Post-conflict housing restitution : the European human rights perspective, with a case study on Bosnia and Herzegovina

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Post-Conflict Housing Restitution
The European Human Rights Perspective
with a Case Study on Bosnia and Herzegovina

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‘I’m basically a historian who got into law via a historical accident. I’ve always been fascinated by texts which last from one world into another world, texts like the Magna Carta, the Sermon on the Mount – that doesn’t have any protocols but it’s still around.’

BRIAN SIMPSON

PREFACE

In the summer of 2002 I was mixing cement, sand, and water to make concrete to rebuild housing destroyed in the war in the small Bosnian town of Bosanska Gradiška. I could not have imagined at the time that the following years would be consumed with research on housing issues in that same country. Yet, that is exactly what happened.

Writing a dissertation may in and of itself be a lonely endeavour, but I have been very fortunate to have conducted my research in an environment that was far from lonely. Apart from the numerous people whose insights have benefited my academic work and which the Leiden tradition does not allow me to thank by name, my research would never have led to the same results without the presence and help of the people and institutions mentioned here.

The research undertaken has been generously supported by a grant of NWO, the Netherlands Organisation for Scientific Research. My research stays abroad have received additional financial support from the Leiden University Fund and the E.M. Meijers Institute. I am very grateful for the practical support of the staff of the latter institute, especially to Kees Waaldijk for his keen eye for the interests of Ph.D. fellows and his wise advice and to Laura Lancée for her help in contacting foreign research institutions. My stay in Geneva at the University Centre of International Humanitarian Law in Geneva was made very enjoyable thanks to Lindsey Cameron and Théo Boutruche. The same goes for the lunches with the young researchers at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. At both institutions, the library staff was extremely helpful in helping me to find my way in the treasure troves of available literature. In Bosnia and Herzegovina, Massimo Moratti, Rhodri Williams, Vandana Patel, Paul Prettitore and Gordana Osmančević. have given me essential insights into the implementation of housing restitution rights in practice. Finally, I am very grateful for the translation of the summary into French by my father and into Serbo-Croatian by Franka Olujić which have made my work more accessible to non-English speakers.

It cannot be underestimated how important diversions from the research can be, as long as they do not entirely overwhelm it of course. Here, my first word of thanks goes to my two subsequent roommates, Felix and Lisa, who have not only been the most pleasant company but have filled the dissertation years with humour, thus creating the perfect environment for serendipities. In addition, my ‘comrades in arms’ – Herke and Mireille – and all my table companions during our weekly case law lunches, and the other colleagues at the Faculty, created an atmosphere of friendship that made my stay in Leiden such a pleasure.

My fellow Board members of the Centre on Housing Rights and Evictions and my friends of Critical Mass – Bas, Enno, Floris, and Hiske – have ensured that my academic work was never done in a vacuum, as the European Court of Human Rights would put it, but was enriched by the practical application of human rights in advocacy and education.

Outside the context of work, I am very grateful for the support of my family and friends. They have not only shown interest in how I muddled through the ups and downs of writing a Ph.D. thesis, but have also often *not* asked about it, which may have been even more important for my peace of mind.

Finally, my deepest gratitude is owed to the two persons who have accompanied me on the road of life and have given me so much strength and love: Ward and the Eternal One. The latter's love is so strong and unconditional that it forms a source of permanent consolation and support. Ward, for his part, has enriched my life in more ways than I could possibly have imagined and he has been my best supporter at every stage of this research project and on all other fronts as well. He has shown me the true meaning of the word joy. It is my wish and hope that they will both continue to walk that road with me for a very long time to come!

Leiden, October 2007

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LIST OF ABBREVIATIONS

a.o.	and others
Appl.no.	Application number
Art.	Article
BiH	Bosnia and Herzegovina
CERD	Committee on the Elimination of Racial Discrimination
CoE	Council of Europe
CRPC	Commission for Real Property Claims
CSCE	Conference for Security and Co-operation in Europe
ECHR	European Convention on Human Rights and Fundamental Freedoms
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
e.g.	exempli gratia (for example)
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
GA	General Assembly
HRC	Human Rights Committee
HRC BiH	Human Rights Chamber of Bosnia and Herzegovina
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
Ibid.	Ibidem
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
ICJ	International Court of Justice
IDP	Internally displaced person
IO	international organisation
IPTF	International Police Task Force
NGO	non-governmental organisation
OHR	Office of the High Representative
OSCE	Organization for Security and Cooperation in Europe
P1-1	Article 1 of the first Protocol of the ECHR
para.	paragraph
PCIJ	Permanent Court of International Justice
PIC	Peace Implementation Council
PLIP	Property Law Implementation Plan
p.	page

pp.	pages
SC	Security Council
SFOR	Stabilisation Force in Bosnia and Herzegovina
s.l.	sine loco
RRTF	Reconstruction and Return Taskforce
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMiBH	United Nations Mission in Bosnia and Herzegovina

INTRODUCTION

CHAPTER 1
INTRODUCTION

1.1 THE PROBLEM IN A NUTSHELL – THE *BLEČIĆ* CASE

Krstina Blečić was a Croatian citizen living in the town of Zadar on the Dalmatian coast.[1] In July 1991 she went to visit her daughter in Italy for the summer. A month later the armed conflict in the former Yugoslavia reached Dalmatia. Zadar was repeatedly shelled and the supply of water and electricity was disrupted for several months. Travelling to and from Zadar became almost impossible. In November a family of four broke into the apartment of Mrs. Blečić and moved in.

In February of the following year the municipality of Zadar started proceedings against Mrs. Blečić in order to terminate her specially protected tenancy[2] of the apartment. The municipality claimed that she had been absent from her house for a period longer than six months without justified reason and that therefore, under Croatian law,[3] her tenancy could be terminated. Blečić contradicted this by claiming that she had not been able to return to Zadar for several justified reasons: she had no means of subsistence there, no health insurance, and she was in bad health. Moreover, she had been physically prevented from returning since another family had occupied her apartment and had threatened her. In spite of these arguments, the municipal court terminated her tenancy on 9 October 1992. Krstina Blečić' appealed unsuccessfully against the judgment and on 8 November 1999, the case ended on the highest domestic level with a rejection of all her claims by the Constitutional Court. Thus she was effectively barred from lawfully returning to her former house.

In many ways, the *Blečić* case exemplifies the problems of people who lose their house in times of armed conflict. They are faced with a myriad of legal and practical problems when they want to return to their former residence and reclaim their house once the conflict has ended. Houses may have been severely damaged or even completely destroyed. And even when a place is still habitable, return is not always an option.

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1 The following facts can be found in: ECtHR, *Krstina Blečić v. Croatia* (partial decision on admissibility), 29 September 2000 (Appl.no. 59532/00). The case law in the present book was last updated in the summer of 2007.

2 Tenancy or occupancy rights date from the system used in the former Yugoslavia. They constituted a strong form of tenure for people living in socially-owned apartments: *Third Party Intervention of the Organization for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, in Blečić against Croatia* (25 April 2003) p. 2.

3 Section 99 (1) of the Housing Act (*Zakon o stambenim odnosima,* Official Gazette nos. 51/1985, 42/1986, 22/1992 and 701993).

Authorities are often reluctant to enable, let alone promote the return of refugees or displaced persons, especially when they belong to ethnic minorities. Their departure may even have been one of the main aims of the conflict in the first place. Krstina Blečić was an ethnic Montenegran in a newly independent country that strongly and violently asserted its Croatian character.

This leads us to a connected problem: the judicial system may not have the required capacity, impartiality or even will to address this issue effectively. A country recovering from conflict has to cope with government institutions that have to be rebuilt. At the same time a tidal wave of claims about wartime violations of human rights is often to be expected. Excessive length of procedures may be the result.

Apart from the incapacities of judiciaries emerging from conflict, all branches of government can make use of tools that hamper or block housing and property restitution. This can take the form of enacting abandonment laws which have the effect of destroying property rights of former inhabitants. But, as is clear from the *Blečić* case, discriminatory interpretations of existing laws can have exactly the same result: by using an in itself useful provision to prevent public housing from standing empty, the Croatian authorities arguably pursued what could be perceived as ethnic policies. On the local level, authorities can fail to implement court eviction orders, to the detriment of people wishing to return to their houses.

Another problem is that houses are often occupied by others who may be refugees or internally displaced persons themselves. Sometimes this so-called secondary occupation was facilitated or even enforced by those that caused the displacement of the original inhabitants. The occupants of Krstina Blečić' apartment were a living impediment to her return. The tension here is clear: returning a house to the former inhabitant immediately creates a housing problem for the occupiers.[4] Authorities can and often do use this tension as a reason to block refugee return.

With all these impediments confronting refugees and displaced persons who want to reclaim their houses, they would be much helped by an enforceable right to housing and property restitution. The United Nations have considered the issue to be of such importance that a special rapporteur was appointed in 2001 to undertake research on the existence of such a right. Ideally, the right to restitution would be provided for by the national authorities within the domestic system. But as we have seen above, this is not always the case. An alternative way to solve the problem of housing restitution is therefore required: if the domestic system fails, the remedies at the international level and those which the international community offer obviously gain importance.[5]

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4 Simon Bagshaw, 'Property Restitution for Internally Displaced Persons: Developments in the Normative Framework', in: Scott Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Ardsley, NY: Transnational Publishers 2003) pp. 375-392, see p. 391.

5 Again problems may arise though: to what international forum can an individual turn whose housing and property has wrongfully been taken? And will a complaint be declared admissible? Krstina Blečić lodged a complaint before the European Court of Human Rights, which immediately gave rise to the question of the temporal scope of treaties: Croatia ratified the European Convention on Human Rights

The changed character of conflicts has both rendered the international level more important and made housing and property restitution issues more urgent and visible.

1.2 THE CHANGING FACE OF CONFLICT

Like a chameleon slowly adjusting to its new surroundings, our understanding of conflict is changing. The attention drawn to wars between states has been replaced by a focus on internal wars of many kinds. A global preoccupation with internal instead of international conflict is now the rule. This section focuses on this change and the consequences this development has for the issue at hand.

Before looking into this development, it is important to establish which different forms of conflicts exist. Peter Wallensteen has developed a detailed and clear typology for this. He defines conflict as 'a social situation in which a minimum of two actors (parties) strive to acquire at the same moment in time an available set of scarce resources.'[6] He distinguishes three basic types of armed conflict: international conflict, civil wars and conflicts over state formation,[7] admitting that the boundaries between these are not always clear.

Conflicts which have a significant interstate component belong to the first type. This covers the traditional conflicts between armed forces of two or more states, but also conflicts in which one country supports a non-state actor in another country in a decisive way. The second type of conflict is intrastate and has as its core a dispute over government power: classical civil wars with different groups trying to gain control over state institutions, or warlords challenging government control within part of a country without pursuing formal independence. The third type is an intrastate conflict with a significant territorial component. In conflicts of this kind a government and a non-state actor clash over land: the former trying to maintain territorial integrity, the latter striving to break away part of the existing state.

I will use this trichotomy in the further discussion, as it offers a very useful distinction. The question of housing and property restitution may come to the fore to a larger or smaller extent depending on the type of conflict. Thus it may help explain the position and urgency of this specific problem in any particular post-settlement situation.[8]

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on 5 November 1997, which means that the Court can in principle only deal with complaints against Croatia for facts *after* that date. I will return to the issue of the temporal scope of treaties in chapter 9.

6 Peter Wallensteen, *Understanding Conflict Resolution. War, Peace and the Global System* (London: Sage Publications 2002) p. 16.

7 For this and the following discussion see: ibid., p. 74 ff.

8 Dozens of conflict distinctions have been developed in the field of conflict resolution, but there seems to be broad agreement on the following trichotomy: (1) interstate conflicts; intrastate conflicts about (2) revolution/ideology; and about (3) identity/secession (see: Hugh Miall, Oliver Ramsbotham & Tom Woodhouse, *Contemporary Conflict Resolution. The Prevention, Management and Transformation of Deadly Conflicts* (Cambridge: Polity Press 1999) p. 30). Type (2) and (3) can be roughly compared to Wallensteen's civil wars and conflicts over state formation respectively, although he does not explicitly treat ethnic, religious or ideological conflicts as different categories.

In the introduction to this section I mentioned a changed *focus* in perceiving conflicts. With good reason. It has often been stated, in an oversimplification of matters, that since the end of the Cold War intrastate as opposed to interstate conflicts have become the dominant form of conflict.[9] Contrary to this assertion, of the total number of conflicts in the whole period since World War II, the majority has been intrastate.[10] The increase in the number of internal conflicts already started in the 1960s.[11] The difference between intrastate conflicts during the Cold War on the one hand and those during the 1990s and later on the other, is that the former were very often seen as part of the global ideological contention between the Western and the communist world.[12] When an internal conflict was observed through this looking glass, it became of international concern *by that very perspective*. Many – in origin – civil wars were thus internationalized.[13]

Consequently, the real change is to be found in other elements of conflict than the internal or international character in itself. These are the increased involvement of international organisations and the changed justifications for armed conflicts. This double development has focussed international attention to the two kinds of internal conflict distinguished above: civil wars and conflicts over state formation.

Firstly, the number of these conflicts in which international organisations are involved has increased.[14] During the Cold War the United Nations, the major international organisation, was often prevented by all sides – the communist bloc, the West, and the newly independent states in Africa and Asia – from getting involved in internal conflicts, albeit for very different reasons. The communist and the capitalist states wanted no interference in each other's affairs and the former colonies strived after real independence from their former colonialist rulers. Article 2(7) of the UN Charter provided the formal argument to ward off any unwanted intermingling of the organisation in internal affairs.[15] Moreover, the major powers used their veto in the Security Council anytime it suited their interests. All of this changed with the downfall of

9 See, among many others: Neil J. Kritz, 'The Rule of Law in the Postconflict Phase. Building a Stable Peace', in: Chester A. Crocker, Fen Osler Hampson & Pamela Aall (eds.), *Turbulent Peace. The Challenges of Managing International Conflict* (Washington D.C.: United States Institute of Peace Press 2001) pp. 801-820, see p. 801.

10 Elaborate research on this has been done in the framework of the Conflict Data Project at Uppsala University, Sweden. See for the relevant statistics: Nils Petter Gleditsch a.o., *Armed Conflict 1946-99: A New Dataset* (Paper prepared for the conference 'Civil Wars and Post-Conflict Transitions', 18-20 May 2001, Irvine, California) p. 10.

11 Ted Robert Gurr, 'Minorities and Nationalists. Managing Ethnopolitical Conflict in the New Century', in: Crocker (2001) pp. 163-188, see p. 166.

12 Although ideology does not offer an adequate explanation of the conflicts during the Cold War. See: John Paul Lederach, *Building Peace. Sustainable Reconciliation in Divided Societies* (Washington D.C.: United States Institute of Peace Press 1997) p. 8.

13 Wallensteen (2002) pp. 131-132.

14 Ibid.

15 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter (…)'.

communist regimes at the end of the 1980s. International organisations, both the UN and regional ones, were used as a tool of action instead of blockade. They became involved in conflict prevention and resolution in many regions. As Wallensteen correctly states, this 'may explain today's conventional wisdom that there are more internal conflicts than ever before.'[16] Paradoxically, the perceived spread of *internal* conflict thus goes together with more *international* involvement. Perhaps we should adjust the metaphor: the chameleon of internal conflict used to be invisible, but in recent years he has not been good at hiding anymore; he has been discovered.

Secondly, the justification of conflicts has changed: identity has replaced ideology.[17] This has been posited for the situation on the global level,[18] but what is of interest here is the level of particular conflicts. The changing international and national power balances at the end of the Cold War and specifically the demise of communist ideology, caused ruling and contending elites to look for new ways to maintain or acquire power. Ethnic or national identity, existing or constructed, proved to be a powerful unifying force for building up constituencies. Political leaders 'conveyed a message to their supporters that unless one's own group dominated, it would be dominated by others. A number of these putative leaders relied on threats about the risk of oppression by others to prompt their followers into violent conflict with their former neighbours.'[19] In Europe, these policies had particularly destructive effects in parts of the crumbling Soviet and Yugoslav states. This evidently does not mean that ethnic differences are the root causes of conflicts – they seldom are[20] – but it is a way of justifying conflict and of perceiving it, both by inside actors in the conflict and by outsiders.

Emphasizing identity over ideology has one important consequence for solving conflicts: it is impossible to 'convert' the enemy, as his perceived ethnicity is not seen as a choice but as a fact. Therefore he must be repressed or physically removed (by killing him or forcing him to flee). Making peace and integrating the warring parties thus becomes very difficult.[21]

The developments considered here have important consequences for the restitution of housing and property. The increased involvement of international organisations may have a double effect. As pointed out in section 1.1, the weakening or destruction of domestic institutions caused by conflict, increases the need for international remedies in case of human rights violations. More international involvement in modern conflict,

16 Wallensteen (2002) p. 132.
17 Ho-Won Jeong, *Peace and Conflict Studies. An Introduction* (Aldershot: Ashgate 2000) pp. 14-15.
18 Samuel Huntington, 'The Clash of Civilizations?', *Foreign Affairs* vol. 72-3 (1993) pp. 22-49, and the book that followed: Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (London: Simon & Schuster 1997).
19 Mary B. Anderson, 'Humanitarian NGOs in Conflict Intervention', in: Crocker (2001), pp. 637-648, see p. 643; Michael E. Brown, 'Ethnic and International Conflict', in: ibid., pp. 209-266, see p. 223.
20 Wallensteen (2002) p. 118.
21 Roy Licklider, 'Obstacles to Peace Settlements', in: Crocker (2001) pp. 697-718, see pp. 698-699; and Wallensteen (2002) p. 118.

at least in this respect, may then have a beneficial effect. The downside of international involvement is dependency. If human rights mechanisms are installed and maintained by international actors, they can easily collapse as soon as the latter leave the arena.[22] In contrast to most human rights, like the prohibition of torture or the freedom of expression, which have to be constantly ensured, the settlement of housing and property claims is in principle a one-time process: claims have to be decided upon and should subsequently be enforced. This entails a choice. Either the international organisations should finish the process of restitution before they leave. Or the system of settlement and enforcement should be firmly rooted in local judicial systems, making it independent of international presence as far as possible.

The changed justification of conflict also has an effect on restitution that cannot be ignored. This effect flows immediately from the problem of settling a conflict. The achievement of peace or at least of a cease-fire is difficult in identity-based conflicts for the reason mentioned above. *A fortiori*, anything that goes further than a mere silencing of the arms is even more problematic. Starting a restitution process, with a real possibility that refugees and displaced persons will return to their former homes, is diametrically opposite to what war-time leaders in these conflicts try to achieve. In their discourse, this equals bringing back the perceived threat right into the middle of society. Any achieved ethnic cleansing may be reverted by restitution; any equal human right for all to respect for one's home goes straight against an ideology of difference and inequality. A change in perception, accompanied by external 'carrots and sticks', is then needed to make housing and property restitution achievable.

The consequences described here vary depending on the specific situation and to a lesser extent on the type of conflict. International involvement is less hampered by sovereignty issues in international conflicts than in internal wars. A role for third parties, be they states or international organisations, can thus be relatively bigger in interstate conflicts. So may be both the advantage and disadvantage of this role for restitution issues. The other change in conflict, the shift from ideology to identity can be discerned both in interstate and internal conflicts, but is more problematic in internal ones. A settlement in those cases will have to find solutions within one territory[23] without the relatively less burdensome possibility of each party retreating to its own territory.[24]

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22 Tonya L. Putnam, 'Human Rights and Sustainable Peace', in: Stephen John Stedman, Donald Rotchild & Elizabeth M. Cousens (eds.), *Ending Civil Wars. The Implementation of Peace Agreements* (Boulder, Colorado: Lynne Rienner Publishers 2002) pp. 237-271, see p. 249. Belloni has described a comparable process in the field of international humanitarian aid, where dependency problems may be even more direct: Roberto Belloni, 'Civil Society and Peacebuilding in Bosnia and Herzegovina', *Journal of Peace Research* vol. 38-2 (2001) pp. 163-180.

23 The split-up of one state into two or more new ones still being more the exception than the rule in international affairs.

24 Kritz speaks, exaggeratedly, of the absence of 'the luxury of being separated by geographic boundaries at the conclusion of the hostilities.' (Neil J. Kritz, 'Progress and Humility: The Ongoing Search for Post-Conflict Justice', in: M. Cherif Bassiouni (ed.), *Post-Conflict Justice* (Ardsley, NY: Transnational Publishers 2002) pp. 55-87, see pp. 56-57). This is not always the case, as even within one state groups

The changing face of conflict offers more possibilities in resolving housing and property restitution issues through international channels. At the same time the difficulties have also grown. How successful a restitution policy can be in a particular post-settlement situation will therefore depend on how these difficulties are dealt with.

1.3 HOUSING AND PROPERTY RESTITUTION: CONTRIBUTION TO PEACE?

Thus far we have looked at the issue of how the changing face of conflict can impact housing and property restitution. The next question is what restitution processes can contribute to rebuilding a stable peace after settlement of a conflict. If such a contribution is positive, then increasing the effectiveness of restitution rights' implementation becomes a legitimate concern in achieving this peace. It will be argued here that such processes can indeed be a beneficial factor in rebuilding societies.

The cessation of armed hostilities is not the complete watershed it may seem to be. A ceasefire is only a temporary success on the long road to peace. Preventing renewed fighting means using the method of 'Clausewitz in reverse', as Miall, Ramsbotham and Woodhouse have dubbed it:[25] peace is the continuation of the politics of war with other means. Although the means of conflict resolution have changed from violent to peaceful, conflict as defined in section 1.2 – parties striving to acquire at the same moment in time an available set of scarce resources – still exists.[26] It may therefore be more precise to speak of post-*settlement* instead of post-*conflict* situations.[27]

This continuation of conflict can be illustrated by giving a picture of what a post-war society often looks like. Ball distinguishes between three types of characteristics of war-torn societies.[28] Firstly, these are institutional weaknesses, like non-participatory and malfunctioning political and judicial systems, strong competition for power instead of attention to governing, a limited legitimacy of political leaders and no consensus on which way society should go. Secondly, economic and social problems: destroyed or decaying social and economic infrastructure, an increase of the illegal economy and a decrease of the legal economy, people reverting to subsistence activities, hatred among population groups and, significant for the issue under review here, conflicts over land and property. Finally these societies have to cope with serious security problems: huge quantities of small arms freely circulating among the popula-

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can choose territorial separation. Bosnia and Herzegovina after the Dayton Peace Agreements is an example in kind.

25 Miall, Ramsbotham & Woodhouse (1999) pp. 188-189.

26 It seems to be possible though to establish a 'durable peace without explicitly solving the issues at stake a conflict. Designing new institutional arrangements for the management of conflict may contribute significantly to stabilizing the peace': Caroline Hartzell, Matthew Hoddie & Donald Rotchild, 'Stabilizing the Peace after Civil War: An Investigation of Some Key Variables', *International Organization* vol. 55-1 (2001) pp. 183-208, see p. 203.

27 As the term 'post-conflict' is generally used and accepted in academia, I will use it interchangeably with 'post-settlement'.

28 Nicole Ball, 'The Challenge of Rebuilding War-Torn Societies', in: Crocker (2001) pp. 719-736, see p. 721.

tion, political influence of the armed forces, demobilization and disarmament issues and 'the prevalence of young soldiers with no skills other than killing', as Licklider describes it. Under such circumstances, it can be correctly argued that war is more likely to begin than to end.[29]

Getting from this situation of negative peace (absence of violence, but nothing more than that) to positive peace (reconciliation among the parties in the long term) requires some form of doing justice.[30] And if justice is a requirement, then the role of law becomes one of the necessary perspectives for looking at any given post-conflict environment. The notion of post-conflict justice can be roughly divided into two separate but related categories,[31] which I will call substantive and structural.

The substantive form aims at making good specific wrongs from the past. It includes all kinds of retributive and restorative justice. Retributive justice is criminal justice, holding individuals accountable for crimes committed during the conflict. In this field, international law has been developing greatly since the 1990s, through the tribunals judging crimes committed in the former Yugoslavia and in Rwanda and even more recently the International Criminal Court, but also through national jurisdictions. Restorative justice is geared toward restoring the situation existing before the conflict. This form covers *inter alia* the present research topic of housing and property restitution to the rightful inhabitants.

Substantive justice can contribute to the second, structural form of post-conflict justice. As much as the first is facing the past, the second looks forward into the future: restoring national systems of justice that are malfunctioning due to the conflict or have been destroyed by it. Formulated differently, it aims at (re)installing the rule of law. Notwithstanding the fact that this is much more difficult to achieve than the already daunting task of offering substantive justice,[32] it has become a cornerstone in the efforts of the international community to rebuild war-torn states.[33]

The opaque notion of the rule of law merits some consideration here. The rule of law is often seen as one of the basic elements of democratic societies in Europe[34] and elsewhere. But there is no agreement on the precise meaning of the term. In a strict sense, the rule of law means that the relations between a state and its citizens are more or less predictable since they are governed by legal rules. The rule of law includes

29 Licklider (2001) p. 698.
30 Miall, Ramsbotham & Woodhouse (1999) p. 208.
31 Bassiouni (2002) p. XV.
32 Ibid., p. XVII. See also: Frederick M. Lorenz, 'Civil-Military Cooperation in Restoring the Rule of Law: Case Studies from Mogadishu to Mitrovica', in the same volume, pp. 829-849, see p. 829.
33 Rama Mani, 'Promoting the Rule of Law in Post-Conflict Societies', in: Lennart Wohlgemuth a.o. (eds.), *Common Security and Civil Society in Africa* (Stockholm: Nordiska Afrikainstitutet 1999) pp. 145-162, see p. 146.
34 See for example the preamble and Articles 6 and 11 of the Treaty on European Union which describe the rule of law as both a foundational principle of the European Union, common to all Member States, and a goal of the Common Foreign and Security Policy. And also the preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) (*European Treaty Series,* No. 5) which calls the rule of law a common heritage of the signatory States.

more than just the existence of law, as implementation of the law is necessary as well, including the availability of remedies to set wrongs right. The central aim of this system is to protect citizens against the arbitrary use of state power. A separation of powers, including an impartial and independent judiciary, functions as a safety valve.

The notion of the rule of law discussed above places an emphasis on the 'rule' element in the rule of law. It provides predictability but not much more. Whether the rules are good or bad from a moral or other perspective is outside the scope of this notion. It provides a technical or 'thin' model as opposed to a more elaborate or robust one.[35] In the latter model the notion of law takes on a different meaning. This difference is concealed behind the ambiguity of the English word 'law', but becomes clearer when looking at other languages. On the one hand there is the notion of law as a rule enacted by an authoritative body: *Gesetz* in German, *loi* in French and *ley* in Spanish. This meaning corresponds to the thin model of the rule of law. On the other hand law can be interpreted as a binding rule because it is sound in principle and embodies a higher ideal. Many languages have a separate word for this: *Recht*, *droit* and *derecho* in German, French and Spanish respectively. This is more than a linguistic difference: in the European tradition the idea of the rule of law is based on 'law' in the second, robust sense.[36]

The second model of the rule of law offers a certain amount of guidance: it incorporates the higher ideals of a given polity. It is more than just the technical separation of powers and predictable patterns of interaction of the thin model, although it includes those as well. The higher ideals are the ones that neutralize or at the least decrease conflicts by providing for better opportunities for justice. To illustrate this, one may imagine a society in which people with brown eyes have two votes in every election. People with blue or green eyes only have one vote. The first category of people can only be fined for infringements of the law, whereas the second can be detained and given physical punishment. A fully functioning separation of powers exists. Such a society offers a high level of predictability to its citizens. According to the thin model the rule of law reigns. But one can easily sense the grudge and resentment that exist among the blue- and green-eyed against the privileges of the other group. Our imaginary society thus has an in-built capacity for conflict that would be much smaller in a system where the principle of equality reigns and where liberty and physical integrity are guaranteed to all. Apparently, the content of the rules can make a difference in a society's proneness for conflict. The thin model's characteristics are necessary, but not sufficient. Therefore, to establish a positive link between the prevention or resolution of conflict and the rule of law, the robust model is preferable: in the context of conflict resolution it offers the conceptual framework that is lacking in the thin one.

35 Sebastián Urbina, *Legal Method and the Rule of Law* (The Hague: Kluwer Law International 2002) p. 225.

36 George P. Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press 1996) pp. 11-13.

Once one accepts the robust model, the following question arises: which rules or norms are inherent parts of it? No international treaty or case-law provides a clear and complete enumeration of them. There are no Ten Commandments of the Rule of Law. To quote Fletcher: 'We recognize breakdowns [of the rule of law] more easily than the positive ideal.'[37] This happens for instance when injustice occurs or when freedom and equality are not upheld. The rule of law is an incomplete set of norms and no definitive tools for its completion exist. The reason is that the concepts used in formulating the norms are not crystal clear in themselves. There is no generally accepted content of the word 'liberty' for example. Although this incompleteness may seem unsatisfactory, it is not a negative characteristic in itself for 'it is a feature of the idea which allows jurisprudence to assess and explain the many varieties of understandings and implementations of the rule of law in otherwise very different legal orders.' In this sense the rule of law is an elastic notion.[38]

This elasticity does not mean that nothing can be said about the contents of the robust model. It is broadly understood that human rights are part and parcel of it. They were originally developed for the same reason as the idea of the rule of law itself: protection against arbitrary use of power by the state. An appeal to human rights is an indirect appeal to this idea.[39] This is not just true for those rights that, like civil and political rights in a classic sense, shield against the state.[40] Human rights that require action from the state[41] can be included in the notion of rule of law as well. They equally necessitate means for redress for violations, provided by an impartial judiciary. Thus human rights both reflect the basics of the thin model and provide the necessary content that is the advantage of the robust model. Consequently, approaching restitution issues from a human rights perspective fits in a rule of law context. Again the substantive and structural forms of justice are interconnected.

Time and again, international organisations have stressed the link between the rule of law and peace. As early as 1990, the participating states in the Conference on Security and Cooperation in Europe[42] expressed their conviction that the rule of law is a prerequisite 'for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe.'[43] And in 1992 Boutros Boutros Ghali, the then Secretary-General of the United Nations, expressed himself along the same lines in his *Agenda for Peace*: 'There is an obvious connection between demo-

37 Ibid., p. 13.

38 Delf Buchwald, 'The Rule of Law: A Complete and Consistent Set of (Legal) Norms?, *Rechtstheorie,* Beiheft Vol. 17 (1997) pp. 155-160, see p. 159-160.

39 Fletcher (1996) p. 12.

40 In the case of weak post-conflict states it would at the very least be paradoxical to adhere solely to such a human rights rationale.

41 Typically these are social and economic rights, but also other rights that have a positive obligations aspect fall under this heading.

42 Since 1994 called Organization for Security and Cooperation in Europe (OSCE).

43 Concluding Document of the CSCE Copenhagen Conference on the Human Dimension, 29 June 1990, in: *International Legal Materials* Vol. 29 (1990) pp. 1305-1306.

cratic practices - such as the rule of law and transparency in decision-making - and the achievement of true peace and security in any new and stable political order.'[44] His successor Kofi Annan emphasized the same link in a 2004 report entitled *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.[45] It is not just lofty international rhetoric that emphasizes this link. Experiences from the field show that the chances for a lasting peace are linked to the successful restoration of justice systems.[46] The shift from arbitrary rule to the rule of law is thus a necessary step on the road to peace.

Apart from being an aspect of rebuilding the rule of law, housing and property restitution can make a second, practical contribution to peace. Wallensteen emphasizes that in the post-settlement phase it is important to undo the effects of war.[47] This entails economic redevelopment and the restoration or creation of democratic institutions, but also the return of refugees and displaced persons. Displacement typically creates all kinds of poverty processes which in turn may increase the risk of conflicts over the few resources left. In addition, being displaced in itself fosters resentment and instability. In the aftermath of the Bosnian conflict, a major human rights' NGO deemed the situation concerning return the main factor of destabilization.[48]

As noted earlier, much of the housing stock at the end of a conflict will either be destroyed or in the hands of others. In order to make return to the original domicile an option at all, houses should be reconstructed or restitution of still existing housing should be made possible, depending on the case. The case of Bosnia and Herzegovina is not unique. Paulo Sérgio Pinheiro, United Nations special rapporteur on housing and property restitution, noted after a review of restitution processes from all over the world:

> '(…) policy approaches to housing restitution premised on the human right to adequate housing may hold the greatest promise for ensuring that the process of voluntary repatriation protects human rights, strengthens the rule of law and provides the basis for

44 Boutros Boutros-Ghali, *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-keeping*, 17 June 1992, UN Doc. A/47/277 – S/24111, para. 59.

45 Kofi Annan, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, UN Doc. S/2004/616 (hereafter: Annan 2004), section II.

46 Mark S. Ellis, 'International Legal Assistance', in: Bassiouni (2002) pp. 921-943, see p. 922.

47 Wallensteen (2002) p. 287.

48 Helsinki Committee for Human Rights in Bosnia and Herzegovina, *Report on the State of Human Rights in Bosnia and Herzegovina,* No. 27A-12/2002 (2002). In the same vein, the Property Law Implementation Plan Inter-Agency Framework Document (15 October 2000), set up by various international organisations active in Bosnia and Herzegovina, speaks of the resolution of property claims as 'the cornerstone of a sustainable and lasting peace in Bosnia and Herzegovina.'

> economic and social stability. These are essential elements for any successful programme of reconstruction and reconciliation.'[49]

Again the link between the rule of law and human rights on the one hand and of undoing the effects of war is stressed. The rapporteur's quotation also points to a very specific form of restitution: it should be based on human rights. This is not as obvious as it may seem. Restitution can just as well be approached in a political way. The exchange of quota of refugees and restitution of their property between warring parties on the basis of reciprocity may be far more appealing for those in power. In most cases – an equal number of refugees on both sides being a rarity – such a setup will leave the interests of at least part of them unattended. This is an unstable basis for peace. A human rights approach, by contrast, is not based on reciprocity but on the rights of individuals. Ideally, it offers to each and every one of the displaced the possibility to reclaim what was lost.

Summarizing the foregoing, housing and property restitution seems to have at least the potential to make a positive contribution to peace. It serves as a legal tool to solve destabilising refugee problems and it may help to cure at least one and maybe two of the three characteristics of war-torn societies: institutional weaknesses and, to a lesser extent, economic and social problems. Restitution is a contribution to substantive justice and may strengthen structural justice. It is a common aspect of reparation processes in post-conflict societies.[50] If considered as a human rights issue, it can be said to be part of the robust notion of the rule of law. In this way, it helps to shift away from negative to positive peace. As to its role in helping solve social and economic problems, it may be more modest: it can help solve conflicts over land and property and may decrease resentment as a source of conflict.

Concluding with a note of caution, it is important to nuance the role of human rights in peace-building: it is a contribution to long-term positive peace. Negative peace may not need a protective system of human rights.[51] Consequently, human rights considerations should not automatically outweigh political ones when peace is negotiated. Doing so would amount to what Putnam calls 'big picture myopia.'[52] Ironically, a certain degree of myopia[53] will have to be accepted here: the very short-run is outside the scope of this research. I will focus on housing and property restitution in the context of middle- and long-term positive peace.

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49 Paulo Sérgio Pinheiro, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons*, Preliminary report, submitted in accordance with Sub-Commission resolution 2002/7, UN Doc. E/CN.4/Sub.2/2003/11 (16 June 2003) para. 44.

50 Annan (2004) para. 54.

51 Although the reverse *is* true: the cessation of armed hostilities is a necessary condition for a robust protection of human rights: Putnam (2002) p. 239.

52 Ibid., p. 240.

53 Or should one say presbyopia?

1.4 CENTRAL RESEARCH QUESTION

Restitution processes can be moulded to fit the wishes or the interests of the parties involved. This can range from using the same kind of violent compulsion which made people leave their houses in the first place to judicial settlement of individual claims. Since a settlement after conflict often takes the form of a compromise, restitution may become part of a broader political deal where only certain quota of people are allowed to return. As argued earlier, this is not the most stable foundation for peace. A human rights approach, taking into account the rights of every individual who has lost his domicile, may offer better prospects. The central question of this research is therefore based on such an approach. It avoids any absolutist claims: conceding that the implementation of a human right will never be completely perfect or perfectly complete, the research will aim at identifying obstacles and possible solutions to these in order to increase the right's effectiveness as far as possible. Consequently, the central research question is formulated as follows:

How can the right to housing and property restitution for refugees and other displaced persons be secured more effectively in European post-conflict situations?

Answering this question may contribute to the development of a universal standard approach to the issue of housing and property restitution, which the UN special rapporteur on this topic has called for.[54] Additionally, it helps to draw attention to the often underemphasized civil justice element of transitions to peace, as opposed to the criminal justice elements.[55]

As H.L.A. Hart succinctly states in his classic *The Concept of Law*, 'the suggestion that inquiries into the meanings of words merely throw light on words is false.'[56] From the start it is important to clarify what will be understood throughout this book by the main elements of the research question and its limitations. The goal of this is threefold: it keeps the line of reasoning focused; it avoids obscurities and ambiguities as far as possible; and it helps explain the choice for the limitation of the research.

Right to housing and property restitution

Housing and property refers to both housing and real property, including land. Several reasons may be advanced to justify speaking about a right to restitution of 'housing and property' as opposed to 'property' simple.[57] The first is that it is a key factor in

54 Pinheiro (16 June 2003) para. 60.

55 Timothy Cornell & Lance Salisbury, 'The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina', *Cornell International Law Journal* vol. 35 (2002) pp. 389-426, see p. 391.

56 H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press 1994, 2nd ed.) p. vi.

57 Pinheiro (16 June 2003) paras. 4-5; Scott Leckie, 'New Directions in Housing and Property Restitution', in: Leckie (2003) pp. 3-61, see note 1 on p. 3.

securing the return of people to their homes in a voluntary, safe and dignified way. In that respect it is of more immediate importance in post-conflict situations than the reclaiming of other types of lost property. The second is that housing rights are treated as human rights to a much greater degree and encompass far more than property rights in general. The third reason is that it does not create a distinction between owners (property) and non-owners (housing). Thus it complies with what Leckie has labelled residential justice, 'the process of attaining justice for losses of residence notwithstanding the type of tenure (…) at the time of flight.'[58] It should functionally cover all losses of residence. Finally, using either 'property' or 'housing' would not reflect the very diverse legal systems of countries involved in restitution processes. The specially protected tenancy of Krstina Blečić is an example. Thus the notion 'housing and property' restitution used here is both more suitable, precise and stronger enshrined under international law than other definitions.[59]

Refugees and other displaced persons
This phrase follows the functional definition of UN special rapporteur Pinheiro.[60] A narrow phrasing, encompassing only the traditional terms 'refugees' and 'internally displaced persons' would leave a category of people out in the semantic and factual cold: those that are displaced across borders, but do not meet the legal definition of 'refugee' under international law.[61] To avoid this, I have chosen the current wording, emphasizing that the research will cover the right to restitution for all categories of persons who have lost housing and property as a result of armed conflict, irrespective of their characterization under international law.[62]

Be secured more effectively
The vocabulary of ways in which states can deal with international human rights is quite elaborate: treaties, declarations and other documents speak of 'promote',

58 See: Leckie (2003), ibid.
59 The precise interpretations of 'property' by the European Court of Human Rights and by the authorities in the case studies will be dealt with in later chapters.
60 Pinheiro (16 June 2003) para. 11. This is wider than his official mandate, which only speaks of refugees and internally displaced persons (ibid.).
61 According to the Convention relating to the status of refugees (Geneva, 28 July 1951) and its Protocol (New York, 31 January 1967) a refugee is any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality (…)'. Internally displaced persons have been defined as follows in the United Nations *Guiding Principles on Internal Displacement* (see chapter 6): 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.'
62 It could be argued that using any term whatsoever becomes useless in that case: if the status under international law is of no importance, why mention any specific category in the research question? There is a good reason to include it, nevertheless. It emphasizes the fact that it concerns only those people that did not leave their domicile out of free will during a conflict.

'encourage', 'respect', 'protect', 'enforce' or 'secure'. The verb secure has been chosen in the formulation of the research question because it embodies a strong legal obligation[63] and because it links up with the wording of Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which provides:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

The immediate reason is the central place the ECHR holds in the European structure of human rights protection that is the context of my research. In addition, the interpretation of Article 1 by the European Court of Human Rights offers useful guidance.[64] A first element of importance is that it includes both negative and positive obligations: abstention and action.[65] In the negative, states should refrain from interfering with the exercise of human rights. Whether the prohibition to interfere is complete depends on the nature of the right involved: absolute rights, like the right not to be tortured, do not allow for any restriction, whereas others, like the freedom of expression, only stand in the way of arbitrary or disproportionate interferences. In the positive, states are required to undertake action to give effect to rights. The 1979 *Marckx* judgment provides the earliest example of this in the case law of the Court. In that case the Court interpreted Article 8 of the European Convention, the right to respect for private and family life, to entail a duty for the state to include certain safeguards in domestic law that facilitated the integration of a child into his family. It stated:

> the object of the Article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities (…). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life.[66]

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63 As opposed to e.g. 'encourage' or 'promote'.

64 In addition, it can be argued that the ECHR provides the best basis for a standard approach on the subject matter as it is a *binding* text which almost all European countries have now ratified.

65 The International Covenant on Civil and Political Rights (16 December 1966, entry into force: 23 March 1976) embodies a comparable idea, but makes the duality of state obligations explicit. Article 2, paragraph 1 speaks of 'to respect and to ensure'. In its General Comment (no. 3, para. 1, 29 July 1981) the Committee on Civil and Political Rights clarified this in the following way: 'The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.' See also: Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Kehl am Rhein: N.P. Engel 2005, 2nd Ed.) pp. 39-41. For the issue of positive obligations in the case law of the European Court of Human Rights, see chapters 2 and 3.

66 ECtHR, *Marckx v.Belgium*, 13 June 1979 (Appl.no. 6833/74) para. 31.

In the following years, the Court extended the line set out in *Marckx* to read positive obligations in many other articles of the ECHR. The views of the Court exactly mirror the human rights idea under the rule of law introduced in section 1.3.

The Court's case law also provides guidance on the second part of the phrase 'more effectively secured' which is closely connected to the notion of positive obligations. It has ruled that the ECHR 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[67] For the individual this means that he can rely on more than a formal recognition of his rights. States have a duty to enable everyone within their jurisdiction to invoke these rights and to guarantee their effective implementation.

In the context of housing and property this is of special importance. As will be shown in the case study, the mere existence of property laws or the judicial resolution of claims is only a first step. Once it has been formally established who has title to property of a specific house or patch of land, implementation of such a decision has often proved to be the real stumbling block. The process of securing housing and property restitution rights effectively thus necessitates a number of steps. Only an emphasis on effectiveness during the whole process can turn these rights into more than just paper tigers growling at unwilling states.

It has been said before and can never be sufficiently stressed: effectiveness will not be used as an absolute notion, as the wording '*more* effectively' points out. The research will be concerned more with the analysis and possible removal of obstacles on the path towards effectiveness than with an attempt to achieve complete effectiveness. To point the way however, a flag should be planted on that path. This flag is in my opinion the reality of return for people to their former house. That means: the title to property has been decided upon, the house has been vacated and they have access to it. Circumstances to make the return sustainable in the long term – socio-economic opportunities, access to education, security and protection against discrimination – are further down the path and fall outside the scope of this research project.

European

The issue of housing and property restitution is certainly not a problem that is particular to Europe. It may not even be the region where this problem is most widespread or where it should be particularly urgently solved when compared to other places. The choice to delimit this study geographically to Europe is driven by other considerations. The first is that in no other part of the globe such a developed and extensive system of human rights protection exists. The ECHR, signed on 4 November 1950, was the first comprehensive human rights treaty in the world, establishing the first international procedure of complaints and the first international court to deal specifically with human rights: the European Court of Human Rights. The Court has developed a much larger and detailed body of jurisprudence than any of its regional or global counter-

67 ECtHR, *Airey v. Ireland*, 9 October 1979 (Appl.no. 6289/73) para. 24. The phrase has since then been regularly repeated in the Court's case law.

parts.[68] Its case-law will be the foundation of my research. Complementing this system, which arose within the Council of Europe, other regional organisations have been involved in human rights issues, the most important and notable of which are the Organization for Security and Cooperation in Europe (OSCE) and the European Union (EU). These organisations have different mechanisms at their disposal to ensure compliance with human rights norms. This means that violations are addressed using a wide spectrum of tools ranging from purely judicial to outright political, from court rulings to the threat of using military force.

As a second consideration, there are interesting complications that result from this specifically European situation. The abundance of guardians of human rights should engender a feeling of safety for its citizens, but it also brings up the possibility of different levels of protection. When each organisation and country has its own catalogue of human rights laid down in constitutions, treaties or declarations, the material content of comparable rights may differ. And the interpretation of the same rights by different organs may diverge. Discovering the common ground and the minimum level of protection accorded under a certain right then becomes of particular importance to ensure legal certainty. Connected to this is the fact that the same human rights may not only be ensured to different extents, but also in different ways. Various national and international jurisdictions overlap, with enforcement possibilities that range from police or military action to mere naming and shaming. In such an environment the possibilities for individuals to reclaim lost housing or property depends largely on the place where their lost assets happen to be situated. The institutional density that is characteristic of the European politico-legal landscape may prove to be a very mixed blessing. Although the European Court of Human Rights has used the phrase 'European family of nations'[69] and called the Convention an instrument of 'European public order',[70] that would seem to suggest more unity about human rights in Europe than actually exists.[71]

Finally, I hope that confining the research to Europe will help the study gain in depth what it lacks in broad global scope. Nevertheless, the outcomes of the present inquiry are not without importance for restitution problems elsewhere. The results may help formulate general policies that help overcome recurring obstacles to restitution in the rest of the world.

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68 Henry J. Steiner & Philip Alston, *International Human Rights in Context. Law, Politics, Morals* (Oxford: Oxford University Press 2000, 2nd ed.) p. 786; Claire Ovey & Robin White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press 2006, 4th ed.) p. 3.

69 ECtHR, *Tyrer v. United Kingdom*, 25 April 1978 (Appl.no. 5856/72) para. 38.

70 ECtHR, *Loizidou v. Turkey* (preliminary objections), 23 March 1995 (Appl.no. 15318/89) para. 75.

71 See about this e.g.: Päivi Leino, 'A European Approach to Human Rights? Universality Explored', *Nordic Journal of International Law* vol. 71 (2002) pp. 455-495.

Post-conflict situations[72]

As noted in section 1.3, post-conflict situations present a kind of intermediate stage: the clattering of arms has subsided but a fully functioning state apparatus, including sufficient means for peaceful conflict resolution, has not yet been put into place. A heavy burden from the recent past and challenges for the future coincide. It is this type of situations between negative and positive peace that will be addressed here. Since renewed fighting may often be a likely occurrence and peace only a temporary phenomenon, it may not be completely correct in all situations to speak of 'post'-conflict. An alternative could be the notion of transitional justice. In this study, however, I will use post-conflict in order to convey that some kind of settlement has been reached. Such a settlement may then form the framework for a process of housing and property restitution.

It should be noted here that the geographical scope is not the only limitation of the present work. Only property restitution processes occurring after the Second World War will be taken into consideration. Again, just like the problem of restitution is not a European one, it is not new either. The choice for the post-1945 period is justified by the fact that the current elaborate system of *international and European* human rights protection emerged after World War II. Studying older cases would be of historical interest, but would have to do without an adequate international legal framework. A sensible comparison with more recent cases would be difficult or impossible.

A third limitation – apart from the geographical and temporal ones – is connected to the international human rights perspective adopted. This perspective implies two points of emphasis. On the one hand a look at international norms and consequently an inquiry into the supra-state level. And on the other hand the position of the individual and his or her possibilities at attaining housing and property restitution in practice: the sub-state level. Connecting these two points creates practical difficulties, as it makes the intermediate level, the state itself, pivotal. The state, much as it is weakened by conflict, is still the focus of international law when it comes to enforcement and responsibility. This point, though formalistic in the light of practical circumstances, cannot be entirely ignored. As argued earlier, international or quasi-international remedies, e.g. special claims or property commissions, may offer an alternative track for individuals to pursue. Besides this practical challenge, the human rights perspective adopted here will limit the material legal scope: national administrative and civil law will only be used when necessary from that perspective and not as an object of study itself.

72 The research shall not be concerned with property restitution in other situations, the most notable of which may be that of restitution of nationalized property in Central and Eastern Europe after the fall of communism.

One important word of the central research question has not been elaborated upon: the first. The question of *how* to secure the right to housing and property restitution effectively. Answering this question depends to a large extent on the vision one takes. Therefore this part is very closely related to the theoretical framework of the research. This will be the subject-matter of the following section.

1.5 RESEARCH FRAMEWORK

It has often been stated: law does not function in a vacuum. The development and implementation of legal rules is not confined to the judiciary, but is influenced by many sectors of society. To study the effectiveness of the right to housing and property restitution is therefore to look beyond the court room or the treaty text. At the same time, it is desirable to counter the frequently encountered lack of legal analysis in peace and conflict studies. This study will therefore pursue two complementary goals when it comes to restitution processes: to place the legal human rights approach in a broader framework and to enrich (post-)conflict studies with a more elaborated legal dimension.

To structure the analysis, a framework used in international organisations theory will be adopted. Diehl, Ku and Zamora offer a clear formulation. They state that there are three necessary conditions for an effective functioning of international law. These are: (1) 'the existence of a legal concept that is sufficiently developed to be communicated clearly'; (2) a supportive structure or framework; and (3) 'the political consensus and will of the system's members to use the law'.[73]

The first factor is part of the *normative system*: the directive aspect of international law, the substance and scope of the existing norms, the acceptable standard of behaviour. The authors define norms in a strict sense, as those rules that are legally binding. Acts of comity or soft law are thus excluded by them. That does not take away a central problematic element: compared to domestic systems, the international normative system does not have the same precision and coherence. There is no defined set of institutions that can enact laws. On the contrary, on the international level there are several qualitatively different recognized sources of law, such as treaties or customary law.[74] To this imprecision a considerable degree of international disagreement on their

73 Paul F. Diehl, Charlotte Ku & Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems', *International Organization* vol. 57 (2003) pp. 43-75, see p. 43. The explanation of the three necessary factors follows their article. See also: Charlotte Ku & Paul F. Diehl, 'International Law as Operating and Normative Systems: An Overview', in: Charlotte Ku & Paul F. Diehl (eds.), *International Law: Classic and Contemporary Readings* (Boulder: Lynne Rienner Publishers 2003) pp. 1-19.

74 Article 38 of the Statute of the International Court of Justice provides the traditional enumeration of sources of international law: international conventions, custom, general principles of law, judicial teachings and doctrine. To these could be added binding decisions of international organizations and institutions, of which the European Union and the Security Council of the United Nations acting under Chapter VII of the UN Charter are the clearest examples.

validity can be added. Or, as Diehl, Ku and Zamora phrase it mildly, the normative system exists of 'issue-specific prescriptions and proscriptions, with some variation in the consensus surrounding them among the international community of states.'[75]

The normative system is comparable to Hart's conception of primary rules[76] in that it contains duties to perform or abstain from certain actions. Norms can *exist* separately from a supportive structure – the authors call this the *operating system* – but cannot *function* to its full extent without it. The only way in which norms can spread within the international arena without the existence of an operating system is through 'compliance pull'. This phrase, borrowed from Thomas Franck,[77] indicates the proneness of states to abide by certain rules because they consider these rules as legitimate, not because they are sanctioned when they do not follow them. This abiding in turn depends on the perceived quality of the rule or the authority and power of the rule-making institution. In the second case, an operative element is of course present. All in all, purely normative compliance pull is weaker than a situation in which normative and operating structures strengthen each other.

The second factor is the structural framework, the *operating system* that sustains the norms. The operating system can be compared to a constitution in a domestic situation in that it regulates the distribution of authority and responsibilities, defines who are the relevant actors, provides mechanisms for setting up and implementing new norms and for the settlement of disputes. Here the analogy ends however, for an operating system neither contains the norms themselves nor is it created as a completely coherent system. On the contrary, it may contain many overlaps and even contradictions. Jurisdictions emanating from different institutions can exist side by side in ways in which they never would in national constitutional systems. Thus 'system' should not be equated to 'systematic' in an absolute sense. Nevertheless the words 'operating *system*' will be used in the present research to indicate that its components are not unconnected.

