles to making property restitution work in Bosnia. Firstly, the massive scale of displacement slowed the process enormously. During the first years of the under-staffed Commission's work, hundreds of returnees were left in limbo while the CRPC ploughed through backlogged cases. Secondly, the socialist system left behind arcane property laws which are difficult to navigate, and were overhauled as the CRPC worked. Lastly, the property issue was highly charged on several key levels. On the personal level, for refugees and evicted secondary occupants alike, the loss of 'home' was a traumatic experience involving psychological and physical insecurity. On the economic level, land was one of the few valuable assets left in tumultuous post-conflict conditions. And on the political level, property restitution was contentious because it undermined the war's rationale by reversing ethnic cleansing. Besides these hurdles, the CRPC also struggled to see its decisions enforced. Nationalist local authorities often refused to carry out evictions until the International Police Force stepped in, although towards the end of the internationally-mandated restitution process in Bosnia, compliance with CRPC decisions increased greatly. Initially, however, many properties were looted and destroyed before returnees could take up residence again.

As originally conceived, the CRPC was to facilitate property return or 'just compensation' in lieu of return. The drafters at Dayton, Garlick (2000: 70) observes, 'clearly sought to give dispossessed people a number of choices and to restore to them a degree of control over their destinies'. Fearing ethnic violence, many minority refugees wished to forgo return to their original homes, and resettle in an area where they would be part of a majority group. However, funding was not made available to support relocation and compensation strategies, because they did not fit with the goal of 'reversing' ethnic cleansing (Garlick 2000: 79). Minority refugees' hesitance to return to their home communities highlights the importance of the second front of the Bosnian restitution process, which addresses protection of human rights and accountability for past abuses.

Comparatively, efforts to secure respect for human rights in Bosnia have floundered. On paper, the provisions are strong: in terms of human rights, Bosnia's new constitution is one of the most progressive in the world. Human rights are mentioned no less than 70 times in the Dayton Accords, which created several mechanisms for the protection of human rights in Bosnia, including the national Commission on Human Rights, the Office of the Ombudsman and Human Rights Chamber, the Commission for Displaced Persons and Refugees, and the Human Rights Coordination Centre (Bagshaw 1997: 576-8, Englbrecht 2003). These mechanisms complement the ICTY, which prosecutes the masterminds of the Balkan crisis. Unlike the aforementioned Dayton institutions, the ICTY was formed by the Security Council in the heat of the conflict. Grounded in the view that 'peace and justice are, if not indivisible, at least close associates', the court was ostensibly intended to deter flagrant violations of international law during the war, although it is commonly recognised that the Tribunal was above all a face-saving mechanism established to compensate for the Security Council's lack of effective military and political interventions (Shawcross 2000: 187). As efforts to found a Balkan truth and reconciliation commission have faltered, the ICTY remains the foremost avenue for redressing wartime atrocities, and is therefore a crucial plank in the restitution process available for Bosnian refugees.

Despite these institutions, in 1997 Bagshaw (1997: 577) lamented that efforts to establish just conditions of return in terms of human rights had failed, ‘unless one equates effective respect for and protection of human rights with the absence of gross and systematic violations’ (Bagshaw 1997: 577). While armed conflict had abated, ‘inadequate safety, harassment, intimidation, punishment, violence, and the denial of fair access to public institutions... and discrimination in the enjoyment of basic human rights [remained] the order of the day’, particularly for minority returnees (Bagshaw 1997: 577). Although conditions have improved markedly since 1997, ensuring accountability through the ICTY remains problematic. The Dayton Agreement obliges the signatories to cooperate with the Tribunal, but because Yugoslavia dissolved through the Balkan conflict, there is no state *per se* to be held responsible for crimes in the region (de Zayas 1995: 301). Instead, the court focuses on individual responsibility. The ICTY has made legal history by trying former head-of-state Slobodan Milosevic; however, pursuing accountability solely through the ICTY has drastically limited the scope of the restitution project as the tribunal has only been able to try a handful of leaders. This has not been enough to generate a sense of justice or reconciliation amongst Bosnia’s diverse ethnic communities. In the absence of accountability, injustices rankle, exacerbating ethnic tensions and infusing the return process with hostility.

The musings of an elderly refugee woman from Banja Luka who regained her home through the CRPC reflect the mixed success of the Bosnian restitution effort: ‘You must be persistent. If I hadn’t been persistent, I would never have returned to my home. I still have lots of problems. My house needs repairs and the secondary occupants stole all my possessions. But I am home. I have my freedom’ (Badil 2003: 1). Persistence is indeed essential to distil and implement the lessons learned in Bosnia. The Bosnian experience affirms that restitution alone cannot achieve just conditions of return. Although restitution promotes economic security and reconciliation in the long run, in the short term it must be supplemented by concerted efforts to uphold returnees’ physical security, such as through the use of the International Police Force. It is essential to address security, property restitution, return, and accountability for human rights violations in an interconnected manner, with a view to promoting reconciliation between returnees, their home communities, and the state. Whereas high-level accountability mechanisms such as the ICTY play an important precedent-setting role, they cannot replace grassroots reconciliation initiatives, which have unfortunately been sidelined in Bosnia. Critics note that because CRPC deliberations were closed to the public and did not involve individual testimony, a valuable opportunity to promote dialogue and reconciliation through the property restitution process was lost (Smit 2004b). Experiences in Bosnia confirm the need to fuse efficiency with recognition of the fact that restitution is a long-term undertaking that must flexibly accommodate new concerns as they arise. Certain issues of competing rights were poorly managed in the Bosnian process, especially regarding the rights of secondary occupants. During the war, moving into abandoned housing was not a crime, and indeed was the only option for many IDP families. Yet when secondary occupants were evicted to make way for returning owners, insufficient resources were available to help these families relocate. This pitfall was avoided in Kosovo, where humanitarian programs are in place to support evicted secondary occupants. A final lesson from this case concerns the role of the international community in restitution. From ensuring refugees’ interests were voiced at Dayton to funding the restitution process and using the International Police Force to enforce CRPC decisions, the international community has played a crucial role in enabling the new Bosnian state to make good on its responsibilities to returnees. The property restitution process in particular demonstrated that cooperation between international actors and domestic institutions can build capacity while legitimising the process in the eyes of local people (Smit 2004b).