The main components that Diehl, Ku and Zamora discern are: sources of law, actors, jurisdiction, and courts and institutions. All of these are in themselves traditional parts of international law, but in the notion of an operating system they are perceived as closely interrelated. The sources of law component is the set of rules about the process of law formation. It is concerned with the legal status of norms and with their hierarchy. The actors component defines which legal or natural persons can hold rights and obligations under international law and whether they can exercise their rights or be held accountable for negligence of their duties on the international plane. Jurisdiction deals with the other side of this coin: rules about when actors or institutions have the right to deal with legal questions. Here the division of competences between the national and the international level is an important element: which level

75 Diehl, Ku & Zamora (2003) p. 52.

76 Hart (1994) p. 81.

77 Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press 1990) as cited in: Diehl, Ku & Zamora (2003) p. 52.

takes precedence? And are they complementary or does one of both levels hold exclusive jurisdiction? Finally, the component of courts and institutions provides the forum for dispute settlement or monitoring. Their internal rules or statutes regulate the way in which disputes are handled and decided. It should be added that not every operating system is institutional. Treaties may also contain operational rules without setting up an institution.[78]

The third factor is the aforementioned 'political consensus and will of the system's members to use the law'. This is at first glance the most problematic factor of the three: it seems both self-evident[79] and somewhat unclear. On the one hand, it could be argued that it is simply a matter of establishing whether a specific norm is implemented and then concluding by reverse sequence that apparently consensus and will were present. On the other hand using the word 'will' would seem to indicate a strong element of subjectivity, making this factor wholly unsuited as a tool for analysis. Both assertions are exaggerations. The third factor can certainly be used in assessing the effectiveness of international law. The will of the main actors involved can be distilled from a combination of declarations, plans and other documents and from their actions. This implies that the effectiveness of international law is approached as a process, not as a static situation; as a series of moments of acceleration, of blockade or of slowing-down over time. It is particularly appropriate for the right to housing and property restitution which is in practice – if at all – given effect in a gradual way.

In the view of Diehl, Ku and Zamora, any failure of international law can be explained by the absence of one or more of these three conditions. This rather straightforward framework will be used to structure the research. There are more reasons to adopt the framework than just its helpful organising potential. It goes beyond existing typologies of positive versus natural law, coexistence versus cooperation law, or higher versus lower rules of law. Instead, it enables us to distinguish between more content-based rules on the one hand and more process-based rules on the other hand, but simultaneously includes the possibility to identify the ways in which these two influence each other.[80] This is especially important when studying legal topics which are still strongly under development, such as the right to housing and property restitution in post-conflict situations. In addition, the framework has three characteristics that render it particularly suitable for the study of that topic.

First of all, the notion of an operating structure that consists of interrelated, but not necessarily systematized components. There is no single treaty on housing or property restitution, no international organisation in which this issue is the very core of its mandate. On the contrary, restitution norms can be found in and derived from provisions of many treaties, other documents and state practice. Different organisations and courts at both the international and national level are involved in restitution processes.

78 Diehl, Ku and Zamora mention the Vienna Convention on the Law of Treaties as an example of this (p. 46).

79 At least, it seems to be perfectly clear to the authors as they do not elaborate on this factor.

80 See chapter for a clear example of this.

A conceptual framework that can accommodate such diversity and multiplicity is thus needed.

Second, the framework reflects both the absence of a central legislative and executive actor in international law and the concomitant enhanced need for clear legal norms. If there is no unified interpreter of the meaning of rules, the rules themselves should be as precise and clear as possible. This partial – or, as sceptics would say, complete – anarchy of the international system is exactly one of the main characteristics of post-conflict societies.

Third, Diehl, Ku and Zamora have developed their theory to be applied to the interplay of *international* law and *international* politics. The issue at stake here will be approached through the looking glass of international human rights law as applied in national contexts. Admittedly, this is not exactly the same. My research deals with specific countries and thus contains a considerable domestic component. I would argue that this does not prevent the use of the trichotomy. The difference between the context for which it was developed and the context of this book is more one of emphasis than of kind. Questions of international law's effectiveness almost always touch upon domestic implementation, especially in human rights issues, which the authors explicitly include as a possible area of application for their model.[81]

The appropriateness of the model does not make it applicable without any adjustments. The difference of emphasis just described requires further clarification. Restitution processes are about more than merely horizontal relations between states. As a human rights issue they have vertical dimensions – individuals vis-à-vis states and institutions – and additional horizontal dimensions – individuals vis-à-vis other individuals. Moreover, the nature of implementing restitution in post-conflict situations necessitates looking beyond the state as a solid, unitary entity. There are two reasons for lifting the veil of the state. In the first place, the state is weakened or placed under international tutelage and often does not yet form an effective structure of governance and thus of law implementation. In many ways governance within such a state may be 'internationalized', that is: contain elements of direct or indirect international rule or at least a very substantial degree of international involvement. The level of analysis of housing and property restitution rights is thus neither clearly the international level nor the domestic level, but some intermediate, mixed form. In the second place the weakness of the state may result in decentralized power structures, in which sub-state levels – sometimes consisting of different former warring parties – may play a decisive role in making restitution rights effective. Finally, and connected to this, the notion of actors should be further specified here. The archetypical actors in the model are states and international organisations or institutions. In this research, though, others should be taken into account as well: specific national institutions, sub-state authorities and maybe even *de facto* rulers.

Even taking all of this into consideration, the model may not provide the perfect mould for the research. The facts arising from the case study that will be studied might

81 Diehl, Ku & Zamora (2003) pp. 49, 52 ff.

prove the basics of the model to be insufficient. Even if all the three requirements that Diehl, Ku and Zamora have formulated are present, the right to housing and property restitution may still be ineffective. The in-depth approach of case study thus provides an opportunity to test their hypothesis and to unveil possible other factors that are relevant for the effectiveness of international law. In theory, the study of a very specific and limited topic in a few specific countries may suggest possible adjustments to the hypothesis that the three factors offer a sufficient explanation.[82]

1.6 STRUCTURE

Following the model presented above, the central research question formulated in section 1.4 shall be approached in three steps. The first step is based on the assumption that a legal approach to claims is potentially the most neutral and depoliticized way of dealing with the issue of return of housing and property and can act as a spill-over in strengthening the rule of law in general in fragile and divided societies. To achieve this it should first be clear what the relevant norms under international human rights law are. Consequently, the first sub-question to be answered is: how is the right to return of housing and property enshrined in international law?

Two positions can be distinguished on this matter. The first view is that the right to return of housing and property does not exist as a separate right, but can only be derived from the broader right to an effective remedy when human rights are violated. The rights of respect for the home and of peaceful enjoyment of property are the ones most obviously involved. Ever since the 1928 *Chorzów Factory (Indemnity)* judgment of the Permanent Court of International Justice (PCIJ), it has been accepted that restitution, as an emanation of *restitutio in integrum*, was the preferred remedy after illegal confiscation of property by the state.[83] Complicating this general principle is the fact that in most situations of conflict the State is not the only actor involved in interfering with property rights. Private parties are often violating human rights as well. The question in the latter case would be whether the state can be held responsible and thereby obliged to organise housing restitution or at least give compensation. The second, more far-reaching view is that the restitution of housing and property can be seen as an emerging right in its own right. This is the view that restitution itself has been acknowledged as more than a preferred remedy – above specifically, compensation – for violations of the human rights mentioned above. The right to restitution essentially puts a positive obligation on the state to restore housing and property to the rightful owner after a period of *de facto* de-possession. Both views will be examined.

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82 The reverse may be true as well: the hypothesis may emerge unscathed. It should be noted here that by using the model of Diehl, Ku and Zamora as a structuring tool for the research, it does not become a self-fulfilling prophecy. Structure should be seen as an ordering mechanism that leaves space for exceptions and falsifications, not as a straitjacket.

83 PCIJ, *Chórzow Factory (Indemnity) Case* (Germany v. Poland), 13 September 1928, Series A, no. 17.

The second step is to analyse the institutional modalities of the right to housing and property institution in a specific situation. The question here is which institutional framework is available to the individual trying to reclaim his housing and property. In other words, what national and international courts, ombudsmen, commissions and other organs have the jurisdiction or the mandate to address individual claims. Which laws and provisions of peace agreements are relevant in this respect and which procedural bars apply? This step focuses on the possible: it describes the existing menu for choice.

Finally, the third step is to look at how the right has been and is being implemented in practice. This step focuses on the actual. After the consideration of the legal and institutional framework in the preceding analysis, a closer look will be taken at the implementation in a specific situation. Of importance at this point is which main actors – international organisations, states and sub-state entities – are involved and whether their role has been to further or to hamper restitution.

1.7 THE CASE STUDY OF BOSNIA AND HERZEGOVINA

In describing the two last steps in the previous section, I have mentioned a 'specific situation.' Indeed, the issue of housing and property restitution will be tackled by an analysis of a case study. I have chosen the method of using a case study for several reasons. In the first place, it is the best suited research strategy for studying contemporary events in cases where behaviour cannot be influenced (as opposed to an experiment) and when the research focuses on modalities (the central research question is formulated as a 'how' question).[84] All of this applies to the present study. Secondly, a comprehensive quantitative comparison between all European restitution processes is impossible. Statistics widely differ in their parameters and availability. Sometimes none even exist. Thirdly, and connected to the second reason, case studies offer another advantage as compared to statistical surveys: they allow for a holistic approach which takes the context of a particular situation into account.[85] In this way, they can provide for a much more nuanced description and explanation of restitution processes. The case study will be used to investigate how rules agreed upon on the international level trickle down in a specific national jurisdiction. From the references made in the preceding sections, it may not come as a surprise that the case study will be Bosnia and Herzegovina. Clearly, many other European countries or regions struggle with restitution problems. Among them Georgia, Turkey, Cyprus, and almost all of the states that were part of the former Yugoslavia. The choice for Bosnia and Herzegovina is not entirely arbitrary though. It offers an intriguing blend of inter- and intra-state elements of conflict. It fits in the pattern of modern conflict described in section 1.2: ethnicity was one of the main conflict justifications, not ideology. Finally, the involvement of

84 Robert K. Yin, *Case Study Research. Design and Methods* (Thousand Oaks: Sage Publications 2003) pp. 1, 7.

85 Yin (2003) p. 2.

international organisations was considerable and could even be labelled as decisive in imposing settlements.

The war in Bosnia was part of the broader process of the dissolution of Yugoslavia. After the death of president Tito in 1980, Yugoslavia was ruled by a rotating presidency and plagued by an economic crisis and increasing nationalism of its different ethnic groups. The break-up of the country started in 1991 with Croatia, Slovenia and Macedonia declaring independence. Bosnia and Herzegovina followed suit on 6 March 1992, after a referendum in which the majority of Bosniaks[86] and Bosnian Croats voted in favour. The referendum was boycotted by the Bosnian Serbs, who declared their own independence in April by creating the Republika Srpska on parts of the territory of Bosnia and Herzegovina. Whereas the new Bosnian state was soon recognised internationally, the Serb entity was not. In those same months the rising tensions escalated into a full-fledged war, in which Croatia backed the Bosnian Croats and the former Yugoslav National Army supported the Bosnian Serbs.[87] This mixture of internal and international conflict gave the Bosnian war traits of all three kinds of conflict as identified by Wallensteen.[88]

A popular view amongst outsiders was and is that the demise of communism unleashed old ethnic hatred inherent in the very minds of the peoples on the Balkans. Rather than this prejudiced view of a recurrence of inbred violence, the real reason for the war in Bosnia seems to have been that elites grappled for power through manipulation of feelings of fear and insecurity about the future to instil ethnic hatred. This explains why Bosnia, as the most mixed of all the former Yugoslav republics, became the main battleground.[89]

The armed conflict was particularly brutal and one of the methods by which war was waged was a policy of 'ethnic cleansing'. Several parties in the conflict tried to establish ethnically 'pure' territories by removing people of other ethnicities than the one in power, either through threats, force, or other forms of coercion.[90] As early as 1991, the presidents of Croatia and Serbia, Tudjman and Milošević, secretly agreed to divide Bosnia between them.[91] Thousands of families and individuals were forced to leave their homes and the social environment they had lived in, prompting some to speak of 'domicide'.[92] Large-scale displacement and the loss of housing were indeed

86 The commonly used word for Bosnian Muslims.

87 Francine Friedman, *Bosnia and Herzegovina. A Polity on the Brink* (London: Routledge 2004) pp. 42-43.

88 See section 1.2.

89 Friedman (2004), pp. 2-3; Carole Roger, *The Breakup of Yugoslavia and the War in Bosnia* (Westport: Greenwood Press 1998) pp. 43-45.

90 See e.g. ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Merits) (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, paras 329 ff.

91 Friedman (2004) p. 42.

92 See e.g. Gearóid Ó Tuathail & Carl Dahlman, 'Post-Domicide Bosnia and Herzegovina: Homes. Homelands and One Million Returns', *International Peacekeeping* vol. 13 (2006) pp. 242-260.

one of the results of the armed clashes, and premeditated ones at that. The presence of UN peacekeepers on the ground did not change this fact.

Even before military clashes first erupted in Bosnia, international actors – the United Nations, the European Community,[93] the United States, and others – tried to broker a negotiated peace between the states of the former Yugoslavia. For years, these efforts failed to produce peace. Thousands of citizens were killed, the genocide in Srebrenica being the saddest landmark in the most devastating war on the European continent since World War II. Only when NATO started bombing Serb positions in Bosnia in August 1995,[94] did the warring parties feel sufficiently compelled to return to the negotiating table to agree on a solution within a single Bosnian state. The negotiations resulted in the Dayton Peace Agreement of December 1995.[95] As a consequence of the Agreement, Bosnia was reconceived as a highly decentralised state under international tutelage. An internationally appointed High Representative was given far-reaching powers to reconstruct the country.[96] According to some, this effectively turned Bosnia into an international protectorate instead of an autonomous democracy.[97] One of the main challenges for the reconstruction effort in this idiosyncratic context was the return of hundreds of thousands of refugees and other displaced persons to their homes. Since ethnically homogenous territories had been one of the main goals during the war, these return and restitution efforts were extremely difficult to bring to fruition. The case study on the Bosnian restitution process will delve deeper into the question of how these challenges were overcome.

1.8 CONCLUSION

The loss of housing and property is one of the many problems caused by armed conflicts. The changing face of conflict makes this loss both more of a salient problem and offers new perspectives to solve it. In this chapter I have tried to show that restitution can contribute to peace in different ways. First, in a very direct way by solving disputes over housing and property and thereby enhancing prospects for the return of refugees and other displaced persons. This can be done both by way of political compromise and by adopting a human rights based approach, although the results may widely vary. Secondly, restitution efforts can contribute more structurally to positive peace by strengthening the rule of law. Human rights are part of a robust model of the rule of law that may offer good possibilities for peace and justice, not just in its form (abiding by the rules, separation of powers) but also through its content.

93 Later: the European Union.
94 Richard Holbrooke, *To End a War* (New York: Random House 1998) p. 101.
95 For more on Dayton, see section 7.2.1.
96 For an inside account, see the memoirs of the first High Representative: Carl Bildt, *Peace Journey. The Struggle for Peace in Bosnia* (London: Weidenfeld and Nicholson 1998).
97 See e.g.: David Chandler, *Bosnia: Faking Democracy after Dayton* (London: Pluto Press 1999).

Having established that housing and property restitution may play a positive role in societies emerging from conflict, the many obstacles to it have also been noted. These arise at many levels – international, national and often local – and are of both a political and a legal nature. In this research the legal perspective, more specifically the individual human rights perspective, will be adopted to look at restitution problems and offer possible solutions for them. The approach taken will not analyse the legal questions without looking at their context. The attention to context is secured in two ways. In the first place, a structuring framework taken from international organisations theory should ensure a broader outlook and puts emphasis on questions of effectiveness. Secondly, the method of case studies stresses the real-world backgrounds of legal restitution disputes – the real world of Krstina Blečić and others facing a similar predicament. Ultimately, this study hopes to contribute to a more effective right to housing and property restitution for all.

PART I

THE NORMATIVE SYSTEM

CHAPTER 2
RESPECT FOR THE HOME

2.1 INTRODUCTION

The *Odyssey* tells of Penelope's suffering in her home on the island of Ithaca. While her husband Odysseus is away fighting in Troy, large numbers of suitors vying for her love have installed themselves in her house. Not only are they depleting the resources of her husbands house and land, they also endanger the life of her son Telemachos. The whole of Homer's epic bears witness to the symbolic importance of returning home and this particular episode shows the grave consequences of unwanted intrusions into one's house. The story thus offers an early example of how war and insecurity can affect the home.

This chapter will focus on the current system of protection of the home under the European Convention against intrusions and other war-related problems.[1] I will use the main conceptions attached to housing rights to analyse the Court's interpretation of the concept of home. Subsequently the nature of the right to respect for the home under Article 8 ECHR will be elaborated upon. Finally I will address how the Court assesses the various situations causing the loss of home: what duties does the European Convention impose upon states in situations of destruction, eviction and denial of access to the home?

2.2 UNDERLYING CONCEPTS: SECURITY, PRIVACY AND ATTACHMENT

One may categorize the underlying concepts of housing rights in three more or less distinct conceptual categories: security, privacy and what I would call (socio-emotional) attachment.[2] The first category, security, lies at the core of housing rights: the protection a house can provide against physical hardship and insecurity. This is the traditional notion of housing as a shelter, a secure place which offers protection against weather and cold, against intrusions from nature and from fellow human beings. In legal terms the security dimension of housing is mainly translated into the socio-

1 The first three sections of this chapter were earlier published as: Antoine Buyse, 'Strings Attached: The Concept of 'Home' in the Case Law of the European Court of Human Rights', *European Human Rights Law Review* (2006) pp. 294-307.

2 See for a full overview of conceptions surrounding the notion of 'home': Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', *Journal of Law and Society* vol. 29-4 (2002) pp. 580-610. Fox points to the fact that the legal concept of home is still in the 'pre-scientific, speculative stage' (p. 588).

economic right to adequate housing. Partly, it also falls under the notion of respect for the home.

The category of privacy does not refer to housing as a social right but rather to the relationships (and the boundaries thereof) an inhabitant of a dwelling has with society at large. A house in this sense provides a private sphere where one can live as one likes, free from constant outside interference. This idea of a private sphere arose from the liberal concept of freedom at the end of the eighteenth century and throughout the nineteenth: every individual was to be able to lead an autonomous life.[3] Such a life entailed a division between the private and the public. The idea materialized in legal provisions on the protection of the family, correspondence and the home, often much earlier than laws on the respect for private life in general.[4] The notion of the home thus became not only the symbolic space for privacy, but also the material one: within the four walls of one's own house one was not to be disturbed by society, be it the state or other individuals. Property was closely linked to this: what was owned was legally more easily defended against interference than what was not. Intrusions into one's house were more and more equated to intrusions into one's privacy. As such the home has been characterized as the 'headquarters of private life', the 'letzte Bastion der Privatsphäre' and a 'rempart de l'intimité'.[5]

The third category is that of attachment. From this perspective a house is more than a useful protective shield. It contains the idea that one develops a bond with a certain place over time:[6] not just with a particular region, municipality or neighbourhood, but with the house one lives in. This explains why people chased from their house want to return to that particular house – apart from any conceivable material considerations. The simple offer of alternative housing may thus not be acceptable to many. In this sense housing restitution is for most people distinguishable from the restitution of a lost sum of money. This sense of attachment is social and psychological and therefore difficult to mould into a usable legal rule.

In the following these three conceptual categories will resurface in the analysis of the scope of the notion of the 'home'. In analysing this notion I will review which categories are used and which are neglected. If it would emerge that the third category

3 Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Kehl am Rhein: N.P. Engel 2005, 2nd ed.) p. 377-378.

4 Jacques Velu & Rusen Ergec, *La Convention européenne des Droits de l'Homme* (Brussels: Bruylant 1990) p. 556; Nowak (1993) p. 378.

5 Respectively: G. Cohen-Jonathan, 'Respect for Private and Family Life', in: R.St.J. Macdonald, F. Matscher & H. Petzold (eds.), The European System for the Protection of Human Rights (Dordrecht: Nijhoff 1993) pp. 405-444, see: 427; Stephan Breitenmoser, *Der Schutz der Privatsphäre gemäss Art. 8 EMRK. Das Recht auf Achtung des Privat- und Familienlebens, der Wohnung und des Briefverkehrs* (Basel: Helbing & Lichtenbahn 1986) p. 252; Vincent Coussirat-Coustère, 'Article 8 § 2', in: Louis-Edmond Pettiti a.o., *La Convention européenne des Droits de l'Homme. Commentaire article par article* (Paris: Economica 1995) pp. 323-351, p. 344.

6 Or in the alternative, in the case of a nomadic lifestyle, to that lifestyle as such. This lifestyle is, under the ECHR, not only protected under the notion of 'home', but also under private and family life: e.g. ECtHR, *Jane Smith v. the United Kingdom*, 18 January 2001 (Appl.no. 25154/94) para. 80.

plays a role, then the restitution to people of their *own* home makes sense. If it does not, then alternative accommodation would suffice. This is why an inquiry into the use of the three categories is relevant in the first place.

2.3 THE NOTION OF 'HOME' UNDER THE ECHR

Article 8 ECHR reads:

1. Everyone has the right to respect for his private and family, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.3.1 Scope of the home

The *travaux préparatoires* do not provide guidance on how the concept of home should be understood.[7] The only thing they show is that in the English text of the Convention 'home' was used and not 'domicile'.[8] This may point to the fact that the home protected under the Convention is not mere functional (as domicile would be), but also symbolical; not just the place where one lives, but also the place where one feels one belongs.[9] This would fit in with the third category underlying housing rights. The French version of the ECHR uses the word 'domicile'.[10] In the French language, this denotes both a person's home and, for the specific purposes of civil law, it is the place where he has his principal establishment.[11] Although the *travaux* do not offer much background on the scope of the home, the European Court of Human Rights has developed clarifications of this concept in the last decades.

The concept of the home should be seen in the context of the other concepts included in Article 8: private life, family life and correspondence. The Court has not developed exact delimitations and definitions of the various concepts. Protection of family life, home and correspondence can both be seen as values in their own right and

7 For a short summary of the *travaux préparatoires* of Article 8 ECHR, see: Jacques Velu, 'The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications', in: A.H. Roberston (ed.), *Privacy and Human Rights* (Manchester: Manchester University Press 1973) pp. 12-95, see pp. 14-18.

8 See e.g. *Collected Editions of the Travaux Préparatoires* vol. 1 (The Hague: Martinus Nijhoff 1975) p. 172. Nor do other Council of Europe texts provide clarity: Breitenmoser (1986) p. 254.

9 See *Collins Cobuild English Language Dictionary* (London: Harper Collins Publishers 1992).

10 On the Court's comparison of the French and English versions of the ECHR, see *infra* in the context of the protection of businesses.

11 *French Legal Terms in European Treaties* (London; Sweet & Maxwell 1972) p. 30. See also the *Niemietz* case, discussed *infra*.

as specific parts of the overarching category of privacy. In any event, there is considerable overlap.[12] An individual can complain about a violation under Article 8 in general without having to specify what aspect is at stake: the rights can be read together.[13]

Compared to most other Convention rights, the case law of the Strasbourg institutions on the *specific* right to respect for the home has been rather scarce. It has played a relatively unimportant role.[14] The European Commission of Human Rights was of the opinion that the concept of 'home' should be understood as being someone's 'principal residence' and that it was a precise concept that 'may not be arbitrarily extended'.[15] One commentator concluded from this – incorrectly in my view – that the term 'home' was not to be extensively interpreted.[16] Indeed, later case law reveals a considerable extension of the notion. The Commission had in fact only held that extension of the notion should not happen *arbitrarily*, not that it should not be done at all. All one needed were tools to interpret specific situations.

These tools were to a certain extent developed by the Court in its first specific and leading case on the scope of the notion of home: *Gillow v. the United Kingdom*.[17] Mr and Mrs Gillow owned a house ('Whiteknights') on the island of Guernsey in which they lived from 1958 to 1960. Due to employment abroad they left the island for almost nineteen years, letting the house to various tenants. Upon the retirement of Mr Gillow they applied for a licence to go and live on the island again and reoccupied their house. Guernsey, with its very high population density and shortage of houses, used a licensing system to regulate the housing market. During the absence of the Gillows, legal provisions had been changed with the effect that the couple now needed a licence. A licence for which they did not qualify, according to the Housing Board. They consequently lost the 'residence qualifications' they had formerly possessed. Since the family did not show an intention to leave, the authorities started proceedings against them. One year after their return the Gillows decided to sell their house.

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12 J.G. Merrills & A.H. Robertson, *Human Rights in Europe* (Manchester: Manchester University Press 2000, 4th Ed.) p. 154.

13 P.J. Duffy, 'The Protection of Privacy, Family Life and Other Rights under Article 8 of the European Convention on Human Rights', *Yearbook of European Law* vol. 2 (1982) pp. 191-238, pp. 191-192.

14 Duffy (1982) p. 196; Andrew Drzemczewski, *The right to respect for private and family life, home and correspondence as guaranteed by Article 8 of the European Convention on Human Rights* (Council of Europe: Strasbourg 1984) p. 14 ; Luzius Wildhaber, 'Der Schutzbereich des Rechts auf Achtung der Wohnung', in: Wolfram Karl & Herbert Miehsler (eds.), *Internationaler Kommentar zur Europäischen Mensenrechtskonvention* (Cologne: Carl Heymans Verlag 1992) pp. 163-172, see p. 163; Cohen-Janathan (1993) p. 427.

15 EComHR, *X v. Belgium*, 30 May 1974 (Appl.no. 5488/72; *Yearbook of the European Convention on Human Rights* vol. 17 (1976) pp. 22-228). In this case, the search of a car could not be equated to the search of a home for the purposes of Article 8 ECHR. In this decision the Commission referred to two earlier decisions in which it had 'tacitly accepted' this notion of the home: EComHR, *X v. Germany*, 4 January 1960 (*Yearbook* vol. 3 (1961) pp. 184-196) and EComHR. *X v. Germany*, 28 March 1963 (*Collection of Decisions of the European Commission of Human Rights* vol. 11 (1963) pp. 1-8).

16 Duffy (1982) p. 197.

17 ECtHR, *Gillow v. the United Kingdom*, 24 November 1986 (Appl.no. 9063/80).

The Gillows lodged a complaint in Strasbourg, *inter alia* about an interference with their right to respect for the home because of the restrictions put on their occupation of 'Whiteknights'. The Commission found a breach of Article 8 in this respect and referred the case to the Court.[18] The Court first established that the Gillow's house was a 'home' within the meaning of the Convention. It took into account the fact that the family had lived in the house from 1958 to 1960 and again upon their return from abroad in 1979, that they owned it, had kept their furniture in it, and that they intended to go and live there permanently after their return. The following factors supported these statements made by the applicants: in 1956 they had sold their former home in Lancashire and moved family and furniture to Guernsey and they had not established a home anywhere else in the United Kingdom. In spite of their years of absence, they had thus retained 'sufficient continuing links'[19] with their Guernsey house.

Apparently, the Court took into account both positive and negative elements. Length of absence and the establishment of another home may diminish or break the continuing link, whereas both objective aspects such as periods of habitation, ownership, presence of personal belongings and subjective aspects such as intention to take up permanent residence may strengthen the link. It is unclear whether each of the positive factors taken by itself is a necessary requirement or that the absence of one of them can be compensated by others. Interestingly, time is both a positive (habitation) and negative (absence) factor. In this case even the fact that the period of absence (nineteen years) was much longer than the total period of residence (around three years) did not break the link between the Gillows and their house. The Court's stance taken here is in line with the Commission's: at the time of the proceedings about the residence permit, 'Whiteknights' was the Gillow's 'principal residence'.

The main criterion since *Gillow* has thus been the link between the applicant and his home. This link should be both sufficient, taking the above-mentioned elements into account, and continuing. Both the Court and the Commission have subsequently applied this criterion in their case law.[20] On continuity it must be added that the link is not easily broken if the absence from the home is caused by the respondent state. Thus in the *Zavou* case, in the context of the Turkish occupation of Northern Cyprus, the Court has held that an involuntary absence of more than 28 years due to this occupation did not sever the ties between the applicants and their home: 'the properties involved would have constituted a home within the meaning of Article 8 § 1 of the

18 Interestingly, the British Government agreed with the Commission's finding of a breach 'in the light of facts which had emerged in the course of the consideration of the case by the Commission and from which it appeared in particular that the applicants had not established a home elsewhere, as had previously been believed' and because the Housing Board's refusal to grant licences had been disproportionate (para. 44). The Court nevertheless considered that its responsibilities extended 'to pronouncing on the non-contested allegation of a violation of Article 8' (ibid.).

19 Para. 46.

20 E.g. EComHR, *Mabey v. the United Kingdom*, 15 May 1996 (Appl.no. 28370/95) and ECtHR, *Buckley v. the United Kingdom*, 25 September 1996 (Appl.no. 20348/92).

Convention which they had been obliged to leave in 1974.'[21] Apparently the Court takes the war-time situation in 1974 into account. Contrary to the Gillows' case, the current housing conditions of the applicants seem to be immaterial here. Assuming that the applicants in *Zavou* have found another place to live in the meantime, we must come to the conclusion that the decisive element is not security or privacy, but attachment – although the Court does not state so explicitly. Forcible evictions thus do not break the continuity of the link as long as there is no real opportunity to return home.

In the *Moreno Gómez* judgment, the Court has developed the notion of home within the privacy category mentioned earlier: 'the home is the place, the physically defined area, where private and family life develops.'[22] The home is the physical shell around privacy, the spatial aspect of it. Thus function, not form, is decisive in establishing whether a certain place can be qualified as home within the meaning of Article 8. In the case of *Camenzind* the applicant occupied only one room in a building of which he let the rest to tenants. Without going into the question whether the rest of the house was part of the home, the Court concluded that the room itself fell within the scope of Article 8.[23] And in *Buckley* a number of caravans placed on a piece of land without permission were also considered by the Court as forming a home.[24] The extent of the 'home' is equal to the property or tenancy of the inhabitant involved.[25] Thus both garage and garden are included.[26]

Nor is the kind of tenure an obstacle in this respect: both owned and rented houses fall within the scope of Article 8. The Convention makes no distinction between the two. In *Khatun a.o.*, the Commission made no difference between those applicants who had a proprietary interest in the land on which their house was built and those who had not.[27] And in the *Blečić* case mentioned in Chapter One the applicant rented her flat under a specially protected contract, a form of contract for inhabitants of socially owned apartments halfway between the renting of a house and ownership. It was immaterial for an answer to the question whether the flat constituted her home.[28] A place can even be a home for people who are neither its owners nor its tenants but live there by family connection.[29]

Along the same lines, the question whether a home was lawfully occupied or established is not in itself decisive for the issue of scope, although it may be an

21 ECtHR, *Zavou a.o. v. Turkey* (admissibility), 26 September 2002 (Appl.no. 16654/90).
22 ECtHR, *Moreno Gómez v. Spain*, 16 November 2004 (Appl.no. 4143/02) para. 53. To my knowledge, this is the only case in which the Court did so explicitly.
23 ECtHR, *Camenzind v. Switzerland*, 16 December 1997 (Appl.no. 21353/93) para. 35.
24 ECtHR, *Buckley v. the United Kingdom*, 25 September 1996 (Appl.no. 20348/92) para. 54.
25 See also: ECtHR, *Surugiu v. Romania*, 20 April 2004 (Appl.no. 48995/99).
26 Jochen Abr. Frowein & Wolfgang Peukert, *Europäische Mensenrechtskonvention. EMRK-Kommentar* (Kehl am Rhein: N.P. Engel Verlag 1996) p. 359.
27 EComHR, *Khatun and 180 Others v. the United Kingdom*, 1 July 1998 (Appl.no. 38387/97).
28 ECtHR, *Blečić v. Croatia* (chamber judgment), 29 July 2004 (Appl.no. 59532/00) paras. 51-52.
29 ECtHR, *Menteş a.o. v. Turkey*, 28 November 1997 (Appl.no. 23186/94) para. 73.

indication.[30] As we have already seen above, the illegal placing of caravans in *Buckley* was no impediment to apply Article 8. Similarly, the Gillows established their home legally, but due to changes in the law during their absence their occupation of the house upon return was illegal. This fact did not render their case inadmissible. Without mentioning it explicitly in that 1986 judgment the Court followed in the footsteps of the Commission's *Wiggins* decision of 1978.[31] Mr Wiggins moved to Guernsey and married there in 1970. In 1973 he divorced and his wife moved from their house, as a result of which Wiggins did not fulfil the necessary residence qualifications anymore. The local authorities ordered him to vacate the premises. The Commission's view was that he could not have reasonably foreseen the breaking-up of his marriage when buying his house. Thus, although his occupation of the house had become illegal, the fact that he had lived there for several years brought his case within the scope of the notion of 'home'. Occupation during a certain period is apparently a relevant additional element in these cases.[32] The illegal occupation of a house would not make it a 'home' within one day. Nevertheless, an occupation that was illegal at first may through subsequent condoning over time by the authorities raise the legitimate expectation for the occupier that the dwelling at issue is – at least silently – recognised as his or her home. It would thus be too absolute to claim, as Loveland asserts, that a legal interest is always necessary.[33] Rather, either a legal interest *or* a legitimate expectation that the house is recognised as a home are relevant elements for the scope of the notion of the home under Article 8.

Whether places used temporarily such as holiday homes, work hostels and hotel rooms fall within the scope of the 'home' as well, is unclear. If one only considers the objective function of the home as being a protective shield for private life against outside interference, then these should be included. From that perspective the intensity or duration of use of a certain space becomes irrelevant. But even if one includes subjective elements, like the Court did in *Gillow*, a hotel room could with the passage of time be qualified as a 'home'.[34] Either way the scope of 'home' is then rather large.[35] The Convention institutions never solved the issue of these kind of (often) temporary shelters explicitly.[36]

In *O'Rourke* a stay of less than a month in a hotel room from which the applicant was evicted for improper behaviour was at stake. The Court expressed its 'significant doubts' over whether O'Rourke's links with the hotel room were sufficient and

30 An answer to the question of lawfulness *is* relevant under Article 8 § 2 in assessing whether an interference by the state was 'necessary in a democratic society'.

31 EComHR, *Wiggins v. the United Kingdom*, 8 February 1978 (Appl.no. 7456/76; *Decisions and Reports* vol. 13 (1978) pp. 40-56).

32 See also: EComHR, *Mabey v. the United Kingdom*, 15 May 1996 (Appl.no. 28370/95).

33 Ian Loveland, 'When is a house not a home under Article 8 ECHR?', *Public Law* 2002, pp. 221-231, see p. 223.

34 Wildhaber (1992) p. 164.

35 Breitenmoser (1986) p. 257.

36 But see section 2.3.2 in respect of secondary homes.

continuous enough to bring the situation within the scope of Article 8.[37] But even assuming that they were, the Court found the interference in conformity with the requirements of paragraph 2 of Article 8. The application was declared manifestly ill-founded. The necessary passage of time needed would thus seem to be, at the very minimum, longer than a month. At least, one could say that in short-stay situations the element of the home as a private life shield does not outweigh the element of duration. One may compare this to the Court's case-law on privacy in which has held that the question whether one has a 'reasonable expectation' of privacy is a relevant factor.[38] By analogy a reasonable expectation that a place will be respected as a 'home' exists in respect of a house one has bought and just moved into, whereas it does not in case of a short stay in a hotel room.

The difficult question of scope is avoided more often; in the case of *Kanthak* concerning a camping car the Commission evaded the question by immediately looking at possible justifications for the interference under Article 8 § 2, irrespective of whether the case concerned the right to respect for private life or for the home.[39] The effect is an enlargement of the scope in practice. Although the Commission's approach is not the most elegant, it does have the positive result of treating the substance of the case. This should in my opinion always be endeavoured as much as possible, as it enables a nuanced assessment of an interference or an omission. I am consequently in favour of a broad scope of the notion of home.

As a more sophisticated alternative to the Commission's decision in the aforementioned case not to answer the question of scope, I think that in contested cases a situation should be *prima facie* assumed to fall within the scope of the 'home'. The tools the Court has developed in *Gillow* and later cases should then be used to assess the link of the applicant to their alleged home. The strength of the link could be weighed against the degree of state interference when deciding on the proportionality issue under Article 8 § 2. This allows for the aforementioned nuanced approach *within* the specific context of respect for the home.

But even when adapting such an approach with a broad *prima facie* scope, some situations would still probably be excluded: those in which there is no house at stake (yet). The Court has limited the scope of the home to existing homes and to housing (as opposed to a home region): in *Loizidou* a piece of land on which the applicant planned to build a home was not considered to fall within the scope of Article 8: 'it would strain the meaning of the notion 'home' in Article 8 to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the

37 ECtHR, *O'Rourke v. the United Kingdom* (admissibility), 26 June 2001 (Appl.no. 39022/97).

38 E.g. ECtHR, *P.G. & J.H. v. the United Kingdom*, 25 September 2001 (Appl.no. 44787/98) para. 57; ECtHR, *Halford v. the United Kingdom*, 28 January 2003 (Appl.no. 44647/98) para. 45.

39 EComHR, *Kanthak v. Germany*, 11 October 1988 (Appl.no. 12474/86; *Decisions and Reports* vol. 58 (1988) pp. 94-105).

family has its roots but where one no longer lives.'[40] Apparently it is not the ties with an area that count, but the ties with a specific home. In the context of the European Convention the third category underlying housing rights, that of attachment, is thus interpreted rather narrowly.

2.3.2 Multiple homes

Does the Commission's view that the home is someone's principal residence exclude other places from coming within the scope of home? In the *Gillow* case of 1986 the Court still attached importance to the fact that the family had not established any other home. Apparently such an alternative home would have been a negative element, weighing against the consideration of 'Whiteknights' as a home under the Convention. Equally, in the *Buckley* judgment, the Court took into account the fact that the applicant had not established a residence elsewhere nor intended to do so.[41]

We have already seen that in the *Zavou* case (2002) the context of the Turkish occupation apparently led to a different result, although the issue of multiple homes was not addressed explicitly. The *Demades*[42] judgment of 2003 provided an important elaboration of this case law. Ioannis Demades owned a secondary home which he and his family used not only during holidays and weekends, but also to receive and entertain friends, relatives and others. He claimed that in the future he planned to go and live there permanently and that it was 'a real home in every sense of the word'.[43] Access to it was barred ever since Turkish troops occupied the northern part of Cyprus where the house was situated.

In this case the Court chose to expand the scope of Article 8 to include Mr Demades' secondary home. Relevant elements to do so were the fact that the house was furnished and equipped as such, regularly used by the Demades' family, and *treated as a home*. The first two elements are the same as the ones used in *Gillow*, but the deviation lies in the importance attached to the third, subjective element. By making this a central element, the Court explicitly accepted the possibility that several places can all be considered home by the same person and be recognized as such under the Convention:

40 ECtHR, *Loizidou v. Turkey* (merits), 18 December 1996 (Appl.no. 15318/89) para. 66. The area in which one lives nevertheless may play a role in another respect. In the *Howard* case the applicant had to leave his house, because he lost his residential rights due to his divorce. He was offered alternative housing in the immediate vicinity of his old home, 'a factor of great significance in view of [his] age, and long connection with this part of the town in which [he] live[s].': EComHR, *Howard v. the United Kingdom*, 8 February 1978 (Appl.no. 10825/84; *Decisions and Reports* vol. 52 (1987) pp. 198-214) p. 205. Such a consideration has not resurfaced in later case law as far as I am aware.

41 ECtHR, *Buckley v. the United Kingdom*, 25 September 1996 (Appl.no. 20348/92) para. 54.

42 ECtHR, *Demades v. Turkey*, 31 July 2003 (Appl.no. 16219/90).

43 Para. 26.

> The Court notes in this context that it may not always be possible to draw precise distinctions, since a person may divide his time between two houses or form strong emotional ties with a second house, treating it as his home. Therefore, a narrow interpretation of the word 'home' could give rise to the same risk of inequality of treatment as a narrow interpretation of the notion of 'private life', by excluding persons who find themselves in the above situations.[44]

Compared to the older case of *Gillow* this more recent judgment suggested that the Court attached increased importance to the third element mentioned in section 2.2: attachment to a particular home. It offered a somewhat puzzling double justification for this broader scope of the notion of home. The Court pointed to earlier case law in which it extended the scope – to include businesses – and it recalled that 'the Convention is a living instrument to be interpreted in the light of societal changes and in line with present-day conditions'.[45] The latter is a well-established principle of interpretation used by the Court, but no explanation is offered why it is relevant in this case. Should we assume that the use of a secondary home is on the rise in European societies and that people attach more and more emotional weight to these houses? It could be. But then the contrast with *Gillow* becomes even more striking, since there is no significant difference in time between the two cases: the Gillows' return to their Guernsey house took place in the 1970s and so did the use of Mr Demades of his house in Northern Cyprus. Apparently, the present-day condition here is not so much the 1970s, but the time of the *Demades* judgment: 2003. Otherwise, one would be bound to assume that the obligations under the ECHR of the Turkish state in 1974 were more extensive than those of the United Kingdom in 1979. For in the *Gillow* case the fact that the family did *not* have a house elsewhere in the United Kingdom was a factor working in favour of them, whereas in *Demades* the existence of a primary home did not prevent the secondary home to be included in the scope of Article 8. It does not seem to make much sense. In a sympathetic reading of *Gillow*, one could try and take away most of this inconsistency by downplaying the relevance of the fact that the Gillows did not have another home. But even then it cannot be denied that the Court used this fact as a supportive element of the Gillows' contention that 'Whiteknights' was their home which in turn was one of the criteria to bring the situation within the scope of Article 8. A certain shift in the Court's views between *Gillow* (1986) and *Demades* (2003) seemed to have occurred. Thus even a secondary home can fall within the scope of Article 8 ECHR, without the primary home presumably losing that status. At least, nothing in the *Demades* judgment would point to such an exclusionary rule.

Nevertheless, the Court has not completely abandoned the existence of another home as an indication to counter someone's claims on his or her house. In the *Prokopovich* judgment, a year after *Demades*, the applicant had moved in with her

44 Para. 32.
45 Para. 33.

partner in a house which the partner was renting. She retained her formal registration at her old address, a house she had left to her daughter, but for all practical purposes used her partner's apartment as her home, as was established by domestic courts. '[C]onvincing, concordant and unrebutted factual circumstances' thus brought her situation within the scope of Article 8. The Court added that it had not been established that Prokopovich had established a home elsewhere. The government's denial of her partner's flat being her home was not sustained by proof of which other place *was* her home.[46] In such cases with clear factual circumstances that a certain place is the applicant's home, the burden of proof therefore falls upon the state when it wants to convince the Court of the contrary. A mere legal fiction, the official place of registration, is thus not decisive.

The cases discussed in this section bring us to the following conclusions: a person or family can have multiple places as a home within the meaning of the word under Article 8 ECHR. Although having an alternative place to live may weaken one's claim to a home (*Gillow, Buckley, Prokopovich*), it is not at all a complete bar to recognition of a house as a 'home' (*Demades* and maybe *Zavou*) – an element which should be kept in mind when looking at displaced people in post-conflict situations.

2.3.3 The specific case of businesses

In a specific range of cases the Court has incrementally extended the protection of Article 8 and the scope of the 'home' to commercial enterprises. First, in *Chappell*,[47] the applicant operated a video exchange club, one of the rooms of which he lived in himself. When the premises were searched by the authorities, the room was entered and searched as well. Both parties and the Court accepted that the situation constituted an interference with the applicant's home. No distinction was made between the search of the private room and the rest of the building. The rather *ad hoc* approach in the *Chappell* case was given a more principled follow-up in the *Niemietz*[48] judgment about the search of the law office of the applicant. The Court first stated that respect for private life must to a certain extent include 'the right to establish and develop relationships with other human beings'[49] of which it considered professional or business activities to be a relevant aspect. It then proceeded to apply this by analogy to the notion of the home:

> As regards the word 'home', appearing in the English text of Article 8, the Court observes that in certain Contracting States, notably Germany, it has been accepted as extending to business premises. Such an interpretation is, moreover, fully consonant

46 ECtHR, *Prokopovich v. Russia*, 18 November 2004 (Appl. 58255/00) paras. 37-38.
47 ECtHR, *Chappell v. the United Kingdom*, 30 March 1989 (Appl.no. 10461/83).
48 ECtHR, *Niemietz v. Germany*, 16 December 1992 (Appl.no. 13710/88).
49 Ibid., para. 29.

with the French text, since the word '*domicile*' has a broader connotation than the word 'home' and may extend, for example to a professional person's office.[50]

Finally, in *Colas Est*[51] the Court considered that the time had come to extend the protection of Article 8 from natural to juristic persons, albeit formulated in the cautious language of 'in certain circumstances' and 'may be'.[52] Thus the search of the companies business premises came within the scope of the 'home'.

Since this study is focussed on *housing* as a place to live and so not much as a centre of economic activities,[53] I will not elaborate further on this part of the Court's privacy-centred case law. Here it suffices to say that the degree of allowed interference under the Convention 'might well be' larger in respect to business premises than to the home in the traditional sense.[54] The home as a residence is thus probably accorded a greater degree of protection. This is a relevant conclusion, since it may indicate that in restitution cases the Court would let the interests of inhabitants of a house prevail over those of commercial users.

2.3.4 Global perspective: 'Home' in the Universal Declaration and the ICCPR

A comparison with international texts on the issue does not offer much clarification. Article 8 of the European Convention was based on Article 12 of the Universal Declaration of Human Rights which provides for protection of the home against arbitrary interference. Article 17 of the International Covenant on Civil and Political Rights (ICCPR), the treaty that was designed to make part of the provisions of the Universal Declaration legally binding upon states, offers a comparable safeguard, specifically including protection against *unlawful* interference. Just like in the case of the European Convention though, the *travaux préparatoires* do not provide any clues on the scope of 'home'.[55]

In interpreting the ICCPR the UN Human Rights Committee (HRC) is less outspoken and precise than the Strasbourg institutions vis-à-vis the ECHR. General Comment No. 16 simply states that the home is 'to be understood to indicate the place where a person resides or carries out his usual occupation.'[56] No explicit reference is made to a principal place of residence, whereas it is explicitly mentioned in relation to occupation ('usual'). Significantly, the HRC gives a broad interpretation: both places to live

50 Ibid., para 30.
51 ECtHR, *Société Colas Est a.o. v. France*, 16 April 2002 (Appl.no. 37971/97).
52 Ibid., para. 41. Interestingly, the Court offers no real explanation (apart from one instance of, arguably, comparable case law) why the interpretation of the Convention as a living instrument required such an extension at that particular time.
53 Although the restitution of business premises can be important in economic recovery after conflict and for sustainable returns of refugees and other displaced persons.
54 *Niemietz*, para. 31; *Colas Est*, para. 49.
55 See also: Nowak (2005) p. 400.
56 Para. 5 of *General Comment* No. 16.

and to work are included, mirroring the European interpretation in cases like *Niemietz*. Manfred Nowak, in his commentary on the ICCPR, holds that legal title or form of tenure is irrelevant to the notion of home. Article 17 relates all kinds of housing.[57] Again a parallel appears with the European approach that seems to sustain the idea of a broad approach of 'home'. Thus on both the European and international level the veil of the law should not distort an assessment of the underlying realities.

In a somewhat puzzling passage in the case of *José Antonio Coronel et al. v. Colombia*, the HRC seemed to extend the scope of home to places which were in reality not the applicants' houses. Several people were arrested in an army raid of a number of houses in an indigenous community. The absence of a search or arrest warrant entailed a violation of Article 17 ICCPR. Since the facts did not clearly disclose in which exact houses the victims of the raids were arrested, the HRC concluded that 'there was unlawful interference in the homes of the victims and their families *or in the houses where the victims were present*'.[58] The latter wording led some commentators to the conclusion that the underlying objective of the home in Article 17 is the protection of the place where one actually is present.[59] I would disagree. First of all, in the specific case at hand, the facts were not sufficiently clear. This may be a reason why the HRC chose such broad wording. Secondly, it is not stated that a home *is* the place were one is present, but on the contrary that these are separate things: the HRC talks about the homes of the victims *and* of the houses in which they were present.[60] Thirdly, I would refer again to the definition in the General Comment: the home is the place where a person resides.

2.3.5 The scope of the home: some conclusions

Gillow and other decisions and judgments show that the Strasbourg institutions have developed an autonomous notion of the 'home', like they did with the other elements protected under article 8, not hindered by classifications under domestic law.[61] Not the legal façade – form of tenure or legality of habitation – but the facts behind it are decisive.[62] Function overrules form.

The Commission and the Court have eschewed general conceptual definitions in two ways. Firstly, a number of relevant but apparently not exhaustive factors have

57 Nowak (2005) p. 399.

58 HRC, *José Antonio Coronel et al. v. Colombia*, 29 November 2002 (Comm.no. 778/1997) para. 9.7. Emphasis added.

59 Alex Conte, Scott Davidson & Richard Burchill, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (Ashgate: Aldershot 2004) p. 156.

60 Admittedly it remains unclear under which heading the latter kind of interference should then come. Arguably this would be privacy in general. The HRC simply does not specify it.

61 ECtHR, *Prokopovich v. Russia*, 18 November 2004 (Appl. 58255/00) para. 36. See also: Cohen-Jonathan (1993) p. 428; D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths 1995) p. 303.

62 Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (London: Butterworths 2001) p. 384.

come forward from the case law instead of a definition. Secondly, when different protected interests under Article 8 are involved in a single case, Court and Commission have sometimes avoided to treat them separately, e.g. in the earlier mentioned decision on the camping car. As argued in that context, this is a not the most elegant solution. The flexibility in applying the concept of home is in line with the recognition that the boundaries of privacy – and thus of the home in the context of Article 8 – vary from time to time and from place to place.[63] It also fits in with the notion of the Convention as a living instrument.[64] The disadvantage of a lack of definition is a lesser degree of legal certainty. On the other hand, it has permitted a dynamic broadening of the scope of protection from classic intrusions such as searches of the home to more modern conceptions of concerns such as noise disturbance.[65]

Let us return to the three underlying concepts of housing rights mentioned earlier: security, privacy and attachment. Security does not really seem to play a role in the case law on the scope of the notion of home. It could only very implicitly be derived from the principle that the existence of another home may weaken the link with the claimed home. One could argue that having one place of shelter thus diminishes the claims on another. But that is a very tenuous piece of evidence. The near absence of the security element in the Court's assessment of the scope of 'home' indeed confirms the emphasis in the European Convention on civil and political rights as opposed to socio-economic ones.

Privacy features slightly more prominently: only in *Moreno Gómez* was the home explicitly dubbed as a place where private and family life develops. This was to be expected considering the place given to the protection of the home in the Convention: in the article which deals with privacy. Still, the issue of privacy seems more connected with the prohibited interferences with the right to respect for the home than with the scope of the home as such.

Finally attachment seems the most decisive element in the Court's definition of the home[66] – surprisingly so for a concept that at first glance seems so difficult to define legally. The defining yardstick for the Strasbourg institutions is the existence of 'sufficient and continuing links' between an applicant and his claimed home. These links can be assessed through the help of indicators, which cannot all be objectively measured: apart from periods of habitation, ownership and presence of personal belongings the intention to use a place as a permanent residence (*Gillow*) and the emotional ties to it (*Demades*) are relevant. There should, at some point in time, have been a legal interest in the home concerned. Alternative places of attachment may weaken but not entirely sever the links. Thus attachment appears to be an important element, but also one which is very difficult to grasp.

63 Velu (1973) p. 34.
64 Duffy (1982) pp. 191-192.
65 See *infra*.
66 Except in the case of businesses: there the privacy dimension is dominant.

This difficulty to my mind adds additional weight to my contention that the Court should in contested cases assume that they fall within the scope of 'home' as protected in Article 8 of the Convention. A certain degree of largesse in this respect prevents that protection is withheld in borderline cases. This is in line with the original purpose of human rights: protection of the individual. Seen from this perspective it is not that problematic to attach great value to the subjective element of attachment – does an individual consider a certain place to be his or her home – when assessing whether sufficient and continuing links exist.

2.4 NATURE OF THE RIGHT

The rights protected by Article 8 ECHR are formulated in a very specific way: it is not private life, family life, home or correspondence as such to which one is entitled, but it is *the right to respect* for all these. During the drafting of the Convention the original wording of 'inviolability' of the various elements of Article 8 was changed into 'respect for' these elements, such as the home. Although the latter appears weaker than the former, the case law of the Court has shown a remarkable flexibility in turning Article 8 into a strong protective shield for the individual.[67]

The Court has developed the notion of 'respect' in two ways: a qualified prohibition of interference on the one hand and positive obligations on the other. The first means that the state itself should not arbitrarily interfere with the individual's enjoyment of his or her home. The second entails that it should protect the home against interferences by third parties, such as other individuals. I will elaborate on both of these in the next sections.

Another special element of the nature of the right to respect for the home is that it is not an absolute right such as the prohibition of torture. On the contrary, paragraph 2 of Article 8 specifies the conditions under which a state may lawfully limit the enjoyment of this right. The limitation itself always requires a balancing exercise between the rights of the individual at stake and the interests of society at large. This balancing should be done by the state concerned and the European Court grants it a margin of appreciation to do so, a degree of freedom and choice in the making and implementing of policy.[68] The limited nature of the right is also reflected in the fact that it is not *notstandsfest*: in times of war or other public emergency a state is allowed to derogate from Article 8.[69] Measures taken in such cases still have to be strictly necessary and consistent with the state's other obligations under international law. In situations of conflict the right to respect for the home may thus not always be guaranteed.

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67 Donna Gomien, David Harris & Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing 1996) p. 228.

68 See e.g., ECtHR, *Botta v. Italy*, 24 February 1998 (Appl.no. 21439/93) para. 33.

69 See Article 15 ECHR.

Finally, a few remarks on the content of the nature of the right can be made. In the *Gillow* judgment, the Court called the right to respect for the home 'pertinent' to the applicant's security and well-being.[70] And in the *Connors* case about a 'gypsy' family in the United Kingdom the Court noted that Article 8 'concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships and a settled and secure place in the community.'[71] In the latter judgment the Court contrasted this with Article 1 of Protocol 1, the protection of property, which apparently lacked these very personal and symbolic connotations. These Court assertions are more than just empty phrases. They may indeed affect how the Court evaluates the allowed degree of state interference in a particular situation and the margin of appreciation given to the state parties. Here it suffices to say that in these judgments on the home in which the Court explicitly qualifies Article 8, all three underlying concepts – security, privacy and attachment – all seem more or less present.

The right to respect for the home is more of a classic civil right than a socio-economic one. Article 8 does not contain the right to a home[72] nor to a particular home.[73] Both the Commission and the Court have held that Article 8 does not include an obligation for the state to offer alternative accommodation of an applicant's choosing.[74] Several authors have pointed out that Article 8 does not encompass the right to a decent accommodation.[75] In the very early case (1956) of a refugee in Germany who complained that he had not been provided with adequate housing, the Commission stated that 'le droit à un niveau de vie suffisant et le droit à un logement convenable (…) ne figurent pas, quant à leur principe' among the rights protected by

70 ECtHR, *Gillow v. the United Kingdom*, 24 November 1986 (Appl.no. 9063/80) para. 55.

71 ECtHR, *Connors v. the United Kingdom*, 27 May 2004 (Appl.no. 66746/01) para. 82.

72 E.g. ECtHR, *Fadeyeva v. Russia*, 9 June 2005 (Appl.no. 55723/00) para. 133. Nor does Article 17 ICCPR, according to Nowak (2005) p. 380.

73 ECtHR, *Natale Marzari v. Italy* (admissibility), 4 May 1999 (Appl.no. 36448/97).

74 EComHR, *Burton v. the United Kingdom*, 10 September 1996 (Appl.no. 31600/96). ECtHR, *Martin Ward v. the United Kingdom*, 9 November 2004 (Appl.no. 31888/03), in which the Court held that the authorities were not obliged under Article 8 to 'provide housing, or conditions for housing, that meet particular environmental standards or in any particular location.' In the particular context of 'gypsies', the Court has held that Article 8 includes the obligation to facilitate the 'gypsy' way of life and thus that the Article 'could impose a positive obligation on the authorities to provide accommodation for a homeless gypsy which is such that it facilitates their 'gypsy way of life.' However, it considers that this obligation could only arise where the authorities had such accommodation at their disposal and were making a choice between offering such accommodation or accommodation which was not 'suitable' for the cultural needs of a gypsy.': ECtHR, *Leanne Codona v. the United Kingdom*, 7 February 2006 (Appl.no. 485/05). See also, more generally: Claire Ovey & Robin White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press 2006, 4th ed.) p. 249.

75 Velu & Ergec (1990) p. 557 and Wildhaber (1992) p. 164. Neither does Article 8 generally impose a positive obligation on the state to provide someone with free alternative accommodation. Thus the Court held in a case on environmental pollution: ECtHR, *Fadeyeva v. Russia*, 9 June 2005 (Appl.no. 55723/00) para. 133. But see the dissenting opinion in the *Buckley* judgment on the supposed existence of a minimum right of accommodation under Article 8.

the Convention.[76] Put differently, Article 8 is not a fundamental social right.[77] Almost fifty years later (2001) the Court went even further than merely saying that Article 8 does not cover such a right; it squarely places the whole issue beyond the judge's grasp, thus not even acknowledging that the Article could be seen as a socio-economic right:

> 'It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is *a matter for political not judicial decision*.'[78]

All of this applies to situations in which one claims something from the state without previous state involvement or even responsibility for having no home (anymore) in the first place. By contrast, when such involvement or responsibility is present, matters may be different. The availability or quality of housing may then become relevant. The Court can take these factors into account to establish whether a fair balance has been struck. In the case of *Velosa Barreto* the applicant wanted to go and live in a house his family owned but which had been let to tenants. Velosa Barreto and his wife and child were living with his parents-in-law. The domestic courts refused to issue an eviction order, since the applicant had not shown that his family was in need of a house of its own. It is important to note, I would argue, that in *Velosa Barreto* the applicant had never been chased from the home at stake, but had let it voluntarily. The European Court accepted the reasoning of the national courts, since the authorities had not acted 'arbitrarily or unreasonably'.[79] Van Dijk *cum suis* derive from this that the Court 'does not seem prepared to fully accept that the right to respect for the home also implies a right to a (decent) home.'[80] 'Not fully' is very correct indeed, since in cases of grave interferences with the right to respect for the home the quality of the housing under review may very well play a role.

A clear example of such a grave interference can be found in the *Novoseletskiy* judgment.[81] The applicant's employer, a state teacher training institute, gave him a

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76 EComHR, *X v. Germany*, 29 September 1956 (Appl.no. 159/56; *Yearbook of the European Convention on Human Rights* vol. 1 (1959) pp. 202-203).

77 Wildhaber (1992) p. 163. The social elements of housing rights are protected in other international treaties: Article 11 of the International Covenant on Economic, Social and Cultural Rights and Article 16 of the European Social Charter. These will not be dealt with here.

78 ECtHR, *Chapman v. The United Kingdom*, 18 January 2001 (Appl.no. 27238/95) para. 99. Similar judgments issued on the same day: *Beard* (Appl.no. 24882/94), *Coster* (Appl.no. 24876/94) para. 113, *Lee* (Appl.no. 25289/94) para. 101, *Jane Smith* (Appl.no. 25154/94) para. 106. Emphais added.

79 ECtHR, *Velosa Barreto v. Portugal*, 21 November 1995 (Appl.no. 18072/91) para. 30.

80 Pieter van Dijk a.o., *Theory and Practice of the European Convention on Human Rights* (Antwerp: Intersentia 2006, 4th ed.) p. 725.

81 ECtHR, *Novoseletskiy v. Ukraine*, 22 February 2005 (Appl.no. 47148/99).

permit of unlimited duration to live in an apartment belonging to the Institute. When the applicant left for another city for a few months to prepare his doctoral thesis, the Institute allowed someone else to occupy the apartment. Upon the applicant's return he was thus forced to live with relatives. Only after six years of proceeding before domestic courts did the applicant recover his apartment. The occupation was declared illegal. By then the apartment had been declared unfit for human habitation.

What was at stake in this case was the re-establishment by the authorities of the applicant's right to respect for – amongst others – his home. The Court concluded that the state did not avail itself of this obligation to re-establish to a sufficient degree: the illegality of the occupation was not taken into account and compensation claims were rejected.[82] Of importance to the analysis here is that the Court established that the Institute had not undertaken the necessary reparations nor made the apartment fit for habitation again.[83] Here the quality or decency of the home at stake was therefore relevant.

Finally, there is the case of *Moldovan a.o. v. Romania*. After a violent quarrel a group of villagers with the implication of local police forces destroyed a number or houses of Roma rendering them homeless. They found no other place to live than in completely overcrowded cellars, stables and hen-houses. Since the actions of the state agents had direct repercussions on the rights of the victims, Romania incurred responsibility under the ECHR. The Court held, without further explanation, that the living conditions fell undoubtedly within the scope of the right to respect for private and family life, but also for the home.[84] Apparently, although Article 8 is not concerned with the quality of housing as such, states are obliged not to cause people to fall under a certain minimum level of decency due to state actions or omissions. In this case the boundary had clearly been overstepped.

Whether one is entitled to a decent home would thus depend on the situation. The decency of an accommodation may play a role when establishing whether a fair balance has been struck. As argued here, Article 8 is not primarily a social right but the provision of alternative or decent accommodation may become relevant once state involvement or responsibility for previous loss of housing can be established. The discussion of the above cases may indicate that the legality of a situation – here lawful tenancy – may weigh against the applicant's interests (*Velosa Barreto*) whereas the illegality of occupation by another person of his home may be a positive element in an applicant's claim to a decent home (*Novoseletskiy*).[85] The latter consideration applies also in instances of illegal destruction of the home (*Moldovan*). Translating these preliminary insights into post-conflicts situations, the following may be inferred:

82 Paras. 76-78.

83 Para. 87.

84 ECtHR, *Moldovan a.o. v. Romania* (No. 2), 12 July 2005 (Appl.nos. 41138/98 & 64320/01) paras. 104-105.

85 In the *Novoseletskiy* case the applicant's claim was even stronger than in other cases of illegal occupation since the state-affiliated Institute had allowed it.

Article 8 may contain to a certain extent the right to a decent home if the home at stake was previously the home of the applicant and if he or she has lost it due to an illegal interference. At the very least this should be taken into account in any fair balance test.

2.5 NON-INTERFERENCE

As has been noted in section 2.4, respect for the home entails first of all a protection against arbitrary interference.[86] Interference with this right by the authorities is only allowed under the conditions enumerated in paragraph 2 of Article 8: the interference should have a legal basis and a legitimate aim and must be necessary in a democratic society.[87] Limiting the right in another way than the method of paragraph 2 is not allowed. There is no room for so-called implied limitations not mentioned in the Article itself.[88] In addition, Article 18 ECHR provides that the limitations permitted under the Convention 'shall not be applied for any purpose other than those for which they have been prescribed.' Finally, since an interference constitutes an exception to a right, the Court has adopted a narrow interpretation of paragraph 2 of Article 8.[89] National authorities thus have to follow a specified legal track when interfering with the right to respect for the home.

A legal basis for the interference means that the interference should be carried out in accordance with the law. There must therefore be a basis for the interference in domestic law as a safeguard against arbitrariness. This domestic law should, according to the criteria developed by the Court, be accessible and foreseeable. Accessibility means that an individual should be able to know what the applicable rules are. Laws in any form should not be secret but public. Secondly, foreseeability entails that the individual should be able to regulate his conduct to keep it within the confines of the law. The consequences of his actions should be reasonably foreseeable, if needed with 'appropriate advice'. In order for him to do so, the law should be sufficiently precise. Such precision should not amount to complete rigidity. Otherwise it would be impossible for states to make laws. The Court has therefore consistently held that 'many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'[90] It is thus up to the state to find the right equilibrium between precision and broad applicability.

The second condition to be fulfilled is the existence of a legitimate aim. Article 8 contains an exhaustive list of the permitted aims: national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection

86 See as one of the earliest among many references: ECtHR, *Gillow v. the United Kingdom*, 24 November 1986 (Appl.no. 9063/80) para. 51.

87 These requirements are common to Articles 8-11 of the ECHR. Interpretations developed under one of these Articles can thus be applied to all of them by the Court. See e.g. ECtHR, *Silver a.o. v. the United Kingdom*, 25 March 1983 (Appl.no. 5947/72) para. 85.

88 ECtHR, *Golder v. the United Kingdom*, 21 February 1975 (Appl.no. 4451/70) para. 44.

89 ECtHR, *Klass v. Germany*, 6 September 1978 (Appl.no. 5029/71) para. 42.

90 ECtHR, *The Sunday Times v. the United Kingdom*, 26 March 1979 (Appl.no. 6538/74) para. 49.

of health or morals and the protection of the rights and freedoms of others. The state concerned has to argue convincingly that it interfered with the right to respect for the home in the interest of one of these aims. This condition is usually not a stumbling block: most of the time, the Court accepts the legitimate aim the state invokes.

For housing restitution four of the stated aims could possibly be relevant. Rather arguably, national security and public safety could be at stake when the home concerned belongs to a person who by affiliation, conviction or ethnicity is, according to the state, likely to cause problems or tensions. In conflict situations where groups find themselves opposing each other, this is easily conceivable. The same may apply in post-conflict situations of return: the state may continue to block returns, and thus interfere with an individual's rights, with the same justification. The economic well-being of the country may also be invoked, especially since post-conflict states are often in shortage of funds and housing in general may be in short supply. Finally, the protection of the rights and freedoms of others may play a role. In post-conflict situations of housing restitution eviction of illegal occupants will often be necessary. The return of the home to one person or family then entails the loss of housing to another. To protect these others, the state may choose to interfere with the right to respect of the home of the occupant of the house. Whichever course of action – or inaction – the state chooses it will always touch the right of respect for the home of one of the parties.

The third and final test is that of necessity: is the interference 'necessary in a democratic society'? In the leading *Handyside* case the Court developed an interpretation of this test that still stands today.[91] First of all the respondent state must show that the interference corresponds to a pressing social need. Secondly, the interference must be 'proportionate to the legitimate aim pursued.' Effectively, this means that the general interest should be balanced against the interests of the individual whose rights are interfered with. Thirdly, the reasons adduced by the state to justify the interference should be 'relevant and sufficient.' This latter condition entails that the Court should not only ascertain that a state 'exercised its discretion reasonably, carefully and in good faith' nor that it should just look at the national decisions at stake in isolation, but also that it 'must look at them in the light of the case as a whole.'[92] The third condition is in fact a substantive appraisal of what the Court would only assess *in abstracto* under the second test: the legitimate aim. The second block may not lead to stumbling, but the third one is often a difficult hurdle for the state to take. When the aim and its relevancy are not contested at all, the Court does not need to apply the third condition of the necessity test. This explains why it does not figure in every judgment.

The Court looks at the facts of a case from a distance and after the event. It is not in the same position as a national authority. It has thus chosen to leave to each state

91 ECtHR, *Handyside v. the United Kingdom*, 12 December 1976 (Appl.no. 5493/72) paras. 48-50. See, for a later summary of the necessity test also: ECtHR, *Silver a.o. v. the United Kingdom*, 25 March 1983 (Appl.no. 5947/72 a.o.) para. 97.

92 ECtHR, *Olsson v. Sweden (No. 1)*, 24 March 1988 (Appl.no. 10465/83) para. 68.

a certain margin of appreciation, a freedom within the bounds allowed by paragraph 2 of Article 8 to make and implement law and policy. The margin leaves room for cultural and other differences between the parties to the ECHR. Additionally it supports the rule that the primary responsibility for securing the rights of the Convention falls upon the national authorities.[93] The margin does not always emerge in the Court's case law: certain rights are so absolute that no margin is left (prohibition of torture). Other rights, including Article 8, are more vaguely formulated and leave more room for national implementation choices.[94] Moreover, sometimes it is so clear that there has been a disproportionate interference or no interference at all that the margin of appreciation is irrelevant.

In those cases in which the margin does play a role, it may vary in scope depending on the situation. Four different factors can help and determine it: (1) the nature of the legitimate aim, (2) the nature of the individual's interest, (3) the nature of the right at stake and finally (4) the divergence in Europe on the issue involved.[95] Certain legitimate aims, such as natural security, are deemed of such importance that their invocation by the state may broaden the scope of the margin of appreciation.[96] The same goes for planning policies,[97] which are of particular importance to housing issues. On the other hand when a high interest for the individual is at stake, such as one that touches the most intimate aspects of his private life, then the margin narrows down again. The nature of the right I have already mentioned above: some rights are formulated such as to inherently require a balancing by national authorities whereas others are of an absolute nature. Finally, a large divergence of views between the parties to the Convention on an issue may serve to stretch the scope.[98] A high level of consensus may decrease it.

The margin of appreciation gives leeway to the states, but not infinitely. It is elastic, but may snap when a state goes too far. The Court may then find a violation of a Convention right. The margin thus goes 'hand in hand with a European supervision'.[99] The path that the state follows towards safeguarding human rights may vary

93 See Article 1 ECHR and also: Paul Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?', *Human Rights Law Journal* vol. 19-1 (1998) pp. 1-6, see p. 2.

94 R.A. Lawson & H.G. Schermers, *Leading Cases of the European Court of Human Rights* (Nijmegen: Ars Aequi Libri 1999, 2nd ed.) p. 39.

95 Mahoney distinguishes even more than these four – among them the difference between times of peace or war. In the latter situation the state could apparently be given a larger margin. This would of course be highly relevant in case of forced evictions and housing restitution. Nevertheless, I have not been able to find case law to substantiate this claim. See Mahoney (1998) p. 5. As to the divergence within Europe the Court has held that a state cannot rely on the margin in that context by mere unquestioning and passive adherence to a historic tradition: ECtHR, *Hirst v. the United Kingdom*, 30 March 2004 (Appl.no. 74025/01) para. 41.

96 See e.g. ECtHR, *Leander v. Sweden*, 26 March 1987 (Appl.no. 9248/81) para. 59.

97 ECtHR, *Buckley v. The United Kingdom*, 25 September 1996 (Appl.no. 20348/92) para. 75.

98 See e.g. ECtHR, *Stjerna v. Finland*, 25 November 1994 (Appl.no. 18131/91) para. 39.

99 ECtHR, *Handyside v. The United Kingdom*, 12 December 1976 (Appl.no. 5493/72) para. 49.

from country to country but is guarded from above and marked by three flags: legal basis, legitimate aim and necessity.

Let us now turn from the path to the actual footsteps. In the context of the right to respect to the home a range of interferences can be imagined: destruction, eviction, searches,[100] nuisance from noise,[101] fumes or smells.[102] Since this research is restricted to housing restitution, I will here focus on the three interferences that result in loss of the home: destruction, eviction and denial of access.

Destruction may very well be considered as the worst and most far-reaching interference with the right to respect for the home. It turns housing restitution into an empty shell. It also is the most extreme, irreversible form of eviction. The Court has dealt with destruction in a series of applications against Turkey. These applications originated in the armed conflict between the Turkish security forces and the Kurdish Workers' Party PKK which started in the 1980s and lasted until an – at least temporary – ceasefire in 1999.[103] During this conflict a large number of villages were attacked and houses were burnt down, both by the PKK and by government forces. The applications in Strasbourg concerned, among others, allegations of Turkish involvement in the destruction of houses.

In the very first case on the issue,[104] *Akdivar and others*,[105] the Commission went on a fact-finding mission to Turkey, since the facts of the case were heavily disputed. Turkey denied allegations of involvement of its security forces in the destruction of houses in the village of Kelekçi in the southeastern part of the country. But the Court concurred with the Commission's view that the security forces were responsible. It held that the deliberate destruction of the houses by burning them was a serious interference with the right to respect for the home. Since Turkey had only denied and not offered subsidiary justification for the alleged actions, the Court did not even use the paragraph 2 test but simply concluded that Article 8 had been violated. Nevertheless, it did not establish the existence of an administrative practice of wanton destruction.[106]

100 See the cases mentioned in 2.3.3.

101 See e.g. ECtHR, *Hatton a.o. v. the United Kingdom* (chamber judgment), 2 October 2001 (Appl.no. 36022/97); ECtHR, *Hatton a.o. v. the United Kingdom* (Grand Chamber), 8 July 2003; ECtHR, *Moreno Gómez v. Spain*, 16 November 2004 (Appl.no. 4143/02).

102 E.g. ECtHR, *López Ostra v. Spain*, 9 December 1994 (Appl.no. 16798/90).

103 Jonathan Sugden, 'Housing and Property Restitution in Turkey', in: Scott Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Ardsley: Transnational Publishers 2003) pp. 335-359, see pp. 335-336.

104 The cases on destruction dealt with here are the leading ones from the total number of cases. They were found by using the HUDOC search engine in looking for destruction cases under Article 8. 'Leading' in this respect means those cases in which the Court used principles or formulated *dicta* on destruction for the first time.

105 ECtHR, *Akdivar a.o. v. Turkey*, 16 September 1996 (Appl.no. 21893/93).

106 Ibid., para. 88.

The *Akdivar* judgment left one question unanswered: is destruction an interference that is so grave in general that it can never be justified under the second paragraph of Article 8? Or could the Court's reasoning be explained by the particular fact that Turkey denied the allegation altogether? The *Selçuk & Asker* case offered a similar set of facts, with security forces destroying the houses of the applicants on purpose. Again the government denied any involvement whatsoever, but this time the Court did not even explicitly weigh this denial in its establishment of a violation of Article 8. It dubbed the interference 'particularly grave and unjustified'.[107] Can it indeed be induced from this that deliberate destruction can never be justified? It seems to be the case if we follow the pithy statement of the Court. One may of course easily imagine many cases in which buildings are destroyed, for example in the context of urban regeneration. This in itself could be justified. The difference with these cases would be that the buildings to be destroyed are no longer people's homes: they have been expropriated or the occupants have been offered alternative accommodation. By contrast, in the Turkish cases the destroyed houses were still inhabited and used as homes.

An even more conclusive Court statement followed in the *Menteş and others* case. The burning of houses by security forces was 'a measure devoid of justification.'[108] Based on these and a range of later cases in which the Court expressed itself in similar ways, it would seem possible to conclude that the deliberate destruction of the home is an act that does not lend itself for justification under paragraph 2 of Article 8.[109] The fact that a conflict is raging in a certain area does not alter that conclusion. On the other hand, it would be more theoretically sound to view things slightly differently. Article 8 provides for justifications to restrict the right to respect for the home. In the cases of destruction dealt with here the state concerned often did not even bother to try and justify its actions. This kind of interference so clearly would not pass one or more of the tests of paragraph 2, even *prima facie*, that the Court would not even deem it necessary to apply them. Apparently then, destruction of the home in such a case could never be proportionate or would not serve any legitimate aim.[110]

A less far-reaching interference, but one having the same effect of not being able to enjoy one's house, is eviction. Evictions play a role in several contexts: housing and planning issues and conflict situations; or combinations of these. The context involved

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107 ECtHR, *Selçuk & Asker v. Turkey*, 24 April 1998 (Appl.nos. 23184/94 & 23185/94) para. 86.

108 ECtHR, *Menteş a.o. v. Turkey*, 28 November 1997 (Appl.no. 23186/94) para. 73. The seriousness of destruction for the applicants and its grave consequences are also recognized by the Court sometimes in finding a violation of Article 3. E.g. *Selçuk & Asker v. Turkey*, paras. 72-80. Even an attempt to evict, deliberately combined with violence and humiliation, can amount to a violation of Article 3: ECtHR, *Osman v. Bulgaria*, 16 February 2006 (Appl.no. 43233/98) paras. 54-66.

109 See e.g. ECtHR, *Dulas v. Turkey*, 30 January 2001 (Appl.no. 25801/94) para. 60; ECtHR, *Bilgin v. Turkey*, 16 November 2000 (Appl.no. 23819/94) para. 108.

110 Matters may be different when a house is at risk of collapsing and it is preventively destroyed to safeguard the lives of both its inhabitants and the neighbours. If the inhabitants are unwilling to leave their home in such a case, a state would have to carry out an eviction that does comply with Article 8.

influences the assessment of the European Court. Before delving deeper into these contexts, I would emphasize that even where eviction proceedings have started, but the eviction itself has not been carried out, a violation of Article 8 may be established. The existence of a real threat is sufficient.[111]

Housing and tenancy issues are a context in which evictions often occur. In this context evictions are allowed, as long as they fulfill the criteria of paragraph 2 of Article 8. When for example a tenant is evicted for refusal of paying rent, this may be justified. The Court has accepted that the legitimate aim in such a case is the protection of the rights of others.[112] In a series of judgments on the situation of 'gypsies' in the United Kingdom planning issues formed the core of the matter. The authorities tried to prevent urban sprawl of large cities into the surrounding countryside by adhering to a so-called Green Belt policy. Under this policy the residential use of land in these green belts was severely restricted. Several 'gypsy' families who established their caravan homes on plots of land they owned were thus obliged to move. These orders to move can be considered as evictions, although in these situations the home moves together with the inhabitants. In this series of cases the legal basis and the legitimate aim – the rights of others to protection of the environment – were not disputed. The considerations of the Court thus centered on the necessity test. The illegality of the settlement weighed against the applicants, whereas a legal establishment would have worked in their favour.[113] This is thus one of the relevant elements in assessing whether a fair balance has been struck.

A second element, and a highly relevant one to the general topic of housing restitution are the Court's considerations on alternative accommodation in these British cases. The existence of alternatives makes the interference less serious, according to the Court.[114] So does the suitability of the alternative to the particular needs of the evicted individual: family situation and financial resources: 'The more suitable the alternative accommodation is, the less serious is the interference constituted by moving the applicant from his or her existing accommodation.'[115] On the other end of the suitability scale are the rights of the local inhabitants to protection of their immediate environment. A large margin of appreciation in planning matters is left to the authorities.[116]

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111 ECtHR, *Larkos v. Cyprus*, 18 February 1999 (Appl.no. 29515/95) para. 28. See also the partly dissenting opinion of Judge Repik in: ECtHR, *Buckley v. the United Kingdom*, 25 September 1996 (Appl.no. 20348/92).

112 ECtHR, *Natale Marzari v. Italy* (admissibility), 4 May 1999 (Appl.no. 36448/97).

113 ECtHR, *Chapman v. The United Kingdom*, 18 January 2001 (Appl.no. 27238/95) para. 102. Similar judgments issued on the same day: *Beard* (Appl.no. 24882/94), *Coster* (Appl.no. 24876/94), *Lee* (Appl.no. 25289/94), *Jane Smith* (Appl.no. 25154/94). No violation of Article 8 was found in these cases.

114 One may caution here that this moving around of people may in general be differently viewed in the case of a nomadic lifestyle where home and inhabitants move together than in case of someone living in a 'fixed' home.

115 *Chapman,* para.103.

116 *Chapman*, paras. 103-104.

A third element of importance for the fair balance appeared in the Italian case of *Marzari.* The applicant was a disabled man who refused to pay rent and was therefore evicted. He did not accept the alternative accommodation offered by the authorities. Marzari was never co-operative, whereas the authorities did their utmost to provide him with suitable accommodation. The Court concluded that in this case a fair balance existed and found no violation of Article 8.[117] Thus both the conduct of the state (due diligence) and of the applicant (co-operation or obstruction) were of importance. Generally, the practical legal and administrative framework of evictions should contain sufficient safeguards to protect the interests of the individual. A situation in which local authorities are not even required to justify an eviction based on the particular facts of the case can thus lead to a violation of Article 8.[118] *A fortiori* every eviction should be carried out in accordance with the existing legal framework. An eviction carried out illegally is a violation in itself.[119]

In the context of conflict matters may be different. Rarely if ever will the state be able – or even try to – to show that a fair balance between the interests of the individual and those of society as a whole has been struck. Consequently, justification of the interference is nearly impossible. Eviction may be an automatic consequence of housing destruction. The latter may be done with the purpose of causing the former. The combination as such of destruction and consequent eviction can be a violation of Article 8.[120] So can the combination of eviction and subsequent denial of access be.[121] An eviction in such a context thus is often a serious and unjustified interference.

Finally, turning to the last of the three relevant interferences, denial of access is the barring of return to one's home that has been left either forcibly through eviction or under the pressure of circumstances. The largest-scale situation of this kind that has come under the consideration of the European Court is the conflict on Cyprus. In 1974 Turkish armed forces conducted military operations in Northern Cyprus which led to a division of the island and the displacement of large number on both sides. Hundreds of thousands of displaced Greek-Cypriots have been denied access to their homes in the north. Visits were not allowed, let alone re-occupation of the homes at stake. In 1994 the government of Cyprus lodged a state complaint against Turkey with the Strasbourg institutions, among others about this denial of access.[122] In 2001 the Court issued a judgment in this case. Turkey was of the opinion that the possible return of the displaced was something to be decided on in the context of the negotiations on an overall settlement. According to the Turkish government returns would enhance the risks of conflict by intermingling the Greek and Turkish-Cypriot communities. The

117 ECtHR, *Natale Marzari v. Italy* (admissibility), 4 May 1999 (Appl.no. 36448/97).

118 ECtHR, *Connors v. The United Kingdom*, 27 May 2004 (Appl.no. 66746/01) paras. 92-95.

119 ECtHR, *Prokopovich v. Russia*, 18 November 2004 (Appl. 58255/00) paras. 44-45. It can also be a relevant element in concluding that a violation of Article 3 has occurred: see *Osman .v Bulgaria*, paras. 63-66.

120 ECtHR, *Yöyler v. Turkey*, 24 July 2003 (Appl.no. 26973/95) paras. 79-80.

121 ECtHR, *Doğan and others v. Turkey*, 29 June 2004 (Appl.no. 8803/02 a.o.) paras. 157-160.

122 ECtHR, *Cyprus v. Turkey*, 10 May 2001 (Appl.no. 25781/94).

Court held that denial of access amounted to 'complete denial of the right of displaced persons to their homes'.[123] It had no basis in domestic law within the meaning of paragraph 2 of article 8. In the Court's view political negotiations on a future settlement could not be invoked to justify violations of the ECHR. Thus the denial of access constituted a violation of Article 8. Since this violation had endured as a matter of policy since 1974, the Court considered it to be a continuing violation.

The Court's judgment in the *Cyprus v. Turkey* case seems to leave some leeway for the state: if one of the reasons leading to the finding of a violation was no basis in domestic law existed, then maybe the existence of such a law may justify similar interferences (outside the Cypriotic context). Is this a convincing inference? The only later cases where a violation on this point was found was the earlier mentioned case of *Demades* and the case of *Xenides-Arestis*.[124] In these cases the Court simply reiterated its findings in the *Cyprus v. Turkey* judgment. Thus it provides no further clarity. The earlier report of the Commission in the case does shed some light. The Commission held that complete denial of access was unjustified. Even if it would accept that the aim of public safety invoked by Turkey could justify a restriction on the right to respect for the home, it still was not necessary in a democratic society. A general exclusion of access could not in any way be seen as proportionate.[125] Put differently, it would strike at the core of the right involved. I tend to concur with the Commission's views on this point: a general policy to downgrade the respect for the home to near non-existence cannot be considered proportionate. Although the Commission's findings cannot be automatically equaled to that of the Court, it seems hard to conceive how the complete denial of access would pass the necessity test, even if there *would* have been a law in Northern Cyprus justifying the policy. A case from a rather different context – the conflict between the Turkish armed forces and the PKK in eastern Turkey – sustains this reasoning. In *Doğan and others* a number of villagers were expulsed from their village for security reasons. For almost ten years they were not allowed to return to their homes. Taking this long span of time into account, the Court considered this to be 'a serious and unjustified interference' with Article 8.[126] The phrasing almost mirrored the 'destruction' cases mentioned above.

As we have seen thus far all three interference resulting in the loss of the home are difficult to justify. In principle the triple test of Article 8, paragraph 2 can always be applied. In times of peace, looking for example at evictions, this is what the Court does. In doing so it is quite strict. In the context of conflict the test is rarely applied at all. Presumably because the interference involved would so clearly fail on one of more counts of the test. Even though such interference is not automatically unjustifiable, it will often be unjustified.

123 For this and the following considerations of the Court: Ibid., paras. 174-175. See also: ECtHR, *Slivenko v. Latvia*, 9 October 2003 (Appl.no. 48321/99) para. 95.

124 ECtHR, *Xenides-Arestis v. Turkey*, 22 December 2005 (Appl.no. 46347/99) paras. 19-22.

125 EComHR, *Cyprus v. Turkey* (Report), 4 June 1999 (Appl.no. 25781/94) para. 261-271.

126 ECtHR, *Doğan and others v. Turkey*, 29 June 2004 (Appl.no. 8803/02 a.o.) para. 159.

2.6 POSITIVE OBLIGATIONS

The second strand of case law along which the Court has developed the notion of respect is that of positive obligations.[127] They are called thus to distinguish them from the negative obligation not to interfere. Positive obligations require states to take action to secure human rights. The Court first elaborated the concept of positive obligations in cases in which it obliged states to grant individuals certain rights, privileges or legal status.[128] Later it extended the scope of positive obligations to a state duty to protect individuals against other individuals.[129] It should be noted that the extent of a positive obligation varies according to the right involved. Positive obligations are thus seldom absolute; the Court in general considers whether the state concerned has taken reasonable and appropriate measures.[130]

Although the qualified prohibition of interference is explicit in the wording of Article 8, the positive obligations are not. Nevertheless the Court has applied more or less the same principles to test both:

> 'In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.'[131]

In addition, when the Court assesses whether this balance has been struck under a positive obligation, it takes the legitimate aims of paragraph 2 – normally used to justify an interference – into consideration.[132] Finally, the Court has held that it is not its role to 'dictate precise measures which should be adopted by the States in order to comply with their positive duties under Article 8.'[133]

Let us now step down from the higher steps of principle to the lower ones of application: what positive obligations, if any, has the Court formulated in respect of the home? The Court has held that positive obligations are applicable to the right to respect for the home,[134] but the case law on this point appears piecemeal and rather

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127 For a very elaborate overview of this doctrine, see: Cordula Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Mensenrechtskonvention* (Springer: Heidelberg 2003). For the relevance of the extent of positive obligations in relation to the territorial scope of the Convention, see section 9.6.

128 ECtHR, *Marckx v. Belgium*, 13 June 1979 (Appl.no. 6833/74); ECtHR, *Airey v. Ireland*, 9 October 1979 (Appl.no. 6289/73).

129 ECtHR, *X & Y v. The Netherlands*, 26 March 1985 (Appl.no. 8978/80).

130 See e.g. ECtHR, *Powell & Rayner v. the United Kingdom*, 21 February 1990 (Appl.no. 9310/81) para. 41. And: Harris, O'Boyle & Warbrick (1995) p. 284-285.

131 ECtHR, *Powell & Rayner v. the United Kingdom*, 21 February 1990 (Appl.no. 9310/81)

132 See e.g. ECtHR, *Rees v. the United Kingdom*, 17 October 1986 (Appl.no. 9532/81) para. 37; ECtHR, *Novoseletskiy v. Ukraine*, 22 February 2005 (Appl.no. 47148/99) para. 69.

133 *Fadeyeva*, para. 133.

134 ECtHR, *Botta v. Italy*, 24 February 1998 (Appl.no. 21439/93) para. 33.

scarce. In one case of interference with the home by private individuals with help of the police, the applicant complained that the authorities had failed to protect the home. Although the case provided the opportunity for the Court to elaborate on the existence and extent of such an obligation, it did not find it necessary to do so since it had already concluded that the police interference with the home was unjustified.[135] In the earlier mentioned 'gypsy' cases the Court held that there was a positive obligation for states to facilitate the way of life of this group, but not to guarantee a sufficient amount of camping sites for them.[136] This connects to the fact that Article 8 does not guarantee the right to a home.[137] Concerning noise disturbance, the Court found a violation of a positive obligation in a Spanish case. The applicant was suffering from extreme disturbance caused by discotheques near her home. The Court found that the authorities had not lived up to the positive obligation of enforcing their own local rules on this point. Thus they failed to protect the right to respect for the home of the applicant.[138]

More specifically on the topic of the present inquiry, positive obligations on the actual loss of the home have been addressed in very few judgments. Concerning destruction and the negative consequences arising from it the earlier mentioned case of *Moldovan a.o. v. Romania* is thus far the only one. Although the actual destruction took place some months before the entry into force of the ECHR for Romania and the Court could thus not assess the destruction itself, it did look at the later consequences of it which in themselves were in violation of the Convention. These included attempts by the police to cover up the incident. The applicants, chased from their village, found no other place to live than in very overcrowded cellars, stables and even hen-houses. The involvement of the police gave rise to state responsibility in this case. No criminal proceedings were instituted against them. Only partial and very belated compensation was offered. Some houses were rebuilt by the authorities but were unfit for habitation. Due to all of this most of the victims were unable to return. On top of that national court judgments contained discriminatory remarks on Roma. The Court held that these elements included both hindrance and failure to act by the authorities. Both interferences and positive obligations were dealt with together in the assessment of compliance with Article 8. Since the human rights violations in this case were so grave, the Court did not even apply a fair balance test,[139] but concluded that the situation amounted to a serious continuing violation of the ECHR, not just of Article 8 but also of Article 3.[140]

On evictions the applications against Croatia are most illuminating. In *Cvijetić* the applicant was chased from her house by other individuals during the civil war in the

135 ECtHR, *McLeod v. the United Kingdom*, 23 September 1998 (Appl.no. 247455/94) paras. 59-61.
136 ECtHR, *Chapman v. the United Kingdom*, 18 January 2001 (Appl.no. 27238/95) paras. 96-98.
137 See section 2.4.1.
138 ECtHR, *Moreno Gómez v. Spain*, 16 November 2004 (Appl.no. 4143/02).
139 The same approach as in the Turkish destruction cases mentioned in section 2.5. It is interesting to note that the Court also stated that the general attitude of the authorities perpetuated the feelings of insecurity of the victims (para. 108), thus emphasizing this underlying concept of the home.
140 *Moldovan a.o.*, paras. 102-114.

former Yugoslavia.[141] She started judicial proceedings to be recognized as the lawful inhabitant of the house and in the end obtained an eviction order. The enforcement of the domestic court order however, led to a host of Kafkaesque situations. At the first eviction attempt another family than the original illegal occupants suddenly inhabited the premises. The second time a group of war veterans prevented the eviction, the police standing by idly. And the third time a doctor who was assumed to help the illegal but disabled occupants did not show up. Eventually, after more than eight years the case was settled without help of the state: the occupants agreed with the applicant to vacate her house.

The applicant complained before the European Court of Human Rights about the fact that the proceedings exceeded the reasonable time requirement protected in Article 6 ECHR and also about the failure of the authorities to protect her right to respect for the home under Article 8. The Court found a violation of Article 6: the execution of a judgment (in this case the eviction) is part of the period to be taken into account and this period lasted far too long, the length being attributable to the state. As to Article 8, the Court held that Croatia had not complied with its positive obligation. The elements taken into account were: the apartment in question was the applicant's home, the occupants lived in it without any legal ground and the applicant could only repossess her apartment through judicial proceedings. Since the latter took so long to execute, as found already under Article 6, the Court also found a breach under Article 8. The *Cvijetić* judgment was the first case in which the Court found that a State has the positive obligation to assist an individual to recover his or her home if there is a domestic court order requiring so. Earlier it had held that such a positive obligation to evict existed in relation to the right to property under Article 1 of Protocol 1.[142] It now extended this principle to the right to respect for the home.

In the second judgment on eviction issues, *Pibernik v. Croatia*, the factual background was almost the same. The Court thus easily came to the same conclusion as in *Cvijetić*: the state had not complied with its positive obligations under Article 8, since it 'created or at least enabled a situation where the applicant was prevented from enjoying her home for a very long time'.[143]

A few points are relevant about these cases in the context of the present inquiry. Firstly, the applicants in both cases were recognized by the state as the legal inhabitants of their apartment, whereas the occupants held no legal title to them whatsoever. This considerably strengthened the applicants' claims and was relevant in the Court's assessment of the facts. Secondly, the fact that the situations at stake took place during and shortly after the war in Croatia did not alter Croatia's obligations. The Court made no reference to this context whatsoever when holding, in both cases, that a state should organize its legal system in such a way as to prevent obstruction of the execution of domestic court judgments. The fact that these very institutions may be weakened by

141 ECtHR, *Cvijetić v. Croatia*, 26 February 2004 (Appl.no. 71549/01).
142 ECtHR, *Immobiliare Saffi v. Italy*, 28 July 1997 (Appl.no. 22774/93).
143 ECtHR, *Pibernik v. Croatia*, 4 March 2004 (Appl.no. 75139/01) para. 70.

recent conflict is apparently immaterial. Thirdly, the Court's judgments in these cases cannot be interpreted as an unqualified positive obligation to provide for housing restitution. It is not clear how the case would have been assessed, had the domestic courts not recognized that the apartments were the legal homes of the applicants. But even then, I would submit, the Court could have ruled in favor of the applicants. Depending of course on the convincingness of the domestic courts' reasoning, the claim of a formerly legal inhabitant vis-à-vis someone that broke into a house and chased him or her would still be strong. It would be difficult for a state to hold that in such a scenario a fair balance had been struck.

Apart from evictions like the ones described above, the Court has also issued a judgment in a case which holds the middle ground between grave disturbance and denial of access. In the Romanian case of *Surugiu* different national authorities issued contradictory titles of ownership.[144] The applicant claimed ownership of his home and the adjoining land, whereas another family claimed ownership of that land too. During the different national procedures on this conflict, tensions rose to such heights that the other family started to use the land, beat on the applicant's house with sticks when the latter was away at a hospital and dropped manure in front of the house. Witnesses heard by the police declared that the family had threatened to beat the applicant up if he returned to his home. The applicant did not dare to return. Only once in the course of the more than five years that the conflict lasted was the interfering family fined for a breach of the peace, and only had to pay a very low amount.

Whereas the authorities claimed not to bear any responsibility since this concerned a conflict between private parties, the Court reiterated the existence of positive obligations to secure the respect for the home. Importantly, the Court held that the property dispute did not exonerate the state from all its responsibility for the interferences by private parties with the applicant's right to respect for the home. This is in line with the notion of 'home'; as I noted earlier, ownership is not decisive for the existence of a home.[145] The Court also held that an applicant can legitimately expect that once his title of ownership has been established, the authorities implement such recognition by concrete action against repeatedly interfering third parties. In this case nothing of that kind had been done. The authorities « n'ont pas déployé les efforts auxquels on pouvait normalement s'attendre ».[146] Thus the Court found a violation of Article 8.

The two Croatian cases and the Romanian case of *Surugiu* show that once title of ownership or even mere recognition of legal tenancy have been officially established, a positive duty is incumbent upon the state. This consists of taking reasonable measures and thus showing due diligence to enforce such a recognition vis-à-vis third parties. Put differently, the *effective* respect for the home must be secured. All these

144 ECtHR, *Surugiu v. Romania*, 20 April 2004 (Appl.no. 48995/99).
145 See section 2.2.
146 Para. 68.

cases, just as the Spanish noise disturbance case,[147] centre on a state's failure to enforce its own rules, laws and decisions.[148] The positive obligations involved here entail that states organize their judicial and enforcement systems to render them effective.[149] An individual thus can expect from the state a reasonable amount of protection for his home against interferences by third parties.

2.7 CONCLUSION

Respect for the home is in itself a vague notion. In the above we have seen that the text of Article 8 ECHR, but especially the judgments and decisions of the Strasbourg institutions have explained and refined the meaning of the notion. First of all, this refinement concerned the meaning of the concept of 'home'. Although the *travaux préparatoires* barely provided clarity on this point, the case law reveals a framework of assessment. The over-arching test emerging from the case law is the existence of sufficient and continuing links between an individual and his or her dwelling. Under this explicit criterion there appears to be an implicit one: the existence of a legal interest, past or present, or a legitimate expectation to have one's dwelling recognised as one's home. Within the general test several objective and subjective yardsticks help to decide on whether a dwelling falls within the scope of the notion of home in a particular case.

147 *Moldovan a.o.* being the odd one out, reflecting an even worse situation.

148 It may of course equally happen that there is something wrong with the decision or law itself. It may be discriminatory or offer insufficient safeguards against abuse. In such case, the situation would be analyzed through the looking glass of an interference instead of a positive obligation. See section 2.5.

149 Interestingly, and as far as I am aware, the Court has never considered the fact that a state has recently experienced conflict and may thus be institutionally weak as a mitigating factor. In the case of *Majarič* Slovenia used the argument that it was experiencing radical legal and economic changes to defend the length of its domestic proceedings. The Court held that it had 'no information which would indicate that the difficulties encountered during the relevant period were such as to deprive the applicant of his entitlement to a judicial determination within a 'reasonable time'.' (ECtHR, *Majarič v. Slovenia*, 8 February 2000 (Appl.no. 28400/95) para. 39). In a case against Armenia, the Court held that a period of almost thirteen years to provide clarity on the rules concerning a fundamental right such as the freedom of peaceful assembly was too long, although it indicated that 'it may take some time for a country to establish its legislative framework in a transition period' (ECtHR, *Mkrtchyan v. Armenia*, 11 January 2007 (Appl.no. 6562/03) para. 43). In my view this indicates two things. Firstly – but this is a general line in the Court's case law – the context of the matter plays a role in the assessment of 'reasonable time'. Secondly, this socio-economic and legal context apparently does not easily serve as an excuse, not even when it concerns the transition from communism to liberal democracy and market economy. Such a transition does not exempt a state from its ECHR obligations: ECtHR, *Schirmer v. Poland*, 21 September 2004 (Appl.no. 68880/01) para. 38; ECtHR, *Skibińscy v. Poland*, 14 November 2006 (Appl.no. 52589/99) para. 96. It may, however, affect the Court's assessment of whether a fair balance has been struck. See e.g. ECtHR, *Jahn a.o. v. Germany* (Grand Chamber), 30 June 2005 (Appl.nos. 46720/99 a.o.) para. 116-117. How the Court would deal with countries facing even graver and more painful transitions, such as Bosnia and Herzegovina, is therefore not really clear. See also section 3.4.

As to the notion of respect, this has been elaborated upon along two paths. First, in the context of non-interference, we have seen that interferences leading to the loss of one's home (destruction, eviction and denial of access) always can be – and theoretically should be – tested on the basis of Article 8 para. 2. In the context of conflict, the severity of these interferences and the often existing lack of legal safeguards render them almost impossible to justify. Frequently the case is so clear that the Court does not even apply a proportionality or necessity test. Secondly, regarding positive obligations, the case law reveals that the state has the duty to protect through reasonable measures an individual's home against interferences by third parties. And in case of loss of a home, of which state authorities have recognized that an applicant is its legal inhabitant, it has the positive duty to help and return him to that home, if need be by evicting illegal occupants. This does not amount to a general right to housing restitution, let alone to a general right to housing under the Convention.

In assessing, along any of the two paths, whether a fair balance was struck by the national authorities several factors are taken into account: the legality or illegality of occupation of both the former and current inhabitant or occupant, the existence of alternatives for the applicant[150] and the conduct of both the applicant and the state (both concerning due diligence and in applying the rule of law with normal procedural guarantees protected by the Convention). It will be difficult for a state to prove that a fair balance exists under Article 8, if the alleged action or omission is in breach of other Convention articles.[151] With the help of these factors national authorities can try and weigh the interests involved in case of conflict between former and new inhabitants of a dwelling.

To what extent does this comply with the criterion of Diehl, Ku and Zamora's legal concept 'that is sufficiently developed to be communicated clearly'?[152] Taking into account the preceding analysis it is clear that the legal concept at stake, the right to respect for the home, has in a few decades evolved from a very general notion to a much more precise one. The Court is constantly refining and elaborating its case law in this respect. The fact that the interpretation of the Convention occurs by way of the Court's judgments has the effect that such a development is to a certain extent always relatively haphazard and dependent upon which cases come before the Court and which points are raised by the parties.[153] In that respect one can only paint an incomplete picture by using the Court's case law. Nevertheless the cases discussed offer, as a whole, a grid and framework to guide state conduct. The contours of the right will always be in development, but the core is clear.

150 And one would assume for the occupant, but the Court has not clarified that yet in this context.

151 E.g. Article 6 in the *Cvijetić* case or Article 14 (a discriminatory law).

152 See section 1.5.

153 Against this background, it should be noted that the Human Rights Committee tries to tackle matters more systematically in its General Comments. Nevertheless, as we have seen in the context of respect for the home that was less rather than more helpful in comparison with the European Court's case law.

CHAPTER 3
THE PROTECTION OF PROPERTY

3.1 INTRODUCTION

In this chapter I will assess whether the protection of property under the ECHR has any added value when compared to the right to respect for the home. If it does, it may strengthen the right to housing restitution. On the other hand, if the protection is weaker than the one accorded under the right to respect for the home, it signals how the rights of an owner of a house should be balanced against those of the person or persons who actually live in it. The relative strength of the two rights is thus especially relevant in situations of conflicting interests over the same dwelling – not uncommon in post-conflict societies where groups of people have been evicted from their homes by others.

The structure of this chapter is roughly the same as that of previous one. I will not cover the entire – and very extensive – Strasbourg case law on property. I will restrict myself to outlining the general principles of Article 1 of Protocol 1 (from here onwards P1-1) and then focus on specific state obligations in the context of housing. Before doing so I will deal with the concept of possessions as elaborated by the European Court of Human Rights and its application to housing.

3.2 The concept of possessions under the ECHR

The scope of the protected right is relevant from the perspective of the central question of this chapter: does P1-1 offer additional protection when compared with the right to respect for the home? Does it cover all the situations where the existence of a home is recognised?

Article 1 of Protocol 1 reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

As can be seen, the text of P1-1 mentions both possessions and property. The French version of the text reads 'biens' for 'possessions' in the first sentence, but 'propriété' for the same word in the second one. Finally, 'property' in the second paragraph of the Article is 'biens' in the French text. These apparent semantic discrepancies do not amount to an important difference in content though, since both in substance guarantee the right of property, as the Court has repeatedly held, even referring to the *travaux préparatoires*.[1] Moreover, both fall under the same fair balance test the Court applies under P1-1.[2] Since the Court generally uses the notion 'possessions' when referring to the protected interests under the right of property, I will use this notion from here onwards.

As with so many notions in the text of the Convention, the meaning of 'possessions' was not the same in all the state parties and within states sometimes differed between private and constitutional law.[3] Thus the Court has introduced its own interpretation.[4] It has not, however, given a rigid definition of its own but has – as is the case with the notion of home – incrementally widened the scope.[5] It has held that:

> the notion 'possessions' (in French: *biens*) in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions', for the purposes of this provision.[6]

The core of the right is thus ownership of movable or immovable property such as a house. But the Court has extended the scope of P1-1 beyond that, encompassing inheritance,[7] claims for damages because of tort,[8] customer goodwill vis-à-vis a business,[9] an option for renewal of a lease,[10] social security benefits[11] and many other

1 Starting with: ECtHR, *Handyside v. The United Kingdom*, 12 December 1976 (Appl.no. 5493/72) para. 62; ECtHR, *Marckx v. Belgium*, 13 June 1979 (Appl.no. 6833/74) para. 63.
2 See *infra*, section 4.3.
3 Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Ashgate, Aldershot 2004) p. 145.
4 See the case of ECtHR, *Stec v. the United Kingdom* (admissibility), 6 July 2005 (Appl.nos. 65731/01 and 65900/01) for an autonomous interpretation. In that case the Court held that P1-1 applied to any assertable right under domestic law to a welfare benefit, irrespective of whether that benefit was based on contributory or non-contributory schemes.
5 Luigi Condorelli, 'Premier protocol additionel, article 1', in: Louis-Edmond Pettiti a.o., *La Convention européenne des Droits de l'Homme. Commentaire article par article* (Economica: Paris 1995) pp. 971-997, see p. 975.
6 ECtHR, *Gasus Dosier- under Fördertechnik GmbH v. the Netherlands*, 23 February 1995 (Appl.no. 15375/89) para. 53.
7 ECtHR, *Inze v. Austria*, 28 October 1987 (Appl.no. 8695/79) para. 38.
8 ECtHR, *Smokovitis a.o. v. Greece*, 11 April 2002 (Appl.no. 46356/99) para. 32.
9 ECtHR, *Tre Traktörer Aktiebolag v. Sweden*, 7 July 1989 (Appl.no. 10873/84) para. 53.
10 ECtHR, *Stretch v. the United Kingdom*, 24 June 2003 (Appl.no. 44277/98) para. 35.
11 *Stec* (admissibility) paras. 47-53.

assets.[12] As Condorelli has aptly stated, the core of the concept is clear, but the contours of the periphery are not.[13]

Whenever the existence of possessions is not debated between an individual applicant and the state authorities – i.e. when possessions are acknowledged under national law – the situation falls within the scope of P1-1. It is of course in case of a *dispute* on this question of existence of possessions that the European Court's autonomous meaning given to 'possessions' becomes crucial. For an assessment on the European level to be possible at all, it is thus necessary that it is done independently from 'the formal classification in domestic law'.[14] In several cases the Court has explicitly indicated that in order to do this it would examine whether 'the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1',[15] looking at 'the relevant points of fact and law'.[16] The domestic law is thus taken into account, but not as the sole factor. In practice this approach of the Court means that objects or claims representing a pecuniary value can be seen as a 'substantive interest'[17] and can thus fall within the scope of P1-1.