The Bosnian restitution case belies explanation in terms of a straight-forward appeal to state responsibility. The state of Bosnia and Herzegovina did not technically exist when the atrocities were committed that forced 2.2 million people to flee their homes. Furthermore, security services, property restitution and human rights programs alike are provided by the Bosnian state in conjunction with the international community. Does this undermine the notion of restitution as a responsibility the state owes to its exiled citizens? At Dayton, the new Bosnian state accepted responsibility for facilitating refugee return, in cooperation with the international community. Therefore, despite not being directly responsible for the violations that left half the population displaced, the new state took on clear legal duties towards the returnees. In theoretical terms, the new Bosnian state demonstrated its commitment to the freshly forged social contract linking it to its scattered citizenry by using restitution to create just conditions so that refugees could return and be part of the state-building process. It is not surprising that, as a fledging state, Bosnia and Herzegovina required international support to make restitution possible. Indeed, seeking international support for restitution was perhaps the most responsible option open to the new state, as otherwise returnees would have been left without any remedy at all.

CONCLUSION

Amongst the many unresolved questions the Bosnian case raises for the overall restitution project, a prevalent one is whether third party states have not only a negative obligation not to re-foul refugees, but also a positive obligation to promote just conditions of return through restitution. Through the simplifying lens of theory, it appears that if a state creates refugees, then it should shoulder the challenge of providing restitution. If international organisations or donors take charge of this task, then the deterrent potential of restitution may decline, as the state does not have to pay as serious a price for violations. Furthermore, restitution mechanisms initiated and funded by the international community are not as likely to promote reconciliation between returnees and the state, as they may not be seen as an expression of *state* responsibility and accountability for past abuses. In Shacknové's terms, unless restitution comes from the country of origin, it is unlikely to repair the bond between the refugee and the state. Not surprisingly, however, reality complicates the picture painted by theory. During regional conflicts such as the Balkan crisis, responsibility for refugee outflows often lies at the doorstep of more than one state. In these cases, it would be unfair and unrealistic to demand that states struggling to rebuild in the wake of war manage the entire restitution process alone, if only because most states of origin simply do not have the resources necessary to mount full restitution programs. The involvement of third party states also lends a greater degree of transparency and legitimacy to the human rights accountability measures that are part of a full restitution process. If restitution is to be anything more than a 'pious ideal', it must be collaborative, an approach effectively modelled in Bosnia (Dowty 1994: 28). Yet why should third party states feel duty-bound to support the restitution project? From a legal standpoint, the ILC Articles on State Responsibility affirm the collective role of the international community in promoting state responsibility, while the Draft Principles on Reparation call on all states to strengthen individuals' access to remedies for human rights violations (Shelton 2002: 854). Sceptics suggest that rising support for restitution is actually rooted in western states' desire to promote repatriation over resettlement, and is therefore an essentially negative element in the ongoing erosion of asylum rights (Leckie 2003b: 25). In the Balkans it has been suggested that property restitution is above all motivated by the western desire to secure the property rights necessary for a thriving capitalist economy (Smit 2004a).

Although partially persuasive, these explanations for the push towards restitution cannot account for efforts such as the Ottawa Process, an ongoing Canadian-sponsored initiative that aims to foster a just and lasting solution to the Palestinian refugee situation through research and dialogue on issues including restitution and just return (Rempel 1999: 36). Even when their own interests are not directly at stake, states such as Canada see support for restitution as part of their overall responsibility to strengthen human rights both domestically and internationally.

Other outstanding issues include whether host states also have a legitimate claim to compensation from states of origin, and how states should resolve the tension between restitution as an individual right and the fact that restitution agreements will inevitably be negotiated on a group basis. Even if a state negotiates a restitution agreement in good faith with groups legitimately representing the majority of returnees' interests, it is unavoidable that some people will remain unsatisfied. How far must the state accommodate individuals' concerns, and to what extent must returnees' adapt their expectations to the state's constraints (Quigley 1999)?

Questions remain about the implications for legitimacy when states fail to make good on their legal and moral obligations to provide restitution to returnees. What is the practical import of Deng's (1995) conception of sovereignty as responsibility for recalcitrant states that create refugees and then refuse to provide just conditions of return? Is this level of irresponsibility sufficient to weaken the state's claim to sovereignty? Pragmatically, it is unlikely that the international community will ever take direct action to force states of origin to live up to their responsibilities in terms of restitution and just return. The real question, then, is how can these duties be upheld through the law, and promoted through political tools such as diplomacy and sanctions? At the moment, these tools remain rough, and the international community and refugees alike struggle to ensure that states abide by their legal and moral duty, affirmed by social contract theory, to provide restitution to repatriating refugees, with a view to creating just conditions of return. Similarly, notions of what decent reparation processes look like need to be honed: while property restitution has been the focus to date, the experiences of Holocaust survivors and Bosnian returnees highlight the value of 'full restitution', which encompasses material concerns such as property return, as well as accountability for human rights violations. As the restitution movement progresses, visions of restitution and the tools available to advance it will be sharpened, ideally to the point where they can not only provide remedy after injustice, but also deter the injustices that create refugees in the first place.

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