In order to circumscribe the scope of the notion of 'possessions' more clearly the Court generally uses the criterion of the so-called legitimate expectation.[18] Although it has been applying this criterion since the beginning of the 1990s, a more detailed explanation of it came only in 2000. In its *Malhous* decision,[19] a Czech property restitution case, the Court qualified the contents of a legitimate expectation. In this case the land of the applicant's father had been expropriated in 1949 under communist rule without compensation. Subsequently the state sold some of the land to natural persons. After the fall of communism new legislation provided that nationalized property could be restored to former owners except when it had been sold to third parties. Thus Malhous' claims were not successful in national courts. The European Court could not adjudicate on the expropriation, since this was an instantaneous act which had taken place before the Czech Republic had ratified the ECHR. As to the restitution claim, the Court held in the *Malhous* admissibility decision:

12 For the preceding and other references see: Camilo B. Schutte, *The European Fundamental Right of Property. Article 1 of Protocol No. 1 to the European Convention on Human Rights: Its Origins, its Working and its Impact on National Legal Orders* (Kluwer: Deventer 2004) pp. 36-37.

13 Condorelli (1995) p. 975.

14 ECtHR, *Beyeler v. Italy*, 5 January 2000 (Appl.no. 33202/96) para. 100; implicitly applied earlier in: ECtHR, *Iatridis v. Greece*, 25 March 1999 (Appl.no. 31107/96) para. 54.

15 *Beyeler*, para. 100; ECtHR, *The Former King of Greece v. Greece*, 23 November 2000 (Appl.no. 25701/94) para. 60.

16 ECtHR, *Zwierzyński v. Poland*, 19 June 2001 (Appl.no. 34049/96) para. 63.

17 Condorelli (1995) p. 979; Schutte (2004) p. 37.

18 ECtHR, *Pine Valley Developments Ltd a.o. v. Ireland*, 29 November 1991 (Appl.no. 12742/87) para. 51.

19 ECtHR, *Malhous v. Czech Republic* (admissibility), 13 December 2000 (Appl.no. 33701/96).

> In this regard, the Court recalls that, according to the established case-law of the Convention organs, 'possessions' can be 'existing possessions' (…) or assets, including claims, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right (…). By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a 'possession' within the meaning of Article 1 of Protocol No. 1 (…), nor can a conditional claim which lapses as a result of the non-fulfillment of the condition (…).'

The difference between mere hope and a legitimate expectation thus seems to be that an applicant has some concrete, objective ground on which to base his expectation. Such a strong ground is to be found in legal provisions or in legal acts, such as decisions of national courts.[20] The *Malhous* decision therefore seems to indicate that the chances of success before domestic courts are an important factor in establishing the existence of a legitimate expectation,[21] although the outcome of national judicial proceedings in the particular case of the applicant as such is not.[22] The case may not even have been finally determined on the national level. The *Malhous* elaboration of the 'legitimate expectation' criterion has become standard case law.[23]

The *Loizidou* judgment[24] on the other hand shows that the situation is evaluated differently if the state concerned is not recognized under international law. In such a case, acts and legislation of the non-recognized entity – in *Loizidou* the Turkish Republic of Northern Cyprus – which lead to formal or *de facto* expropriation are not held against the applicant. This means that the situation falls under the notion of 'possessions' *in spite of* the domestic legal framework. In the case of *Loizidou* the chances of success before a national judge were thus immaterial; the existence of a legitimate expectation was implicitly based on international instead of national law. As long as the entity was not recognized under international law, its acts could not be either. Or, approaching it from another angle, the legitimate expectation was based on the original Cypriotic laws that recognized Loizidou as owner. These laws were formally still valid and applicable, since laws proclaimed by a non-recognized entity could not be deemed to have replaced them. This case law is of high relevance in

20 ECtHR, *Peter Gratzinger & Eva Gratzingerova* (admissibility), 10 July 2002 (Appl.no. 39794/98) para. 73.

21 Tom Allen, 'The Autonomous Meaning of 'Possessions' under the European Convention on Human Rights', in: Elizabeth Cooke (ed.), *Modern Studies in Property Law* vol. II (Hart: Oxford 2003) pp. 57-77, p. 65.

22 Otherwise a lost national case would of course never be able to be declared admissible by the European Court.

23 See e.g. ECtHR, *Polacek & Polackova v. the Czech Republic* (admissibility), 10 July 2002 (Appl.no. 38645/97) para. 62; ECtHR, *Jantner v. Slovakia*, 4 March 2003 (Appl.no. 39050/97) para. 27. See also: Schutte (2004) p. 71. The Court has not specified, however, what exact time limits should be attached to the concepts 'old' and 'long'. No specific European 'standard' thus exists on this point and regard should then mainly be had to domestic laws and principles.

24 ECtHR, *Loizidou v. Turkey* (merits), 18 December 1996 (Appl.no. 15318/89), discussed in Chapter 2.

situations of armed conflict in which war-waging parties may erect their own miniature states with their own legislation, including on housing and property.

Apart from (1) the situations in which the existence of possessions are undisputed and (2) situations in which they can be derived from a legitimate expectation based on domestic law (although not necessarily recognized as such by national administrative or judicial bodies), possessions may also be deemed to exist (3) in the absence of all of this.[25] In the latter case, the Court will have to look at the facts themselves. The original meaning of possessions, as in physical possession, then becomes of importance. If an applicant can show that he has been in physical possession of something and this was not challenged by the authorities for a period of time, the situation falls within the scope of P1-1. A later challenge by the authorities to this claim does not have the effect of retracting the possession from the protective umbrella of the ECHR.

Two cases that ended up before the Court in Strasbourg show that such conduct by the authorities eventually leads in fact to estoppel regarding a state's claim that something does not amount to 'possessions' under the Convention. In the *Matos e Silva* case, the claim of ownership of certain plots of land by the applicants and their use of those plots remained uncontested for almost a hundred years. The Court considered both these unchallenged rights and the yields of the land as 'possessions' under P1-1.[26] The lapse of a century is thus sufficient, but what about shorter periods?

In *Öneryildiz* the applicant lived on waste-land owned by the state. Öneryildiz had illegally built his house there and due to a change in the law, the authorities could have legally destroyed it at any time. But the authorities tolerated this illegal situation for more than five years – until an explosion occurred which destroyed the house – and even provided public services and levied taxes to the whole neighborhood of illegal dwellings. The case came subsequently before the First Section and the Grand Chamber of the Court.[27] Although the land as such was not considered to be the applicant's 'possession', the Court considered that his slum dwelling was a 'possession' within the scope of P1-1. The Section took a very practical approach by holding that Öneryildiz was 'to all intents and purposes the owner of the structure and fixtures and fittings of the dwelling he had built and of all the household and personal effects which might have been in it.'[28] To this very physical notion of 'possessions', the Section added that the authorities had not bothered him, that he did not have to pay any rent and that generally they had implicitly tolerated the situation. The Grand Chamber took a similar approach, but placed more emphasis on the overall Turkish policy of integrating illegal dwellings into town planning. This in itself created legal uncertainty about whether and when the laws rendering the dwellings illegal would be applied. Through the levying of taxes the authorities *de facto* acknowledged that the applicant had a pro-

25 I owe this categorization to: Schutte (2004) p. 43.

26 ECtHR, *Matos e Silva, Lda, a.o. v. Portugal*, 16 September 1996 (Appl.no. 15777/89) para. 75.

27 ECtHR, *Öneryildiz v. Turkey,* 18 June 2002 (First Section) and 30 November 2004 (Grand Chamber) (Appl.no. 48939/99).

28 First Section, para. 141. This distinguishes the situation from that of squatters of pre-existing housing.

prietary interest in his house. This was 'of a sufficient nature and sufficiently recognized to constitute a substantive interest and hence a "possession".'[29] Thus this kind of substantive interest could arise within the relatively short period of five years. Two dissenting judges expressed the fear that the Court, by introducing the new element of 'official toleration' of a situation to bring it within the scope of P1-1 would encourage illegal situations. I would tend to disagree. Firstly, as argued in Chapter 2 with respect to the notion of home, it is in the interest of human rights protection to make the scope broad and to weigh eventual factors which can be held against an applicant in the application of the fair balance test. Secondly, it can be expected of authorities that they uphold the rule of law and thus apply the laws and rules they make to ensure legal certainty – or at the very least, that they do not hold their own leniency in law enforcement against their citizens.

Thus in the third kind of situations described above, the legitimate expectation is again the decisive element. The Court takes the subjective perspective of the applicant as its starting point, but requires a rational basis for this expectation to exist – more than a mere hope. Apart from formal factors such as expectations based on law, regulations or administrative or judicial decision, it can also be grounded on the *conduct* of the authorities. It must be added that this latter factor was only applied in a case in which the applicant was also in physical possession, as opposed to merely claiming something he did not yet have. The conduct of the applicant on the other hand, does not play a role in the question of scope, but in the assessment of the existence of a fair balance.[30]

Having seen on what basis the Court may regard something as 'possessions', let us now turn to the question of homes. When do they fall within the scope of P1-1?

There is only one category of individuals whose homes can be considered to be possessions without further ado: owners of a house whose title of ownership is not contested. For all other categories one needs to show either uncontested use amounting to 'possessions' or a claim to a house representing a pecuniary value, sustained by a legitimate expectation. Such a claim may take two forms. Either one claims ownership of a house or one claims some form of tenancy right which in itself represents a pecuniary value.

The first kind of claim, one of a legitimate expectation of ownership, can come into existence on the basis of national law or decisions in the applicant's favour. In the Bulgarian case of *Kirilova and others*[31] the houses of several families were expropriated. Under regulations specified by the national planning act the mayor of their respective towns indicated the exact flats which they were to receive as compensation, including title of ownership to those flats. Since the flats were not built yet, they were

29 Grand Chamber, para. 129.

30 See also a parallel in the context of Article 8: ECtHR, *Chapman v. The United Kingdom*, 18 January 2001 (Appl.no. 27238/95) para. 102.

31 ECtHR, *Kirilova a.o. v. Bulgaria*, 9 June 2005 (Appl.nos. 42908/98 a.o.).

put on waiting lists. The European Court assessed that their claim to these flats could be considered as possessions, since the applicants had a vested right under national law to the flats offered to them as compensation. Accordingly, P1-1 was applicable to their case. In this case an important element seems to have been the fact that *specific* flats had been assigned. The applicants' claims thus represented a clear and quantifiable pecuniary asset. This seems to be in line with the general line of the Court that an entitlement should exist to something specific[32] rather than to an asset whose value cannot in any way be established. In the latter case, it would in fact be impossible to assess how any state action would influence the worth of the claimed possessions – a decisive element in engaging state responsibility under P1-1.[33]

In situations where the house in question is both specified and already existing, the existence of a possession can be more readily established. Such is the case for example when someone is reclaiming his own or his family's house that has been nationalized by the state in the past. If restitution of the house is ordered by a final and binding judgment of a national court, this in itself amounts to a legitimate expectation of an enforceable claim.[34]

Under the second type of claim, a tenancy right, the existence of a legitimate expectation is not the only question to be addressed. Prior to that, it should be established that the claim of a tenancy right itself represents a pecuniary value. This excludes the claims of most tenants. The right to live in a specific house which one does not own does not in itself amount to a 'possession' within the scope of P1-1.[35] Especially in Middle and Eastern Europe special forms of protected tenancy have been existing for decades; some of them surviving the collapse of communism. In *Teteriny v. Russia*[36] the applicant obtained a national court judgment ordering the town council to provide him with a flat with specific characteristics under a so-called 'social tenancy'. The Russian system of social tenancies included, for the tenants, the right to use the flat, the right to exchange it with other social tenancy holders, the right to acquire title of possession from the state without any costs and even the right to privatize it. Therefore the national court judgment gave the applicant a legitimate expectation to acquire a pecuniary asset. The pecuniary asset here was apparently the possibility to acquire title and eventually to sell. The claim thus constituted a 'possession'.[37] *A*

32 Jeremy McBride, 'Compensation, Restitution and Human Rights in Post-Communist Europe', in: F. Meisel & P.J. Cook (eds.), *Property and Protection. Legal Rights and Restrictions* (Hart Publishing: Oxford 2000) pp. 87-105, see p. 94.

33 Pieter van Dijk a.o., *Theory and Practice of the European Convention on Human Rights* (Antwerp: Intersentia 2006, 4th ed.) p. 870.

34 E.g. ECtHR, *Popov v. Moldova*, 18 January 2005 (Appl.no. 74153/01).

35 See e.g. the following admissibility decisions of the Court: ECtHR, *J.L.S. v. Spain*, 27 April 1999 (Appl.no. 41917/98); ECtHR, *Kovalenok v. Latvia*, 15 February 2001 (Appl.no. 54264/00); ECtHR, *H.F. v. Slovakia*, 9 December 2003 (Appl.no. 54797/00).

36 ECtHR, *Teteriny v. Russia*, 30 June 2005 (Appl.no. 11931/03).

37 This case law was confirmed in: ECtHR, *Malinovskiy v. Russia*, 7 July 2005 (Appl.no. 41302/02) and ECtHR, *Shpakovskiy v. Russia*, 7 July 2005 (Appl.no. 41307/02). Compare also the *Akimova* case, in which the Court recognised that an 'occupancy voucher' amounting to a right to a social tenancy

fortiori the rental of a house under such a social tenancy agreement would in itself amount to a possession. For each particular case the existence of possessions under P1-1 remains dependent on the exact content of the terms of tenancy involved: encompassing a pecuniary asset or not.

Finally, one could ask whether it makes any difference if the person inhabits his property – thus considering it as his home. Does this make his claim to the existence of property stronger? Of course, occupation of a building is not a prerequisite – nor a guarantee, one may add – for the characterization of that building as one's 'possessions'. But the use of a certain claimed property, such as a house, combined with the lack of contestation of that claim can over time be considered 'possessions', as the *Matos e Silva* case has shown. Physical occupation can in this way strengthen a claim that 'possessions' exist. To be more precise: the legitimacy of the claim will be easier to prove in comparison with a situation in which one claimed but was unable to show any use made of the possession. The case of *Dogan* illustrates this. It concerned villagers who were prevented by the authorities to return to their village from which they had been allegedly forcibly evicted. The applicants were unable to show title deeds, but it was established that the villagers had either built their own houses or lived in those of their fathers. They had unchallenged rights over the land they used to earn their living. All of this taken together could, in the Court's view, qualify as 'possessions' within the scope of P1-1.[38] If the villagers would not have actually lived in the houses and worked the land for years on end, it is difficult to see how they would ever been able to prove their 'possessions'. A deed of ownership is not necessary, although it is helpful to an applicant if the authorities acknowledge ownership in some other way through their conduct, such as levying ownership taxes (*Öneryildiz*) or listing someone as an owner in an official government report (case of *Ayder and others v. Turkey*).[39] Thus a formal and recognized title under national law is the best proof of the existence of possessions, but an uncontested claim of ownership supported by inhabitation and use or a *de* facto recognition by the authorities both represent possible alternatives under the ECHR.

Concluding on the issue of scope, it is submitted that the notions of 'home' and 'possessions' in the European Convention are distinct, but overlapping categories. On the one hand not all those places the Court would consider as a home due to the existence of sufficient and continuing links qualify as possessions under P1-1. A simple tenancy of an apartment without any proprietary rights attached would not qualify as 'possessions'. On the other hand not every possession of a house will also be recognized as a home. This is abundantly clear in the case of large housing corporations owning high numbers of apartment blocks. But it can even be the case for an individual who owns one house. If he does not have sufficient and continuing links

agreement fell within the notion of 'possessions': ECtHR, *Akimova v. Azerbaijan*, 27 September 2007 (Appl.no. 19853/03) paras. 40-41.

38 ECtHR, *Doğan a.o. v. Turkey*, 29 June 2004 (Appl.no. 8803/02 a.o.) para. 139.

39 ECtHR, *Ayder a.o. v. Turkey*, 8 January 2004 (Appl.no. 23656/94) para. 120.

with it in treating it as a home, e.g. because he voluntarily lives elsewhere, and his relationship to the possession is simply one of landlord, his situation may fall outside the scope of 'home' under Article 8, but within the scope of P1-1. Since the focus of the present study is on housing as the place where one lives (or wants to live) this second category is not relevant here. Importantly not every dwelling covered under Article 8 is thus protected by P1-1. If the latter does offer additional protection it is then only helpful to people whose housing also falls within the scope of P1-1. Nevertheless, it should be kept in mind in this context that the ECHR should always be interpreted 'in such a way as to promote internal consistency and harmony between its various provisions.'[40] This means for example that if the Court considers the question of property to be relevant for the establishment of a 'sufficient link' under Article 8, the interpretation of what property is should be in line with the Court's own interpretation under P1-1.

3.3 NATURE OF THE RIGHT

During the drafting process of the ECHR the inclusion and form of an article on property protection was so contentious that it was decided to refer it to later negotiations on an additional protocol.[41] This is indeed where the right to protection of property eventually ended up. The difficult drafting process reflects a wider discussion: is the protection of property a human right at all? Whereas many would consider the seizure or destruction of someone's entire house a human rights violation, the answer is much more debated if the value of a private art collection is somewhat diminished due to new taxation measures. And whereas the ECHR protects property, the UN human rights conventions do not. Maybe only certain aspects of the right deserve the status of fundamental right.

As we have seen, P1-1 protects a very range of possessions. The Court has given this human rights provision a very wide scope. Thus it does not use a technique differentiation between kinds of property. To return to the examples mentioned, both the house and the private art collection are protected. Rather, I would argue, the Court assesses the importance one could attribute to a possession in relation to other rights under the fair balance test. As a useful dividing tool one can use Schermers' suggestion that the core of property rights as human rights is the protection of possessions which are necessary to facilitate private life.[42] This reflects the idea that possessions 'are an essential component in the meaningful enjoyment of other human rights such

40 See e.g. *Stec* (admissibility) para. 48.

41 Theo R.G. van Banning, *The Human Right to Property* (Intersentia: Antwerpen 2002) pp. 65 ff on the discussions leading to its inclusion into the First Additional Protocol to the ECHR.

42 Henry G. Schermers, 'The International Protection of the Right of Property', in: F. Matscher & H. Petzold, *Protecting Human Rights: The European Dimension* (Köln: Carl Heymanns Verlag 1988) pp. 565-580, see pp. 572-573. Schermers acknowledges, at p. 568, that '[f]undamental human rights and property rights blend at their borderlines.'

as the right to privacy, the right to a life in dignity and the right to work.'[43] Of course what is considered to be necessary varies depending on the context. Van Banning has adequately dubbed such an approach 'interaction'. It entails that the protection of one's possessions can be strengthened or limited, depending on whether this right to protection concurs or clashes with other human rights.[44] This approach to property rights can be helpful in case of conflicting interests over a certain house. The fact that the house involved is also someone's home – and not just his property – is then in itself a strong indication that it is necessary for private life. It is after all no coincidence that the protection of the home is part and parcel of the privacy protection of Article 8. The approach outlined here has a triple advantage over differentiation. Firstly, it includes a wide range of possessions in the protective scope of P1-1.[45] Secondly, and this follows from the first advantage, it enables a precise assessment in the case of concurring or conflicting rights by the Court. Thirdly, it avoids difficult discussions on the precise boundaries between those possessions that deserve human rights protection and those that only deserve ordinary legal protection.

Although the scope of P1-1 is broad, the level of protection is not very high. Even more than the right to respect for the home, the right to protection of property can be limited. The text of the provision itself reflects this. On top of that, the margin of appreciation is broad, as will be shown in the following sections.

The protection of property in P1-1 has been considered as the only real economic right protected in the ECHR and its Protocols.[46] The Article does indeed protect assets which are of economic value. And it explicitly includes both natural and legal persons – whereas most other ECHR provisions use the term 'everyone'.[47] Violations of the right can thus be much more readily expressed in specified amounts of pecuniary losses than for example the effects of torture would. This is where the additional value compared to Article 8 may be found: complaining about the loss of home under P1-1 puts the focus on the negative *financial* effects of that loss. The compensation question then becomes much more of an economic problem as opposed to the more ethical or moral dimension it would have under Article 8. In cases where not compensation but restitution is sought, this difference is of less importance.

The economic nature of P1-1 does not mean that it is a right to acquire or be entitled to property.[48] As such it does not guarantee a minimum level of subsistence.

43 Van Banning (2002) p. 174.
44 Ibid., p. 199-200.
45 See Chapter 2 for a parallel reasoning on the broad scope of the notion of 'home'.
46 Jochen Abr. Frowein, 'The Protection of Property', in: R.St.J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers 1993) pp. 515-530, see p. 515.
47 The latter has not prevented the Court from declaring complaints by legal persons admissible under some of these other articles, including Article 8 (see section 2.3.3).
48 *Marckx*, para. 50.

Nor does it contain a right to restitution.[49] There is no general obligation to restore property expropriated before the entry into force of the ECHR.[50] *A fortiori*, the Convention 'imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused by a foreign occupying force or another State.'[51] In addition, as the Court has stated in several cases, P1-1 does not impose any limitations on the freedom of states 'to choose conditions under which they accept to restore property which had been transferred to them before they ratified the Convention.'[52] However, the freedom is not as complete as this quotation seems to suggest, since other ECHR provisions do confine what the state can do, especially Articles 6 (fair trial), 13 (effective remedy) and 14 (non-discrimination). Even problems associated with difficult transitions, such as from communism to a market economy based on the rule of law, cannot exempt a state from its ECHR obligations.[53] Although P1-1 thus does not include the right to property restitution, national legislation recognizing restitution can be seen as having created a property right under P1-1, for those persons satisfying the conditions of that legislation.[54]

In conclusion, the case law on P1-1 has been developing enormously over the years. In the 1980s, in one of its early judgments on property protection, the Court held that the object and purpose of P1-1 was in the first place to offer protection against arbitrary confiscation.[55] Later this was extended to broader procedural safeguards, as I will show in the next section.

3.4 NON-INTERFERENCE

P1-1 consists of three distinct but connected rules on the protection of property. Together they limit the freedom of state action in respect to possessions. In one of the earliest cases in which the Court established a violation of P1-1, *Sporrong & Lönnroth v. Sweden*, it first made this distinction which has become standard case law:

> Article (P1-1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph.

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49 See e.g., among many others, ECtHR, *Gaischeg v. Slovenia*, 30 November 2006 (Appl.no. 32958/02) para. 30.

50 ECtHR, *Kopecký v. Slovakia* (Grand Chamber), 28 September 2004 (Appl.no. 44912/98) para. 35. On *ratione temporis* issues, see chapter 9.

51 ECtHR, *Wolf-Ulrich von Maltzan a.o. v. Germany*, 2 March 2005 (Appl.nos. 71916/01 a.o.) para. 77. This principle also applied to the Federal Republic of Germany which succeeded the German Democratic Republic.

52 *Jantner*, para. 34. See also e.g.: *Kopecký*, para. 35.

53 ECtHR, *Beshiri a.o. v. Albania* (admissibility), 22 August 2006 (Appl.no. 7352/03) para. 61.

54 See e.g. ECtHR, *Josef Bergauer a.o. v. the Czech Republic* (admissibility), 13 December 2005 (Appl.no. 17120/04).

55 ECtHR, *James a.o. v. the United Kingdom*, 21 February 1986 (Appl.no. 8793/79) para. 42.

> The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.[56]

Later the Court elaborated on this by holding that the second and third rule should be seen as specific instances of the first one, the peaceful enjoyment of property, and should thus be interpreted 'in the light' of that first rule.[57] This simultaneous separation and connection has two main consequences. Firstly, even if a situation does not fall under the rather specific rules on deprivation of possessions or control of the use of property, it may still be within the scope of P1-1 under the first very broad and general rule of the Article. Secondly, each situation under whichever of the three rules it may fall is decided with the help of a fair balance test. Sometimes the Court chooses not even to identify under which rule a situation could be addressed, but simply applies the test.[58] Due to this the importance in early case law to distinguish between the three rules has later been played down by the Court in favour of a more unified approach.[59]

As is the case with the rights protected under Article 8 both a qualified prohibition of interference and positive obligations are part of the protection P1-1 offers. I will address the latter in the next section. The interferences may fall under one of the three rules of P1-1. The peaceful enjoyment of possessions, the first rule, applies when someone's property has been affected without amounting to a situation mentioned in the two other rules. This happens for example when authorities fail to enforce a Court judgment that confers possessions to an applicant.[60] In such a case he or she is unable to enjoy his new possessions. To assess the legality of interferences the Court uses, as mentioned, the fair balance test. Completely in parallel with its assessment under Article 8 in the last decade or so – in which the difference between evaluating interferences and positive obligations has faded – the test consists of determining whether a fair balance has been struck between 'the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'[61] The fair balance test offers both procedural and substantive protection.[62] On the first point, national proceedings:

> must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfer-

56 ECtHR, *Sporrong & Lönnroth v. Sweden*, 23 September 1982 (Appl.nos. 7151/75 & 7152/75) para. 61.
57 *James a.o.*, para. 37.
58 D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths 1995) p. 522.
59 Claire Ovey & Robin White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press 2006, 4th ed.) p. 375.
60 ECtHR, *Prodan v. Moldova*, 18 May 2004 (Appl.no. 49806/99).
61 *Sporrong & Lönnroth*, para. 69.
62 Van Dijk a.o. (2006) p. 876.

> ing with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures.[63]

In assessing whether a fair balance has been struck the conduct of the state, including the way in which it implements its policies, has to be taken into account. The Court has emphasized that:

> uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner.[64]

The substantive element of the fair balance test protects against state action that is either arbitrary or puts an individual and excessive burden on the person involved. The latter in fact amounts to a proportionality test between means employed and the legitimate aim the state pursues in the public interest.[65]

The second rule of P1-1, the qualified prohibition on the deprivation of property, comes into play when the legal rights of the owner are extinguished. This may happen either by law or by actions of the authorities which cause such an extinction of property rights. An expropriation is in that sense a deprivation. But actions having the same effect without formally qualifying as such are too. As the Court has asserted, it 'must look behind the appearances and investigate the realities of the situation' to assess whether there has been a *de facto* expropriation.[66] A state can justify a deprivation when three conditions are satisfied: (1) it must be in accordance with national law, (2) with the general principles of international law and (3) it must be in the public interest. It may be noted that the latter condition is in fact part of the fair balance test which comprises the proportionality of the means used in the public interest weighed against the interests of the individual.

The first criterion is broadly the same as the legality test under the second paragraph of Article 8;[67] the law has to be of a certain quality and compatible with the rule of law.[68] When a deprivation occurs in violation of national law it automatically brings about a violation of P1-1.[69]

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63 ECtHR, *Jokela v. Finland*, 21 May 2002 (Appl.no. 28856/95) para. 45.

64 ECtHR, *Broniowski v. Poland*, 22 June 2004 (Appl.no. 31443/96) para. 151. See also e.g. ECtHR, *Păduraru c. Roumanie*, 1 December 2005 (Appl.no. 63252/00) para. 91. An example of the state acting inappropriately and inconsistently, is the situation in which it sells possessions – later assigned by a domestic court order to the original owner – to *bona fide* third parties without offering any compensation to that original owner. See e.g. ECtHR, *Străin a.o. v. Romania*, 21 July 2005 (Appl.no. 57001/00) paras. 39, 43, and 59) and ECtHR, *Radu c. Roumanie*, 20 July 2006 (Appl.no. 13309/03) para. 28.

65 *James a.o.*, para. 50.

66 *Sporrong & Lönnroth*, para. 63.

67 ECtHR, *Špaček v. Czech Republic*, 9 November 1999 (Appl.no. 26449/95) para. 54.

68 *James a.o.*, para. 67.

69 E.g. ECtHR, *Iatridis v. Greece*, 25 March 1999 (Appl.no. 31107/96).

The second criterion is only applicable when possessions of non-nationals have been taken[70] and has thus played only a minor role in the Court's case-law.[71] In the context of post-conflict housing restitution it may be relevant, either when someone has been deprived of his or her nationality or when, as a result of the armed conflict, the house in question falls within the jurisdiction of another state than it originally did. The Court has interpreted this criterion in the following way: it safeguards the position of non-nationals, 'in that it excludes any possible argument that the entry into force of Protocol No. 1 has led to a diminution of their rights.'[72] The Court added that there may be legitimate reasons to have nationals bear a greater burden in the public interest than non-nationals.[73] If anything, P1-1 may then offer non-nationals more protection than nationals, and certainly not less.

Finally, the third criterion of public interest relates to the justification and the motives for the taking of property[74] which the state puts forward. As with the legitimate aim test under Article 8, here too the Court normally accepts the interest the state puts forward, except when it would deprive someone of his possessions for no other reason than to benefit another private party. But as soon as such a compulsory transfer from one party to another can be construed in the light of a wider public interest this exception does not apply anymore. The Court has held that 'a taking of property effected in pursuance of legitimate social, economic or other policies may be 'in the public interest', even if the community at large has no direct use or enjoyment of the property taken.'[75] In the context of housing such a public interest can for example be the construction of housing for disadvantaged persons[76] or the protection of the rights of tenants.[77] The fact that the possible grounds of public interest are not enumerated – in contrast to the legitimate aims of Article 8 – entails a large measure of freedom for the state concerned to justify a deprivation. In that respect the hurdle under P1-1 is even lower than the already easy one to take under Article 8.

Concluding on deprivations; the first condition – legality – is often quite easy to establish, the second criterion – accordance with international law – rarely plays a role and the third criterion – the general interest is rather easy to argue for the state. Thus the assessment of the Court in deprivation cases will very often boil down to the fair balance test. An important element in this fair balance test is the existence and amount of compensation offered.[78] Compensation may happen both in money and in kind, e.g.

70 *James a.o.*, paras 62-66.
71 Ovey & White (2006) p. 362.
72 *James a.o.*, para. 62.
73 Ibid., para. 63.
74 ECtHR, *Lithgow a.o. v. United Kingdom*, 8 July 1986 (Appl.no. 9006/80 a.o.) para. 109.
75 *James a.o.*, see especially paras. 40-46.
76 ECtHR, *Zubani v. Italy*, 16 June 1999 (Appl.no. 14025/88) para. 45.
77 ECtHR, *Mellacher a.o. v. Austria*, 19 December 1989 (Appl.no. 10522/83) para. 47. See also: Van Banning (2002) p. 229.
78 Van Dijk a.o. (2006) pp. 881-882.

in the form of alternative housing.[79] Generally compensation which is not reasonably related to the value of the property involved would cause a disproportionate interference. But the Court held that there is no 'right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.'[80] The same goes for situations in which the original taking of property is not attributable to the state.[81] Offering no compensation at all can only be justified in exceptional circumstances and thus will not be easily accepted by the Court.[82]

The third rule of the Article allows state parties to the ECHR to control the use of property through law enforcement when it deems this necessary for two different reasons; either to 'secure the payment of taxes or other contributions or penalties' or in accordance with the general interest. Although the phrasing of the kind of interest involved differs – *general* as opposed to *public* under the second rule – the Court does not seem to use the two in different ways.[83] As under the first two rules, the main test applied is that of a fair balance.[84]

Finally a margin of appreciation is accorded to the states when securing the rights protected by P1-1, both in the adduced justification for what is in the public interest and in the means chosen to interfere with property rights. The Court has even considered it 'natural' that the state's margin of appreciation in the implementation of social and economic policies is a wide one.[85] On housing issues specifically, it has held that 'in spheres such as housing, which plays a central role in the welfare and economic policies of modern societies, the Court will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation.'[86] As long as a state interference is proportional it falls within the margin. The ECHR does not require the state parties to use the *most* proportionate solution. Even if for example lesser interferences than expropriation are available P1-1 does not,

79 ECtHR, *Hingitaq 53 v. Denmark* (admissibility), 12 January 2006 (Appl.no. 18584/04).

80 *James a.o.*, para. 54.

81 ECtHR, *Broniowski v. Poland*, 22 June 2004 (Appl.no. 31443/96) para. 186; ECtHR, *Põder a.o. v. Estonia* (admissibility), 26 April 2005 (Appl.no. 67723/01).

82 See e.g. ECtHR, *The Holy Monasteries v. Greece*, 9 December 1994 (Appl.no. 13092/87 a.o.) para. 71. In the Turkish case of *N.A. a.o.*, the state did cite 'any exceptional circumstances to justify the total lack of compensation' for the destruction of a hotel building. There had thus been a violation of P1-1: ECtHR, *N.A. a.o. v. Turkey*, 11 October 2005 (Appl.no. 37451/97) paras. 41-43.

83 *James a.o.*, para. 43.

84 ECtHR, *Chassagnou a.o. v. France*, 29 April 1999 (Appl.no. 25088/94).

85 *James a.o.*, para. 46. It has later applied this same reasoning to socio-economic matters in the context of Article 8: ECtHR, *Blečič v. Croatia* (chamber judgment), 29 July 2004 (Appl.no. 59532/00) para. 65. This judgment was internally appealed before the Grand Chamber, however, which declared the case inadmissible for lack of jurisdiction *ratione temporis*. Further case law will thus have to be awaited to see whether this reasoning will be confirmed or not.

86 ECtHR, *Immobiliare Saffi v. Italy*, 28 July 1999 (Appl.no. 22774/93) para. 49.

as a general rule, prevent expropriation.[87] Thus the mere existence of possible alternatives does not in itself render a state's actions unjustified.[88]

In the specific context of societies in transition, the Court also accords a wide margin for instances in which the authorities seek to 'redress the consequences of certain acts that are incompatible with the principles of a democratic regime but for which it is not responsible.'[89] The context in which the Court phrased this was the process of German reunification.[90] One may logically extend this to post-conflict states.

The general system under P1-1 to a large extent resembles the fair balance test under Article 8. The possible differences that do emerge – the theoretically almost endless range of justifications under the general or public interest and the very broad margin of appreciation – would give more freedom to the state than under Article 8. Consequently the individual whose rights have been interfered with ends up with less European protection.

Let us now return to the three interferences causing the loss of the home: destruction, eviction and denial of access. In the preceding chapter I elaborated upon a number of Turkish cases which showed that the Court was particularly quick to conclude that destruction of housing violated the right to respect for the home. A comparison with P1-1 shows no difference in assessment on this point. The Court equally considers destruction of owned houses as grave or particularly grave and unjustified interferences with the right to respect for property.[91] In its judgments on the Turkish destruction cases it does not even bother to assess the situation separately under Article 8 and P1-1, but concludes that the destruction of housing by state security forces causes a

87 ECtHR, *Kleyn a.o. v. the Netherlands* (admissibility), 3 May 2001 (Appl.no. 39343/98 a.o.).

88 *Mellacher*, para. 53.

89 *Wolf-Ulrich von Maltzan*, para. 111. The problem remains, however, that the Court's dictum is somewhat opaque. Does it refer to acts for which the state is not responsible factually or legally? The first seems logical, the second depends entirely on the context. Under general public international law a state can be held to account for the acts of its legal predecessor. Under the ECHR responsibility for acts and omissions starts with the entry into force of the Convention for the state concerned. Thus the Court must have referred to the factual situation and/or the responsibility under the ECHR.

90 See also e.g. ECtHR, *Karl-Heinz Mitzon v. Germany* (admissibility), 9 March 2006 (Appl.no. 58182/00) in which the Court reiterated that Germany 'enjoyed a wide margin of appreciation when regulating outstanding property issues in the aftermath of German reunification.'

91 The case can be different for non-residential property. In the case of *Saliba*, a domestic court order to destroy an illegally built storage building on the Maltese island of Gozo did not amount to a violation of P1-1. As the Court put it: 'In the Court's opinion, the effect of ordering the demolition of a totally unlawful construction is to put things back in the position they would have been in, had the requirements of the law not been disregarded.': ECtHR, *Saliba v. Malta*, 8 November 2005 (Appl.no. 4251/02) para. 46. It is to be noted that this happened in the context of town- and country-planning policy, in which the Court allows a large margin of appreciation.

double violation.[92] Cases in which the applicants complained only under either Article 8 or under P1-1 yield the same results through the same line of reasoning.[93] P1-1 thus does not seem to offer a different kind of protection.

As a caveat one should be aware of two stumbling blocks preceding the Court's material assessment of housing destruction. The first is that it considers destruction to be an instantaneous act as opposed to a continuing violation. This entails then when the destruction occurred before the entry into force of the ECHR for the state concerned, a complaint about it is inadmissible *ratione temporis*.[94] The second is that the Court, assessing cases years after the facts, is confronted with problems of proof. When the facts are in dispute between the parties it has to establish whether a sufficient factual basis exists for an applicant's allegation that the destruction was caused, supported or condoned by the authorities. In the absence of such a basis P1-1 cannot be held to have been violated.[95]

The second interference leading to the loss of home is eviction. Evictions can be approached from two perspectives: the perspective of the evicted and the perspective of people seeking the eviction of others. Both can submit their complaints to the European Court of Human Rights if their possessions are involved. The Court will then have to weigh the interests of the one against the other. Under P1-1 the interests of a private party opposing the applicant in the eviction situation will be hidden under the umbrella of the general or public interest.[96] What is at stake for them will have to be justified by the state as being part of a wider interest, such as the problem of housing shortages.

Considering the perspective of the person seeking eviction of people from a house he or she owns, one can first of all differentiate between those for whom the house is also their home and those for whom it is a mere possession. An example of the latter is a housing corporation. Such a corporation only has an interest under P1-1, whereas the former have an additional interest under Article 8. Mere plans to establish a home in a property one owns do not create such an additional interest,[97] at least not legally. Arguably the former group has a much stronger claim than the latter. From the perspective of the evicted I would argue, in parallel, that for those applicants for whom the disputed possession is also their home have higher interests at stake. This should

92 Among many others: ECtHR, *Bilgin v. Turkey*, 16 November 2000 (Appl.no. 23819/94); ECtHR, *Orhan v. Turkey*, 18 June 2002 (Appl.no. 25656/94); ECtHR, *Altun v. Turkey*, 1 June 2004 (Appl.no. 24561/94).

93 For Article 8: ECtHR, *Menteş a.o. v. Turkey*, 28 November 1997 (Appl.no. 23186/94). For P1-1: ECtHR, *Ipek v. Turkey*, 17 February 2004 (Appl.no. 25760/94).

94 ECtHR, *Jasiūnienė v. Lithuania,* 6 March 2003 (Appl.no. 41510/98) paras. 38-39. See Chapter 9 for an analysis of the Court's *ratione temporis* jurisdiction.

95 E.g. ECtHR, *Çaçan v. Turkey*, 26 October 2004 (Appl.no. 33646/96) and ECtHR, *Menteşe v. Turkey*, 18 January 2005 (Appl.no. 36217/97).

96 Just as they could be incorporated in a 'legitimate aim' under Article 8.

97 ECtHR, *Velosa Barreto v. Portugal*, 21 November 1995 (Appl.no. 18072/91).

be weighed when assessing whether a fair balance has been struck. It would be in line with the interaction approach argued in section 3.3.

In the previous chapter I have shown that several factors played a role when assessing whether a fair balance had been struck in eviction cases under Article 8: the (il)legality of the occupation of the home at stake, the conduct of the state, the conduct of the applicant and the existence of alternative accommodation. Under P1-1 some parallel considerations can be discerned. The legality of occupation – and thus also the conduct of the applicant – finds its parallel in whether one *bona fide* possesses or owns a house.[98] If an individual knowingly squats a house illegally then that weighs heavily against him as opposed to someone who acquired or bought a house in good faith. This only plays a role in the material consideration when the applicant is the one asking for eviction. If the evicted person would be the applicant, his complaint would probably fall outside the scope of P1-1 for lack of a legitimate expectation of ownership and thus be inadmissible. The conduct of the State returns in whether it does or does not provide procedural safeguards. Alternative accommodation is explicitly important in situations where domestic courts ordered the authorities to provide the applicant with it or where the national law so requires.[99]

In a series of Italian cases the Court dealt with eviction proceedings. In *Spadea & Scalabrino* (1995) the applicants tried to have the tenants evicted from the apartments which they had bought, as they wanted to establish their home there. Due to housing shortages Italian law provided for suspension of evictions in non-urgent cases. This caused a waiting time of around seven years for the applicants. The Court held that this constituted control of the use of property – the third rule of P1-1. It accepted that housing shortages and its consequences – the need to protect low-income tenants and avoidance of the risk of public disorder when evictions would simultaneously be carried out on a large scale – represented a 'public interest' and held that the measures were not disproportionate, even though the applicants had to buy alternative housing to lodge themselves in the meantime.[100] Four years later in the case of the construction company *Immobiliare Saffi* (1999) the Court held that the same Italian system of postponing evictions had imposed an excessive burden on the applicant and consequently that P1-1 had been violated.[101] In that case the delay was even longer: eleven years. But particularly important was the lack of sufficient procedural safeguards: there

98 This criterion was relevant in: ECtHR, *Papastavrou a.o. v. Greece*, 10 April 2003 (Appl.no. 46372/99) para. 37; and ECtHR, *Katsoulis a.o. v. Greece*, 8 July 2004 (Appl.no. 66742/01) para. 34.

99 ECtHR, *Popov v. Moldova*, 18 January 2005 (Appl.no. 74153/01) and ECtHR, *Pincová & Pinc v. The Czech Republic*, 5 November 2002 (Appl.no. 36548/97) respectively. When the applicant had to rent alternative accommodation as a consequence of a violation of the ECHR, the Court may afford him just satisfaction on that account. E.g. ECtHR, *İpek v. Turkey*, 17 February 2004 (Appl.no. 25760/94) paras. 232-233.

100 ECtHR, *Spadea & Scalabrino v. Italy*, 28 September 1995 (Appl.no. 12868/87) para. 33-40.

101 ECtHR, *Immobiliare Saffi v. Italy*, 28 July 1999 (Appl.no. 22774/93) para. 59. Many comparable cases were brought before the Court, e.g. ECtHR, *Lunari v. Italy*, 11 January 2001 (Appl. no. 21463/93) and ECtHR, *Palumbo v. Italy*, 30 November 2000 (Appl.no. 15919/89).

was no possibility to ask a national judge to rule on the effects for the applicant of the Italian system nor was a final deadline for repossession given. In the judgment the Court indicated that a wide margin of appreciation exists concerning both the means of enforcement and in 'ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.'[102] There is thus no strict necessity test involved. If one compares *Spadea & Scalabrino* to *Immobiliare Saffi* it is striking that the Court ruled that a violation had occurred in respect of the company but not in respect of the individuals. It confirms that mere plans to establish a home somewhere do not give individuals an additional advantage compared to businesses. To use the interaction approach: they had no concurring right under article 8 yet that could strengthen their P1-1 claim. Nevertheless the difference in approach between the two cases can be explained by the lapse of time. When the *Immobilaire Saffi* judgment was issued, four more years had passed. The Court – correctly, to my mind – pointed out that the constant extension of the system of non-enforcement of domestic judgments for years on end gave the impression that the authorities 'were content to rely on that system rather than to seek effective alternative solutions to the public-order problems in the housing sector.'[103]

The Italian cases show that in eviction cases in which the applicant is the one seeking eviction, the Court accepts housing shortages as a legitimate general or public interest and allows the state a lot of leeway – even when this causes considerable waiting time for the applicant – on the condition that procedural safeguards are put in place.[104] The protection of P1-1 in these kind of eviction cases is thus mostly of a procedural nature. The same goes for the other perspective, when the evicted are the applicants. In those cases though, the Court does not consider it necessary to assess the situation under P1-1 when it has already done so under Article 8.[105] And when it does, it either deals with the complaints under both articles simultaneously or it refers to the same reasons used under Article 8.[106]

The third interference causing loss of the home is denial of access. The leading judgment on this issue, *Loizidou*, dealt with the continuous barring of access by Turkish security forces to land owned by the applicant.[107] Ever since the occupation by Turkey of the northern part of the island of Cyprus, Loizidou could visit nor use her plots of land in the occupied zone. The Court ruled this situation fell under the first rule and was accordingly an interference with the peaceful enjoyment of possessions. Factual hindrance, such as the one in this case, could be an interference with the right concerned just as much as a legal impediment would. The Court held that neither the continuing negotiations about the island on a political level nor the need to re-house

102 *Immobiliare Saffi*, para. 49.
103 Ibid., para. 73.
104 The applicant may of course complain under Article 6 that the enforcement proceedings take too long.
105 E.g. ECtHR, *Connors v. The United Kingdom*, 27 May 2004 (Appl.no. 66746/01) para. 100.
106 E.g. ECtHR, *Chapman v. The United Kingdom*, 18 January 2001 (Appl.no. 27238/95) para. 120.
107 ECtHR, *Loizidou v. Turkey* (merits), 18 December 1996 (Appl.no. 15318/89).

displaced Turkish Cypriots from the south of the island 'could justify the complete negation'[108] of the applicant's rights by barring access. A continuing violation of P1-1 was found to exist in this case. *Loizidou* clarifies several matters. First of all the existence of political negotiations does not absolve a state party to the ECHR from its obligations – an element of importance in the aftermath of conflict. Secondly, the provision of housing or land to build housing on cannot in the long run justify denial of access. Implicitly the Court seems to indicate here that short-term housing needs may serve as a *temporary* justification. In the inter-state case of *Cyprus v. Turkey* the Court confirmed its reasoning in the *Loizidou* judgment, extending its assessment to the situation of the displaced Greek Cypriots being barred from accessing their possessions in general.[109]

Finally, in the somewhat different context of civil strife in Eastern Turkey, the case of *Doğan and others* offers additional clarity on denial of access. A group of villagers was expelled from their village and forbidden to return for almost ten years. The Court again held that denial of access for such a long time amounted to a violation of P1-1. Although it accepted that the protection of the applicants against the insecurity of the region could be considered as a legitimate general interest, it held that the interference had been disproportionate. The following factors were taken into account: the applicants had to live elsewhere in the meantime in extreme poverty and in appalling circumstances; they were neither offered pecuniary compensation nor alternative housing or employment; and once return was allowed no financial help was provided to guarantee better living conditions or a sustainable return process. The Court even added an explicit reference to United Nations norms on internal displacement:

> [T]he authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or habitual places of residence, or to resettle voluntarily in another part of the country.[110]

All of this taken together imposed an individual and excessive burden upon the applicants. The *Doğan* judgment shows that the state can make its interferences with possessions more proportionate by providing alternative housing or, even better, enabling the choice of either returning or settling elsewhere.

Concluding on interferences entailing the loss of dwellings no significant differences with Article 8 arise. The general fair balance test of P1-1 applies to all three kinds of interferences, albeit that destruction will almost never pass this test. The same factors are taken into consideration. If there is any difference, then it would be that the

108 *Loizidou*, para. 64.

109 ECtHR, *Cyprus v. Turkey*, 10 May 2001 (Appl.no. 25781/84) paras. 184-189. See for another confirmation e.g. ECtHR, *Xenides-Arestis v. Turkey*, 22 December 2005 (Appl.no. 46347/99) para. 32.

110 ECtHR, *Doğan and others v. Turkey*, 29 June 2004 (Appl.no. 8803/02 a.o.) para. 154. The Court here referred to Principles 18 and 28 of the *United Nations Guidelines on Internal Displacement*, 11 February 1998, UN Doc. E/CN.4/1998/53/Add.2.

margin of appreciation is even wider under P1-1. The Court mostly limits itself to an assessment of the availability of procedural safeguards. As to the competing interests at stake between two parties disputing the right to use a certain house, the ownership of property will strengthen an Article 8 claim. The other way around the same effect can be seen: if someone is evicted from his home which is also his possession then the availability of alternative accommodation will be relevant in the fair balance test. When the possession is not a home this consideration is of course immaterial. States may protect tenants against eviction for a certain time on the ground of housing shortages, but cannot use this legitimate public interest ground endlessly. When they do, the fair balance will be upset.

3.5 POSITIVE OBLIGATIONS

As is the case with all other ECHR rights, state parties are obliged to secure the effective exercise of the rights protected by P1-1. This can take the form of positive obligations. Under P1-1 these are rather limited. Firstly, as pointed out in section 3.3, P1-1 does not include a right to acquire property. Positive obligations are thus mainly of a procedural nature: there are meant to protect an existing system of property rights, including their enforceability.[111] Secondly, the margins of state discretion are wide in the field of property protection. Nevertheless, as we shall see, positive obligations have emerged from the case law on P1-1.

The horizontal applicability of the right to protection of possessions is limited by the nature of the ECHR system: complaints against states, not against private parties. But state responsibility may arise even in property conflicts between individuals.[112] This happens on two levels, either the state acts through legislation or through the executive which affects civil law relations. Positive obligations may then exist.[113] Or, on the second level, the procedural elements of a case may be flawed. In cases where the property involved is the applicant's home, the domestic authorities will have to show 'particular diligence' in their handling of the case.[114] Under P1-1, a state is obliged 'to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons.'[115] When for example national court proceedings were in violation of Article 6 or a court judgment was not executed, P1-1 may become applicable even though the proceedings concerned a conflict between

111 Peter van den Broek, 'The Protection of Property under the European Convention on Human Rights', *Legal Issues of European Integration* (1996) pp. 52-90, see p. 78. See also: Çoban (2004) p. 164.

112 T. Barkhuysen, M.L. van Emmerik & H.D. Ploeger, *De Eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht* (preadvies) (Kluwer: s.l. 2005) p. 53.

113 ECtHR, *Gustafsson v. Sweden*, 25 April 1996 (Appl.no. 15573/89) para. 60.

114 The Court used this criterion as part of its standard assessment under Article 6: ECtHR, *Bečvář & Bečvářová v. the Czech Republic*, 14 December 2004 (Appl.no. 58358/00) para. 50.

115 ECtHR, *Sovtransavto Holding v. Ukraine*, 25 July 2002 (Appl.no. 48553/99) para. 96.

private parties.[116] The Court may also assess matters the other way around: if a violation of P1-1 is found because of the length of proceedings, Article 6 may have been violated for that very same reason.[117] In the context of this research a private interference with the enjoyment of a house one owns may thus be considered under P1-1 and entail a positive obligation for the state to restore that enjoyment. The test to be applied is, like with the interferences, the fair balance test. As the Court has held:

> [T]he boundaries between the State's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority which requires to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole.[118]

We have already considered in the previous paragraph the situation of applicants seeking to evict tenants from the houses they own. Implicitly there the positive obligation of the state is involved to secure an applicant's enjoyment of his possessions against third parties (the tenants). The basis of this is the national court decision ordering eviction. If such a positive obligation exists in cases of tenants then *a fortiori*, I would argue, a state has the obligation to evict illegal occupants if a domestic court thus orders. But even in the absence of such a court order, one is entitled to the protection of the house one owns against interferences by third parties. Such a conclusion can be inferred from the *Cyprus v. Turkey* judgment. In that case the Court found no violation concerning alleged interferences of private parties with Greek-Cypriot property. It held that the evidence was not sufficient to conclude that there was an administrative practice of condoning these acts.[119] Since the complaint was thus dismissed on lack of evidence and not because no state duty was involved, the Court implicitly held that the state is under the positive obligation to protect possessions against interference by private parties.[120]

A degree of protection against eviction for these third parties can be easily accepted when they are legal tenants, since this is defendable in the public interest. In the case of illegal occupants this will be much more difficult; although the solving of housing shortage problems may still be in the public interest involved, the state will have much more difficulties to argue that a fair balance has been struck between the occupant and

116 ECtHR, *Fuklev v. Ukraine*, 7 June 2005 (Appl.no. 71186/01) para. 93. ECtHR, *Cvijetić v. Croatia*, 26 February 2004 (Appl.no. 71549/01) suggests this too, although in that case the Court did not consider it necessary to examine a P1-1 complaint separately after having dealt with Article 8.

117 ECtHR, *Scollo v. Italy*, 28 September 1995 (Appl.no. 19133/91) paras. 44-45.

118 ECtHR, *Broniowski* (merits), para. 144. In this case the Court decided it was unnecessary to make a choice between interference and positive obligation. This in itself shows the all-encompassing nature of the fair balance test.

119 *Cyprus v. Turkey*, paras. 271-272.

120 Ovey & White (2006) p. 348; Çoban (2004) p. 164.

the owner. Especially when the house involved is the owner's home. The owner's case can be strengthened even more when the occupant has obtained the house through force or fraud or simply by occupying it without the freely given consent of the owner. On the other hand, when the occupant acquired the house in good faith and thus had a legitimate expectation, the house may be seen as his possession. In such a case both owner and occupant would be protected by P1-1. The Court would then have to assess the international legality of the domestic laws or regulations under which the occupant acquired property. If these can be shown to be discriminatory either in content or in application, the state may be at fault. But the occupant, if he or she acted in good faith, may still be to some extent protected.

On the topic of destruction and the prevention thereof, the earlier-mentioned *Öneryildiz v. Turkey* case shows the positive obligation incumbent on the state in case of imminent destruction. The Grand Chamber held that Turkey should have taken preventive measures to prevent the explosion that eventually destroyed the house. They should have done 'everything within their power' to protect the applicant's possessions.[121] In times of conflict such knowledge beforehand may be much rarer. It would be difficult to argue for the existence of a general preventive obligation on part of the authorities. But if specific knowledge is available that certain houses are at grave risk, then such an obligation could arise; particularly when one takes into account the grave consequences of destruction for an individual's safety and well-being, as has been recognized by the Court.[122] This is in my view a case where the generally broad margin of appreciation under P1-1 narrows due to the serious effects on someone's home. The concurrence of possession and home, with its strong connections to private and family life, in such cases necessitates the imposition of stronger positive obligations on the state than would be the case with ordinary possession. The stakes are much higher; a smaller margin is then called for.

Finally, denial of access by third parties to the home one owns will most often happen in cases where those third parties are also the occupants of that house. The comments on positive obligations in case of evictions therefore apply by analogy.

3.6 CONCLUSION

This chapter started with the question of the 'added value' of P1-1 as compared to Article 8. I have shown that the scope of the protected interests is rather broad: all property one owns, all possessions whose ownership is not contested, and all claims in respect of which one has a legitimate expectation to obtain the effective enjoyment of a right of property. Importantly, it does not include an autonomous right to property restitution. The scope of P1-1 entails that not all situations falling within the scope of 'home' are also covered by P1-1. If any additional value would exist it would therefore only be of partial relevance to persons in situations protected under Article 8.

121 *Öneryildiz* (Grand Chamber), para. 135.
122 See the Court's qualification of destruction in section 3.4.

The level of protection would seem to be a little lower in general than under Article 8. There are several indications for this. First there is no exhaustive list of legitimate aims to justify state interferences, but a less specific notion of public or general interest. Secondly, the protection offered by P1-1 is mostly procedural in nature. Thirdly, the margin under P1-1 is generally broader than under Article 8. Nevertheless, there are instances in which the margin narrows down again. This is the case when the property involved is also directly affecting someone's private life. A clear example of this is the series of judgments on housing destruction in Turkey: the Court did not treat the complaints under Article 8 and P1-1 separately. This means that the margin in the case did not differ between the privacy right of respect for the home and the more economic right of protection of possessions. Such an outcome can be explained by the interaction model introduced in section 3.3. The collusion of two different rights strengthens both. Thus the normally broad margin under P1-1 narrows down if it is connected to a privacy-connected right. In fending off claims of contenders claiming the right to live in a certain house, people with a double claim to that house as both their home under Article 8 and their possession under P1-1 are in the strongest position.

This collusion argument is the first way in which P1-1 has additional value. The second is that an argument over whether a house falls under the notion of home can be helped if that house is recognized as a possession. It is an indicator under Article 8 of a sufficient and continuing link with the place concerned. Thirdly, since possessions under P1-1 represent a pecuniary value, the loss of those possessions may be more easily assessed than the compensation due for the loss of the more symbolic notion of the home.

All of these differences, both positive and negative, between the two provisions of the Convention are to a certain extent softened by the fact that the Court increasingly resorts to the fair balance test under both articles. Sometimes it even seems to indicate that no significant differences exist between the two whatsoever, such as in the *Cvijetić* judgment where the applicant complained about the same situation under the two articles. The Court held that 'in this instance the requirements of that Article [P1-1] are subsumed under those of Article 8 of the Convention.'[123]

In conclusion, the protection of property in itself only has a small added value. It is in the interaction with the right to respect for the home that its significance becomes clear: they are mutually supportive. Any individual who can argue that his situation falls within the scope of both thus has a stronger claim under the European Convention. To paraphrase a famous motto, *l'interaction fait la force*.

123 *Cvijetić*, para. 55. Although it does not become clear from that judgment itself, one may also explain this 'subsuming' as Article 8 being stricter than P1-1. A violation of Article 8 in such cases would then automatically entail a violation of P1-1.

CHAPTER 4
NON-DISCRIMINATION AND MINORITY RIGHTS

4.1 INTRODUCTION

Losing one's home is not like being affected by a blind force striking at random from above, although it may feel as such. On the contrary, very often specific minorities are targeted in armed conflict. The destruction or occupation of houses of minorities can be part of a wider process of ethnic cleansing. The extent of housing losses may thus affect some groups much more heavily than others. In a second phase, mostly once the armed clashes have stopped, the restitution process or the lack thereof may also work in unbalanced ways, offering some parts of society good access to the procedures, while other parts may face legal or other obstacles or be excluded from restitution altogether. This inequality is very often, if not caused, then at least strengthened by the outcome of the conflict and possible 'victor's justice'. All these problems can manifest themselves both in practice and in laws. As Karadjova has aptly stated:

> An obvious but crucial general rule has emerged with regard to restitution of the property of minority groups: the greater the degree of strained relations between the minority and the majority that existed in the past, the greater the degree of difficulty that it encounters today.[1]

It is, consequently, important to ask which norms address this problem. In the following, I will look at two aspects of this topic. First, I will address anti-discrimination under the ECHR. Subsequently, I will look at what additional protection minorities are given under European human rights law, not just by the ECHR but also by the European Framework Convention for the Protection of National Minorities (FCNM).[2] The norms studied in this chapter serve as an additional protective shell around the core provisions of respect for the home and protection of property, which have been dealt with in the previous two chapters.

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1 Mariana Karadjova, 'Property Restitution in Eastern Europe: Domestic and International Human Rights Responses', *Review of Central and Eastern European Law* vol. 29-3 (2004) pp. 325-363, see p. 342.

2 I will not go into the legislation on the prohibition of racial and other forms of discrimination as developed within the European Union, since the focus of this study is on (recent instances of) post-conflict states which for the most part lie outside the Union – in the Balkans and the Caucasus. Nor will I elaborate on the 1965 United Nations' Convention on the Elimination of All Forms of Racial Discrimination, since the emphasis of this research is on European norms.

The definition of a minority in international law is a bone of contention on which no clear consensus exists.[3] Neither the recognition by the state nor purely individual choices unsubstantiated by objective elements seem to be by themselves relevant factors under international law.[4] Which of these elements is crucial is in itself a debated issue.[5] Without going into the discussion any deeper, I will here stick to a very general notion of a minority as a non-dominant group[6] with a (perceived) shared identity.[7] This best covers all the possible reasons (ethnicity, language, religion, culture, sex, political conviction, etc.) underlying the loss of housing during conflict. The choice for the FCNM as one of the focal points of this chapter is therefore not caused by its limitation to 'national' minorities, but by the fact that it is the main binding instrument on minority rights in the European context.[8]

4.2 PROTECTION AGAINST DISCRIMINATION

The European Convention on Human Rights protects against discrimination in two places: in the Convention itself in Article 14 and in additional Protocol No. 12. Article 14 states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The non-discrimination principle as interpreted by the European Court of Human Rights traditionally protects individuals and legal persons[9] who are placed in compar-

3 For more on the definition discussion, see: Athanasia Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law* (The Hague: Kluwer Law International 1997) p. 86; Natan Lerner, *Group Rights and Discrimination in International* Law (The Hague: Martinus Nijhoff Publishers 2003, 2nd ed.) p. 8; Tove H. Malloy, *National Minority Rights in Europe* (Oxford: Oxford University Press 2005) p. 223; John Packer, 'On the Definition of Minorities', in: John Packer & Kristian Myntti (eds.), *The Protection of Ethnic and Linguistic Minorities in Europe* (Turku: Institute for Human Rights 1993) pp. 23-65.

4 Gaetano Pentassuglia, *Minorities in International Law. An Introductory Study* (Strasbourg: Council of Europe Publishing 2002) pp. 68 and 74; Patrick Thornberry & Maria Amor Martín Estébanez, *Minority Rights in Europe* (Strasbourg: Council of Europe Publishing 2004) p. 14.

5 See e.g. Lerner (2003) p. 10.

6 Such a group may even be a numerical *majority* as long as it is non-dominant. For further discussion of this element, see: Kristin Henrard, *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague: Martinus Nijhoff Publishers 2000) pp. 35-37.

7 Freely adapted from: Spiliopoulou Åkermark (1997) p. 96.

8 I will not address the international standards on indigenous peoples, since this issue is of relatively small importance within the European context.

9 ECtHR, *Lithgow a.o. v. the United Kingdom*, 8 July 1986 (Appl.no. 9006/80) para. 177.

able situations against discrimination.[10] In the leading, if somewhat exceptional, case of *Thlimmenos* the Court extended the protection of Article 14 to what it called the other 'facet' of the prohibition of discrimination: the failure to treat persons differently who are placed in significantly different situations without a reasonable and objective justification.[11] One should add that Article 14 does not entail that any distinction is forbidden, but it does mean that difference of treatment can be submitted to scrutiny by the European Court of Human Rights.[12] Sometimes, as the *Thlimmenos* judgment shows, unequal treatment may even be called for in order to counter existing inequalities.[13]

The material scope of Article 14 is both open and limited. It is open in two ways: the mentioned prohibited grounds of discrimination are not limitative ('or other status')[14] and discrimination is not defined – thus no limitation is put on the possible grounds of justification.[15] But the Article is limited in that it is accessory in nature. Article 14 can only be applicable if the situation complained of falls within the ambit[16] of one of the rights protected by the Convention.[17] Complaints about other rights where discrimination may be a problem, mostly in the socio-economic realm, will thus be inadmissible. The Convention contains no *general* anti-discrimination clause. Nevertheless, the connection between Article 14 and other Convention rights is not so tight that the former can only be violated if the latter also is.[18] An acceptable interference under Article 8 may very well violate Article 14. A housing restitution scheme can be proportionate under the first Article, whereas its discriminatory nature may violate the second Article. This is where the added value of Article 14 can be found.

Article 14 is not only accessory, but also subsidiary. The Court will not always assess a case under Article 14 even if it falls within the ambit of one of the other Articles. The Court set out its approach in the *Airey* judgment:

> If the Court does not find a separate breach of one of those Articles that has been invoked both on its own and together with Article 14, it must also examine the case

10 ECtHR, *National Union of Belgian Police v. Belgium*, 27 October 1975 (Appl.no. 4464/70) para. 44.
11 ECtHR, *Thlimmenos v. Greece*, 6 April 2000 (Appl.no. 34369/97) para. 44.
12 See section 4.3.
13 Pieter van Dijk a.o., *Theory and Practice of the European Convention on Human Rights* (Antwerp: Intersentia 2006, 4th ed.) p. 1035. This may also happen outside the context of Article 14. In its *Hirst* judgment, the Court assessed the voting rights of prisoners and concluded that a broad and *indiscriminate* restriction of the right to vote was incompatible with Article 3 of Protocol 1: ECtHR, *Hirst v. the United Kingdom* (No. 2) (Grand Chamber), 6 October 2005 (Appl.no. 74025/01) para. 82.
14 ECtHR, *Engel a.o. v. the Netherlands*, 8 June 1976 (Appl.no. 5100/71 a.o.) para. 72. See also: Van Dijk a.o. (2006) p. 1050.
15 Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (The Hague: Martinus Nijhoff Publishers 2003) p. 33.
16 ECtHR, *Rasmussen v. Denmark*, 28 November 1984 (Appl.no. 8777/79) paras. 28-29.
17 ECtHR, *Belgian Linguistics* case, 23 July 1968 (Appl.nos. 1474/62 a.o.) para. 9. See also: D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths 1995) p. 464; Van Dijk a.o. (2006) pp. 1028-1029; Arnardóttir (2003) p. 35.
18 ECtHR, *National Union of Belgian Police v. Belgium*, 27 October 1975 (Appl.no. 4464/70) para. 44.

> under the latter Article. On the other hand, such an examination is not generally required when the Court finds a violation of the former Article taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (…).[19]

The Court is said not to have applied this approach consistently.[20] Sometimes it follows the *Airey* rule, sometimes it dismisses consideration under Article 14 without further ado[21] or by stating that there is 'no legal purpose' in doing so.[22] Although the criteria of 'fundamental aspect' and 'legal purpose' offer a some amount of guidance, there seems as yet not to exist an entirely clear and principled stance by the Court on this issue.[23]

One of the shortcomings of Article 14 has been countered by an additional Protocol, the twelfth one, to the ECHR. States can accede to this Protocol, which was adopted in 2000, on a voluntary basis. It entered into force on 1 April 2005. The Protocol introduces a general prohibition on discrimination which is no longer dependent on the other rights of the Convention. For the countries ratifying this Protocol the Court will no longer have to answer the question of whether a situation falls within the ambit of other Convention rights.[24] This has the additional advantage that applicants can complain solely about discrimination issues, precluding the problem of legal uncertainty mentioned in the previous paragraph. The extended scope of the non-discrimination protection is set out with more precision in the Explanatory Report to the Protocol. It concerns discrimination cases:

> - i. in the enjoyment of any right specifically granted to an individual under national law;
> - ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
> - iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
> - iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).[25]

Article 1 of the Protocol states that '[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground'. The list of prohibited grounds of

19 ECtHR, *Airey v. Ireland*, 9 October 1979 (Appl.no. 6289/73) para. 30. See also: ECtHR, *Chassagnou a.o. v. France*, 29 April 1999 (Appl.nos. 25088/94 a.o.) para. 89; ECtHR, *Kuznetsov a.o. v. Russia*, 11 January 2007 (Appl.no. 184/02) para. 77.

20 Van Dijk a.o. (2006) pp. 1031-1034

21 E.g. ECtHR, *Johnston a.o. v. Ireland*, 18 December 1986 (Appl.no. 9697/82) para. 79.

22 ECtHR, *Dudgeon v. the United Kingdom*, 22 October 1981 (Appl.no. 7525/76) para. 69.

23 Claire Ovey & Robin White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press 2006, 4th ed.) p. 422.

24 Arnardóttir (2003) p. 38.

25 *Explanatory Report* to Protocol 12, para. 22.

discrimination is exactly the same as that of Article 14 and is equally open-ended. Importantly, the Protocol offers protection against discrimination by public authorities, but no general obligation to combat all instances of discrimination of private persons.[26] In this respect too the protection of the Protocol is in line with the rest of the ECHR; some kind of state responsibility always needs to be established.

For issues of restitution this broad scope of Protocol 12 means that even if situations cannot reasonably be argued to fall within the ambit of Article 8 or P1-1, the prohibition of discrimination still applies.[27] For temporary inhabitants of a house who are neither the owners nor have lived there for a sufficiently long time to claim that it is their home, this may prove to be an important legal life-jacket. Moreover as the Explanatory Report shows, not just the legal provisions should be non-discriminatory, but also any act or omission by a public authority. Even restitution programs which are non-discriminatory on paper may be implemented in discriminatory ways. It is against this situation that the non-discrimination clauses of the Convention, both the Protocol and Article 14, protect individuals.

4.3 System of review by the Court

After having established the scope of non-discrimination under the European Convention, it is now time to give a succinct and basic overview of the Court's review of cases of alleged discrimination. The main elements of this review were set out in one of its first judgments, the *Belgian Linguistics* case.[28] First, there should be a difference in treatment of persons in analogous – or 'relevantly similar'[29] – situations.

Secondly, if such a difference or distinction is found to exist, then the Court assesses whether the State has put forward an objective and reasonable justification. Lacking such a justification the distinction will be judged to be in violation of the prohibition of discrimination. *Thlimmenos*-like cases as mentioned in the previous section are assessed under the same criterion. A justification is objective and reasonable if the difference in treatment pursues a legitimate aim and is proportionate.[30]

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26 Nevertheless, some positive obligations may exist in this respect. *Explanatory Report to Protocol 12*, paras. 24-28.

27 The practical impact of Protocol 12 is thus far limited. As of 21 June 2007, only fifteen states had ratified it. Importantly however, most of the states of ex-Yugoslavia were among them. For the reasons and counter-arguments concerning ratification of this Protocol, see: Robert Wintemute, 'Filling the Article 14 'Gap': Governmental Ratification and Judicial Control of Protocol No. 12 ECHR: Part 2', *European Human Rights Law Review* (2004) pp. 484-499.

28 See reference under section 4.2.

29 As it was phrased in e.g.: ECtHR, *Stubbings a.o. v. the United Kingdom*, 22 October 1996 (Appl.nos. 22083/93 a.o.) para. 72.

30 *Belgian Linguistics*, para. 10.

Since no legitimate aims are mentioned in the Article, the possibilities for states to justify distinctions are rather broad and the Court has mostly accepted them.[31] Almost in any situation a legitimate aim can be put forward. In general, the Court has not delved into possible incongruities between the stated and real goals pursued in unequal treatment cases, except when the applicants have made such an incongruity very probable.[32] A stricter test applies in cases of suspect classifications, such as race. In such cases, very weighty reasons need to be put forward by the state to prove that the difference in treatment made was reasonable in relation to the legitimate aim. Here, the question of the legitimate aim is thus closely connected to proportionality. Even if the case law on this point is very casuistic, Gerards has identified the case of *Inze v. Austria*[33] as offering criteria to test the reasonableness of legitimate aims: (1) the goal must be specific enough; (2) the underlying reasons for choosing the justification must not merely reflect traditional opinions; (3) and there must be a sufficient basis in the facts of the case to make the distinction.[34] Although in general the state is given a lot of leeway on the issue of legitimate aims, Arnardóttirs assertion that this part of the Article 14 test is merely 'rhetorical and artificial'[35] would thus seem to be too blunt.

The proportionality requirement refers to the relation between 'the means employed and the aim sought to be realised.'[36] If an applicant has suffered an excessive disadvantage in relation to the legitimate aim the state wants to pursue, it is probable that the Court will hold that Article 14 has been breached.[37] The Court applies the proportionality test in a casuistic way[38] and has not 'settled on any one approach to applying the proportionality test in its Article 14 cases.'[39]

The combination of a broad legitimacy test and a connected proportionality test would seem to lead to a certain degree of freedom for the state in matters of discrimination. In line with its case law on other ECHR provisions the Court indeed allows the states concerned a margin of appreciation 'in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope

31 Harris, O'Boyle & Warbrick (1995) p. 480; Stephen Livingstone, 'Article 14 and the prevention of discrimination in the European Convention of Human Rights', *European Human Rights Law Review* (1997) pp. 25-34, see p. 32. On the discussion this entails, see e.g.: Karl Josef Partsch, 'Discrimination', R.St.J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers 1993) pp. 571-592, see pp. 587-588.

32 Janneke Gerards, *Judicial Review in Equal Treatment Cases* (Leiden: Martinus Nijhoff Publishers 2005) pp. 139-140.

33 ECtHR, *Inze v. Austria*, 28 October 1987 (Appl.no. 8695/79).

34 Gerards (2005) pp. 142-144.

35 Arnardóttir (2003) p. 45.

36 *Belgian Linguistics*, para. 10.

37 See: ECtHR, *National Union of Belgian Police v. Belgium*, 27 October 1975 (Appl.no. 4464/70) para. 49. Also cited in: Ovey & White (2006) p. 428.

38 Arnardóttir (2003) p. 50.

39 Livingstone (1997) p. 32.

of this margin will vary according to the circumstances, the subject-matter and its background.'[40]

It is precisely in the assessment of the margin of appreciation that more decisive clues about the Court's views on discrimination can be found. In this assessment – not in the proportionality test which the Court formally uses – the more decisive elements of the Court's approach may be discerned. A narrow margin of appreciation for the state entails a strict scrutiny by the Court and vice versa.[41] The Court's dictum on 'the circumstances, the subject matter and its background' does not offer much explicit guidance. I have therefore chosen in this study to follow Arnardóttir's thorough clarification on this point. She distinguishes three influencing factors: the type of discrimination alleged, the 'badge'[42] of differentiation and the interest at stake.[43] The interplay of these three then determines the level of scrutiny by the Court. Before elaborating on these three, I would add that a fourth factor is relevant: the existence and degree of consensus in Europe on a certain matter, like under other Convention articles.[44] When consensus is absent, this may be an indication towards lenient review.[45]

First, as to the types of discrimination, direct and indirect discrimination both fall within the scope of Article 14. Arnardóttir subdivides direct discrimination in situations of active discrimination and what she has dubbed 'passive' discrimination. The former encompasses situations in which state agents are the source of discrimination, such as different non-uniform applications of general measures, covert differences in treatment or even express differences. Such active forms of discrimination point towards strictly review by the Court, especially when the discrimination is overt.[46] Passive discrimination is a concept Arnardóttir uses to describe claims concerning positive obligations, such as the failure to remedy situations of discrimination and also the failure to provide different measures for groups which significantly differ (*Thlimmenos*-type situations). Since positive obligations often receive more lenient scrutiny than interferences in the Court's case law, one may expect that the fact that

40 *Inze*, para. 41.

41 Thus the margin of appreciation serves as a tool for determining the strictness of review. See: Gerards (2005) p. 169.

42 Traditionally, this is often called the 'ground' for differentiation. In this chapter I will use Arnardóttir's notion.

43 Arnardóttir (2003) p. 92. Gerards considers the kind of distinction, which could be compared to the badge of differentiation, and the right or interest at stake, as two of the main relevant factors in determining the intensity of review: Janneke Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', *Netherlands International Law Review* vol. 51 (2004) pp. 135-183.

44 See e.g. section 2.5.

45 And the other way around. See e.g.: Livingstone (1997) pp. 32-33.

46 Arnardóttir (2003) pp. 93-95.

a claim refers to passive discrimination claims can be an indication towards lenient scrutiny.[47] However, as yet, there is barely any case law supporting this conclusion.[48]

Indirect discrimination[49] occurs when apparently neutral measures have a disproportionate effect on particular groups of people. In those cases it is not so much the intent of the measure that is relevant, but rather its consequences:

> Where a general policy or measure has disproportionate prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.[50]

It must be said that case law on this point is still rather scarce. In addition, the Court itself has seemed to evade the term indirect discrimination for a long time and did not apply clear distinctions between the tests applied to direct and indirect discrimination. Therefore the influence of the concept on the level of scrutiny cannot be predicted yet.[51] Nevertheless, the principle of indirect discrimination offers a promising direction for the future, since it may substantially increase the scope of protection against discrimination.[52]

Secondly, the badge of differentiation is relevant for the level of scrutiny. The badge is the ground on which a difference in treatment is made, including all those mentioned in Article 14 itself. The Court has indicated a number of grounds for which 'very weighty reasons' have to be advanced by the state to make a difference of treatment compatible with the requirements of the ECHR and thereby require a strict scrutiny.[53] Although no general rule exists to decide which grounds require very weighty reasons, the Court has thus far included sex, illegitimate birth, religion, sexual orientation and sometimes nationality.[54] The existence of a common ground on a

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47 Ibid., pp. 117-122.

48 See e.g. ECtHR, *Petrovic v. Austria*, 27 March 1998 (Appl.no. 20458/92) in which the Court reviewed leniently, even though the badge of sex discrimination was concerned. See also: Arnardóttir, pp. 118-119.

49 The notion is derived from European Community Law. For a very elaborate analysis of the genesis of the notion of indirect discrimination in EC law, see: Christa Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerp: Intersentia 2005). The ECtHR has long shunned the term indirect discrimination, but in its case law has incrementally shifted from a dismissive towards a more accepting stance concerning the concept of indirect discrimination in more recent years (see the cases mentioned in the two following footnotes).

50 ECtHR, *Kelly a.o. v. the United Kingdom*, 4 May 2001 (Appl.no. 30054/96) para. 148.

51 See e.g. ECtHR, *Hoogendijk v. the Netherlands* (admissibility), 6 January 2005 (Appl.no. 58641/00); ECtHR, *D.H. a.o. v. the Czech Republic*, 7 February 2006 (Appl.no. 57325/00, pending before the Grand Chamber)).

52 Just before this typoscript was sent to the printer, the Court's Grand Chamber ruled in the case of *D.H.* and clarified its stance on indirect discrimination: ECtHR, *D.H. a.o. v. the Czech Republic* (Grand Chamber)*,* 13 November 2007 (Appl.no. 57325/00).

53 ECtHR, *Abdulaziz, Cabales & Balkandali v. the United Kingdom*, 28 May 1985 (Appl.nos. 9214/80 a.o.) para. 78.

54 Gerards (2005) p. 201.

certain issue may be an indication; if a certain badge of differentiation is generally held to be unacceptable within Europe, the very weighty reasons test is very likely to apply.[55] The threshold of compliance in these cases has been so high, that the Court has rarely found that a difference of treatment on one of these grounds was justified.[56] In the Russian case of *Timishev* the Court set apart the ground of race and ethnicity for which no justification seems to be possible whatsoever: 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.'[57] Thus for this specific badge the review is strictest of all.

Thirdly and least importantly, the interest at stake influences the degree of scrutiny by the Court. The higher the interest, the stricter the scrutiny is. If the interest at stake is to guarantee social justice and substantive equality, the review may be more strict than otherwise. Thus a measure that affects a socially disadvantaged group or person will be more strictly scrutinized than state interference that is unfavorable to the privileged. For example, the complaint of a property owner who lets his property to tenants will receive a more lenient review than a tenant complaining about an interference with his rights.[58] As a caveat, Arnardóttir adds that this third factor is in practice difficult to detect and rather serves 'to support an already existing indication towards either strict or lenient review rather than being the primary indication'.[59] I would argue that this only can be defended for the more hidden interests at stake. By contrast, if one considers the *right* at stake as the interest involved, the influencing factor is both more easily identifiable and also plays a much more decisive role. Thus Gerards has shown that even the rather indeterminate case law of the Court points to a strict review in the case of affected core rights and more lenient scrutiny in more peripheral cases.[60] Core rights are e.g. those rights that are centrally important to the functioning of democracy and the rights that protect human dignity and personal autonomy. The inviolability of the home is a point in case.[61]

One of the main obstacles for applicants in discrimination procedures before the European Court is the issue of proof. When an applicant alleges discrimination, he or she should in principle prove this beyond reasonable doubt. This may arise from 'the co-existence of sufficiently strong, clear and concordant inferences or of similar

55 Gerards (2004) p. 162. This does not automatically entail that the absence of such common ground takes away the suspect character of a badge: Ibid., p. 164.

56 Rare exceptions include: ECtHR, *Petrovic v. Austria*, 27 March 1998 (Appl.no. 20458/92) and ECtHR, *Fretté v. France*, 26 February 2002 (Appl.no. 36515/97), as mentioned in Gerards (2004) p. 164. See also: ECtHR, *Stec a.o. v. the United Kingdom*, 12 April 2006 (Appl.nos. 65731/01 & 65900/01).

57 ECtHR, *Timishev v. Russia*, 13 December 2005 (Appl.nos. 55762/00 and 55974/00) para. 58. In paras. 55-56 the Court had already concluded that ethnicity and race are in its view 'related and overlapping concepts.'

58 Arnardóttir (2003) p. 165.

59 Ibid., p. 172.

60 Gerards (2005) pp. 197-199.

61 Ibid., p. 220 and Gerards (2004) p. 172.

unrebutted presumptions of fact.'[62] This burden is not as high as it may be in most national criminal systems. It is not the Court's role to assess the criminal responsibility of the individual or authority who is accused of discriminatory actions, but rather the state's responsibility under the Convention 'in the light of the relevant principles of international law.'[63]

The burden of proof lies primarily with the applicant. In the Bulgarian case of *Nachova* a Chamber of the Court held that a shift in the burden of proof could occur when the state would violate its duty to conduct an effective investigation,[64] but the Grand Chamber in the same case overruled this by arguing that 'where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned.'[65] Nevertheless, the Court has not ruled out the possibility that the burden of proof may in some circumstances shift to the state. It seems that the Court refers to instances of indirect discrimination in which policies or decisions have discriminatory effects.[66] An applicant can be aided in these cases by statistics which disclose a discriminatory policy. Whereas the Court long held that statistics in themselves could not furnish such proof,[67] it seemed to change its views on this in 2005, when it held in the decision of *Hoogendijk v. the Netherlands* that statistics were 'not automatically sufficient'.[68] However, in a later case – on alleged discrimination against Roma children in the Czech school system – a Chamber of the Court reverted to its previous views on the matter.[69] Finally, mentioning its inconsistent approach, the Grand Chamber ruling in the same case found statistical evidence to be decisive.[70] There may thus be possibilities to use statistical evidence, but the extent to which this can be relied upon is not entirely clear yet. Increased clarity on this point would be of high importance in relation to housing policies and laws, since these may be neutral in form but indirectly discriminatory in effect.[71]

62 E.g. ECtHR, *Tanlı v. Turkey*, 10 April 2001 (Appl.no. 26129/95) para. 109.
63 Ibid., para. 111.
64 ECtHR, *Nachova a.o. v. Bulgaria* (chamber judgment), 26 February 2004 (Appl.nos. 43577/98 & 43579/98) para. 169. See also the dissenting opinion of judge Bonello, arguing for a less severe standard of proof than the standard one used by the Court, in: ECtHR, *Anguelova v. Bulgaria*, 13 June 2002 (Appl.no. 38361/97).
65 ECtHR, *Nachova a.o. v. Bulgaria* (Grand Chamber), 6 July 2005 (Appl.nos. 43577/98 & 43579/98) para. 157.
66 Ibid. See also: ECtHR, *Bekos & Koutropoulos v. Greece*, 13 December 2005 (Appl.no. 15250/02) para. 65.
67 See e.g.: ECtHR, *Hugh Jordan v. the United Kingdom*, 4 May 2001 (Appl.no. 24746/94) para. 154; ECtHR, *McShane v. The United Kingdom*, 28 May 2002 (Appl.no. 43290/98) para. 135.
68 ECtHR, *Hoogendijk v. the Netherlands* (admissibility), 6 January 2005 (Appl.no. 58641/00).
69 ECtHR, *D.H a.o.. v. the Czech Republic*, 7 February 2006 (Appl.no. 57325/00) para. 46.
70 ECtHR, *D.H. a.o. v. the Czech Republic* (Grand Chamber), 13 November 2007 (Appl.no. 57325/00) paras. 191-195.
71 For more on this, see chapter 7.

As a final remark, it should be added that the framework of protection of Article 14 and Protocol 12 is 'intended to be identical', as Arnardóttir puts it. The Court's approach in interpreting both is rather likely to be identical too.[72]

4.4 NON-DISCRIMINATION AND RESTITUTION

How to apply the above to the specific issue of housing restitution? First of all, acts causing the loss of the home, such as destruction, eviction and denial of access, may themselves be carried out in a discriminatory way, whether during or after the end of armed conflict. Instances of ethnic cleansing through the use of armed force are the most obvious and extreme examples of this. Nevertheless, much more subtle methods can yield exactly the same results. These may include the discriminatory application of laws and regulations which are neutral in themselves. In even more hidden ways, these ostensibly neutral laws may have discriminatory effects. This may happen for example by the setting of tight deadlines for using remedies which benefit those which have close access to justice (the non-displaced) at the detriment of displaced people and refugees who temporally dwell much further away. This goes to show that the second phase, that of possible restitution after conflict, may be just as contaminated with discrimination as the loss of the home during the conflict.

Turning to the Court's system of review in connection with housing restitution, we have just seen that differences in treatment may occur in many ways. As argued earlier, the test of an objective and reasonable justification is often a relatively easy one to pass for states – the exception being certain badges of discrimination for which justification is very difficult or nearly impossible, such as race.[73]

In the context of housing, a shortage of houses in a certain region may be used as a justification to postpone restitution.[74] If someone is refused restitution on the grounds that another displaced person is using the house, it is improbable that the state's refusal will be deemed excessive, except when the situation lingers on indefinitely. Since the formal review factors provide so little certainty on how the Court will decide in particular cases, the strictness of review will have to provide guidance on the issue of restitution after conflict.

The first factor, the type of discrimination, is relevant both in the phase of losing one's home and in the later phase of trying to recover it. In both phases discriminatory practices may take place by private parties or by the state. As argued above, the Court's review will be stricter when interferences by the state are at stake than when the stake fails to take measures to protect individuals against discrimination by private

72 Arnardóttir (2003), p. 41. See also: Ovey & White (2006) pp. 430-431; *Explanatory Report* to Protocol 12. paras. 18 & 20.

73 See section 4.3.

74 Jeremy McBride, 'Compensation, Restitution and Human Rights in Post-Communist Europe', in: F. Meisel & P.J. Cook (ed.), *Property and Protection. Legal Rights and Restrictions* (Oxford: Hart Publishing 2000) pp. 87-105, see pp. 90-91.

parties. Restitution laws may also cause indirect discrimination. It is here that, even in the absence of bad faith on the part of the state, special vigilance is called for. If restitution legislation would negatively affect minorities reclaiming housing for example, the problems and displacement caused by the previous armed conflict would remain unresolved. Thus both in their wording and structure, but also in their implementation, restitution laws and policies should take an approach that is neutral in that it is non-discriminatory, without covertly supporting the ethnic majority in power and using the restitution scheme to its sole benefit. Such covert use of restitution schemes for other purposes is a phenomenon which will be difficult for an applicant to prove. If the laws themselves are formulated in a neutral way, statistical evidence will have to be used to prove the imbalanced impact these laws have. Since the Court has accepted the possibility of using statistical material as evidence, this may hold some promise. Nevertheless, it will be difficult to sustain this general proof by specific proof of discrimination in a case at hand. Until it will become clear whether the latter proof is necessary to support the former, the extent of this obstacle for an individual will remain equally vague.

The second factor of influence is the badge of differentiation. We have seen that certain badges call for strict scrutiny by the Court. Of these, religion, sex, nationality, and ethnicity or race may be relevant. Religion can play a role, since it can be attached to particular minorities and the overlap between religion and ethnicity may be almost total. The badge of sex can be relevant in the sense that restitution programs may favor men over women. The ground of nationality[75] can be especially important, since people who have involuntary left their home may also have lost the nationality of the country in which they lived. On this particular badge, the UN Human Rights Committee (HRC) is more benevolent towards individual claimants than the European Court of Human Rights. The HRC has repeatedly recognized that restitution legislation that excludes those non-nationals for whose departure the state was responsible – in these cases under the former Communist regime – is discriminatory and contrary to Article 26 ICCPR.[76] The same involuntary departure could be argued in cases of war and *a fortiori* concerning ethnic cleansing targeting the group to which applicants belong. Before the European Court of Human Rights success has proven much more elusive.[77] Rather ironically, since the ECHR does include a property protection provision whereas the ICCPR does not. Paradoxically, the very existence of such a provision (P1-1) has been a bar rather than a catalyst for discrimination claims due to the accessory nature of Article 14; whenever the Court does not accept that possessions within the ambit of P1-1 exist, e.g. because expropriation took place before the entry

75 As stated above, this ground only sometimes leads to a very weighty reasons test.

76 HRC, *Simunek a.o. v. the Czech Republic*, 19 July 1995 (Comm.no. 516/1992) para. 11.6; HRC, *Adam v. The Czech Republic*, 23 July 1996 (Comm.no. 586/1994) para. 12.6; HRC, *Blazek a.o. v. the Czech Republic*, 12 July 2001 (Comm.no. 857/1999) para. 5.8. See also: Karadjova (2004) pp. 355-356 and Patrick Macklem, 'Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law', *European Journal of International Law* vol. 16 (2005) pp. 1-23, see p. 10.

77 See chapter 3.

into force of the Convention for the country concerned, it considers claims under Article 14 to be inadmissible *ratione materiae*.[78] The HRC, by contrast, seems less reluctant on this point. Protocol 12 to the European Convention will bring an important improvement by taking away the accessory nature of the non-discrimination protection.[79]

The badge of race or ethnicity[80] has played an extremely destructive role in many contemporary conflicts. In that context, the loss of housing is often the result of either ethnic cleansing or heightened ethnic tensions. Restitution after conflict is in many instances plagued by the same problem, but may often be difficult to prove. A prospective claimant is confronted with a particular paradox: on the one hand no objective justification can be brought forward by the state for a difference in treatment based on this ground and proof of this badge will thus offer full protection under Article 14. On the other hand evidentiary problems in this context may form an insurmountable obstacle,[81] as discrimination on account of ethnicity will rarely be explicitly incorporated in the law, but rather will be implemented in more subtle and hidden ways. The issue then becomes one of assessing whether indirect discrimination has occurred in violation of the European Convention. If the Court is serious in assigning the highest importance to this badge, then this calls for a heightened awareness and sensitivity to this background, not only by national courts, but also by the European Court itself. A state should not be accused too easily of that gravest form of discrimination for which no legal justification exists, but equally a victim should not be asked to prove the impossible. It would thus be wise for the Court to collect and allow as much relevant – including statistical – information as possible, for example by allowing interventions by third parties, in order to balance these interests based on as solid evidence as possible.

The third influencing factor is the right or interest at stake. As to the *interest* at stake, we have seen that social justice plays a role and that the Court will review more strictly if the interests of a socially disadvantaged group are at stake. In the context of restitution relevant factors would be whether the claimants are refugees or displaced persons and thus in a disadvantaged position. This would call for strict scrutiny and thus a smaller margin of appreciation. Counter-indications would be that they have reasonable alternative accommodation and the fact that the occupiers of their house were displaced persons themselves. As indicated in the previous section, the interest at stake is more a supportive rather than a primary indication for the intensity of review. This is not so for the *right* at stake, which is a much stronger indication. In the

78 E.g. ECtHR, *Gratzinger & Gratzingerova v. the Czech Republic* (admissibility), 10 July 2002 (Appl.no. 39794/98) paras. 74-77.

79 Karadjova (2004) p. 355.

80 And thus by corollary the badge of association with a national minority, I would argue, in as far as this is perceived as an immutable trait of a person.

81 In the case of *Akdivar*, for example, the Commission – followed by the Court – concluded that there was no evidence that the applicants had been expulsed from their village on account of their Kurdish origin: EComHR, *Akdivar a.o. v. Turkey*, 19 October 1994 (Appl.no. 21893/93).

case of housing lost, one of the core human rights, the inviolability of the home, is at stake. If an applicant can thus convince the Court that his former dwelling was not just his property, but also his home, then this could be an indication for stricter review – of course depending on the specific circumstances of the case, since other aspects may very well call for more lenient review.

Finally, the factor of consensus in Europe will depend heavily on the specific case at hand. Taking all these influencing factors together, I would argue, an indication for strict review of discrimination claims on housing restitution may be discerned. Although the first and fourth factors, the type of discrimination and the degree of consensus may differ highly according to the specific situation, the second and third factor will often militate in favor of such strictness. Discrimination on ethnic, racial or religious backgrounds can be seen as one of the main causes for displacement and the ensuing loss of housing during and after armed conflicts. And the interest at stake for displaced people or refugees will in many cases be high. Housing lost involuntarily in times of armed conflict may generally be identified as an interference with a core human right. Although the specific circumstances of the case should always be taken into account, several factors call for a narrowed margin of appreciation for the state concerned and a thorough scrutiny by the Court. In order to increase legal certainty on this point, it would be advisable for the Court to argue more precisely why and when it takes a strict approach in discrimination cases. Only then will a norm come into existence that can be easily communicated.

4.5 MINORITY PROTECTION: THE FRAMEWORK CONVENTION

Non-discrimination is a norm which can be invoked by anyone. During armed conflicts, however, not everyone is affected in the same manner. Weaker groups in a society, which may often include minorities, can be the first targets in eviction actions. Similarly, minorities encounter the gravest difficulties in trying to recover their homes. In this section and the following one I will therefore assess if and to what extent minorities receive additional protection under European human rights law. I address this question under both the Framework Convention for the Protection of National Minorities (FCNM or Framework Convention) and the ECHR.

The Framework Convention was drafted in the 1990s, in the period immediately following upon the fall of communism in Central and Eastern Europe. It was the legally binding translation of political commitments agreed upon in the context of the Conference on Security and Co-operation in Europe (CSCE, later called OSCE). The FCNM, negotiated within the Council of Europe, came into being in consultation with both the – then – European Communities and the CSCE.[82] Although it is the first multilateral treaty with binding obligations on minority protection, it contains – as the name 'framework' indicates – for the most part programmatic provisions and is to that extent not directly applicable. Put differently, it will be nearly impossible to invoke the

82 Explanatory Report to the Framework Convention, paras. 6 and 10.

FCNM before a domestic court. Moreover, some of the provisions are formulated in such a weak and qualified way that a very broad freedom of implementation is left to the states.[83] Finally, the Framework Convention contains no definition, by lack of agreement on the issue, of what a national minority is.[84] In practice, many states have therefore made a declaration in acceding to the FCNM in which they either give their own definition or specifically indicate which groups they regard as national minorities.[85]

The monitoring of the commitments in the Framework Convention is performed by a political organ, the Committee of Ministers of the Council of Europe, assisted by an expert body, the so-called Advisory Committee. This Committee evaluates the periodic reports which are submitted by the state parties.[86] This supervisory tandem cannot issue legally binding decisions and the thrust of the Framework Convention is thus more of an encouraging character, through dialogue, than of a sanctioning one.[87] In spite of all the potential weaknesses in the FCNM – vague language, lack of a definition of 'national minorities', and a relatively feeble monitoring system – the Convention seems to have triggered positive changes in many countries on the issue.[88] Importantly, the Advisory Committee has taken a pro-active stance and has not limited its review to those minorities which the state parties officially recognize.[89] More generally, the Advisory Committee applies a broad approach of minorities, in reflection of international human rights law, instead of focusing solely on a narrow concept of *national* minorities.[90]

The Framework Convention reflects general international law in that it prohibits discrimination on the basis of belonging to a national minority (Article 4). But it adds

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83 E.g. qualifications such as 'as far as possible' in Article 10 and 'where appropriate' in Article 11. See also: Gudmundur Alfredsson, 'A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures', *International Journal on Minority and Group Rights* vol. 7 (2000) pp. 291-304, see pp. 292-294.

84 Jochen Abr. Frowein & Roland Bank, 'The Effect of Member States' Declarations Defining 'National Minorities' upon Signature or Ratification of the Council of Europe's Framework Convention', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* vol. 59 (1999) pp. 649-675, see p. 675.

85 See the website of the Council of Europe (www.coe.int), under 'national minorities'.

86 Articles 24-26 of the Framework Convention.

87 Gaetano Pentassuglia, 'Minority Protection in International Law: From Standard-Setting to Implementation', *Nordic Journal of International Law* vol. 68 (1999) pp. 131-160, see p. 136.

88 Frank Steketee, 'The Framework Convention: A Piece of Art or a Tool for Action?', *International Journal on Minority and Group Rights* vol. 8 (2001) pp. 1-13, see p. 13.

89 See e.g. Advisory Committee, *Opinion on Denmark*, 22 September 2000 (ACFC/INF/OP/1(2001)005). However, states have not been very willing to reconsider the scope of application of the FCNM. See: Rianne M. Letschert, *The Impact of Minority Rights Mechanisms* (The Hague: T.M.C. Asser Press 2005) p. 188. This has not influenced the Committee's position: Advisory Committee, *Second Opinion on Denmark*, 9 December 2004 (ACFC/INF/OP/II(2004)005).

90 Gudmundur Alfredsson, 'Article 4', in: Marc Weller (ed.), *The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press 2005) pp. 141-152, see p. 147.

an explicit obligation to ensure 'where necessary' effective equality by way of adequate measures.[91] As such the FCNM requires a more active stance from state parties than the mere fight against discrimination, although the latter is an obligation in itself (Article 6). The Advisory Committee has addressed housing restitution issues under the discrimination provision of Article 4 in its opinions on Croatia. In its first opinion on the country (2001) the Committee held that Croatia's policies were not compatible with this Article. The reasons were the deficiencies in the overall legal framework and its implementation. First of all, no anti-discrimination legislation existed in the field of housing. Secondly, even where national legislation was non-discriminatory, lower level regulations and decisions often were, especially in the context of repossession of property and the return of displaced persons. This was particularly apparent at the local level which showed *de facto* discrimination against Serbs and other minorities.[92] In the second monitoring cycle (2004) the Committee lauded the progress, but showed concern over the problems minorities encountered in the repossession of property and slow progress on providing (alternative) housing to former tenancy rights holders.[93] The opinions of the Committee show that the additional value of the Framework Convention system to an important extent lies in the specific consideration given by the supervisory body to minority interests. General anti-discrimination norms are thereby given focus. Through such zooming-in the situation of minorities is given special attention which may otherwise have been only peripheral. This may at the very least help to name and shame states on this particular point instead of overlooking the specific problems of minorities.

In addition to the general non-discrimination articles, specific provisions protect the interests of national minorities in the fields of e.g. religion (Article 8), media (9), language (10-11) and education (12-14). Most relevantly for the topic under review, Article 16 stipulates that state parties have the duty to 'refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention.' The Article does not apply to non-state actors. The focus is on state obligations. It could be argued, as with other human rights obligations, that states have the duty not to tolerate or condone actions by private parties which have the same effect.[94] Nevertheless, the practice of the Advisory Committee has not yet provided clarity on this point.[95]

The goal of Article 16 is protection against state action which changes 'the proportion of the population inhabited by persons belonging to national minorities' in all cases in which these measures are aimed at national minorities. According to the text

91 For a comparable obligation, see Article 2(2) CERD.

92 Advisory Committee, *Opinion on Croatia*, 6 April 2001 (ACFC/INF/OP/I(2002)003) paras. 21-25.

93 Advisory Committee, *Opinion on Croatia*, 1 October 2004 (ACFC/INF/OP/II(2004)002) paras. 45-54; see also: Letschert (2005) p. 368.

94 On the relevance of this in relation to property restitution, see chapters 7, 11 and 12.

95 Jennifer Jackson-Preece, 'Article 16', in: Weller (2005) pp. 463-485, see pp. 483-84.

of the Article, the aim of the measures at stake is relevant and not the effects. The Explanatory Report mentions expropriation, evictions and expulsions as examples of prohibited measures and the building of a dam which requires the resettlement of a village as an example of the contrary.[96] The distinction between intention and effects is highly problematic. This was acknowledged by some during the drafting process, but the proponents of an approach which included detrimental *effects* were in the minority.[97] The problem this engenders is twofold. In the first place, even measures which have a legitimate rationale may disproportionately affect minority groups. Secondly, while negative consequences can be measured to some extent, for example by eviction statistics, bad intentions are nearly impossible to prove.[98] The difference between deliberate and unintended consequences will often be unclear. The provision thus seems to establish a bias in favor of states to the detriment of minorities. In spite of this, the Advisory Committee has taken a more inclusive approach in practice.[99] When large-scale displacement and loss of home in areas inhabited by national minorities has taken place, the Committee has called upon governments to take measures to ensure 'a process of sustainable voluntary return'.[100] Sometimes the Committee even asked the government concerned to rebuild housing, revive the economy and restore security in order to foster the return of minorities.[101] And it has held that the possibility for displaced minorities to return home should be 'a permanent entitlement without deadlines'.[102] In most of these cases the Framework Convention entered into force after the end of armed conflict. This did not prevent the Committee from addressing the consequences of displacement. What this question of timing did entail is that the Committee did not address the duties or responsibilities of the government as to the causes of the displacement. This may explain why the question whether the initial forced displacement was caused by the government or by private parties was deemed to be irrelevant. Thus an assessment under Article 16 of e.g. ethnic cleansing has not taken place yet.[103]

96 Explanatory Report to the Framework Convention, paras. 81-82.

97 Ibid., p. 484.

98 At least they are more difficult to prove than in a traditional criminal law context in which the intentions of individuals rather than of institutions are mostly at stake.

99 The general prohibition of discrimination of Article 4 FCNM may offer some relief in this matter. Alfredsson asserts that the Advisory Committee not only questions discrimination in law but also in fact and has often asked the states for improved statistical data in order to assess the negative consequences of general measures on minorities: Alfredsson (2005) p. 146. Concerning housing for example, see: Advisory Committee, *Opinion on Azerbaijan*, 22 May 2003 (ACFC/INF/OP/I(2004)001) para. 30.

100 Advisory Committee, *Opinion on Azerbaijan*, 22 May 2003 (ACFC/INF/OP/I(2004)001) para. 122; *Opinion on Croatia* (2001) para. 66; *Opinion on the Russian Federation*, 3 September 2002 (ACFC/INF/OP/I(2003)005) para. 114. In its opinion on Bosnia, rather surprisingly, the Committee held that Article 16 did not 'give rise to any specific observations': *Opinion on Bosnia and Herzegovina*, 27 May 2004 (ACFC/INF/OP/I(2005)003) para. 113.

101 Advisory Committee, *Opinion on Macedonia*, 27 May 2004 (ACFC/INF/OP/I(2005)001) para. 104.

102 Advisory Committee, *Opinion on Croatia* (2004) paras. 173-174.

103 Preece (2005) p. 485.

Even though the Advisory Committee has rarely found it relevant to formulate specific observations on compliance with Article 16, the reports of state parties seem to suggest that three compliance criteria are widely accepted as being necessary. The state, in any of its policies causing demographic change

> (1) must not discriminate against, nor deliberately target members of national minorities; (2) legal and administrative procedures relating to such policies must guarantee equality of treatment and the right of individual review; and (3) members of minorities or their representatives must be able to participate in the decision-making process with respect to such policies.[104]

In conclusion, the Framework Convention's additional protection lies in its specificity. Whereas the ECHR protects against arbitrary state action as such, the Framework Convention has been set up to protect against acts specifically targeting national minorities.[105] Within that specific context the norms are at some points vague and open ended, but the practice of the Advisory Committee shows that this permits a broad assessment, including on the points of displacement, return and restitution. No right to restitution as such is given under the FCNM though. Relevantly, Article 23 of the FCNM stipulates that the rights in the Framework Convention, 'in so far as they are the subject of a corresponding provision' in the ECHR or its Protocols, 'shall be understood so as to conform to the latter provisions'. We will now return to the latter Convention.

4.6 MINORITY PROTECTION: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECHR, unlike for example its global peer, the International Covenant on Civil and Political Rights, contains no special provision on minority rights.[106] Attempts to add a protocol to the ECHR to such effect have been thwarted by the state parties.[107] In general, the Court itself has tended to separate the minority aspects of a case from the substantive rationale of its decisions.[108] In other words, the minority question has rarely played a decisive role in the reasoning of the Court. Nevertheless, minority groups have benefited from the general protection of the ECHR. States interfering with the rights of individuals or groups belonging to a minority will have to justify such interferences under the regular conditions of the ECHR. Such cases have produced

104 Ibid. See there also for further references to state reports.

105 Ibid., p. 480.

106 Roberta Medda-Windischer, 'The European Court of Human Rights and Minority Rights', *Revue d'intégration européenne* vol. 25 (2003) pp. 249-272, see p. 249.

107 Geoff Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', *Human Rights Quarterly* vol. 24 (2002) pp. 736-780, see p. 737.

108 Gaetano Pentassuglia, 'Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee', *German Yearbook of International Law* vol. 46 (2003) pp. 401-451, see p. 442, including further references. As an example, see the *Chapman* case discussed in this section.

positive results for minorities, but not so much because of the particular minority aspect.[109] In this section, however, I will address those cases in which such an aspect was more explicitly brought forward and discussed.

As early as in 1981, the Court recognized that the interests of minorities in the broadest sense[110] should be taken into account:

> Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[111]

The fact that a minority asserts its own minority consciousness, for example by setting up associations, cannot in itself justify interferences with the ECHR rights of that minority.[112] When an individual defines himself or herself as member of a minority, this cannot be used against him or her as such.

What about potential additional rights that such a status may bring? The Strasbourg institutions have given interests of national or ethnic minorities only very limited special prevalence. In 1997 the European Commission of Human Rights recognized that the protection of linguistic minorities was a legitimate aim for states to pursue when interfering with human rights of others. It specifically referred to the protection offered to these minorities in both the relevant national constitution and the European Charter for Regional or Minority Languages.[113] In 2001 the Court, in the case of *Noack,* dealt with the transfer of an entire village community in the east of Germany for the benefit of a coal mine. It held that special vigilance on its part was required, since many people in the village belonged to a minority and 'as such were entitled to special protection – as is attested by the Constitution of the *Land* of Brandenburg'.[114] In the same year though, in *Gorzelik*, a Chamber of the Court refrained from giving a definition of a national minority. It reasoned that not even the Framework Convention gave a definition.[115] Nor did the domestic law concerned. Amongst other reasons it did not accord special weight to possible interests of the applicants as presumably being

109 See e.g. ECtHR, *Sidiropolous v. Greece*, 10 July 1998 (Appl.no. 26695/95); ECtHR, *Stankov & the United Macedonion Organization of Ilinden v. Bulgaria*, 2 October 2001 (Appl.nos. 29221/95 and 29225/95).

110 The case dealt with a minority of the total number of railway employees in the United Kingdom.

111 ECtHR, *Young, James and Webster v. The United Kingdom*, 13 August 1981 (Appl.nos. 7601/76 & 7806/77) para. 63.

112 ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, 2 October 2001 (Appl.nos. 29221/95 & 29225/95) para. 89.

113 EComHR, *Polacco & Garofallo v. Italy*, 15 September 1997 (Appl.no. 23450/94). These and the following cases have been selected on the basis of references to the Framework Convention in them.

114 ECtHR, *Noack a.o. v. Germany* (admissibility), 25 May 2000 (Appl.no. 46346/99).

115 ECtHR, *Gorzelik a.o. v. Poland* (chamber judgment), 20 December 2001 (Appl.no. 44158/98) para. 62.

members of a national minority. In the Grand Chamber judgment in the same case the Court confirmed its stance and added:

> [P]ractice regarding official recognition by States of national, ethnic or other minorities within their population varies from country to country or even within countries. The choice as to what form such recognition should take and whether it should be implemented through international treaties or bilateral agreements or incorporated into the Constitution or a special statute must, by the nature of things, be left largely to the State concerned, as it will depend on particular national circumstances.[116]

Put differently: since there is no consensus on this issue within Europe, the state parties are given a broad margin of appreciation. A series of applications by Gypsy families against the United Kingdom on the lack of caravan sites to sustain the traditional traveling lifestyle confirms such a conclusion. In that context the Court was reticent to take on more than a purely supervisory role, thus leaving a broad margin to the state. The applicants had pointed to the increasing support among states for the Framework Convention as a sign that the specific needs of minorities were gaining recognition. The Court, however, held in *Chapman* and other cases that consensus on minority protection in Europe, although it was emerging, was not yet 'sufficiently concrete' to derive guidance from it. It emphasized that this Convention 'sets out general principles and goals but signatory states were unable to agree on means and implementation.'[117]

The Court's case law leads to several conclusions. First, thus far the Court has not used the Framework Convention in any way as a guiding light, although it does sometimes refer in judgments, under 'relevant law', to the Convention and government reports submitted under that Convention.[118] The main reason given is the lack of sufficient consensus within Europe. This argument may not be as strong as it may seem; already in the British Gypsy cases the Court was not unanimous on the issue. Seven out of seventeen judges held in a dissenting opinion that there was an emerging consensus in Europe which *did* recognize 'the special needs of minorities and an obligation to protect their security, identity and lifestyle'.[119] This may point to a development in the direction of more emphasis on minority rights.[120] A second conclusion is that the case law seems internally contradictory. On the one hand the Court uses the apparent lack of consensus to allow a broad margin of appreciation. On

116 ECtHR, *Gorzelik a.o. v. Poland* (Grand Chamber), 17 February 2004 (Appl.no. 44158/98) para. 67.

117 See e.g. ECtHR, *Chapman v. The United Kingdom*, 18 January 2001 (Appl.no. 27238/95) paras. 93-94, and four other judgments issued on the same day. The Court did recognize, in para. 96, that Gypsies are in a vulnerable position and that to a certain degree states are under the positive obligation to facilitate their way of life. For more on these cases see, chapter 2, especially section 2.5.

118 ECtHR, *Nachova a.o.* (Grand Chamber) para. 78 and *D.H. a.o.*, paras. 26-27 respectively. The Court did not use these references when dealing with the merits.

119 ECtHR, *Chapman*, Joint dissenting opinion of judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casedevall.

120 Letschert (2005) pp. 212-213.

the other hand, it has called for 'special vigilance' when the rights of minorities are affected, which would seem to suggest a smaller margin and thus strict scrutiny. The contradiction could be explained by the one factor that distinguishes the different cases: the national recognition of minorities. If a minority is recognized by the state itself and is domestically accorded special protection on that basis, like in *Noack*, the Court apparently applies stricter scrutiny. By contrast, if such national recognition is lacking, in the absence of clear international norms on what a minority is and what its rights are, the Court will apply a more lenient review. If this is indeed, as it seems to be, the underlying rationale of the Court's reasoning, the protection of a minority under the ECHR seems almost arbitrary. One of the ways in which to provide a more objective or at least external yardstick to review the actions of a state party to the ECHR would be to use the reports and views of the Advisory Committee of the Framework Convention.[121] The Committee's pragmatic approach to minority protection, relatively unhindered by the states' own interpretation of which groups are recognized as minorities, would be – at least for the near future – a good alternative to the absence of clarity under international law in general. The use in the Court's case law of the reports of the Committee for the Prevention of Torture, like the Advisory Committee established under a different treaty than the ECHR, is an important precedent in this respect.[122]

4.7 CONCLUSION

The thrust of this chapter was to explore the possible additional protection offered by the norms on non-discrimination and minority protection in the ECHR and the FCNM to those who have lost their home. Article 14 ECHR and its more independent legal twin, Protocol 12, offer protection against arbitrary distinctions made by the state in its laws, policies and actions. For any distinction to pass the test it should, in the Court's formal reasoning, be objectively and reasonably justified. This entails that it pursues a legitimate aim and is proportionate. Since this test has no absolute predictive value in itself, the margin of appreciation left to the state parties and consequently the intensity of review the Court applies, is a more promising way to tell whether difference of treatment will be allowed or not. Four factors help determine this intensity: the type of discrimination, the badge of differentiation, the interest at stake, and the presence and degree of consensus in Europe. I have argued that in most cases of housing lost by minorities during conflict and of any subsequent restitution policy most indications point in the direction of strict Court review. However, there is no guarantee for strict scrutiny to be applied. Such strict scrutiny by an international court would be a valuable asset for an individual who has lost faith in the neutrality of his

121 A first clear reference in that respect is to be found in: ECtHR, *D.H. a.o. v. the Czech Republic* (Grand Chamber), 13 November 2007 (Appl.no. 57325/00) para. 192.

122 See e.g. ECtHR, *Dougoz v. Greece*, 6 March 2001 (Appl.no. 40907/98) and ECtHR, *Khudoyorov v. Russia*, 8 November 2005 (Appl.no. 6847/02).

or her own state, especially in a post-conflict period. More reasoned Court judgments are needed to clarify this point. And even if clarity is reached, an individual applicant is still faced with burden of proof issues, of which the underlying system has not been spelled out unequivocally by the Court yet. Although the protective umbrella of the ECHR is large, it is not entirely clear where the holes in the umbrella are.

Minority protection as a notion includes the idea that specific non-dominant groups in society should be given additional protection *beyond* the general protection against discrimination. The Framework Convention is one of the first legally binding instruments to do so. Due to the sensitive nature of minority protection – many states are still fearful that it is the first step on the path to secession – the Convention is programmatic in form. It includes several vaguely formulated provisions, and does not contain a complaints procedure. As such the protective mechanism is based on monitoring through dialogue instead of through adversarial proceedings. In spite of the weaknesses of the Framework Convention, such as the absence of a definition of what a national minority is, the Advisory Committee has played an active role. Its scrutiny has gone beyond a general review of anti-discrimination legislation and has taken due consideration of the discriminatory effects of governmental action on minorities. In this way, and through its contacts with NGOs, the Advisory Committee is able to assess the factual effects of official regulations and policies on minorities. Although the views of the Committee are not binding, this in-depth approach does justice to the specific vulnerable situation of minorities. Thus what it lacks in binding force, the Committee makes up for in focus and attention to local realities.

In the context of housing restitution this means that not only national legislation has been assessed but equally so local implementation or the lack thereof. The Framework Convention not only guarantees non-discrimination, but also requires states to involve minorities in policies that especially affect them. Thus restitution policies should be set up in consultation with those minorities that have been affected by displacement during conflict.

The situation under the European Convention on Human Rights seems to be exactly opposite to the one under the Framework Convention: the supervisory mechanism works through individual complaints and binding Court rulings, but the norms contained in the ECHR are not specifically geared towards the protection of minorities. The Court's case law seems on the one hand to acknowledge the vulnerable position of minorities, but on the other hand it does not in general attach a strict level of scrutiny to that observation. Although the stance is under discussion among the Strasbourg judges, as dissenting opinions show, the Court as yet does not consider that there is sufficient consensus on the issue of minority protection among the state parties to derive guidance from it. Thus far the protection minorities may claim is for the most part the same as that of any other person claiming the right to non-discrimination, with only minor exceptions.

The difference between the two mechanisms is striking. The Framework Convention's norms are more flexibly formulated than those in the ECHR, but at the same time tailored to the needs and rights of minorities. The Advisory Committee has a keen

eye for matters that directly or indirectly affect minorities, although clear legal rules do not follow from its practice of what is still mainly a factual assessment. The ECHR on the other hand contains clear, but very general norms. Due to this general character and the international lack of consensus on which groups qualify for minority protection, the Court's case law only haphazardly gives minority interests as such special prevalence.

In the light of the framework of Diehl, Ku and Zamora the ECHR norms on non-discrimination may only partly qualify as norms capable of being communicated clearly. Although the basic elements of these are clear, the developments concerning indirect discrimination are only in their infancy. Equally, the level of scrutiny is not explicitly spelled out, but has to be inferred from the Court's not always entirely systematic judgments. The norms on minority protection would probably not qualify under the framework at all, since neither the text of the Framework Convention is perfectly clear on all points nor is the Advisory Committee's approach a preponderantly legal one. As such, the level of predictability is rather low. The Court's case law on minority protection, as proven by its self-declared lack of guidance on the issue, certainly would not either. According to the theoretical framework one of the three crucial elements for effectiveness of a norm, its clarity, is thus rather weak. The multiple problems minorities face in regaining their homes seem to be not so silent witnesses of that conclusion.

The Framework Convention explicitly links its norms to the ECHR. It would be advisable if it would also work the other way around. As suggested above, the Court could use the Advisory Committee as a fact-finder, by using the information from its opinions. The strong supervisory system of the ECHR could thus be strengthened by the use of data available within the Council of Europe system on minority issues. In that way minority interests could be taken into account more easily in proceedings at the European Court of Human Rights. In this respect, one could say that it is not only the eye of the beholder that matters, but also the focus of the eye.

CHAPTER 5
RESTITUTION AS A REMEDY FOR HUMAN RIGHTS VIOLATIONS

5.1 INTRODUCTION

This study focuses on the *restitution* of housing. Restitution – or *restitutio in integrum* as it is often called, using its Latin origin[1] – is one of the ways in which a violation of international law can be remedied. Before embarking on an inquiry into the right to housing restitution as a distinct and specific right in the next chapter, I will in this chapter look at restitution as a remedy. In order for such a remedy to become relevant, there will first have to be a violation of a human right. In the present context these are primarily the right to respect for the home and the right to property protection, as elaborated upon in earlier chapters.

Remedies have a double meaning in the English language. On the one hand they point to access to justice in case of alleged violations of the law. Access to justice is the possibility to lodge a complaint before a judicial, administrative or other body that can redress the harm done. This is the procedural notion of remedies. On the other hand remedies have a substantive meaning. They relate to measures taken to 'make good the damages caused.'[2] Whereas the former concerns the availability and form of the procedure, the latter concerns its outcome.[3] The confusion this gives rise to in English, is absent in other languages. In French for example, different words are used: *recours* and *réparation* respectively. In this chapter, I will focus on the substantive meaning of remedies, often called reparations. The procedural notion of remedies will be dealt with in part two of the present research, which deals with the institutional framework.

In this chapter the question of restitution as a remedy for human rights violations will be looked into. First of all, this approach entails an assessment of the place of restitution among other reparations under international law. Secondly, I will look at

1 S. Haasdijk, 'The Lack of Uniformity in the Terminology of the International Law of Remedies', *Leiden Journal of International Law* vol. 5 (1992) pp. 245-263, see p. 250.

2 Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations', *Tulane Journal of International and Comparative Law* vol. 10 (2002) pp. 157-184, see pp. 167-168.

3 Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press 2005, 2nd ed.) pp. 7-9. 'Access to relevant information concerning violations and reparation mechanisms' has been recognized as a third aspect of remedies in: Commission on Human Rights resolution 2005/35, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 19 April 2005, UN Doc. E/CN.4/2005/ L.10/Add.11, principle 11(c).

restitution in the context of human rights. Thirdly, the chapter will zoom in on restitution as a form of reparation under the European Convention.

5.2 REMEDIES FOR VIOLATIONS OF INTERNATIONAL LAW

A remedy presupposes a wrong. Thus the rules which govern the consequences of wrongful conduct under international law are of importance for present purposes. These rules have been codified in the context of wrongful conduct of states by the International Law Commission (ILC) in the *Articles on Responsibility of States for Internationally Wrongful Acts* (hereafter: ILC Articles).[4] State responsibility arises (Art. 2) when an act (or omission) can be attributed to the state concerned under international law and when it 'constitutes a breach of an international obligation' of that state. These requirements are cumulative. The responsible state has the duty 'to cease that act, if it is continuing' and to 'offer appropriate assurances and guarantees of non-repetition, if circumstances so require.'[5] The obligation of cessation arises from the general norm of acting in conformity with international law.[6] In this sense the duty of cessation exists independently of a duty of reparation. Nevertheless, depending on the circumstances, it can *also* be part of reparations. For example, the cessation of denial of access to someone's home may in effect amount to partial reparation – partial, since arguably material and or immaterial harm caused by the denial of access will also have to be remedied.

The state responsible for the wrongful act is obliged to make full reparation for material or moral injury or damage caused by that act (Art. 31). This principle of international law has been recognized by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case.[7] The PCIJ added that reparation 'is the indispensable complement of a failure to apply a convention and there is no need for this to be stated in the convention itself.' Its successor, the International Court of Justice (ICJ), confirmed this in the *LaGrand* case.[8] This position is relevant for our subsequent inquiry, since it offers the possibility for international courts to assume the power to afford remedies, even if the treaty under which they operate does not explicitly attribute them this power.[9]

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4 *Report of the International Law Commission, fifty-third session*, UN Doc. A/56/10 (not yet published). Also to be found in: James Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press 2002). All references to articles between brackets in this chapter will be to these Articles, unless otherwise specified.

5 Article 30. See also: Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press 2003, 5th ed.) p. 714.

6 Shelton (2005) p. 149.

7 PCIJ, *Chórzow Factory (Jurisdiction) (Germany v. Poland),* 26 July 1927, Series A, no. 9, p. 21. See also UN Doc. A/56/10, p. 223.

8 ICJ, *LaGrand (Merits) (Germany v. United States of America)*, 27 June 2001, para. 48.

9 Shelton (2005) p. 52.

What then should reparation consist of? In a later phase of the proceedings of the *Chorzów* case, the PCIJ formulated a definition which is still used today:

> Reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[10]

The aim of reparations in the most technical sense is thus to turn back the time as if nothing bad has happened, the reparation functioning as a kind of magical wand. The general and comprehensive notion of reparation[11] can take several specific forms: restitution, compensation and satisfaction, separately or in combination (Art. 34). Article 35 describes restitution as follows: 'to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.' Thus two exceptions to the duty of restitution exist. The first is related to the circumstances of the wrongful act. A destroyed house, for example, cannot be restituted, for the simple reason that it no longer exists. A poignant example is the 2007 judgment of the International Court of Justice in the case of Bosnia and Herzegovina against Serbia. Although the Court held that Serbia had violated its legal obligation to prevent genocide in the Bosnian town of Srebrenica, the Court seemed to conclude that *restitutio in integrum* was not possible in relation to genocide.[12] The second exception is related to the capacity or capability of the wrongdoing state: if for that state the duty of restitution would involve a much heavier burden than compensation, then the latter may be called for. Since this may not always be in the interest of the injured state, this exception is rather one of pragmatism than of justice for the wrong done.

Compensation is a secondary form of reparation in the sense that a state has the obligation of compensation for damage 'not made good by restitution', covering 'any financially assessable damage including loss of profits insofar as it is established' (Art. 36). Compensation thus concerns all forms of reparation which can be paid in cash or kind.[13] In the context of a house lost, compensation may therefore consist of alternative housing.

Satisfaction, as the third form of reparation, comes into play when the other two cannot constitute full reparation. Satisfaction can be provided in multiple ways: a state

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10 PCIJ, *Chorzów Factory (Merits) (Germany v. Poland)*, 13 September 1928, Series A, no. 17, p. 47. See for other case law references: Shaw (2003) p. 715.

11 Theo van Boven a.o. (ed.), *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, SIM Special* vol. 12 (1992) p. 6.

12 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Merits) (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 460.

13 Ibid., pp. 6-7.

can formally acknowledge the wrong done, express its regret, formally apologize or choose another appropriate modality (Art. 37), such as an assurance of non-repetition.[14]

5.3 RESTITUTION AS THE PREFERRED REMEDY

The injured state can in principle choose between the various available modes of reparation it wants to claim. For example, if it prefers compensation over restitution it can claim accordingly.[15] But apart from this freedom of choice for the injured state, it is relevant to see what the preferred order is under international law. A hierarchy of modes of reparation does exist.[16] From a theoretical perspective this can be shown by the Articles themselves: compensation and satisfaction only become relevant to the extent that restitution does not suffice to provide full reparation. Such an approach was also followed by the PCIJ in the *Chorzów Factory* case, in which it held that there was a duty on the wrongdoing state in the case at hand to 'restore the undertaking and, if this be not possible, to pay its value at the time of its indemnification, which value is designed to take the place of restitution which has become impossible.'[17] Restitution is thus the primary means of reparation.

In practice the situation is less clear. Restitution is a rather rare remedy in international arbitration and compensation is sought much more often. Already in the 1980s, the claim was made that the divergence between principle and practice is so extensive that the principle of the primacy of restitution is in itself misleading.[18] In order to assess whether general practice indeed requires that we discard with the principle altogether, it is necessary to look into the advantages and disadvantages of restitution as a remedy.

The most important disadvantages are enumerated by Gray in her monograph on remedies: legal restitution may cause clashes or divergences between international and national law which may in turn diminish or annihilate the effect of international judicial decisions in national legal systems. The payment of cash as compensation may in those cases be easier. Secondly, the passage of time since the enactment of the wrong may make restitution rather difficult or even impossible. One could think of a new inhabitant of an illegally taken home. With each subsequent generation, restitution of the house to the original inhabitant or his heirs will become more difficult in a practical sense and more unjustifiable in a moral sense. Finally, restitution may not be adequate reparation for the damage done.[19] Medical care does not by itself serve as restitution for torture. These disadvantages, according to Gray explain why restitution

14 Shaw (2003) p. 720. Article 37 specifies that satisfaction 'shall not be out of proportion to the injury and may not take a form humiliating to the responsible state.'
15 See the ILC's *Commentary*, pp. 244-245.
16 Antonio Cassese, *International Law* (Oxford: Oxford University Press 2002, 2nd ed.) p. 259.
17 *Chorzów Factory (Merits)* p. 48. See the ILC's *Commentary*, p. 239, for case law references.
18 Christine Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press 1987) p. 13.
19 Ibid., pp. 13-16.

is not often used in international dispute settlement. Nevertheless, she admits that there is 'not sufficient arbitral practice to provide clear guidance to a tribunal as to when *restitutio in integrum* would be a suitable remedy and when not.'[20]

Although practice thus does not unequivocally confirm the primacy of restitution, neither does it exclude it in principle. Indeed, all the disadvantages mentioned are of a *practical* nature. The incongruity of national and international legal systems is a rather awkward shield for a wrongdoing state to hide behind. It runs counter to an effective system of state responsibility. This is why Article 32 stipulates that the 'responsible state may not rely on the provisions of its internal law as justification for failure to comply with its obligations' to make full reparation. Thus either national law should be changed or not be applied in such a case. The second disadvantage, the lapse of time, is more an argument in favor of rapid dispute settlement than against the principle of restitution as such. Finally, the disadvantage of inadequacy would be a convincing argument against the *exclusive* use of restitution. The principle, by contrast, posits the primacy, but not the exclusivity of restitution. Therefore, if restitution cannot – or not entirely – make good the wrong inflicted, then the other ways of reparation can be used to complement it.

On the other hand, the advantage of restitution is that it is most in conformity with the general aim of reparations: wiping out the consequences of the illegal act and restoring the situation as it was before that act.[21] Restitution is thus the best road forward to achieve the goal for which the whole notion of reparations was developed in the first place. This is not just an advantage of principle, but also of practice, if we accept that the injured party's interests are best served by a return to the *status quo ante*. In addition, it does justice to the idea that a right is more than a commodity, a violation of which can always be traded off monetarily by way of compensation. In relation to the latter, it may be remarked that an obligation of restitution could be a greater incentive for state authorities to change their policies or actions than the mere financial obligation of compensation.

Concluding on the issue of hierarchy of reparations, we have seen that the primacy in principle lies with restitution. The other means of reparation are subsidiary. General legal practice on the international level does not offer full support for this, but neither does it exclude it. The underlying reasons for the limited use of restitution are practical, not principled, and can be overcome. The advantages of restitution can be argued to outweigh the disadvantages.

20 Ibid., p. 16.

21 See also the ILC's *Commentary*, p. 238. And: Felipe H. Paolillo, 'On Unfulfilled Duties: The Obligation to Make Reparations in Cases of Violations of Human Rights', in: Götz a.o. (eds.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (Berlin: Springer 1999) pp. 291-311, see p. 303.

5.4 RESTITUTION AS REPARATION FOR HUMAN RIGHTS VIOLATIONS

After having surveyed the situation under the general law of state responsibility, it is time to zoom in on the specific field of human rights. The first question in this context is whether the principles as laid down in the ILC Articles, which have been designed to regulate legal relations between states, can be transposed to those between individuals and states.[22] A first indication towards an answer to this question can be found in the Articles themselves. Article 33 stipulates that although the Articles concern the duties owed towards other states, they are without prejudice to 'any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' In its *Commentary* the ILC points out that in the context of human rights individuals are the 'ultimate beneficiaries' and in that respect the holders of rights. Whether state responsibility can be invoked by individuals directly at the international level, instead of through their states, depends on the rules and mechanisms at stake. Human right treaties may provide for a right to individual application.[23] The existence of a right is thus to a certain extent independent of the possibility to invoke it internationally. This can be clearly seen in the adjacent field of international humanitarian law (IHL), where rights for individuals exist, although these individuals have almost no possibilities to enforce them. There is no general international mechanism through which they can invoke their rights.[24] The possibilities to lodge claims at the national level are therefore all the more important.[25] Although the ILC Articles codify principles on state responsibility, this does not rule out the continued existence of principles and rules on the topic. The Articles concern inter-state relations. Other relations, such as those between individuals and states, can exist outside these Articles.

A second argument for the possibility of extending state responsibility rules to individuals could be made as follows: the ICJ in its Advisory Opinion *Reparation for Injuries Suffered in the Service of the United Nations* recognized that a non-state entity – the international organization of the United Nations – had the right to claim repara-

22 For a more general discussion on the applicability of the *Articles* on human rights law, see: Rick Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century', in: Monique Castermans-Holleman a.o. (ed.), *The Role of the Nation-State in the 21st Century* (The Hague: Kluwer Law International 1998) pp. 91-116, see especially pp. 98-101.

23 ILC *Commentary*, pp. 234-235. See also: Nigel S. Rodley, 'The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance', in: Lutz a.o. (eds.), *New Directions in Human Rights* (Philadelphia: University of Pennsylvania Press 1989) pp. 167-194, see p. 172. And: Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law', *International Review of the Red Cross* vol. 84 (2002) pp. 401-434, see p. 418.

24 Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', *International Review of the Red Cross* vol. 85 (2003) pp. 497-527, p. 525.

25 Riccardo Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview', *Journal of International Criminal Justice* vol. 1 (2003) pp. 339-347, see pp. 342-344.

tion at the international level from a state.[26] Extending this, one could argue that if other new subjects of international law arise, they too can claim. Individuals have been recognized as being such subjects of international law.[27] To the extent that they are accorded rights under international law, they should therefore have the possibility to claim. Again, this points to the possibility to claim, not to a guarantee to do so. Such a (procedural) guarantee only arises in the context of regimes of treaties or international organizations which envisage it.[28]

The possibility thus exists. What about the necessity of transposing the principles? A strong argument of cogency can be made. This argument starts with three basic assumptions. The first is the general principle that every violation of a substantive rule of international law requires a remedy. The second is that states are under a general obligation to respect and ensure human rights. The third is that individuals, as stated in the previous paragraph, are the main beneficiaries towards which the duty of human rights observance is owed. If one accepts these three assumptions, there can be no other logical conclusion than the following: individuals should have a right to reparation applying the ILC Articles by analogy.

Tomuschat, who puts forward such trains of thought, is very cautious himself. He even concludes that establishing an individual right to reparation would be a 'progressive development of the law and not [a] codification of existing rules.'[29] Others, such as Kamminga, have argued that such an entitlement already exists under international law.[30] To answer the question more conclusively it is necessary to look at the practice of human rights institutions. In that context the possibility to complain, and thus to lodge a claim on the international plane exists. But have the supervisory or adjudicative mechanisms provided for or even ordered reparations to be made in the cases in which they found a violation of a human right? More specifically, have they ordered restitution?

Before delving into this question, one should be aware that the filing of claims before international institutions often requires prior exhaustion of domestic remedies.[31] This follows from the subsidiary nature of those institutions. The national state concerned is under a duty to provide a remedy. This subsidiary international role entails that human rights institutions can both indicate what procedural and substantive remedies a national state should provide and can also themselves recommend or order specific reparations to be made, but only *if* the national level has failed to play its role.

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26 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, 11 April 1949.

27 Cassese (2005) p. 150.

28 Ibid.

29 Christian Tomuschat (2002) see p. 173.

30 Menno Kamminga, 'Legal Consequences of an Internationally Wrongful Act of a State against an Individual', in: Tom Barkhuysen a.o. (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague: Martinus Nijhoff Publishers 1999) pp. 65-74, see p. 74.

31 Shaw (2003) p. 730. It therefore often is an admissibility requirement: see e.g. Art. 35(1) ECHR.

The International Covenant on Civil and Political Rights (ICCPR) stipulates in Article 2(3) that states have a duty to provide an effective remedy in case of a violation of the human rights protected in the Covenant and that individuals have a concomitant right. The Human Rights Committee (HRC) has held that Covenant violations in general entail 'appropriate compensation' and that reparation can involve 'restitution, rehabilitation and measures of satisfaction'.[32] In its own views on individual applications in which it found a violation, the HRC has always found this obligation of reparation on the state to apply. Although the ICCPR provides no express basis for the HRC to indicate which remedies should be used, the Committee has done so as part of an 'inherent authority' of its role as monitor of state compliance with the Covenant.[33] Gradually, it has gone beyond general findings and started to give specific indications on how to remedy the violation, including specific monetary amounts of compensation, amendments of national laws, public investigations and even restitution, of liberty, employment and property.[34] The latter was ordered in cases concerning property deprivations in the Czech Republic. In the *Des Four Walderode* case the HRC held that the state was under an obligation to provide the applicants with an effective remedy 'entailing in this case prompt restitution of the property in question or compensation therefor.'[35] And in *Brok* it held that the remedy 'should include' these reparations.[36] Although the views of the HRC are not legally binding *stricto sensu*, they can be seen as the most authoritative interpretations of the ICCPR. This may explain why the HRC's indication of specific remedies is formulated as part of a general obligation under the Covenant, which *is* legally binding as a treaty. In spite of this, the compliance of states with the HRC's views on reparations seems very low, a study done in 1999 suggests.[37] In this context, the requirement to comply is rather a moral or quasi-judicial carrot than a legal stick.[38]

The HRC's position does not seem to reflect the preference for restitution as the most appropriate reparation under international law. Compensation seems to be at least on an equal footing and many other forms of reparations have been indicated by the HRC. Even in specific cases involving deprivations of property, neither restitution nor compensation is given clear primacy. What the Committee's position does indicate, however, is that restitution is a recognized and appropriate form of reparation in

32 Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 16.
33 Shelton (2005) p. 178.
34 Ibid., pp. 183-184, including specific references to case law.
35 HRC, *Des Fours Walderode v. the Czech Republic*, 30 October 2001 (Comm.no. 747/1997) para. 9.2.
36 HRC, *Brok v. the Czech Republic*, 31 October 2001 (Comm.no. 774/1997) para. 9.
37 Paolillo (1999) pp. 294-295.
38 Eckart Klein, 'Individual Reparation Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee', in: Albrecht Randelzhofer & Christian Tomuschat (eds.), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers 1999) pp. 27-41, see p. 36.

specific cases and that it is an element of a more general obligation for states to provide remedies for human rights violations.

At the regional level, the Inter-American Court of Human Rights has held in the *Velásquez Rodríguez (Compensatory damages)* judgment that 'that every violation of an international obligation which results in harm creates a duty to make adequate reparation'. Although it acknowledged that compensation was the most usual way of doing so, it also held that *restitutio in integrum* was the starting point to counter the harm done.[39] It took a very broad view of the latter though, including 'the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.'[40] Effectively, this amounts to a broad notion of restitution which includes both a return to the situation before the harm was done and compensation. The legal basis for such an approach is to be found in Article 63(1) of the Inter-American Convention on Human Rights, which stipulates that when the Court has found that a Convention right has been violated, it:

> shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

This provides a solid basis for remedial action by the Court, which it has indeed used. Both the Court and the Commission have often required states to take specific measures, including restitution where possible,[41] to remedy violations.[42] They have thus gone beyond mere awards of compensation. Nevertheless, it should be noted that the Court has the discretion to award restitution or compensation ('if appropriate').

The African system of human rights seems to follow suit. The African Commission of Human and Peoples' Rights has accepted the principle of reparations. In spite of an absence of express authority in the African Charter on Human and Peoples' Rights or in its own rules of procedure, it has been developing a practice of providing remedies, including declaratory relief, compensation and restitution.[43] The Protocol establishing a Court to the Charter system, does stipulate in Article 27 that if 'the Court finds that

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39 IACtHR, *Velásquez Rodríguez v. Honduras (Compensatory damages)*, 21 July 1989 (Series C, No. 7, Case No. 7920) paras. 25-26.

40 Ibid., para. 26.

41 Scott Davidson, *The Inter-American Human Rights* System (Aldershot: Darthmouth 1997) p. 216. For full references to the Court's restitution case law, see: Douglas Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights', in: K. De Feyter a.o. (eds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerp: Intersentia 2005) pp. 191-223, see p. 197.

42 Shelton (2005) pp. 285-289.

43 Gino J. Naldi, 'Reparations in the Practice of the African Commission on Human and People's Rights', *Leiden Journal of International Law* vol. 14 (2001) pp. 682-693, see p. 685.

there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.'

Overall, the practice of the global and regional human rights mechanisms dealt with here does not seem to clearly single out restitution as the preferred form of reparation. All mention restitution as a possibility, but only apply it when appropriate, in a tailor-made fashion. This may be explained by the fact that in the case of human rights violations restitution may be especially difficult or even impossible.[44] Still, I would argue, a house lost is something different than a tortured or killed individual. In the former situation restitution is not in principle impossible.

Another indication militating against a *specific* right to restitution at the international level is that the award of reparation is at the discretion of the supervisory institution involved. Such institutions therefore function as instruments which can be used by the individual against the state to a limited extent only. The general obligation upon states under international law to provide redress for violations, preferably through *restitutio in integrum*, is not complemented by a concomitant possibility for an individual to enforce a right to reparation in the international arena when his human rights have been violated. This is an asymmetry that has not gone unnoticed in human rights forums and to which I will turn in the next section.

5.5 THE BASIC PRINCIPLES: TOWARDS A RIGHT TO RESTITUTION?

At the end of the 1980s, the Sub-Commission on Prevention of Discrimination and Protection of Minorities,[45] a subsidiary body of the UN Human Rights Commission, started the quest for universal principles on reparations for victims of human rights victims.[46] In 1989 it asked one of its members, Theo van Boven, to prepare a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. The aim was to develop international standards to ensure that victims of these violations 'have an enforceable right to restitution, compensation and rehabilitation, as appropriate, duly recognized at the international level.'[47] A process of drafting, research and redrafting started with the involvement of Van Boven, of independent expert Cherif Bassiouni from 1998 onwards, and of Chairperson-Rapporteur Alejandro Salinas, starting 2002.[48] Numerous

44 Paolillo (1999) pp. 304-305.

45 Later called the Sub-Commission on Promotion and Protection of Human Rights.

46 Shelton (2005) p. 144. Earlier, in 1985, the UN General Assembly had already recognized that victims of violations of fundamental rights should, where appropriate, receive restitution: UN GA Res. 40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, principle 8.

47 Theo van Boven, 'The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms', in: Gudmundur Alfredsson & Peter Macalister-Smith (eds.), *The Living Law of Nations* (Kehl: N.P. Engel Verlag 1996) pp. 339-354, see p. 340.

48 Shelton (2005) p. 146.

drafts of basic principles and guidelines were submitted and commented upon by member states of the UN. Controversy centered on the scope and on the binding nature of the principles. The questions of scope were whether serious violations of humanitarian law should be included – which was eventually done – and whether the focus should be on gross and serious violations only or on all human rights' violations. The first approach was taken. As to the issue of the binding nature, the United States, among others, insisted that the principles were aspirational and certainly not a statement of existing law.[49] During the process, the Commission on Human Rights (CHR) called upon 'the international community to give due attention to the right to restitution, compensation and rehabilitation for victims of grave violations of human rights.'[50] According to Paolillo, the 'true intention' of the CHR was to require states indirectly to fulfill their general obligation under international law to remedy unlawful acts.[51] This may be correct to the extent that states were asked to submit information on national reparation laws; the venue to create rights for individuals was apparently a focus on the state's duty to legislate in this context. From such a perspective, the *Basic Principles* can be seen as a global guidebook indicating the framework within which national laws should fit. Although the perspective is seemingly that of the individual,[52] the state's duties are in reality the focal point of the *Basic Principles* – rights of individuals and duties of states being of course closely interrelated.[53]

The UN General Assembly finally adopted – without a vote – the *Basic Principles* on 16 December 2005, their official title being *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Interna-*

49 US Mission to Geneva, *General Comments of the United States on Basic Principles and Guideline on the Right to A Remedy for Victims of Violations of International Human Rights and Humanitarian Law* (press release), 15 August 2003.

50 E.g. CHR Resolutions 1994/35, 4 March 1994; 1995/34, 3 March 1995; 1996/35, 19 April 1996; 1997/29, 1 April 1997, as mentioned in: Paolillo (1999) p. 291.

51 Ibid.

52 Looking e.g. at the title of the *Guiding Principles*.

53 A lot has been written on the relationship between duties and rights in the field of legal philosophy. It is often emphasized that the correlation between rights and duties is not an absolute one. A commonly used typology of rights was devised by the American legal philosopher Wesley Newcomb Hohfeld, who distinguished between claim-rights, liberty-rights, power-rights, and immunity-rights. Only the first category qualified, in his view, as a real legal right. In my view, restitution rights can be seen as belonging to that category, although it is not always crystal-clear by whom the duty of restitution is owed in cases of deprivation of the home by other actors than states. In the human rights context, and this is the perspective I adopt, the state in those instances can become involved through the concept of positive obligations – in the most practical sense the obligation to evict the illegal occupier of someone's house. Although I will not further delve into these issues in the context of the present study, it is important to keep this broader context in mind. For further reading and references, see e.g. Elizabeth Ashford, 'The Inadequacy of Our Traditional Conception of the Duties Imposed by Human Rights', *Canadian Journal of Law and Jurisprudence* vol. 19 (2006) pp. 217-235; David Lyons, 'The Correlativity of Rights and Duties', in: Carlos Nino (ed.), *Rights* (Aldershot: Dartmouth 1992) pp. 45-59; Jack Mahoney, *The Challenge of Human Rights. Origin, Development, and Significance* (Oxford: Blackwell Publishing 2007) pp. 85-90; Carl Wellman, *The Proliferation of Rights. Moral Progress or Empty Rhetoric?* (Boulder: Westview Press 1999) pp. 7-8 and 125-127.

tional Human Rights Law and Serious Violations of International Humanitarian Law.[54] This is a formal endorsement, but does not amount to a binding agreement. Nevertheless, the process has clearly put the issue on the international agenda.[55] The principles may start to serve as some form of soft law which may gradually impact national and international practice. Moreover, the fact that they were adopted by the General Assembly gave them increased political weight and may function as an element of emerging customary law on the issue.

Having seen how the principles came into being it is now time to turn to their contents. The first part of the *Basic Principles* is much broader than its title suggests and stipulates the general obligation for states to respect and ensure respect for human rights and humanitarian law (principle 1) and to make their internal laws consistent with international norms in these fields, including 'adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice' (2b) and 'making available adequate, effective, prompt, and appropriate remedies, including reparation' (2c). The *Principles* thus include both kinds of remedies, procedural and substantive.

The second part specifies that this general duty includes equal and effective access to justice for victims 'irrespective of who may ultimately be the bearer of responsibility for the violation' (3c) and effective remedies, including reparation. The second part seems a mere repetition of the first, but when one takes a closer look there is a difference to be seen: under principle 2, access to justice and reparations should be implemented in the domestic legal order. This is a duty of transposition for the direct benefit of the individual. Under principle 3, on the other hand, the emphasis is on these procedural and substantive remedies as part and parcel of the international obligation to respect human rights. Put differently, under principle 2 accountability is mainly downwards towards the individual, under principle 3 upwards, towards the international community. A positive aspect to be noted here is that access to justice should be guaranteed, whether the perpetrator is the state or another private party (or even unknown, one may add).

The third part of the guidelines concerns those violations that constitute crimes under international law and includes duties of investigation and prosecution (4 and 5). Part four stipulates that national statutes of limitations shall not apply if international obligations concerning those violations which are international crimes so provide (6). For all other violations of human rights and IHL national statutes of limitations 'should not be unduly restrictive'(7). One cannot help but notice how weak this latter principle is: no binding language is used ('should' instead of 'shall') and even within this exhortation – rather than obligation – states have a certain margin. This means that the access to justice and the right to reparations can be limited by states to a considerable extent, at least in time. Although it is understandable that societies dealing with past

54 UN GA Res. 60/147.
55 Shelton (2005) p. 144.

abuses want to close this past by way of a *punto final*[56] and to focus on the future, it would be very desirable from the perspective of human rights and thus of the victims to have minimum guarantees on this point. This would, to a larger extent than the *Principles* now provide for, preclude states from barring restitution claims for reasons of political expediency. Parts five and six respectively concern the definition of victims (8 and 9) and their humane treatment (10). Part seven stipulates, in principle 11, the actual core of the *Principles*: remedies 'include the victim's right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; and (c) Access to relevant information concerning violations and reparation mechanisms.' The third right enumerated, access to information, can serve both substantive aims – helping the family of a disappeared person to know what has happened – as well as procedural, by informing victims of the specific ways in which they can use the remedies available. It should be noted that this principle again points to existing international law, thus not adding new norms.

On the issue of reparation in particular, principle 15 stipulates that reparation 'should be proportional to the gravity of the violations and the harm suffered' – again more a desirability ('should') than a reflection of an obligation. Since implementation of reparation decisions has in the past often been a problem, states are exhorted to enforce these decisions. This entails the necessity to set up effective domestic mechanisms to that end (17). Full and effective reparation should be the starting point. This can include 'restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition' (18). Although mentioned as the first possibility, restitution is not given the same formal precedence as in the *Articles on State Responsibility*.[57] Again, objections by states may have been the main cause for this avoidance of strongly worded provisions.[58] Restitution itself is defined as restoring the victim to the situation before the violation occurred (19). Return to one's place of residence and return of property are two of the explicitly mentioned examples of such restitution.

The *Principles* finally stipulate that their interpretation and implementation should be done without discrimination of any kind (25). They do in no way whatsoever restrict other existing norms of human rights or IHL and are without prejudice to a remedy and reparation for victims of all violations in these two fields of law (as opposed to the *Principles'* scope of gross and serious ones) (26).

Taken as a whole, the *Principles* seem to contain somewhat less than what their bold title seems to promise. As we have seen, they do in effect not only focus on establishing a right for individuals, but to a large extent on structuring existing obligations for states. In that respect their approach does not differ as much from the

56 Notion used in the Latin American context for amnesty laws which barred further prosecution of perpetrators of human rights violations.

57 Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal', *Netherlands Quarterly of Human Rights* vol. 24 (2006) pp. 641-668, see p. 666.

58 Shelton (2005) p. 150.

ILC Articles as one would expect. The weak language and the constant references to existing norms of international law seem to reflect that the concerns the UN member states voiced have been taken into account to such an extent that not much news remains. The *Principles* do not create nor even clearly stipulate a general right to restitution, be it only for the reason that their scope is limited to the gravest of violations.

Beyond these points of criticism, the *Principles* can undoubtedly still be seen as a major step forward. First, they take the victim of violations as their point of departure. Not the violations of rights as such, but the needs (and rights) of the victim are the central concern of the *Principles*.[59] This focus is reflected not just in the *Principles*' wording and rhetoric, but also by the fact that they compile and structure a broad range of victim-related standards.[60] Secondly, they can play a very important role in providing guidance for the practice of states, international organizations and others. A salient example is the Bosnian Human Rights Chamber which implicitly relied on them.[61]

The development of the *Principles* engendered a broader discussion concerning reparations. A legal approach to reparations, as opposed to a political one in the form of a general settlement, has been argued to be inappropriate. It has been argued that a right to reparation may be effective and adequate only in a stable state under the rule of law. But in the wake of catastrophes such as armed conflict, as this line of reasoning suggests, requirements of justice should be weighed against what a society is able to handle.[62] The means of reparation may not be available to poor states with weak governments emerging from conflict.[63] These are practical difficulties of potentially enormous extent that have to be reckoned with. Nevertheless, these arguments can be countered by the fact that reparations 'may be the most tangible and visible expression of both acknowledgement and change'[64] after periods of large-scale human rights violations. In that respect they contribute to the reconstruction and reconciliation of the afflicted society.[65] Arguably a legal approach is better than a political compromise to achieve this goal. Moreover, even if one accepts that the burden of an individual right to reparation on weakened states can be too heavy, this argument should not rule out the possibility of such a right altogether. I would argue that it depends on the human right and situation involved. In the case of housing restitution the financial and practical burden is lessened with each house that has not been destroyed. Each of these

59 Zwanenburg (2006) p. 646.
60 Ibid., 667.
61 See section 7.6.
62 Christian Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law', in: Randelzhofer & Tomuschat (1999) pp. 1-25, see p. 21.
63 Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas', *Hastings International and Comparative Law Review* vol. 27 (2004) pp. 157-219, see p. 185-186; Tomuschat (2002) p. 174; Shelton (2005) p. 389.
64 Roht-Arriaza (2004) p. 200.
65 See also chapter 1 on this issue.

can be part of a restitution process without the need to resort exclusively to expensive and full compensation. Maybe it is here that one of the main merits of the *Basic Principles* is to be found; they emphasize a legal approach, but leave room for specific application in specific national situations and for specific rights. In that respect their relative weakness could be their strength.

5.6 WHICH REPARATIONS DOES THE STRASBOURG COURT PROVIDE?

After having surveyed restitution as a remedy under international law and under human rights specifically, I will now assess the situation in the European context. I will elaborate upon what possibilities for restitution the Convention offers. Because of the subsidiary nature of the Strasbourg system, the Convention puts the primary obligation to provide remedies at the national level. Article 13 ECHR guarantees the right to an effective remedy to everyone who has an arguable claim[66] that his Convention rights have been violated 'notwithstanding that the violation has been committed by persons acting in an official capacity.' This claim should be decided by a judicial or other authority which is able to provide redress if appropriate.[67] The protection Article 13 offers can thus be said to be mainly of a procedural nature. Since in this chapter the focus is on the substantive remedies, I will not elaborate on this Article.[68] What is of more interest for the present inquiry is whether the Court itself can and will provide substantive remedies, specifically restitution, once a human rights complaint has found its way to Strasbourg. The Court's power to provide for reparations is laid down in Article 41 which stipulates:

> If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

The text of the article shows that the primary obligation to provide reparation lies with the state; it should provide redress for breaches of the Convention.[69] In that sense Article 41 conforms to the general principle of international law that the state should be given an opportunity to provide redress before international reparation claims can be made.[70] However, this does not entail that applicants in whose case the Court has found a violation, have to exhaust domestic remedies for a second time before they can

66 ECtHR, *Klass a.o. v. Germany*, 6 September 1978 (Appl.no. 5029/71) para. 64.
67 ECtHR, *Silver a.o. v. The United Kingdom*, 25 March 1983 (Appl.nos. 5947/72 a.o.) para. 113.
68 See section 8.4 for more on Article 13 ECHR.
69 ECtHR, *Z. a.o. v. The United Kingdom*, 10 May 2001 (Appl.no. 29392/95) para.103.
70 D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths 1995) p. 683.

claim just satisfaction in Strasbourg.[71] What it does mean is that the Court's role under Article 41 is of a subsidiary nature: its purpose in this context is to 'provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.'[72] The Court's decisions on just satisfaction are binding on the state parties since these have, in acceding to the Convention, undertaken to abide by the Court's judgments. The Committee of Ministers supervises the execution of these judgments.[73]

'Just satisfaction' under the ECHR has a broader meaning than satisfaction under the *Articles on State Responsibility*. The Court has awarded a broad range of just satisfaction: declaratory judgments, awards of pecuniary and of non-pecuniary damages, costs and expenses, and sometimes very specifically restitution. In the first decades of its existence the Court held that its powers to afford just satisfaction were limited to forms of monetary compensation and to declaratory judgments. This position found firm ground in the drafting process of the Convention. When the idea of a European Court of Human Rights was developed, it was originally meant to have the power to take punitive or administrative action vis-à-vis the national wrongdoer and to order the annulment or amendment of national acts. Since the Committee of Experts drafting the Convention was not in favour of this, it decided to limit the powers of the Court in this respect.[74]

In its early judgments, the Court often restricted itself to a declaratory judgment in cases in which it established violations of Convention rights. This shows that the finding of a violation may of itself constitute just satisfaction.[75] During the 1980s the Court increasingly awarded monetary compensation as just satisfaction. The amounts of compensation were simultaneously on the rise.[76] Requests for reparations other than monetary relief were consistently rejected by the Court.[77] In the *Gillow* case, for example, in which the applicants sought to have their residence qualifications on the island of Guernsey restored, the Court held that the Convention did not allow it to

71 E.g. ECtHR, *De Wilde, Ooms & Versyp v. Belgium* (just satisfaction), 10 March 1972 (Appl.nos. 2832/66 a.o.) paras. 15-16; ECtHR, *Barberà, Messegué & Jabardo v. Spain* (just satisfaction), 13 June 1994 (Appl.nos. 10588/83 a.o.) para. 17.

72 ECtHR, *Scozzari & Giunta v. Italy*, 13 July 2000 (Appl.nos. 39221/98 and 41963/98), para. 250.

73 Article 46 ECHR.

74 Montserrat Enrich Mas, 'Right to Compensation under Article 50', in: R.St.J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers 1993) pp. 775-790, see pp. 777-778; Harris, O'Boyle & Warbrick (1995) pp. 683-684; Shelton (2005) pp. 280-281.

75 Gray (1987) p. 155.

76 Jean-François Flauss, *La satisfaction équitable dans le cadre de la Convention européenne des droits de l'homme – perspectives d'actualité* (Saarbrücken: Europa-Institut der Universität des Saarlandes 1995) p. 4. It should be noted that one of the elements that the Court takes into account when assessing the amount of compensation is the temporal scope of the ECHR: a state is not required to compensate for problems which occurred before the entry into force of the Convention, since those cannot be characterized as violations under the Convention. See e.g. ECtHR, *Weissman et autres c. Roumanie*, 24 May 2006 (Appl.no. 63945/00) para. 79.

77 Shelton (2005) p. 281; Tomuschat (2002) p. 163.

make an order of this kind.[78] The general stance it took was that state parties, although bound by the Court's judgments under Article 46,[79] could themselves choose the means of implementing them in their own legal orders.[80]

The reluctance of the Court to say anything on how a judgment should be implemented gradually changed in the 1990s. The first important step was taken in the case of *Papamichalopoulos* (1995), which concerned land expropriation in Greece contrary to Article 1 of Protocol 1 (P1-1). In its judgment on just satisfaction the Court formulated the principle that when it found a breach of the Convention the defendant state was under a legal obligation to 'put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.'[81] It added that, in spite of state parties' freedom to choose how to implement judgments, '[i]f the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself.'[82] Interestingly, the Court lit the torch to show which path the state should follow. The torch, however, was explicitly not its own power or authority. Rather, I would argue, the Court implicitly referred to the general norm under international law that restitution is the preferred remedy in case of a breach. In doing so, it efficiently pointed the attention to a rule generally incumbent upon states without having to expect the criticism that it was acting out of bounds.

The Court has very rarely indicated restitution as the preferred remedy. Sometimes it has indicated the re-opening of trial proceedings in relation to Articles 5 and 6 ECHR.[83] In a case concerning unlawful detention, the Court held that 'by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it' and that the state thus had to 'secure the applicant's release at the earliest possible date.'[84] One of the few examples concerning housing is the judgment of *Brumărescu v. Romania* (2001). The case concerned deprivation of an apartment building in violation of P1-1. The applicant had received no adequate compensation nor had his efforts to recover ownership been successful. The Court specifically indicated the restitution of the building ('should' was the wording used) and established the sum of compensation to be paid by the state if restitution would

78 ECtHR, *Gillow v. The United Kingdom* (just satisfaction), 14 September 1987 (Appl.no. 9063/80) para. 9. Another example, among many others, is: ECtHR, *McGoff v. Sweden*, 26 October 1984 (Appl.no. 9017/80) para. 31.

79 Before the entry into force of Protocol 11, which reformed the Convention's supervisory system (1 November 1998), this was Article 53.

80 ECtHR, *Campbell & Cosans v. The United Kingdom* (just satisfaction), 23 March 1983 (Appl.nos. 7511/76 & 7743/76) para. 16.

81 ECtHR, *Papamichalopoulos a.o. v. Greece* (just satisfaction), 31 October 1995 (Appl.no. 14556/89) para. 34.

82 Ibid. See also: Shelton (2005) p. 199.

83 See e.g. ECtHR, *Somogyi v. Italy*, 18 May 2004 (Appl.no. 67972/01) para. 86; ECtHR, *Stoichkov v. Bulgaria*, 24 March 2005 (Appl.no. 9808/02) para. 81.

84 ECtHR, *Assanidze v. Georgia*, 8 April 2004 (Appl.no. 71503/01) paras. 202-203.

prove impossible.[85] The judgment has been criticized for offering the state a possibility to disobey the restitution order by providing compensation.[86] However, the Court's reasoning is in harmony with international law by ordering restitution as the primary, not as the exclusive, remedy. In addition, the applicant himself had indicated he was willing to consider compensation if restitution would be impossible to implement. In this particular case, the Court's approach is both pragmatic and just, especially considering the fact that ownership of one of the apartments had been obtained by another individual in good faith. The applicant himself lived in one of the other apartments. Partial restitution and partial compensation – the latter for the apartment of the third party – thus makes sense.

A few years earlier, in 1998, the Court had already provided some clarification on restitution as reparation, in the Turkish housing destruction case of *Akdivar*. The Court held that if *restitutio in integrum* was impossible, as in the case at hand, 'the respondent States are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.'[87] Again, a reflection of general international law: the state is free to choose the way of reparation, with restitution being the preferred method. Paradoxically, through these judgments the Court did give to some extent an indication how to remedy – restitution as the primary method – while at the same time preaching its own impossibility to order it. These judgments could thus be called 'groundbreaking',[88] but they break this new ground only in disguise.

In *Scozzari and Giunta* (2002) the Court put even more emphasis on what could be the appropriate remedy. It held that a state party's duty to abide with the Court's judgments under Article 46 does not only mean that the state has to

> pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Furthermore,

85 ECtHR, *Brumărescu v. Romania* (just satisfaction), 23 January 2001 (Appl.no. 28342/95) paras. 22-23. A few months later, in another case in which it had found a violation of article 5, the Court held that the prolonged detention of the applicants would 'necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46 § 1 of the Convention to abide by the Court's judgment.': ECtHR, *Ilaşcu a.o. v. Moldova & Russia*, 8 July 2004 (Appl.no. 48787/99) para. 490.

86 Tomuschat (2002) p. 165. The same criticism could be leveled against later comparable cases, such as *Rabinovici*, a case on post-communist housing restitution. In that case, like in *Brumărescu*, the Court indicated that restitution would place the applicant as much as possible in the situation as it had existed before the human rights violation occurred: ECtHR, *Rabinovici c. Roumanie*, 27 July 2006 (Appl.no. 38467/03) para. 42.

87 ECtHR, *Akdivar a.o. v. Turkey* (just satisfaction), 1 April 1998 (Appl.no. 21893/93) para. 47. See also, e.g., ECtHR, *Orhan v. Turkey*, 18 June 2002 (Appl.no. 25656/94) para. 451.

88 Tomuschat (2002) p. 165.

> subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment.[89]

Apart from the obligation to comply with the Court's judgments on reparations, there is thus a parallel obligation of cessation of the violation; yet another reference to general international law. The combination of freedom and compatibility in this quotation however begs the question of how states should do this. Before long precisely this problem was brought to the Court's attention by the state parties.

The cautious steps of the Court outlined here reflect the need to change the traditional course. This need arose from the enormous increase in applications reaching the Court. A considerable number of these concern repetitive cases: applications relating to the same problem. If in every single of these cases the Court would continue only to award compensation without ordering specific structural changes, it risked getting submerged by the flood of cases coming from the state parties. These states, for their part, increasingly felt the need for guidance on how to change national acts or situations that had been found to contravene the ECHR. In 2004 these combined pressures led to a resolution by the Committee of Ministers in which it invited the Court:

> as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.[90]

The Court took up the challenge a month later in the *Broniowski* judgment, a so-called pilot case.[91] Pilot cases address structural or specific problems with so many potential victims that a high number of repetitive cases threatens to flood the Court.[92] *Broniowski* concerned the property rights of a large group of Poles who had lost their land due to border changes after the Second World War. The Court held that P1-1 had been violated and that, since this concerned a systematic defect in the Polish legal order, the measures to be adopted by Poland should remedy this defect. The Court indicated that Poland either had to 'remove any hindrance to the implementation of the right of the

89 ECtHR, *Scozzari & Giunta v. Italy*, para. 249.

90 Committee of Ministers, *Resolution on judgments revealing an underlying systemic problem*, 12 May 2004 (Res(2004)3). See also: Shelton (2005) pp. 198-199.

91 ECtHR, *Broniowski v. Poland*, 22 June 2004 (Appl.no. 31443/96).

92 Elisabeth Lambert-Abdelgawad, 'La Cour européenne au secours du Comité des ministres pour une meilleure execution des arrêts 'pilote'', *Revue trimetrielle des droits de l'homme* vol. 16 (2005) pp. 203-224, see p. 204. The Court has decided very few pilot cases yet: ECtHR, *Sejdovic v. Italy*, 10 November 2004 (Appl.no. 56581/00); ECtHR, *Hutten-Czapska v. Poland* (chamber judgment), 22 February 2005 (Appl.no. 35014/97); ECtHR, *Hutten-Czapska v. Poland* (Grand Chamber), 19 June 2006 (Appl.no. 35014/97).

numerous persons affected by the situation (…) or provide equivalent redress in lieu.'[93] It was the first case in which the Court gave specific indications to remedy a systemic problem. In the ensuing friendly settlement judgment, the Court did not merely assess the settlement between the applicant and the state, but also the general measures taken by Poland to remedy the systemic defect. The reason given was that 'it is evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand.'[94]

The Court has thus, when the circumstances made this possible, slowly been moving towards more specific indications of judgment implementation. This move has its limits, however. In the case of *Hirst* on voting rights of detainees, the British government specifically referred to the problem of knowing which system would be in line with the European Convention. The Court, however, refused to indicate which restrictions on voting rights would be compatible with the ECHR. In an attempt to indicate the boundaries of its own judicial activism, the Court reiterated its stance that the choice on how to implement judgments remained with the state, under the supervision of the Committee of Ministers. The Court added that it could give more precise recommendations only in two types of cases. First, cases in which it had found a systemic violation (the *Broniowski*-type cases) and, secondly, in exceptional cases in which 'the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure.' But as long as the state parties to the Convention address a matter in different ways, the Court stated that it would not go beyond testing whether the states had remained within the allowed margin of appreciation.[95]

The new developments in the Court's case law described here are relevant for the issue of housing restitution after conflict in two ways. In the first place, the main advances have been made in the field of property protection, in which restitution has been indicated several times as the preferred remedy. Secondly, the phenomenon of pilot cases has the potential to develop into an effective tool for dealing with systematic human rights violations. Such a tool is of special interest for post-conflict situations in which societies have to cope with high numbers of potential violations and victims.[96] Displacement on a large scale and the ensuing need for housing restitution is an example in case.

93 ECtHR, *Broniowski*, para. 194.

94 ECtHR, *Broniowski v. Poland* (friendly settlement), 28 September 2005 (Appl.no. 31443/96) para. 36.

95 ECtHR, *Hirst v. the United Kingdom (No. 2)* (Grand Chamber), 6 October 2005 (Appl.no. 74025/01) paras. 83-84.

96 In a way, the *Broniowski* case was exactly that, since the problems were due to a border change at the end of a war.

5.7 REPARATION: RIGHT OR PROBABILITY?

Although the Court has at times become more specific in its reparation judgments, it is not always clear when the Court will award anything at all and when not. This part of the Court's case law has received a considerable amount of criticism for its lack of clarity, reasoning, and legal certainty.[97] The award of just satisfaction even seems to depend on the character and personality of the applicant or, put more harshly, on the degree of sympathy the Court has for an applicant.[98] And whenever the damages cannot be calculated or when the applicant's calculation is not reasonable, the Court awards just satisfaction based on the principle of equity.[99] Can an individual then have any guarantee that he will receive restitution or compensation or is an application to the ECHR a mere lottery ticket? Again, it has to be stressed that the Court has discretion in deciding to award just satisfaction, as the wording 'if necessary' illustrates. Nevertheless, the requirements the Court has used explicitly and implicitly for awarding just satisfaction can give some guidance.

The first requirement is laid down in Article 41 explicitly: 'if the internal law of the High Contracting Party concerned allows only partial reparation to be made', then just satisfaction is a possibility. The second requirement is that the applicant must himself claim satisfaction. The Court will normally not award such satisfaction *ex officio,*[100] with the possible exception of questions of public policy being involved.[101] Interestingly, unlike under traditional international law, in the Convention system the individual has the possibility to claim before a court on the international level. Although human rights create obligations *erga omnes*,[102] towards all states, and the Convention system offers the possibility of inter-state claims, this possibility is rarely used for obvious reasons of political sensitiveness. Moreover, most of the complaints under the ECHR stem from individuals complaining against their own state of nationality. An exclusion of an individual possibility to claim would lead to the absurd result in which the state of nationality would have to claim against itself in order to obtain damages on behalf of the injured individual. Thus Article 41 should be read in conjunction with

97 Claire Ovey & Robin White, Jacobs and White, *The European Convention on Human Rights* (Oxford: Oxford University Press 2006, 4th Ed.) p. 491; Matti Pellonpää, 'Individual Reparation Claims under the European Convention on Human Rights', in: Randelzhofer & Tomuschat (1999) pp. 109-129, see p. 113.

98 Enrique Mas (1993) p. 789; Gray (1987) p. 156; Shelton (2005) p. 352.

99 Pieter van Dijk a.o., *Theory and Practice of the European Convention on Human Rights* (Antwerp: Intersentia 2006, 4th ed.) p. 262.

100 Harris, O'Boyle & Warbrick (1995) p. 684; Pellonpää (1999) p. 112.

101 ECtHR, *Sunday Times v. The United Kingdom* (just satisfaction), 6 November 1980 (Appl.no. 6538/74) para. 14. One such exception emerged in 2005. In the Russian case of *Mayzit* the Court found a violation of article 3 ECHR, but the applicant had not submitted any claims for just satisfaction. Nevertheless, the Court held that since the violation concerned an absolute right, the Court found it 'possible to award the applicant 3,000 euros by way of non-pecuniary damage': ECtHR, *Mayzit v. Russia*, 20 January 2005 (Appl.no. 63378/00) para. 88.

102 Cassese (2005) p. 262.

Article 34, the right to individual application. The victim in the latter article coincides with the injured party in the former article.[103]

An injured party presupposes an injury and a violation. A violation of a substantive Convention article is indeed the third requirement. Only if the Court has found a violation in the judgment (part) on the merits, does Article 41 come into play.[104] The fourth requirement is that the applicant must have suffered damage, either pecuniary or non-pecuniary. As pecuniary damage the Court has recognized reductions in the value of property, loss of earnings (both past and future), fines, and loss of opportunities. Non-pecuniary damage may involve 'reparation for the anxiety, inconvenience and uncertainty caused by the violation, and other non-pecuniary loss.'[105] Although damage must normally be shown by the applicant, the Court has mostly applied lenient review in cases of non-pecuniary damage.[106] In the latter cases the Court can award just satisfaction 'if it considers that it is reasonable to assume that an applicant has suffered injury requiring financial compensation.'[107] This relative leniency has made awards for non-pecuniary damage much more common than for pecuniary losses.[108] Fifthly, a causal link between violation and injury has to be proven. If this link cannot be shown, then the Court will award no just satisfaction.[109] The standard of proof is very high and many applications for just satisfaction fail to meet this requirement.[110]

Even an applicant meeting all these requirements is not certain of obtaining just satisfaction. The ultimate discretion of the Court is to be found in the last requirement: the Court assesses whether the award is necessary. It is here that the Court's case law is not very predictable. Nevertheless, a number of factors seem to be taken into account when deciding on necessity. First of all, the nature of the violation of the Convention is important.[111] If the breach involved is not of a very serious nature, it is more likely that the Court will hold that the finding of the violation constitutes in itself just satisfaction. In the opposite case, when the Court has held that a violation is very grave, monetary just satisfaction will often be awarded.[112] Another factor of importance is the earlier mentioned sympathy the Court has for an applicant. The applicant's conduct and the criminal offences he or she has committed are sometimes also taken into account. Since this factor is so subjective, no clear conclusions for satisfaction or against it can be drawn from this. Finally, damages are more often awarded in 'routine

103 Enrich Mas (1993) p.776.
104 Pellonpää (1999) p. 112.
105 See e.g. ECtHR, *Comingersoll S.A. v. Portugal*, 6 April 2000 (Appl.no. 35382/97) para. 29.
106 Harris, O'Boyle & Warbrick (1995) pp. 686-687. See e.g. ECtHR, *Abdulaziz, Cabales & Balkandali v. The United Kingdom*, 28 May 1985 (Appl.nos. 9214/80 a.o.) para. 96.
107 E.g. ECtHR, *Romanov v. Russia*, 20 October 2005 (Appl.no. 63993/00) para. 117.
108 Shelton (2005) p. 319.
109 E.g. ECtHR, *Quaranta v. Switzerland*, 24 May 1991 (Appl.no. 12744/87) para. 43, as mentioned in: Van Dijk & Van Hoof (2006) p. 261. See also: Ovey & White (2006) pp. 491-492.
110 Shelton (2005) p. 323, including relevant case law references.
111 Harris, O'Boyle & Warbrick (1995) p. 685.
112 Gray (1987) p. 156. See e.g. ECtHR, *Akdivar v. Turkey* (just satisfaction), 1 April 1998 (Appl.no. 21893/93) para. 37.

and non-controversial substantive violations or procedural violations where there is a pattern of non-compliance.'[113] When the Court agrees on the merits instead of being split, the chances are thus better than otherwise. Additionally, if an applicant is not the first complaining about a situation in which the Court earlier found violations, chances are equally on the rise.

The above shows that many hurdles have to be taken by an individual applicant before obtaining just satisfaction in the form of more than a simple declaratory judgment. It is certain that an applicant does not have an 'automatic' right to an indemnity by the Court.[114] This is caused by the Court's discretion, which is incorporated into Article 41.[115] To increase legal certainty for both the applicants and the respondent states, it would be helpful if the Court's judgments on just satisfaction would be argued more thoroughly. This may also increase the deterrent function of the Court's judgments and thus possibly make state parties more prone to offer a remedy on the national level.[116] For their part, applicants can contribute to their own chances by presenting more detailed arguments concerning the link between violation and damage and concerning the nature – and in the case of compensation, amount – of reparation they ask for. The necessity of this to ensure the future of the Strasbourg system is felt more and more with the rising burden of the case load. The European Court 'will increasingly need to rely' on the arguments of the parties.[117]

Nevertheless, as argued in section 5.6, there is a duty on the state to remedy violations of the Convention within its own legal order as far as possible. In principle, the ECHR therefore does not leave an individual whose rights have been violated without any relief. Some of the hurdles reflect international law: there has to be a wrongful act under the Convention attributable to the state. In such a case the state should remedy the wrong done towards the individual. The most appropriate reparation, if possible, is *restitutio in integrum*. If an applicant can show that the violation caused him or her damages which are not compensated on the national level, the Court is *likely* though not guaranteed to afford satisfaction – especially in case of pecuniary damage, when the amount of damage done often lends itself to calculation. For non-pecuniary damage the Court's discretion is more important and more likely to distort any strong expectations.[118] Just satisfaction is not a right, but neither is it a simple lottery ticket.

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113 Shelton (2005) p. 296.

114 Walter van Gerven, 'Remedies for Infringements of Fundamental Rights', in: Gert Brüggemeier (ed.), *Transnationalisierung des Rechts* (Baden-Baden: Nomos 2004) pp. 67-88, see p. 79.

115 Such discretion and flexibility in application can also be found in the practice of other international human rights institutions: Heidy Rombouts a.o., 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in: De Feyter a.o. (2005) pp. 345-503, see p. 451.

116 See for an argument that punitive damages may be the best way to ensure state compliance: Laplante (2004). The Court has so far always rejected claims for punitive damages though: ECtHR, *Selçuk & Asker v.* Turkey, 24 April 1998 (Appl.nos. 23184/94 a.o.) para. 119; ECtHR, *Cable a.o. v. the United Kingdom*, 18 February 1999 (Appl.nos. 24436/94 a.o.) para. 30. See also: Shelton (2005) p. 360.

117 Shelton (2005) p. 353.

118 Pellonpää (1999) p. 113.

5.8 CONCLUSION

In this chapter I have followed three trails of research: (1) the place of restitution among other reparations under international law; (2) restitution in the context of human rights; and (3) restitution as a form of reparation under the ECHR. As to the first trail, it has been shown that international law puts a twofold obligation on states. First, an obligation of cessation of the wrongful act and, secondly, a duty to make full reparation for injuries caused. Since reparation should as far as possible wipe out the consequences of the act and restore the situation as it would have been had the act not been committed, restitution is the preferred remedy under international law. Although its use is rare in practice, this does not destroy its theoretical primacy.

The second trail started out with the argument that it is theoretically possible and necessary to transpose the inter-state rules on state responsibility for wrongful acts to legal relationships between states and individuals, the main beneficiaries of human rights. The practice of international human rights only reflects this to a certain extent. Although international human rights bodies have all accepted the possibility of restitution as a remedy, they have not clearly pinpointed it as the preferred one. This can be explained by the fact that for many human rights violations restitution is not a possibility. An individual can obtain restitution at the international level, but he has no right to it, since these bodies have discretion in deciding whether to award reparation. Within the United Nations efforts have been undertaken to resolve this asymmetry of state duty without concomitant individual right. The *Basic Principles*, however, do not entirely solve the problem. In spite of their focus on the victim, their contents still very much reflect state obligations without clearly giving restitution formal precedence. Moreover, the formulations used are at some points weak. Nevertheless, the *Principles* are very commendable for their legal approach to reparations. They form a key document that brings together international standards on reparation rights of victims. Finally, and most importantly, they may gradually impact national and international practice.

Finally, the third trail led to Strasbourg and to the practice developed by the European Court of Human Rights. Within the ECHR system the primary obligation of reparation for violations of the Convention is to be found at the national level. If such reparation is only partially possible at that level, the Court can afford just satisfaction. Like its international peers, the Court has a level of discretion in this matter. It has used this discretion to act very cautiously and for decades the Court was reluctant to go beyond declaratory judgments and monetary compensation. Only in the 1990s, partly under the pressure of the state parties to provide more clarity, the Court started to indicate in some cases which specific form of reparation would be the most appropriate. Although it kept emphasizing that states could choose the means of implementation of judgments, it has developed the general principle that states should provide *restitutio in integrum* whenever possible – a clear reflection of general international law. The tool of pilot judgments has strengthened this development by providing specific guidance in cases of large-scale violations.

The development in the Court's position has not meant that an applicant has the guarantee to receive just satisfaction, let alone restitution specifically. The judgments indicating restitution have been few and far in between. Interestingly though, these cases mostly concern property disputes. This shows that although in general restitution may not constitute possible reparation for human rights violations, it can be in the case of housing lost. In addition, better argued applications *and* judgments could prove to be an important impetus in this direction.

The network of rules on restitution in international and human rights law outlined here has not yet grown into a coherent whole. The duties of states are to a large extent established, but the rights of individuals are not. Although specific human rights regimes such as the ECHR offer a right to claim just compensation, there is no directly enforceable right to reparation as such. The European Court has the power to issue binding judgments and has held that on the national level *restitutio in integrum* should be strived for, but it has not itself ordered restitution in a clearly binding way. A recent trend in its case law is that it *indicated*, on occasion, that restitution was the preferred or only possible reparation. Thus the formally professed freedom of implementation for the state has in some cases been subject to a certain degree of confinement. Nevertheless, on the international plane, the duty for the one, the state, is not yet an enforceable right for the other, the individual. In Diehl, Ku and Zamora's theoretical framework the individual right to restitution on the international level is thus not yet a norm that is a 'legal concept that is sufficiently developed to be communicated clearly' in the sense of a right as a binding norm.[119] It can be regarded as a state duty in many respects, however. One side of the restitution coin is thus clearly shining, but the other side is still in need of polishing. In spite of slow but hopeful developments within the ECHR system, for the foreseeable future much will still depend on the systems for redress available at the national level. This shows the need, for the time being, of explicitly stipulating a right to housing restitution in peace treaties or constitutions after the end of armed conflict.

119 See chapter 1.

CHAPTER 6
HOUSING RESTITUTION AS A RIGHT ON ITS OWN?

6.1 INTRODUCTION

The right of refugees and internally displaced persons to return to their homes is imprescriptible. That, at least, was the strongly worded assertion of the Security Council in a resolution on Abkhazia in 2000.[1] Does such a right to return to one's home exist under general public international law and does it imply a right to restitution? The restoration of property rights is one of the recurring characteristics of post-conflict reparation efforts,[2] but is there also a genuine *right* to housing and property restitution? In the previous chapter, we have seen that a state's duty to offer reparation follows automatically from a breach of international law.[3] Restitution is the preferred form of reparation. This does not, however, grant an individual the right to restitution in case of a violation of his or her human rights. Even the *Basic Principles*, couched in the language of individual rights, in reality focus on state duties and do not clearly accord restitution the same formal precedence as under the ILC's *Articles on State Responsibility*.[4] In this chapter, I will assess whether the breach of the rights to respect for the home and to the protection of property and the existence of the right to return give rise to something more: an individual right to housing restitution. The possible existence of such an autonomous right could greatly strengthen the chances of regaining one's home after conflict, since it is then that such a right could serve to limit the state's discretion on what form of reparation to choose. As will be shown, such a right is increasingly considered to be part and parcel of the more general right to return under international human rights law.

Before embarking upon such an assessment, it is important to remember the context and confines of restitution rights involved here. This study is not concerned with all possible instances of loss of the home. Legal, non-arbitrary evictions in the general interest in times of peace or the loss of domicile caused by natural disasters both fall outside the scope of the present research. The focus is rather on housing lost during or in the wake of armed conflict as a result of human rights violations.[5] The beneficiaries

1 United Nations Security Council (UN SC), Res. 1287, 31 January 2000, para. 8. See also section 6.2 on this resolution.

2 Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General*, 23 August 2004, UN Doc. S/2004/616, para. 54.

3 See section 5.2.

4 See section 5.5.

5 Most notably: the rights to respect for the home, property protection, and non-discrimination.

are refugees and internally displaced persons. The analysis concerning the possible existence of a right to housing restitution thus concerns only that situation.

The quest for the possible existence of the right to housing restitution requires us to evaluate the legal status of the various documents in which this right is mentioned. To perform this evaluation, it is essential to shortly indicate what the sources of international law and thus of legal obligation on the international level are. Article 38(1) of the Statute of the International Court of Justice is generally accepted as the authoritative reflection of those sources.[6] The provision mentions treaties, international customary law, and general principles of law. In addition, 'judicial decisions and the teachings of the most highly qualified publicists of the various nations' are mentioned as subsidiary tools to determine rules of law.

As to the first source mentioned, treaties, there is no general multilateral treaty which includes a right to housing restitution. Nevertheless, specific peace treaties have included such a right. I will return to this point in section 6.3. International custom seems, potentially, to be more relevant as a source of law in this respect, since the right to housing restitution has been claimed to be an *emerging* right.[7] To understand a legal rule in that context, one has to look for the two defining elements of customary law: state practice and the existence of an *opinio juris*, the belief that a state is legally obliged to act as it does.[8] The International Court of Justice has specified that practice should include those states 'whose interests are especially affected' and that such a practice should be 'extensive and virtually uniform' and 'have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'[9] In the alternative, in cases in which a rule does not meet these criteria, it could be qualified as so-called 'soft law'. This relates to those texts which do not have the binding force of law, but are nonetheless sufficiently important 'within the framework of international legal development (…) that particular attention requires to be paid to it.'[10] Such 'soft law' can influence international politics and the practice of international organizations and thus indirectly the lives of the displaced, even though it is not legally binding. Finally, the third main source of international law, general principles, will not be studied in this chapter. As far as relevant, they relate more to restitution *as a legal consequence* of an earlier breach of international law and therefore not to

6 Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press 2003, 5th ed.) p. 66; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 2003, 6th ed.) p. 5.

7 COHRE, *Housing and Property Restitution for Refugees and Internally Displaced Persons: International, Regional and National Legal Resources* (COHRE: Geneva 2001) p. 7. Many of the legal resources referred to in this chapter have been found through this publication.

8 G.M. Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff Publishers 1993) p. 81; Shaw (2003) p. 70.

9 ICJ, *North Sea Continental Shelf (Merits) (Germany v. Denmark; Germany v. the Netherlands)*, 20 February 1969, para. 74.

10 Shaw (2003) pp. 110-111.

housing restitution as a right of its own. The texts dealt with in the following sections will be evaluated in the light of the above.

6.2 STOCK-TAKING OF PRACTICE AT THE UNITED NATIONS

First, it is important to shortly review the more general right to return, since a possible right to housing restitution is often seen as offspring of the former right. The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948 contains a general right to return.[11] Article 13(2) provides that 'Everyone has the right to leave any country, including his own, and to return to his country.' The latter part of the provision was added as a kind of afterthought or corollary to strengthen and ensure the right to leave.[12] The right in this formally non-binding Declaration found firmer ground in various universal and regional human rights treaties. The 1966 International Covenant on Civil and Political Rights (ICCPR) includes the right to return in Article 12 on the freedom of movement: 'No one shall be arbitrarily deprived of the right to enter his own country.'[13] As the word 'arbitrarily' indicates, states are given the possibility to limit the right to return. However, such limitations should be strictly interpreted.[14] It is of special relevance to many conflict-related situations of displacement that the minimum requirement for such limitations is their non-discriminatory nature.[15] A refusal to allow the return of refugees and displaced persons who are the victims of ethnic cleansing will thus clearly be contrary to this provision. Such an inference is strengthened by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). This Convention guarantees equality before the law in the enjoyment of the right to return to one's country.[16] The Convention on the Rights of the Child (CRC) recognizes the right of children to enter their own country.[17] It is clear from all these provisions that the 'return' element was understood to refer to one's country in general, not to one's home specifically. Throughout the 1960s to 1980s even declarations of NGOs and expert meetings on the topic only mentioned a general right to return to one's *country*.[18] 'One's country', at least in the ICCPR, does not generally mean that the right is reserved for nationals of the state concerned, but includes a person 'who, because of his or her special ties to

11 UN General Assembly (UN GA), Res. 217 A(III), 10 December 1948.
12 Eric Rosand, 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent', *Michigan Journal of International Law* vol. 19 (1998) pp. 1091-1139, see p. 1130.
13 Article 12(4).
14 UN Human Rights Committee (HRC), *General Comment No. 27: Freedom of Movement*, 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9, para. 21. See also e.g.: Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Kehl am Rhein: N.P. Engel 2005, 2nd ed.) pp. 283-284.
15 Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Dordrecht: Martinus Nijhoff Publishers 1987) p. 132.
16 Article 5(d)(ii).
17 Article 10(2).
18 See: Hannum (1987) pp. 142-158, for an overview of these.

or claims in relation to a given country, cannot be considered to be a mere alien.'[19] Persons who lost their nationality in violation of international law are included in this group.[20]

Not just the scope of the right differed from what we are looking for in this chapter, but also the groups able to claim it. As the right to return to one's country implies that one has left it, only refugees and 'internationally' displaced persons can invoke it. IDPs on the other hand, would not seem to benefit from it. The situation in Cyprus may serve as a clear example of a situation in which people are formally displaced within one state, but *de facto* find themselves in a different state than the one they fled from. In that context, it has been accepted time and again that there *is* a right to return.[21] Moreover, for IDPs specifically, the right to return can be linked to the right to freedom of movement within a state. This right has been recognized in Article 13(1) UDHR, Article 12(1) ICCPR and Article 2(1) of Protocol 4 ECHR. Restrictions to such right should be provided by law and should be necessary and consistent with other rights.[22] Such a right to freedom of movement could imply, in cases of forced displacement contrary to international human rights, the possibility to return to one's place of residence.[23]

This survey of the human right to return shows that it has gained broad acceptance in international human rights law. Nevertheless, the precise scope is more controversial[24] and until the 1980s seems to have been limited to return to one's country. Let us

19 HRC, *General Comment No. 27*, para. 20.

20 Ibid. See also: Nowak (2005) p. 287. He supports the HRC's view, but goes beyond it and argues that even long-term resident foreigners with 'a strong personal and emotional relationship to the country' are protected by this right. The broad interpretation also connects to the symbolic aspect of returning to one's homeland, that is, the place to which one feels most connected. See e.g. Bill Frelick, 'The Right of Return', *International Journal of Refugee Law* vol. 2 (1990) pp. 442-447, see p. 444. For a more restrictive view, see: Guy S. Goodwin-Gill, 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in: Vera Gowland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (The Hague: Martinus Nijhoff Publishers 1996) pp. 93-108, see p. 100. Note that Article 3(2) of Protocol 4 ECHR does limit the right to entry to the territory of the state of which one is a national.

21 Christa Meindersma, 'Population Exchanges: International Law and State Practice – Part I', *International Journal of Refugee Law* vol. 9 (1997) pp. 335-364, see pp. 262-263.

22 Article 12(3) ICCPR. The ECHR does not contain the latter requirement, but states that restrictions should be 'justified by the public interest in a democratic society' (Article 2(4) of Protocol 4 ECHR). It is my contention that discriminatory refusals to allow return cannot under international human rights law fulfill these criteria.

23 Under Article 12 ICCPR states are obliged to prevent forced displacement: Nowak (2005) p. 266. In the case of *Ackla v. Togo*, the Human Rights Committee held that the applicant, who had been evicted from his house, had been barred from returning to his residence without government explanation justifying such a restriction. The Committee concluded that Article 12 had been violated and that the applicant should have his freedom of movement and residence restored to him: HRC, *Ackla v. Togo*, 25 March 1996 (Comm.no. 505/1992) paras. 10-12.

24 See also: Maria Stavropoulou, 'Bosnia and Herzegovina and the Right to Return in International Law', in: Michael O'Flaherty & Gregory Gisvold (eds.), *Post-War Protection of Human Rights in Bosnia and Herzegovina* (The Hague: Martinus Nijhoff Publishers 1998) pp. 123-140, see p. 123.

now have a closer look at the work of the bodies functioning under the Charter of the United Nations in order to see how a more specific right to return to one's home seems to be emerging. The Security Council started referring to restitution issues in the beginning of the 1990s. With regard to the Iraqi occupation of Kuwait, the Council noted in 1991 that Iraq was liable under international law for loss of possessions as a result of its unlawful occupation, and decided to establish a compensation fund for claims in that context.[25] The very first specific reference to housing and return rights concerned a resolution on Bosnia and Herzegovina. In 1993, the Council 'reaffirmed' (sic!) that 'all displaced persons have the right to return in peace to their former homes and should be assisted to do so.'[26] That same year, the right of refugees and displaced persons to return to their homes was affirmed when the Council dealt with the conflict between Abkhazia and Georgia.[27] The Council reaffirmed this right in the same context two years later, adding that it was valid for those refugees and displaced persons 'affected by the conflict.'[28] Near the end of the war in Croatia, in the summer of 1995, the Council demanded that Croatia respect fully, 'in conformity with internationally recognized standards', the right of displaced Serbs to return and to create conditions 'conducive to the return of those persons who have left their homes.'[29] In 1996, the Council emphasized the right of all the displaced affected by the conflict in Abkhazia to return to their homes, even indicating the specific region of origin – as opposed to the whole of Abkhazia – to which the displaced should be allowed to return.[30] It reasserted this right in the Kosovar context and demanded that the Federal Republic of Yugoslavia facilitate the safe return of refugees and internally displaced *to their homes*.[31] Stronger language followed in 2000, again on Abkhazia, when the reference was made to the 'unacceptability of the demographic changes resulting from the conflict and the *imprescriptible* right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions, in accordance with international law.'[32] In 2004 and 2005 in the same context, it even called this right 'inalienable'.[33]

Almost none of these resolutions were enacted under Chapter VII of the UN Charter.[34] As such, they were thus not legally binding. Nor could one consider the decisions of a body composed of a small number of states to be necessarily a reflection of a widespread practice. Nevertheless, the recurrent occurrence of references to the

25 UN SC, Res. 687, 2 March 1991, paras. 16 and 18.
26 UN SC, Res. 820, 17 April 1993, para. 7.
27 UN SC, Res. 876, 19 October 1993, para. 5.
28 UN SC, Res. 971, 12 January 1995.
29 UN SC, Res. 1009, 10 August 1995, para. 2.
30 UN SC, Res. 1036, 12 January 1996, *considerans* and para. 6.
31 UN SC, Res. 1199, 23 September 1998, *considerans* and para. 4. See also UN SC, Res. 1244, 10 June 1999, *considerans*.
32 UN SC, Res. 1287, 31 January 2000, para. 8.
33 Respectively UN SC, Res. 1554, 29 July 2004, para. 15 and UN SC, Res. 1615, 29 July 2005, para. 18.
34 The exception being UN SC, Res. 1244, 10 June 1999, on Kosovo. The right to return to one's home only appeared in the *considerans* of that resolution, however, and not in the operative part.

right of people displaced by conflict to return to their homes is striking. The character of such a right in conflict-related situations is even asserted as being imprescriptible which implies that it cannot be taken away at will by states. No difference is made between refugees and internally displaced persons in this respect. Relevantly, the wording of the resolutions is given the form of rights from the 1990s onwards.[35] One can see the difference, when these more recent resolutions are compared to, e.g., a 1974 resolution on Cyprus in which the Council merely urged the parties to 'permit persons who wish to do so to return to their homes in safety.'[36]

The General Assembly has equally addressed the issue, but earlier on than the Security Council. In 1980 it 'reaffirmed', in a general resolution on refugees, the right of refugees to 'return to their homes in their homelands'.[37] In 1997, in the context of the Palestinian territories, it reaffirmed the right of those displaced in the 1967 war and later armed conflicts to 'return to their homes and former places of residence'.[38] Rights-based language was something which only gradually emerged in this context[39] and even relatively recent resolutions did not all mention a right to return.[40] Even before rights in this context were mentioned, the Assembly sometimes alluded to the return of refugees *to their homes* as opposed to simple return to their country.[41]

One could argue that a general right to return does not equal a right to housing restitution. However, there are good reasons to assume that housing restitution may be implied in the different wordings used by the Security Council and the General Assembly. First, recurrent reference is made to return to 'their homes'. In my view, this strongly indicates that more than just a return to a home country or region is meant.[42] Secondly, the right to return to one's home without such a restitution right implied in it would be a *non-sequitur* in all cases in which the housing left had been occupied by others in the meantime.[43]

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35 With only very few exceptions. E.g. concerning Tajikistan: UN SC, Res. 999, 16 June 1995, para. 14, which only refers to obligations upon the parties to cooperate 'in ensuring the voluntary return, in dignity and safety, of all refugees and displaced persons to their homes'. Note, however, that even in this formulation return was specified as 'to their homes' instead of to their country or original region in general.

36 UN SC, Res. 361, 30 August 1974, para. 4.

37 UN GA, Res. 35/124, 11 December 1980, *considerans*.

38 UN GA, Res. 51/126, 13 December 1996, para. 1.

39 An early resolution on Palestine/Israel, for example, did not mention a right to return, but merely 'resolved that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so': UN GA, Res. 194 (III), 11 December 1948, para. 11. In the same vein, a 1974 resolution on Cyprus, only stated that 'all refugees should return to their homes in safety': UN GA, Res. 3212(XXIX), 1 November 1974, para. 5.

40 UN GA, Res. 51/114, 12 December 1996.

41 UN GA, Res. 1672(XVI), 18 December 1961.

42 See for the same interpretation: Scott Leckie, 'Housing Rights', *UNDP Human Development Report 2000, Background Paper No. 10*, p. 16.

43 See also to that effect: Christian Tomuschat, 'State Responsibility and the Country of Origin', in: Vera Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (The Hague: Martinus Nijhoff Publishers 1996) pp. 59-79, see pp. 69-70. Sub-Commission on

The UN bodies specialized in human rights also dealt with return and restitution issues. The Sub-Commission on the Promotion and Protection of Human Rights has addressed the specific issue of housing and property restitution on numerous occasions and recognized the right of return to one's home of origin for all refugees and IDPs.[44] Its work eventually resulted in a set of principles to which I will return in section 6.4. The *Basic Principles* concerning remedies and reparations developed within the UN Commission on Human Rights, the predecessor of the current Human Rights Council, have been dealt with in the previous chapter.

One initiative specifically concerned the internally displaced.[45] In 1996, the Commission asked the Representative of the Secretary General on Internally Displaced Persons, Francis Deng, to develop an 'appropriate framework' for this group.[46] Deng had already noted by then, in a compilation of applicable legal norms, that there was 'a certain trend' towards a right to restitution for internally displaced persons (IDPs) under international law.[47] His work eventually led to the *Guiding Principles on Internal Displacement*, which the Commission adopted in 1998.[48] The principles aimed to be an application and reflection of general standards of human rights and interna-

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the Promotion and Protection of Human Rights, *The Return of Refugees' or Displaced Persons' Property. Working Paper Submitted by Mr. Paulo Sérgio Pinheiro Pursuant to Sub-Commission Decision 2001/122*, 12 June 2002, UN Doc. E/CN.4/Sub.2/2002/17 (hereafter: Pinheiro 2002), para. 29.

44 Sub-Commission on Prevention of Discrimination and Protection of Minorities [as it was originally called; hereafter: Sub-Commission], Res. 1998/26, 26 August 1998, para. 1, in which it 'reaffirmed' this right.

45 The need for this was felt, because IDPs – unlike refugees – do not benefit from specific treaties for their protection nor from a specialised international organisation working specifically on their behalf (as the UNHCR does for refugees). Nevertheless, IDPs enjoy the protection of international human rights law and international humaniarian law like any other person. The problem is therefore more one of '*access* to legal protection, not absence of legal protection'. The *Guiding Principles* sought to clarify and focus the applicable standards to the situation of IDPs to help and counter this problem: Anne Willem Bijleveld & Erika Feller, 'Foreword', *Refugee Survey Quarterly* vol. 24 (2005) pp. 5-6.

46 Commission on Human Rights, Res. 1996/52, 19 April 1996, para.9.

47 Commission on Human Rights, *Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng, Submitted Pursuant to Commission on Human Rights Resolution 2001/54*, 16 January 2002, UN Doc. E/CN.4/2002/95(2002) (hereafter: Deng (2002)) para. 275.

48 The formal phrasing used by the Commission was that it took note of the *Guiding Principles*: Commission on Human Rights, Res. 1998/50, 17 April 1998, para. 1. Later on, it became less reticent in endorsing the *Principles*. See e.g. Res. 2005/46, 19 April 2005, para. 8, in which it 'welcomed [their] dissemination, promotion and application'. In 2004, the General Assembly, expressed its appreciation over the *Principles*, welcomed that states and UN institutions increasingly used them and encouraged all other actors to do so as well: UN GA, Res. 58/177, 12 March 2004, para. 7. One year later, at the UN's *Millennium Summit*, the Assembly, recognized the *Principles* as 'an important international framework for the protection of IDPs': UN GA, Res. 60/1, 24 October 2005, para. 132. However, this fell short of recognizing them as an international minimum standard, as the original draft of the resolution had provided: Walter Kälin, 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool', *Refugee Survey Quarterly* vol. 24 (2005) pp. 27-36, p. 27.

tional humanitarian law to the situation of IDPs.[49] As to property and possessions left behind by IDPs, Principle 21(3) stipulates that these should be 'protected against destruction and arbitrary and illegal appropriation, occupation or use.'[50] Principle 28(1) stipulates that states have the duty to enable IDPs 'to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.' On restitution, Principle 29(2) provides that

> Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

This is not very strong language, but since the *Guiding Principles* were built on existing law and since international human rights treaties contain no real right to property, the wording could not have been otherwise.[51] Obviously, both principles mentioned here refer to state duties and are not formulated as individual rights. In addition, the *Guiding Principles* are not legally binding.[52] Nevertheless, they find strong basis in existing international law and are thus more a clarification than an elaboration of new law.[53] Moreover, international and regional organisations have promoted the use of the *Principles* and several states in Latin America, Asia and Africa have applied and included them in their laws, policies and even case law.[54] Finally, they are another indication of a new focus on restitution.

Apart from the Charter-based bodies, a UN human rights treaty body has referred to restitution issues. The Committee on the Elimination of All Forms of Racial

49 Simon Bagshaw, 'Internally Displaced Persons at the Fifty-Fourth Session of the United Nations Commission on Human Rights, 16 March – 24 April 1998', *International Journal of Refugee Law* vol. 10 (1998) pp. 548-556, see p. 549; Walter Kälin, 'The Guiding Principles on Internal Displacement – Introduction', *International Journal of Refugee Law* vol. 10 (1998) pp. 557-562, see p. 561.

50 A reflection of a growing trend in international law to include in human rights positive obligations for states to protect against violations by third parties: Walter Kälin, 'Guiding Principles on Internal Displacement. Annotations', *Studies in Transnational Legal Policy* vol. 32 (2000) p. 54.

51 Walter Kälin, 'Internal Displacement and the Protection of Property', in: Hernando de Soto & Francis Cheneval, *Realizing Property Rights. Swiss Human Rights Book* vol. 1 (Zürich: Rueffer + Rub Sachbuchver 2006) pp. 175-185, p. 182.

52 Kälin (1998) p. 562; Simon Bagshaw, 'Property Restitution for Internally Displaced Persons: Developments in the Normative Framework', in: Leckie (2003) pp. 375-392, see p. 377.

53 Walter Kälin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework', *Presentation at Roundtable Meeting, Ralph Bunch Institute for International Studies, CUNY Graduate Center*, 19 December 2001 (www.brookings.edu/fp/projects/idp/idp.htm) p. 6.

54 Kälin (2001) p. 7; Kälin (2005) pp. 27 & 33.

Discrimination (CERD)[55] has issued two General Recommendations concerning housing restitution, both in 1997. In Recommendation 22, CERD emphasized that refugees and displaced persons, in the context of forced displacement on the basis of ethnic criteria, have the right to return to their homes and have

> after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property under duress are null and void.[56]

The CERD reiterated these norms for indigenous people in General Recommendation 23.[57] As the wording 'recommendation' indicates, these statements were not binding. Moreover, they formally only concerned the states party to the relevant Convention.[58] In spite of these caveats, the CERD's General Recommendations are another indication of what seems to be a recent rights-based approach to address restitution issues. Additionally, in line with the general preference under international law, restitution is given full precedence over compensation. The latter only comes into play once restitution is impossible. In full cognizance of reality, the CERD also emphasized the nullity of wartime property commitments. In the same context of the fight against racism, the final declaration of UN-sponsored World Conference against Racism in 2001 stated: 'We recognize the right of refugees to return voluntarily to their homes and properties in dignity and safety, and urge all States to facilitate such return.'[59] Again, the text as such is non-binding, but the participation in the conference and endorsement of the text by the majority of states – and by many UN agencies and NGOs – points to widespread support for such a right or at the very least to a lack of explicit resistance to it.

6.3 RULES OF WAR, PEACE TREATIES AND OTHER STATE PRACTICE

The applicable rules in time of armed conflict under international humanitarian law (IHL) and the agreements ending conflicts also include some pointers on restitution issues. The Fourth Geneva Convention (1949), which governs the protection of civilians during armed conflict,[60] contains several references to the return of displaced people to their homes. Article 49 obliges states to transfer evacuees 'back to their

55 This Committee monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.

56 CERD, *General Recommendation* 22, 23 August 1996 (UN Doc. A/51/18(1997)) para. 2(c).

57 CERD, *General Recommendation* 23, 18 August 1997 (UN Doc. A/52/18, annex V(1998)), para. 5.

58 By all means not a very restricted group of countries, though. In May 2006 170 states had ratified the Convention.

59 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report* (UN Doc. A/CONF.189/12(2001)) para. 65.

60 Official name: Geneva Convention relative to the Protection of Civilians in Time of War (12 August 1949).

homes as soon as the hostilities in the area in question have ceased.' Under the same Convention, states are bound 'not to do anything to increase the difficulties of repatriating [internees] or returning them to their own homes.'[61] Even during the course of hostilities, states should try and conclude agreements on the return of internees to their place of residence.[62] Once the armed conflict has ended, states shall 'endeavour (…) to ensure the return of all returnees to their last place of residence.'[63] These provisions only cover international armed conflict. By contrast, for situations of internal armed conflict, neither the Geneva Conventions nor their Additional Protocols contain rules relating to the rights of IDPs to return to their homes.[64] This entails that IDPs in territories occupied by another state are in a better position under the Geneva Conventions than those displaced in a civil war. The benefits of IHL thus seem to be unevenly divided. Nevertheless, the authoritative International Committee of the Red Cross compilation of current customary IHL provides that both in international and non-international armed conflicts a right for displaced persons in general exists to 'voluntarily return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.'[65] Relevantly, no official state practice pointing in the opposite direction was found.[66] In addition, the compilation found a general rule that the property rights of the displaced must be protected.[67]

The problem remains, however, that the treaty articles mentioned here all concern obligations put upon states, not direct rights for individuals. No clear and directly enforceable restitution right can therefore be derived from them. Even if such a right does exist in *customary* IHL, there is no direct possibility under international law to make use of such customary rights. All depends on the possibilities under the various national legal systems for individuals to invoke such rights. Indeed, apart from some scarce national practice, there is no general mechanism under IHL for victims of violations to assert their rights. In spite of this current lack of possibilities, the *Basic Principles* dealt with in the previous chapter may point to a move in that – more positive – direction.[68]

State practice in the aftermath of conflict seems to offer a more promising venue to find restitution rights. The first way by which states commit themselves to address restitution issues are the voluntary repatriation agreements between states and the

61 Article 127.
62 Article 132.
63 Article 134. Compare the very similar wording of the UN resolutions mentioned in section 6.2, which may have been inspired by this provision.
64 Kälin (2000) p. 70.
65 Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law. Volume 1: Rules* (Cambridge: Cambridge University Press 2005) p. 468.
66 Ibid., p. 470.
67 Ibid., p. 472. Interestingly, this rule was not derived from IHL treaties as such, but from state practice in concluding peace treaties and from international human rights law practice. This shows the close interconnection between IHL and human rights during and immediately after armed conflict.
68 Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', *International Review of the Red Cross* vol. 851 (2003) pp. 497-526, see pp. 525-526.

Office of the United Nations High Commissioner for Refugees (UNHCR), which concern the return of refugees to their countries of origin.[69] Such agreements are legally binding.[70] In the context of refugee return to Congo in 1991, the agreement stipulated that the government 'shall take all measures to allow returnees to settle in areas of their origin or choice and assist them to recover any property they may have left behind.'[71] Mozambique, in 1993, agreed to assist returnees to recover lost property and recognized that they had 'the right to return to their former places of residence.'[72] Myanmar, or Birma as it is more commonly known, bound itself to ensure that 'returnees will be allowed to return to their respective places of origin.'[73] A 1994 agreement between Georgia, Russia, Abkhazia, and UNHCR provided that 'Returnees shall, upon return, get back movable and immovable properties they left behind and should be helped to do so, or to receive whenever possible an appropriate compensation for their lost properties if return of property appears not feasible.'[74] In 1995 Angola recognized the right of return to former places of residence and undertook to provide assistance to those returnees attempting to recover lost property.[75] One year later, in the Liberian context, the right to return of refugees to 'their places of origin or habitual residence' was emphasized.[76] Although not all of these agreements include restitution provisions, since the 1990s a trend can be discerned. Increasingly, in parallel to the practice of the Security Council and General Assembly, the right to return is specified as the right to return to one's original home.[77] Often the wording provides for individual rights as opposed to mere state duties. However, one may still question to what extent rights in international agreements can be used within the various national legal orders which may or may not recognize the direct justiciability of such rights.

The second way in which states and other parties have started to recognize individual restitution rights after armed conflicts are peace agreements. This development has

69 These agreements in many – though not all – cases do not concern IDPs, since these are displaced *within* the borders of the country concerned and formally fall outside the mandate of the UNHCR. Often the more generic term 'returnees' is used.

70 UNHCR, *Voluntary Repatriation*, 25 April 2002 (EC/GC/02/5) para. 10.

71 *Tripartite Agreement on the Voluntary Repatriation of Congolese Refugees from Tanzania*, 27 August 1991, Article 10.

72 *Tripartite Agreement between the Government of the Republic of Mozambique, the Government of Zimbabwe and UNHCR for the Voluntary Repatriation of Mozambican Refugees from Zimbabwe*, 22 March 1993, Article 8.

73 *Memorandum of Understanding Between the Government of the Union of Myanmar and UNHCR*, 5 November 1993, Article 2.

74 *Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons Between Abkhazia, Georgia and the Russian Federation*, 4 April 1994, Article 3(g).

75 *Memorandum of Understanding between the Government of the Republic of Angola and the UNHCR for the Voluntary Repatriation and Reintegration of Angolan Refugees*, 14 June 1995, Article 4.

76 *Agreement between the Government of the Republic of Liberia and the UNHCR for the Voluntary Repatriation and Reintegration of Liberian Returnees from Asylum Countries*, 3 January 1996, preamble, para. 5.

77 Leckie (2003) p. 13. The relevant parts of the agreements mentioned in this section are to be found in: Ibid., pp. 13-15.

been parallel to the one in repatriation agreements. Many peace agreements since the 1990s include return and restitution rights for refugees and IDPs.[78] The 1991 peace agreement on Cambodia stipulated that the rights of repatriated refugees and displaced persons should be fully respected, including their right to choice of domicile and to property.[79] In 1992, the peace negotiations on Mozambique led to an agreement which included the following: 'Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it.'[80] The short-lived Arusha Peace Agreement, which temporarily ended the civil war in Rwanda in 1993, contained only a negative clause to the effect that refugees who had fled longer than a decade ago could not reclaim property occupied by others in the meantime.[81] In the 1994-1995 agreements ending the armed conflict in Guatemala, the government undertook to return land to the original holders.[82] It would develop measures in order to ensure 'recognition, the awarding of title, protection, recovery, restitution and compensation' of property rights of the uprooted indigenous communities of the country.[83] The Dayton Peace Agreement, which brought an end to the war in Bosnia and Herzegovina, gave refugees and displaced person the direct right to return home and to have their property restored to them. I will return to this peace treaty extensively in the next chapter. In post-conflict Kosovo, housing restitution rights were recognized in regulations of the UN administration governing the province.[84] Both in the Bosnian context and in post-conflict Kosovo specific institutions were established to deal with the housing and property claims of returnees.[85]

This short overview of peace agreement has produced two insights. On the one hand, return to one's former place of residence and sometimes explicitly the concomitant right to property restitution are more and more common in these agreements, in all corners of the globe. On the other hand, only a few, most notably Dayton, address these issues in the form of unequivocal restitution rights instead of state duties or even weaker intentions of state action. It seems that return and restitution discourse is

78 Ibid., p. 15. There are some exceptions to this general trend: Ibid., p. 19.

79 *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict*, 23 October 1991, Annex 4, Part II(4).

80 *General Peace Agreement for Mozambique*, 4 October 1992, Protocol III, Article IV(e).

81 *Arusha Peace Agreement*, 4 August 1993, Article 4.

82 *Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict*, 17 June 1994 (UN Doc. A/48/954-S/1994/751, Annex I(1994)) Principle 9.

83 *Agreement on the Identity and Rights of Indigenous Peoples*, 31 March 1995 (UN Doc. A/49/882-S/1995/256(1995)) Section F, Article 1.

84 United Nations Mission in Kosovo (UNMIK). The relevant regulations are UNMIK, Regulation Nos. 1999/23, 15 November 1999, and 2000/60, 31 October 2000, specifically Article 2.2. The more general right to return to one's home in the Kosovar context had been previously recognized by the UN Security Council: UN SC, Res. 1244, 10 June 1999, *considerans*. For an elaborate overview and analysis of the Kosovar restitution regime, see: Alan Dodson & Veijo Heiskanen, 'Housing and Property Restitution in Kosovo', in: Leckie (2003) pp. 225-242.

85 Respectively, Articles VII-XVI of Annex 7 of the Dayton Peace Agreement (see section 11.2) and UNMIK, Regulation No. 1999/23.

growing stronger, but that its legal formulation and implementation are lagging behind. Nevertheless, the trend is notable. For the issue of housing restitution this is especially important, since chances of success for restitution programmes seem to be much greater when the issue is explicitly dealt with in peace agreements instead of later on.[86]

6.4 THE PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION

All the developments mentioned so far reached their apex in 2005 in a set of norms developed within the Sub-Commission on the Promotion and Protection of Human Rights: the *Principles on Housing and Property Restitution for Refugees and Displaced Persons* (hereafter: the *Principles*) by special rapporteur Paulo Sérgio Pinheiro. They form the most direct, explicit and elaborate collection of rules and norms on housing restitution. In this section I will trace how they came into being and what norms they contain.

The impetus for Pinheiro's work came from outside the Sub-Commission. It was the CERD which in 1997, following calls from the different organs within the UN human rights system to cooperate more closely with each other, suggested several topics to the Sub-Commission to prepare studies on.[87] One of these suggestions was the issue of the return of property of refugees or displaced persons. In 2001, the Sub-Commission took up this suggestion and entrusted Pinheiro with preparing a working paper.[88] The working paper was the first of four phases which led to the *Principles* in 2005. In the intermediate years, the rapporteur presented a preliminary report[89] and a progress report which included draft principles and a commentary on them.[90] The final version of the *Principles* was drafted after intensive consultation with UN agencies, states, NGOs, experts, and others.[91] It contains an addendum with *Explanatory Notes*.[92]

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86 Leckie (2003) p. 15.

87 Pinheiro (2002) paras. 1-3.

88 Sub-Commission on the Promotion and Protection of Human Rights, Decision 2001/122, 16 August 2001.

89 Sub-Commission on the Promotion and Protection of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons. Preliminary Report of the Special Rapporteur, Paulo Sérgio Pinheiro, Submitted in Accordance with Sub-Commission Decision 2002/7*, 16 June 2003, UN Doc. E/CN.4/Sub.2/2003/11 (hereafter: Pinheiro 2003).

90 Sub-Commission on the Promotion and Protection of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons. Progress Report of the Special Rapporteur, Paulo Sérgio Pinheiro, Submitted in Accordance with Sub-Commission resolution 2002/7*, 2 June 2004, UN Doc. E/CN.4/Sub.2/2004/22 (hereafter: Pinheiro 2004).

91 Sub-Commission on the Promotion and Protection of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons. Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro*, 28 June 2005, UN Doc. E/CN.4/Sub.2/2005/17 (hereafter: Pinheiro 2005) para. 3.

92 Sub-Commission on the Promotion and Protection of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons. Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro. Addendum: Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 8 July 2005, UN Doc. E/CN.4/Sub.2/2005/

The Sub-Commission formally endorsed the *Principles* on 11 August 2005 and encouraged 'their application and implementation by States, intergovernmental organizations and other relevant actors.'[93] It added that the right to housing restitution was an essential element to resolve conflicts and rebuild societies after such conflicts, including the re-establishment of the rule of law.[94] The Preamble of the *Principles* themselves reaffirms this nexus and emphasizes that the return of refugees and displaced persons to their former homes should always be a voluntary step. Put differently, forced returns are anathema to the spirit of the *Principles* and the underlying international legal norms.

The norms are divided into seven sections. The first deals with their scope and application. Section II relates to the right to housing and property restitution itself. This is followed by sections on overarching principles (III), on the right to voluntary return in safety and dignity (IV), and on implementation mechanisms (V). A separate section is devoted to the role of the international community (VI). Finally, section VII deals with the interpretation of the *Principles*, stating in a formula well-known in human rights law that the *Principles* 'shall not be interpreted as limiting, altering or otherwise prejudicing' other relevant rights and standards of international and national law consistent therewith.[95]

Principle 1 indicates that the *Principles* apply not only to refugees and internally displaced persons, but to other displaced persons as well. These are people who had to leave their homes due to conflict, disaster or other calamities, and fled across borders, but do not reach the threshold of the definition of refugees, i.e. someone who is unwilling or unable to return due to a 'well-founded fear of being persecuted' for belonging to a particular group.[96] This broad scope connects to the central right contained in the *Principles*, enunciated in Principle 2:

> 2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.
> 2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.

17/Add.1 (hereafter: Explanatory Notes). The notes give an overview of the norms and standards 'which serve to support and inform' the *Principles* (para. 1). The draft version of the *Principles* had been accompanied by a commentary, which the draft referred to as the 'main authoritative interpretation of the Principles': Pinheiro (2004), draft Principle 25.2. By comparison, there has thus been a weakening.

93 Sub-Commission on the Promotion and Protection of Human Rights, Res. 2005/21, 11 August 2005, para. 5.

94 Ibid., preamble.

95 Principle 23.1

96 Explanatory Notes, paras 2-3. See also section 1.4 in Chapter 1.

This Principle shows that the common element of all groups endowed with this right is that they were 'arbitrarily or unlawfully' deprived of their housing, land or property. This explains the inclusion of the third category of what could be called 'internationally' displaced persons. The most interesting part of Principle 2 is that it clearly indicates restitution as the primary right. This becomes clear both from the fact that compensation comes into play only when restitution is *factually* impossible – and such has been independently determined – and from the obligation for states to 'prioritize' the right to restitution. The element of factual impossibility is an addition compared to the text of the draft principles. The related Principle 21 elaborates that 'factually impossible' only refers to the exceptional circumstances in which the 'housing, land and/or property is destroyed or no longer exists.' Compensation only becomes relevant in those circumstances or when the claiming individual himself 'knowingly and voluntarily' accepts compensation instead of restitution.[97] The final choice between restitution and compensation is thus not, contrary to traditional international law, left to the state's discretion, but is explicitly given to the individual.[98] The only exception which the *Principles* mention is when a negotiated peace settlement provides for a combination of the two.[99] But even then, it should be added, the state is not given the possibility to opt solely for compensation. The formulation of factual impossibility is derived both from CERD Recommendation 23[100] and from the *Guiding Principles on Internal Displacement*.[101] Although these texts are not binding, the preference for restitution in case of loss of housing and property is in line with restitution as the preferred remedy under international law, as indicated in the previous chapter.

This brings us to the relationship of the right to housing and property restitution and the two main rights it has been derived from so far: the right to a remedy for human rights violations and the right to return. The *Explanatory Notes* to Principle 2 refer extensively to the *Basic Principles and Guidelines*, developed by Van Boven and Bassiouni, to explain that restitution refers to an equitable remedy and that the right to a remedy exists. Additionally, the right to voluntary return (Principle 10) is explained as being 'increasingly seen as encompassing not merely returning to one's country, but to one's home as well.'[102] In spite of these obvious sources of the right to housing and property restitution, Principle 2 seeks to detach the child from the legal parents. It positions the right to restitution in this context as a 'distinct right', which does not depend on the actual return of the displaced.[103] The *Principles* are thus an explicit attempt to assert a right independent from a previous violation – a factual state of affairs is sufficient to qualify for the right – and from posterior return to the home regained.

97 Respectively Principle 21.2 and 21.1.
98 See also: Ibid., para. 70.
99 Principle 21.1
100 See section 6.2.
101 See Principle 29(2) of those *Guiding Principles*.
102 Explanatory Notes, paras. 4-7 and 42 respectively.
103 See also Principle 10(3).

Section III on overarching principles contains seven principles adapting existing human rights to the specific situation of refugees and other displaced persons. Some of these seek to formulate guarantees for these groups for the phase before displacement, the displacement itself, and the process of restitution. These are the right to non-discrimination (Principle 3) and the right to equality between men and women (4). Other rights in this section relate to the protection against displacement and are thus primarily preventive,[104] ideally precluding the need for restitution: the right to be protected against displacement (5), the right to privacy and respect for the home (6), the right to peaceful enjoyment of possessions (7) and the right to adequate housing (8). Finally, Principle 9 enunciates the right to freedom of movement, which implicitly refers again to the element of free choice – both in not being forced to leave one's house and also in not being compelled to return to it. This is explicitly mentioned in the next section (IV) of the *Principles*, which contains the earlier mentioned right to voluntary return in safety and dignity. This Principle 10 includes not merely this right for individuals, but also the concomitant obligation for states not to force return but rather to enable it. The Principle stipulates that the right 'cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations.'[105]

As mentioned, the rules in this section reflect existing human rights. The Explanatory Notes show that not only universal human rights treaties were used to build the *Principles* on. Regional treaties played a role as well, including the European Convention on Human Rights. References included are Article 14 ECHR for the right to non-discrimination, Article 8 for the right to privacy and respect for the home, and P1-1 for the right to the peaceful enjoyment of possessions. The latter right as incorporated in Principle 7 is almost exclusively built on regional human rights treaties, since the general UN human rights treaties contain no clause to that effect.[106] Other principles in this section contain no ECHR references, however. The right to freedom of movement, for example, could have included a reference to Article 2 of Protocol 4 ECHR. Even the right to adequate housing, although not explicitly recognized in the ECHR as such, has received at least implicit support in the case law of the European Court of Human Rights in situations of loss of housing.[107] The links with the ECHR are especially important in the European context with which this study is concerned, since ECHR norms and the case law of the Court will often be what national judges will be most familiar with and first make use of when adjudicating cases in the light of international human rights norms. Irrespective of whether ECHR norms have been mentioned in the Explanatory Notes in all cases, these norms serve to sustain the legal force of the *Principles*.

104 Ibid., para. 14.

105 Principle 10(2).

106 The only exception is International Labour Organization Convention No. 169 concerning Indigenous Peoples in Independent Countries: Explanatory Notes, para. 33.

107 See section 2.4.1.

The fifth section marks the descent from rights to practice. The principles contained in this section were developed in response to common obstacles encountered in restitution efforts in post-conflict societies. They thus present not so much a reflection of existing legal rules, but a bundle of best practices of restitution.[108] The language used shows this: in most cases 'should' is used instead of the stronger 'shall'. Principle 11 stipulates that restitution procedures should be fully compatible with IHL, refugee law, and human rights and should recognize the right to voluntary return. Principle 12 gives indications for what is a 'cornerstone of successful restitution programs'[109]: the existence of effective national procedures, institutions and mechanisms. These should, according to the Principle, be equitable, timely, independent, transparent and non-discriminatory. They should be sufficiently funded and staffed and be able both to assess and enforce claims. When states are unable to do so by themselves or when there has been a breakdown of the rule of law, they should request the help and assistance of international agencies. Finally, these procedures, institutions and mechanisms should be included in peace agreements and voluntary repatriation agreements, explicitly giving priority to restitution as the preferred remedy. The latter point illustrates how the *Principles* build on the emerging global practice, dealt with earlier in this chapter.

The subsequent principles in section V deal with the accessibility of restitution claims procedures, including the requirement that states should not 'establish any preconditions for filing a restitution claim' (13), adequate consultation and participation in the restitution process of the persons affected (14) and the need to establish or re-establish housing land and property records (15) in order to facilitate, *inter alia*, the establishment of the facts. The latter Principle includes the important and strongly worded provision that 'States shall not recognize as valid any housing, land and/or property transaction, including any transfer that was made under duress, or which was otherwise coerced or forced, either directly or indirectly, or which was carried out contrary to international human rights standards.'[110] This formulation is reminiscent of CERD recommendation 22.[111]

Principle 16 protects the interests of non-owners, such as tenants, holders of social occupancy rights and other 'legitimate occupants or users' of housing. They should as much as possible be treated on the same footing as owners. This Principle implicitly emphasizes that it is not just the property aspect of restitution that is primary or central, but equally the housing aspect, the protection of someone's home. Principle 17 shows that the *Principles* do not turn a blind eye to those suffering from restitution: the secondary occupants. Although the protection of these, other displaced persons

108 Explanatory Notes, para. 51.

109 Ibid., para. 53.

110 Principle 15(8).

111 Section 6.2. See also SC Resolution 820 cited in section 7.2 in the context of Bosnia and Herzegovina. The Explanatory Notes mention that the provision is also consistent with the general principles of contract law (para. 61).

themselves, should not prejudice just and timely housing restitution of the former inhabitants, secondary occupants do have the right to be protected against arbitrary or unlawful evictions and against homelessness. Otherwise the cycle of injustice would just be continued instead of being inverted.

Principles 18 to 21 cover the legislative restitution framework. Principle 20 essentially asks states to bring their national legal systems in line with the requirements of the right to housing restitution. This includes legally recognizing this right and amending or repealing existing law or practice which is contrary to it. Principle 19 builds upon this foundation by providing that states should not adopt laws that prejudice the process of restitution. The Principle connects to Principles 3 and 4: the rights to non-discrimination and gender equality in these principles should be reflected in the laws and policies on housing restitution. Finally, one of the main bottlenecks of restitution efforts[112] is addressed in Principle 20: enforcement of restitution decisions and judgments. States are asked to enforce their own administrative and judicial decisions. This is what one should expect in any situation with a functioning rule of law. However, considering the often poor record of post-conflict states on this account, the Principle elaborates on what this entails: designating specific institutions to enforce judgments and decisions, ensuring that relevant authorities are obliged to implement them, and preventing and countering public obstruction of enforcement, e.g. by prosecuting and punishing. In addition, states should prevent the 'destruction or looting of contested and abandoned housing, land and property.'[113] Public information campaigns should strengthen this approach, emphasizing both the rights of secondary occupants and the legal consequences of non-compliance with restitution decisions. Principle 21 on compensation has been dealt with above.

In recognition of the fact that post-conflict societies will more often than not require external assistance to recover, Section VI addresses in its sole provision (Principle 22) the responsibility of the international community. The international community should 'promote and protect' the right to housing restitution and to a safe and dignified voluntary return. This means that international organisations and agencies, including the states participating in them should take this right into account in developing policy. Furthermore, they should help to ensure that national restitution processes are in compliance with international law and should monitor these processes. The former can be done by promoting that restitution rights and mechanisms are included in peace agreements.[114] The latter can be achieved both from a distance – through human rights monitoring mechanisms – and on the ground by peace and reconstruction operations. Principle 22 even goes as far as to state that the Security Council should consider to include in the mandate of peace operations a role for UN troops of helping to enforce domestic restitution decisions. Additionally, international organisations present in

112 Pinheiro (2002) para. 64.
113 Principle 20(4).
114 See section 6.3 on the importance of including restitution rights and mechanisms in peace agreements.

post-conflict societies should lead by example and thus avoid using housing or property which is to be given back to the original inhabitants.

This elaborate summary of the content of the *Principles* shows how multi-faceted the approach taken in the *Principles* is. The rights and duties of all the relevant stakeholders are addressed, whether they are victims, states, secondary occupants or international organisations.[115] The right to restitution of refugees and other displaced persons is given clear precedence. The rights of those persons who will in some cases need to be evicted to achieve that goal are safeguarded at the same time. States cannot use the interests of the latter to prevent restitution of housing to the former; restitution should always be timely. The issue of restitution is given the form of a right for individuals. The main parallel of the housing restitution *Principles* with the *Guiding Principles* is that they are not legally binding as such. Not even all of them build on existing international law, since several of the *Principles* reflect lessons learned form the practice of restitution policies. One could add that even if they would be binding as such, the abundant use of 'should' when it comes to the responsibilities of states does not enhance their justiciability.

Nevertheless, a more positive[116] parallel with the *Guiding Principles* is also present. The housing restitution *Principles* provide clarity and guidance by applying general rules from human rights law, refugee law and IHL to the specific situation of housing and property restitution for refugees and displaced persons. The fact that they emanate from the Sub-Commission, a body of experts on human rights, adds the weight of being an authoritative interpretation of international law as it currently stands to those principles which reflect an application of existing human rights law to housing restitution issues. The explicitly stated aim of the *Principles* is to assist the relevant actors in 'addressing the legal and technical issues' concerning housing and property restitution.[117] This is indeed the point where their main relevance can be found. The Sub-Commission chose not to submit the *Principles* to the Human Rights Council, a body of state representatives, but rather to distribute them as widely as possible, so that they would directly be used in practice. This prevented that states would start to alter and potentially weaken the text.[118] The aim to disseminate the *Principles* and to use them, was brought a step closer with the publication in 2007 of the *Handbook on Housing and Property Restitution for Refugees and Displaced Persons* by a consortium of UN agencies.[119]

115 In this sense, the *Principles* address the problems that may arise in a horizontal application of the right to housing restitution between private parties. In such cases it is the state that has to guarantee both the right to restitution of one party as well as the protection against arbitrary eviction and homelessness for the other party.

116 That is, if one considers the fact that they are not legally binding as a document as a disadvantage. Other factors may be just as or even more important. See also section 6.5.

117 Principle 1(1).

118 Personal communications with Special Rapporteur Paulo Sérgio Pinheiro and with Mayra Gomez, Centre on Housing Rights and Evictions (COHRE), 23 September 2006.

119 See: www.ohchr.ch.

In the previous section I have described the trend to include issues of restitution in peace treaties. The *Principles* will not ensure that this will happen in all cases in the future, but they *do* give clear and elaborate guidance once the choice to include restitution is made. Another clear advantage is a point also mentioned under weaknesses: the *Principles* are based on experience gathered in practice. This prevents that they are merely lofty words on paper flying in the face of facts on the ground. Lessons learned have been integrated in the text. As we shall see in the next chapter, many of the points addressed in the *Principles* reflect issues which are highly relevant in practice. It is not surprising therefore, that the Bosnian experience was one of the building blocks of the *Principles*.[120]

6.5 CONCLUSION

This chapter started off with the question whether an independent right to housing restitution exists under international law. For lack of a multilateral treaty affirming a right to housing restitution, the analysis has focused on a search for a rule of customary law. In the foregoing we have surveyed international human rights treaties, the practice of the United Nations institutions, international humanitarian law, and state practice as evidenced by voluntary repatriation agreements and peace treaties.

The right to housing restitution can be construed on two different legal foundations: on restitution as a remedy for human rights violations – as explored in chapter 5 – and on the basis of the right to return.[121] The overview in this chapter has yielded a three-step edifice of rights. First, since the Second World War a general right to return has found a firm basis in both human rights law and international humanitarian law. The second step is the right to return to one's specific home. Whereas such a right could be inferred early on from IHL, in the context of human rights law and general international law references have started to appear only in the 1980s and especially in the 1990s. Resolutions and recommendations of the Security Council, the General Assembly, and of UN human rights organs show this. Clearer state practice by way of binding international agreements arises in the immediate post-conflict context of voluntary repatriation agreements and peace treaties. The third step, and the most uncertain one, is the emergence of a specific right to housing restitution. I have argued that such a right logically follows from the right to return to one's home. However, the specific recognition of such a right – even if on the rise since the 1990s – is rarer than the broader right to return to one's home. The clear increase in concern with the problem of restitution is more often than ever, but still not in all cases, followed by a legal elaboration in the form an assertion of a right to restitution.

120 See e.g. Pinheiro (2003) paras. 21-29.

121 For an overview of the use of the two legal foundations in the subsequent Pinheiro reports, see: Rhodri Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice, *New York University Journal of International Law and Politics* vol. 37 (2005) pp. 441-553, see pp. 459-461.

Another notable trend is that the protective umbrella has been broadening over an increasing number of people. Whereas traditionally the right to return was obviously limited to those who crossed borders in the first place, a good case can and has been made for the inclusion of internally displaced persons. From the perspective of humanitarian law, the unfavorable position of the displaced in non-international armed conflicts has arguably been mitigated by developments in customary law. The position of IDPs has been strengthened through the inclusion of the *Guiding Principles on Internal Displacement* in the practice of various organisations. This broadening has not only occurred in an extension over new legal categories, but also very substantially in practice by the inclusion in a growing number of peace treaties.

In deciding whether the right to housing restitution is as yet a rule of customary law, we should return to the requirements formulated by the International Court of Justice.[122] The first one is that practice should include those states 'whose interests are especially affected'. In the field of post-conflict housing restitution these are obviously the states emerging from conflict. As we have seen several of these states have indeed recognized such a right in peace treaties and repatriation agreements. The second point is that it should be 'extensive and virtually uniform'. On the extensiveness, one can say that recognition is *extending* but no precise quantitative evaluation of whether it is indeed *extensive* has been made. As to the virtual uniformity, among those states which included return and restitution issues in international post-conflict agreements, the language used varies greatly – from recommendations to states to enable returns to strongly worded restitution rights for individuals. This fact diminishes the importance of a positive answer to the third point, namely that practice should have 'occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.' This has indeed happened, since the wording used since the 1990s was often one of state obligations and individual rights and the form was often an international agreement. In conclusion, it can be said that there is a recent and clear trend towards the formation of a customary right to housing restitution, but that it does not at this point in time entirely fulfill the necessary criteria.

The trends mentioned here culminated in the UN *Principles on Housing and Property Restitution for Refugees and Displaced Persons*. The *Principles* explicitly reflect these trends by both proclaiming the right to housing restitution as a distinct right and affirming that it applies to refugees, IDPs and other displaced persons. Part of this text applies existing international law to the specific situation of these groups and can be said to reflect hard law. Another part builds on best practices from experience gained in restitution processes. That part takes an approach focused on common obstacles to restitution in ways which are in harmony with principles of good governance. Nevertheless, they do not represent hard law. As to the right to housing restitution itself, one may question whether it is indeed an existing and independent right as yet, as the *Principles* assert. The first foundation on which this is built is the right to restitution for grave violations of human rights and IHL. This has not yet hardened, in

122 See section 6.1.

spite of developments in that direction, into a right which can be generally invoked, as I have shown in the previous chapter. The same goes for the second base, the right to return. As we have seen in the present chapter this right has been developing and specializing into a right to return to one's home and in some cases even to a right to housing restitution, but this is not yet either a right which can be generally invoked. Since the *Principles* are not of themselves a legally binding text, they do not offer that last affirmative step. However, they are an authoritative witness to a general trend in that direction. They are thus certainly an important text of soft law in this field.

Moreover, if we look at the *Principles* from the perspective of the theory of Diehl, Ku and Zamora, they live up to a great extent to the first requirement for the effectiveness of a rule of international law: 'the existence of a legal concept that is sufficiently developed to be communicated clearly.'[123] Their elaborateness, inclusion of norms on behaviour for all actors involved, and focus on rules both for the phase before loss of housing and for the aftermath reflect this. Certainly, they thus offer the boundaries within which states should formulate and implement their restitution policies and they can be 'communicated clearly'. The communicative aspect is reflected by the fact that the *Principles* were explicitly developed to *guide* the behaviour of all relevant actors and have therefore been made as clear and precise as possible. Diehl, Ku and Zamora, it must be said, only recognize those rules that are legally binding. In that respect, the right to housing restitution does not yet completely meet the requirements. I would argue, however, that their effectiveness in the end depends more on the availability of implementation institutions and the will to use them – the other two factors for legal effectiveness – than just on their legal status. The future will have to show.

The right to housing restitution for refugees and displaced persons thus far has made its main strides forward in national contexts, such as in Bosnia and Herzegovina as we will explore in the next chapter. This right is, as Leckie aptly puts it, an emerging right or more precisely a 'right for ever increasing proportions of the displaced.'[124] As the *Principles on Housing and Property Restitution* show, the message is now there, but the medium still needs development.

123 See section 1.5.
124 Leckie (2003) p. 24.

CHAPTER 7
THE RIGHT TO HOUSING RESTITUTION IN BOSNIA AND HERZEGOVINA

7.1 INTRODUCTION

The war in Bosnia and Herzegovina came to an end in 1995 with the Dayton Peace Agreement (hereafter: Dayton). It caused the death of approximately 200,000 people, led to the disappearance of around 25,000 persons and resulted in more than 1 million internally displaced people and over 1.2 million persons fleeing the country.[1] If one compares this to a total pre-war population of 4.5 million, the extent of the problem becomes clear.[2] Many of these people were deprived of their homes. Housing restitution was therefore one of the requirements to attain a major objective of the peacemakers after the war: encouraging the return of the displaced.[3] One of the major stumbling blocks on the road towards this aim was that the ethnic cleansing, which had been one of the main characteristics of the war, continued to guide the post-war policies of the parties involved, even in the application of property laws.[4] Several years after the war the prospect of large-scale returns was still much more a dream of the international community than a reality on the ground.[5]

In spite of domestic resistance to returns and restitution, more than a decade after Dayton the situation had changed. A very significant number of people had been able

1 Peter Neussl, 'Bosnia and Herzegovina Still Far from the Rule of Law. Basic Facts and Landmark Decisions of the Human Rights Chamber', *Human Rights Law Journal* vol. 20 (1999) pp. 290-302, see p. 291.

2 Hans van Houtte, 'Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina', *International and Comparative Law Quarterly* vol. 48 (1999) pp. 625-638, see p. 626.

3 John M. Scheib, 'Threshold of Lasting Peace: The Bosnian Property Commission, Multi-Ethnic Bosnia and Foreign Policy', *Syracuse Journal of International Law and Commerce* vol. 24 (1997) pp. 119-142, see p. 119. See also: Catherine Phuong, 'At the Heart of the Return Process: Solving Property Issues in Bosnia and Herzegovina', *Forced Migration Review* vol. 7 (2000) pp. 5-7, see p. 5. The Dayton Peace Agreement confirms that the protection of refugees and displaced persons is 'of vital importance in achieving a lasting peace' in Article VII.

4 Marcus Cox & Madeline Garlick, 'Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina', in: Scott Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers: Ardsley, NY 2003) pp. 65-81, see p. 67.

5 Marcus Cox, 'The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina', *International and Comparative Law Quarterly* vol. 47 (1998) pp. 599-631, see p. 631.

to return home[6] and to successfully reclaim their homes. One of the causes may be found in a clear right to return and to housing and property restitution as laid down in an annex to Dayton. This individual right was supported by the normative actions of several institutions which had been set up under the peace agreement. These included the Office of the High Representative (OHR) which repeatedly amended domestic legislation and the Human Rights Chamber (HRC) which developed and clarified housing restitution rights in its case law. These actions show how international norms can be adapted to a specific post-conflict national context. Therefore, after having surveyed the applicable norms at the international level, it is now time to zoom in on the national norms in the case study of Bosnia and Herzegovina.

In this chapter I will review the right to housing restitution as applicable to Bosnia.[7] First, I will assess how this norm has been formulated in the various texts applying to Bosnia. These are primarily UN resolutions, the Dayton Peace Agreement itself and the various relevant domestic laws. Secondly, I will evaluate how the Bosnian Human Rights Chamber has applied the three ECHR rights from the previous chapters – the right to respect for the home, the right to property protection and the norm of non-discrimination – to the Bosnian context. This evaluation will give an insight into the process of fine-tuning general human rights norms to specific national situations. Thus the Bosnian experience may provide an example of the way in which the right to housing restitution can be read into the European Convention of Human Rights.

7.2 THE RIGHT TO HOUSING RESTITUTION IN BOSNIA AND HERZEGOVINA

Already during the Bosnian conflict itself several international resolutions pointed in the direction of housing restitution rights. The Security Council in its resolution 752 (1992) voiced its full support for efforts to 'assist in the voluntary return of displaced persons to their homes.'[8] A more legal formulation followed a year later in resolution 820. As mentioned in section 6.2, the Council held that displaced persons had the right to return to their former homes and should be assisted to do so. It added that 'all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void.'[9] The latter assertion was added to counter claims of the warring parties that people had left their houses of their own free will. In 1994 the General Assembly pronounced itself in a comparable way and added that victims of ethnic cleansing had the right to receive 'just reparation' for their losses.[10] Although

6 By February 2006, according to UNHCR statistics, 442,168 refugees and 570,152 internally displaced persons had returned: UNHCR Representation in Bosnia and Herzegovina, *Statistical Summary*, 28 February 2006 (www.unhcr.ba).

7 The institutional context of Bosnia will be dealt with in Chapter 11.

8 UN Security Council, Res. 752, 15 May 1992, para. 7.

9 UN Security Council, Res. 820, 17 April 1993, para. 7.

10 UN General Assembly Res. 49/196, *Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, 23 December 1994, para. 13.

the parts of the Security Council resolutions relevant here were not enacted under Chapter VII of the UN Charter and thus had no full binding force as such – nor had the General Assembly's resolutions – they indicate that early on a right to return and restitution was of international concern.

7.2.1 The Dayton Peace Agreement

The resolutions were only one tool around which international concern with human rights in Bosnia clustered. The others were the various drafts of the constitution of the state of Bosnia and Herzegovina and the Dayton Peace Agreement. Already during the first months of independence in 1992 outside interference with the Bosnian constitutional set up existed, initially mainly by the European Community, later also by the United States. This interference led to the inclusion of human rights provisions in virtually all draft constitutions and peace plans that emerged in the first half of the 1990s. Instead of creating new rights and formulations, these drafts leaned heavily on existing international human rights treaties including the European Convention on Human Rights, both in content and in form.[11]

The General Framework Agreement for Peace in Bosnia and Herzegovina, better known under the name Dayton Peace Agreement, was concluded at the American airbase of Dayton at the end of 1995 and signed in Paris on 14 December 1995 by Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia. It entered into force on the latter date.[12] The peace agreement itself is rather short. The really significant provisions are to be found in eleven elaborate annexes. For present purposes the following ones are relevant: the Constitution (Annex 4), the Agreement on Human Rights (Annex 6) and the Agreement on Refugees and Displaced Persons (Annex 7). The state structure formalised by Dayton was a very weak federal system, with the majority of powers and competences divided between the two 'Entities': the Republika Srpska and the Federation of Bosnia and Herzegovina. The latter was in fact not much more than a loosely organised group of Croat or Bosniak/Muslim[13] dominated cantons.[14] Under Dayton the Entities were given all governmental functions not expressly assigned to the state level, including even part of the foreign relations of Bosnia.[15] In that respect they could be seen as 'some sort of mini-states with all

11 Paul C. Szasz, 'The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia', *American Journal of International Law* vol. 90 (1996) pp. 301-316, see pp. 301-303 for a short overview.

12 Article XI of Dayton.

13 The Muslim community is usually referred to as Bosniak in post-war Bosnia.

14 Timothy William Waters, 'The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution', *Harvard International Law Journal* vol. 40 (1999) pp. 517-592, see p. 525. See also Article 1(3) of the Constitution. The Federation had been officially established on 30 March 1994.

15 Articles III(3-a) and III(2-a) respectively of the Constitution.

attributes of sovereignty.'[16] Dayton in this way *de facto* rubber-stamped the division along ethnic lines which the hostilities had created.[17]

Although the ethnic rationale in Dayton is thus quite strong, this is balanced or countered by a very elaborate and universalistic protection of human rights, an in-built tension in the peace treaty.[18] The Constitution states that both the state and the Entities 'shall ensure the highest level of internationally recognized human rights and fundamental freedoms.'[19] The ECHR and its protocols apply directly and have priority over all other law. This is remarkable in the sense that Bosnia had at the time of Dayton not yet acceded to the ECHR.[20] The Constitution enumerates a number of rights explicitly, including the right to home (sic),[21] the right to property and the prohibition of discrimination. The latter is connected not only to ECHR rights, but also to a large number of human rights provisions from other treaties, mentioned in an Annex to the Constitution.[22] Only non-discrimination in relation to the rights in those treaties is guaranteed, not the rights as such. The Constitution expressly provides a specific right for refugees and displaced persons:

> All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.[23]

The Agreement on Refugees and Displaced Persons (Annex 7), to which the Constitution refers, contains the very same right. Annex 7 emphasizes that 'the early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.'[24] Return is thus explicitly connected to peace.

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16 Viktor Masenkó-Mavi, 'The Dayton Peace Agreement and Human Rights in Bosnia and Herzegovina', *Acta Juridica Hungarica* vol. 42 (2001) pp. 53-68, see p. 57.

17 Gro Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff Publishers: Leiden 2005) p. 252. Nystuen underlines that the reason for this was that the negotiators feared that the peace negotiations would be endangered if this concession to the warring parties was not included.

18 Zoran Pajic, 'A Critical Appraisal of the Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina', in: Wolfgang Benedek a.o. (eds.), *Human Rights in Bosnia and Herzegovina after Dayton. From Theory to Practice* (The Hague: Martinus Nijhoff Publishers 1999) pp. 33-43, see pp. 39-40.

19 Article II(1-2) of the Constitution.

20 Bosnia ratified the ECHR on 12 July 2002, the Convention thereby entering into force on the same day.

21 Article 8 ECHR provides for the right to *respect for the* home.

22 Article II(3-4). The Annex contains an enumeration of the main UN and European human rights and humanitarian law treaties. Article II(7) of the Constitution stipulates that Bosnia 'shall remain or become party' to all of these treaties.

23 Article II(5).

24 Article I(1) of Annex 7.

Restitution is recognized as a right in itself. It may seem from this provision that compensation is solely provided when property cannot be restored and that thus only objective factors, such as the destruction of a house, play a role. But a choice between return and restitution on the one hand and compensation for each refugee, based on a personal assessment of for example the safety to return to the former home region, was meant to be given to the displaced themselves.[25] Under Annex 7 they are also given the choice of destination, since there is no obligation to return to the original place of residence.[26] A Commission for Displaced Persons and Refugees was created (later known more appropriately as the Commission on Real Property Claims or CRPC) to decide upon claims for real property 'where the property has not voluntarily been sold or otherwise transferred since 1 April, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of property or for just compensation in lieu of return.'[27]

Annex 7 goes beyond the mere creation of individual rights; it spells out duties for the parties to the Annex – the central state and the two Entities – in detail, again to the benefit of the refugees and the displaced. The parties are to accept the return of these groups and are required not to discriminate against them.[28] Apart from this duty of non-interference with returns, positive obligations apply. The parties 'undertake to create political, economic, and social conditions conducive to the voluntary return and harmonious reintegration' of the people concerned.[29] In addition, the parties have the duty to ensure that safe return is possible and the duty to prevent activities within their respective territories which would 'hinder or impede' return.[30] This entails, amongst others, an obligation to 'immediately' repeal legislation and administrative practices which have a discriminatory intent or effect and to protect minorities.[31] The right to return and restitution are thus, at least in the paper reality of Dayton, strengthened by an extensive catalogue of state duties.

Finally, Annex 6 on human rights enumerates the same rights as the Constitution and thereby provides citizens, for the second time, with the rights from the ECHR and its Protocols and protects them against discrimination in relation to the rights mentioned in the same list of international treaties.[32] Annex 6 also establishes a Human Rights Commission to assist the signatory parties in honouring their obligations. The Commission consists of two parts: the Office of the Ombudsman and the Human

25 Eric Rosand, 'The Right to Compensation in Bosnia: An Unfulfilled Promise and Challenge to International Law', *Cornell International Law Journal* vol. 33 (2000) pp. 113-158, see p. 129, with a reference to Article XII(5) of Annex 7.
26 Article I(4).
27 Article XI.
28 Articles I(1) and II(2) respectively.
29 Article II(1).
30 Article I(2-3).
31 Ibid.
32 Article I of Annex 6.

Rights Chamber.[33] I will return to these two more elaborately in Chapter 11 on Bosnian institutions. Suffice it to say here that these two parts could to some degree be compared to the former European Commission of Human Rights and the European Court of Human Rights respectively.[34] The Ombudsman does most of the investigating and fact-finding,[35] but the decisions he or she takes are not binding. The Human Rights Chamber is the judicial part of the two and consists of partly national and partly international members.[36] Its decisions are final and binding and the state and the Entities are under an obligation to fully implement them. The Chamber can decide whether one of the signatory parties has breached a human right protected by Annex 6 and furthermore it can indicate which steps should be taken to remedy the breach.[37] I will therefore focus on its case law in this Chapter.

7.2.2 Domestic legislation

Before continuing on the contents of the Commission's case law, we have to go a few more steps down the ladder of jurisdictions, from the international and semi-national Dayton norms to the federal and Entity level laws on housing and restitution. Although not all these norms concern housing restitution rights as such, they do touch upon them and in some of these laws important legal impediments against restitution can be found. I will therefore give an overview of them here.

As noted above any power not assigned specifically to the state level by the Constitution falls within the realm of the Entities. Housing and property matters are such a field of policy implicitly assigned to the Entities by this principle.[38] This has entailed that the Entities were the law-makers in this field and that individual complaints on housing issues were mainly directed against the Entities.

The housing situation in Bosnia had been changing already before violent conflict erupted by way of privatisation. In the former Yugoslavia two kinds of property existed: private and socially owned. Socially owned property mainly concerned

33 Article II.

34 Venice Commission, *Opinion on the Constitutional Situation in Bosnia and Herzegovina with Particular Regard to Human Rights Protection Mechanisms*, 18 November 1996, CDL-INF(1996)009, para. 3.1.2; Manfred Nowak, 'Lessons for the International Human Rights Regime from the Yugoslav Experience', *Collected Courses of the Academy of European Law. Book 2: The Protection of Human Rights in Europe* vol. 8 (1997) pp. 141-208, see p. 185.

35 A difference with the former European Commission of Human Rights is that the Ombudsman could investigate matters out of his own motion, whereas the Commission only acted upon incoming complaints.

36 Masenkó-Mavi (2001) p. 61.

37 Article XI of Annex 6. See section 7.6 for an elaboration on this point.

38 See e.g. Human Right Chamber for Bosnia and Herzegovina (hereafter: HRC BiH), *Milivoje Bulatović v. State of BiH and Federation of BiH*, 7 November 1997 (CH/96/22) para. 31. The decisions of the Chamber are available online at www.hrc.ba. BiH is the common abbreviation used in Bosnia for 'Bosna i Hercegovina'. In the more decentralized Federation housing matters also fall within the competence of the cantons: Waters (1999) pp. 531-532.

apartments located in urban areas.[39] This kind of property was owned by public institutions and corporations that could allocate these apartments to their employees. These institutions were therefore called 'allocation right holders'. The tenants had specially protected tenancies also called 'occupancy rights' over the apartment in question. Under this system they could live in the apartment indefinitely, their rights could be terminated only in exceptional circumstances, and the right could be passed on to other household members when the occupancy right holder died.[40] An occupancy right thus did not amount to full private property, but it was stronger than an ordinary tenancy. Applicable rules and procedures were laid down in the *Law on Housing Relations*.[41] Although privatisation of these apartments had started shortly before the start of the war,[42] the majority of them were still socially owned. Crucially, the *Law on Housing Relations* provided that occupancy rights could be cancelled if the inhabitant of an apartment was absent for more than six months without justified reasons.[43]

Before the war these provisions seem to have been rarely enforced.[44] During the war the apartments left by those fleeing the hostilities were temporarily reallocated to others, usually benefiting persons belonging to the same ethnic group as those in power in the area concerned. In many cases this was done without any legal ground or by authorities having no legal competence to so.[45] In other cases, the warring parties used the old pre-war law' unjustified absence criterion to temporarily suspend the occupancy rights. In doing so, the parties did not recognise the war as a special circumstance justifying absence.[46] In addition they introduced new housing laws which made return even more difficult. In the Republic of Bosnia and Herzegovina – the relatively small area dominated by Bosniaks, but still representing the internationally recognised state – the *Law on Temporary Abandoned Real Property Owned by*

39 Cox & Garlick (2003) p. 67.

40 Lynn Hastings, 'Implementation of the Property Legislation in Bosnia Herzegovina', *Stanford Journal of International Law* vol. 37 (2001) pp. 221-254, see pp. 225-226; Charles B. Philpott, 'From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina', *International Journal of Refugee Law* vol. 18 (2006) pp. 30-80, see pp. 33-34.

41 *Law on Housing Relations*, SRBH (Socialist Republic of Bosnia and Herzegovina) Official Gazette, no. 14/84, as mentioned in Philpott (2006) p. 34.

42 Rhodri C. Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice', *New York University Journal of International Law and Politics* vol. 37 (2005) pp. 441-553, see p. 476. See also: Waters (1999) pp. 536-537.

43 Articles 47-48 of the Law, which included military service and travels abroad for studies, work or medical treatment as justified reasons: Williams (2005) p. 480. See also: Paul Prettitore, *The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study*, paper prepared for BADIL Expert Forum (22-23 May 2003) p. 5.

44 Williams (2005) p. 480; Philpott (2006) p. 34.

45 Philpott (2006) p. 35.

46 Williams (2005) p. 484.

Citizens and the *Law on Abandoned Apartments* were adopted.[47] These allowed the state to declare housing which was vacated after 30 April 1991[48] abandoned and reallocate it. In practice the precise procedures laid down in these laws, which provided for safeguards concerning e.g. property left behind by the original inhabitants, were often ignored. Immediately after the end of the hostilities the *Law on Abandoned Apartments*, by then applicable to the entire Federation Entity, was amended. A new provision stipulated that the specially protected tenancies would be terminated permanently *de jure* for every apartment to which the original owner did not return within 7 (for internally displaced people) or 14 days (for refugees, i.e. those who had fled outside the country). These extremely short deadlines, combined with a situation on the ground that was far from secure, resulted in the termination of enormous numbers of specially protected tenancies.[49] The ethnic cleansing was thus made permanent through housing legislation.

In the Republic of Herzeg Bosna, the Croatian area of Bosnia that existed until its merger with the Bosniak part to form the Federation in 1994, a decree was issued during the war with similar contents as the national law mentioned above. In the Republika Srspka (RS) the municipalities regulated war-time property redistribution. Only in February 1996 the central RS authorities formalised these practices in the *Law on the Use of Abandoned Property*.[50] The law did not set deadlines like its Federation counterpart. Instead it gave new war-time occupiers the right to stay in the apartments indefinitely. Apartments would be returned to the original inhabitants on the basis of reciprocity; only when the new occupier would be able to return to his own apartment in the Federation or would be paid compensation, a house would be restored to the original inhabitant.[51] This served to be an equally effective bar to returns as the Federation's deadline method.

The weakness of the rule of law in Bosnia in the immediate post-conflict years is illustrated by the fact that in both Entities laws were enacted just after Dayton but in complete contradiction to the provision in Annex 7 that obliged the parties to repeal legislation with discriminatory effects.[52] Legal changes moved away from a right of return instead of towards it. This development was curbed in 1998 under heavy international pressure by the enactment in both Entities of the so-called laws on cessation, referring to the cessation of application of the previous laws.[53] The *Law on*

47 *Law on Temporary Abandoned Real Property Owned by Citizens*, Official Gazette of the Republic of Bosnia and Herzegovina, no. 11/93, and *Law on Abandoned Apartments*, Official Gazette of the Republic of the Republic of Bosnia and Herzegovina, no. 6/92 (as amended in nos. 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95) as mentioned in: Hastings (2001) p. 226.

48 This date marked the start of the war in *Croatia* which caused the first mass population movements.

49 Hastings (2001) pp. 226-227 and Williams (2005) p. 485.

50 *Law on the Use of Abandoned Property*, Official Gazette of the Republika Srpska, no. 3/96. as mentioned in Hastings (2001) p. 227.

51 UNHCR, *Extremely Vulnerable Individuals: The Need for Continuing International Support in Light of the Difficulties to Reintegration upon Return* (Sarajevo, November 1999) www.unhcr.ba, see p. 9.

52 Article I(2-3) of Annex 7.

53 Cox (1998) p. 615.

the Cessation of the Application of the Law on Abandoned Apartments, the *Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens* and the *Law on Taking over the Law on Housing Relations* (April 1998) in the Federation and the *Law on the Cessation of Application of the Law on the Use of Abandoned Apartments* (December 1998) in the Republika Srpska for the first time included the right to return and restitution from Annex 7 and made it possible in theory for people to reclaim their houses.[54] The Federation's cessation law on apartments (occupancy rights) provided that all decisions terminating occupancy rights between the start of the war and the enactment of the cessation law were declared null and void.[55] Although such nullification might to a certain extent be problematic from the point of view of third parties having acquired such rights in a *bona fide* manner – something which is somewhat unlikely in times of openly enacted ethnic cleansing – it was probably the only viable way forward to *start* the process of large-scale restitution.

A claims system was set up at the municipal level. One could claim housing restitution in the municipality where one's former home was situated.[56] The authorities were obliged to decide on return claims of occupancy holders within 30 days.[57]

Nevertheless, progress was not as straightforward as the introduction of new laws may suggest. Especially the RS law on cessation contained stipulations that effectively countered the formal aim of the law to enable returns. It protected current occupants against forcible eviction until the moment they could return to their pre-war homes. It did not contain any mechanism for former inhabitants to initiate evictions. And finally, appeals were allowed to delay the implementation of any decision under the law.[58] These combined provisions offered strong protection for the temporary occupants at the expense of the original inhabitants and thereby blocked return movements. In the Federation, the restoration of pre-war occupancy rights was not accompanied by an automatic cancellation of new occupancy rights that had been given to new occupants.[59] These would only be cancelled when an official decision was taken under the cessation law. This entailed that old and new rights could exist simultaneously for the same apartment. Coupled with the practical and legal difficulties to reclaim this gave new occupants an enormous advantage over previous inhabitants. In addition, in both Entities, the lodging of claims for occupancy right holders was restricted by deadlines, whereas no such limiting provisions existed for real property claims.

54 Respectively FBH (Federation of Bosnia and Herzegovina) Official Gazette, no. 11/98 and RS Official Gazette, nos. 38/98, 12/99.

55 Art. 2 of the Federation's cessation law on occupancy rights.

56 Williams (2005) p. 491.

57 Art. 6 of the Federation's cessation law and art. 17 of the RS law. And in the Federation specifically art. 12 of the abandoned property cessation law and art. 9 of the corresponding RS law. In the RS both private owned property and occupancy rights were regulated by one and the same cessation law, whereas in the Federation two separate laws existed.

58 Hastings (2001) p. 230.

59 Art. 2 of Federation's cessation law on occupancy rights.

Although balancing the right and interests of all parties involved is in itself a laudable aim, the scales in the Bosnian case tilted heavily towards the side of the current occupants. A clear advantage was given to this group, whereas it could be argued that the reparation of often flagrant housing rights violations should weigh heavier, especially if the accompanying evictions would be in accordance with international human rights law.

Dissatisfaction with the new cessation laws and their return-obstructing provisions led to a number of OHR-imposed amendments to the existing housing laws of the Entities in the following years.[60] These amendments included several extensions of the claiming deadlines (1998, 1999), the annulment of all Court-ordered cancellations in RS of occupancy rights since the start of the war (1999) and the conversion of all permanent occupancy rights issued in the Federation and in the RS during and after the war into temporary ones (1999). Primarily, the amendments aimed at making the existing administrative claims procedures effective and harmonizing them in the two Entities. Illegal occupants and so-called multiple occupants – those who possessed alternative accommodation or had sufficient means to acquire alternative accommodation – were given fifteen days to vacate an apartment. The relevant period started at the moment a positive decision for the original tenancy right holders was issued. Legal temporary users without such possibilities were given ninety days to vacate.[61]

A second wave of amendments followed in 2001. These amendments took away several other restrictions. The most significant change in practical terms was probably that the requirement to actually re-occupy an apartment on penalty of losing an occupancy right was replaced by a requirement to collect the keys of the apartment, even by legal proxy. In this way restitution was made possible in all cases in which actual return was considered to be too dangerous or unfeasible for other reasons. Moreover the right to alternative accommodation was restricted to the most severe cases of humanitarian need and the burden to show this shifted to the occupant. Finally, the amendments imposed the obligation upon the authorities to solve claims in chronological order. This prevented the constant deferral of 'difficult' or politically unwanted claims and increased transparency and legal certainty. Since this helped to protect citizens against the arbitrary use of state power,[62] these changes also contributed to the rule of law. All the measures taken helped to shift the balance from an advantage for the occupants to one for the original inhabitants. The right to return and restitution from Annex 7 was, after years of mere recognition on paper, finally given a more practical effect.

60 For a full survey, see the *Chronology of Amendments to Laws on Repossession of Prewar Property in the FBiH and RS*, compiled by the Commission on Real Property Claims (CRPC), which can be found on the CRPC's former website, as currently hosted by the University of Leuven in Belgium: http://www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm.

61 Williams (2005) pp. 505-506.

62 See section 1.3.

7.3 Human Rights Chamber case law: the right to respect for the home

One of the main catalysts for change, apart from the amendments imposed by the OHR, was the adaptation of the norms of the ECHR to the Bosnian situation. Whereas the right to restitution under Annex 7 was very broad and undefined, the Human Rights Chamber, established under Annex 4, extensively interpreted European human rights norms.[63] Since these norms were directly applicable throughout Bosnia and Herzegovina they provided the ideal tool to implicitly fill in the frame that the Annex 7 right provided. Formally, the Chamber assessed whether the parties – the state and the Entities – had acted in accordance with Annex 6. The Annex, in turn, made reference mainly to the ECHR and, in addition, to non-discrimination provisions in other human rights treaties.[64] Summarizing, the Chamber interpreted the ECHR *in the context* of (Annex 6 of) Dayton. The case law of the Strasbourg institutions was the main source of reference for the Chamber in this respect.[65] European norms and national application were in this way closely connected, bringing Bosnia into the European legal order or, put the other way around, bringing the ECHR to Bosnia and giving it meaning in that context.[66] In this section I will address one of the main rights the Chamber dealt with: the right to respect for the home of Article 8 ECHR.

7.3.1 The notion of home

Let us first explore how the Court interpreted the notion of home in the Bosnian context. In its first decision in which it had to rule on the scope of the notion, *Saša Galić*, the Chamber took the first tentative and not very systematic steps on the path of interpretation. The case concerned an applicant who had left an apartment he owned a few months before the outbreak of hostilities to study abroad. After years of proceedings he regained possession of the apartment on 3 October 1997. One day later he was forcibly evicted by the authorities. The Chamber held that since he had lived in the apartment before the war, it had been his home at the time. Since he regained possession on 3 October, the Chamber concluded that therefore 'in accordance with Article

63 Ibid., p. 492. To give an impression of the amount of cases which the Chamber dealt with: it registered 15,169 cases in the period 1996-2003. 6,243 of these were resolved in a total of 2,619 decisions, either in the form of friendly settlements, by declaring them inadmissible, or by issuing a decision on the merits (239 decisions). See: Manfred Nowak, 'Reparation by the Human Rights Chamber for Bosnia and Herzegovina', in: K. De Feyter a.o. (eds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Violations* (Antwerp: Intersentia 2005) pp. 245-288, see p. 247. For more on the mandate and structure of the Chamber, see section 11.4.2.

64 Article XIII(1) juncto Article II(2) of Annex 6.

65 Mehmet Semih Gemalmaz, 'Constitution, Ombudsperson and Human Rights Chamber in "Bosnia and Herzegovina"', *Netherlands Quarterly of Human Rights* vol. 17 (1999) pp. 277-329, see p. 326.

66 Timothy Cornell & Lance Salisbury, 'The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina', *Cornell International Law Journal* vol. 35 (2002) pp. 389-426, see p. 421.

8 of the Convention, the apartment should be considered his home as and from that date.'[67] The subsequent rapid eviction apparently did not put the situation outside the scope of 'home' again. Should one conclude from this that voluntarily leaving one's house for studies does break the tie with the house, but that forced eviction does not? The *Galić* does not clarify this unequivocally.

A few months later the Chamber started to link its case law on this point explicitly to that of the European Court of Human Rights. In *Ivica Kevešević* the applicant had had an occupancy right over an apartment from 1982 to 1993 when he fled due to the war. In 1996 the applicant returned and started paying all the bills, a fact which he himself stated confirmed that he wanted to continue living in the house. Within a few months however the local authorities evicted the applicant and his family. The Chamber held that the situation fell within the notion of the home, since the applicant had continuously lived in the apartment until the war forced him to leave and had returned as soon as it was safe to do so. Therefore, the Chamber concluded that the links the applicant had 'retained with the apartment are sufficient for it to be considered 'his home' at the time of the eviction.'[68] The Chamber explicitly referred to the Strasbourg case of *Gillow*.[69] It did not, it should be noted, explicitly copy the 'sufficient and continuing link' criterion in its entirety, but merely mentioned the sufficiency of the link in this case, which was not broken by the hostilities. As in the Northern Cyprus case of *Zavou*, eviction caused by war apparently does not break the continuity of the link as long as there is no real chance to return.[70]

The principle used in *Kevešević* was confirmed in later cases, such as *Dušanka Onić*, in which the applicant was prevented from returning, first due to the hostilities and later by the refusal of the authorities to allow return. She had instituted proceedings however to reclaim her house. According to the Chamber in this situation the links between the applicant and the house were sufficient.[71] In *Onić* and later decisions the Court made it clear that the *Kevešević* decision – and underlying it, *Gillow* – was the leading case on this point. In *Neđeljko Ubović* the principle was formulated as follows: sufficient links under Article 8 exist when 'the applicant had to leave his house or apartment due to the hostilities and wanted to return when it was safe.'[72] Two factors were thus of overriding importance: involuntary leaving one's house due to the war (or to a forced eviction) and a proven intention to return. The intention could be shown either by actual return or by having instituted a restitution claim. The relevance of intention for the Chamber goes to show that the 'continuing link' element from *Gillow* was implicitly used after all. Although the Chamber's case law is faithful to its

67 HRC BiH, *Saša Galić v. Federation of BiH*, 12 June 1998 (CH/97/40) para. 48.
68 HRC BiH, *Ivica Kevešević v. Federation of BiH*, 10 September 1998 (CH/97/46) para. 42.
69 See section 2.3.1.
70 Ibid.
71 HRC BiH, *Dušanka Onić v. Federation of BiH*, 12 February 1999 (CH/97/58) para. 48. See similarly, HRC BiH, *Fatima Ramić v. Federation of BiH*, 7 September 2001 (CH/97/114) paras. 77-78.
72 HRC BiH, *Neđeljko Ubović a.o. v. Federation of BiH*, 7 September 2000 (CH/99/2425 a.o.) para. 153.

European peer institution, it has in this way also specified and applied the sufficient and continuing link criterion to the Bosnian context.

In several other ways the explanation of the notion of home was linked to European case law, both implicitly and explicitly. The Chamber recognised that even a part of a house could be considered as a home[73] and equally that business premises fell under that notion, with an explicit reference to *Niemietz*.[74] In the same vein it indicated – in a specific and explicit reference to *Loizidou*[75] – the limits of the notion by specifying that mere intentions or emotional bonds do not constitute a sufficient link:

> It is not enough to maintain close ties to a previous home. The fact that one was born at a place or that one's ancestors had lived and were buried at a place is not sufficient for the place to be considered a 'home' for the purposes of Article 8 of the Convention. Also (…) the mere intention to establish permanent residence does not make this place his home.[76]

The Chamber's case law is not only concerned with the interests of original inhabitants though. In the case of *D.K.* the applicant had rented an apartment from a tenancy right holder, who had not officially registered as such herself. The deal was confirmed by a contract between the parties. Within a few months the authorities issued an eviction order, since the applicant was living in the apartment illegally. The Chamber held that the apartment in questioned could be considered as the applicant's home, since 'Article 8 of the Convention does not require the existence of a legal basis under national law for the place where a person lives to be considered his or her home.'[77] This may be stretching the concept too far though. As mentioned in chapter 2, some form of legal interest in the house at stake is necessary according to ECHR case law.[78] Significantly, the Chamber did not provide a reference to specific Strasbourg cases to prove its point. The Chamber thus went a little further than the European jurisprudence did. This may be explained by the specific Bosnian context, in which the whole conception of legality was a grey area due to discriminatory wartime laws and the simultaneous existence of a multitude of old and new national and semi-international laws. As we shall see, this played a role in the Chamber's assessment on the legality under the ECHR of interferences with the right to respect for the home. In this case, it may might have been wiser if the Chamber had given the applicant the benefit of the doubt in assuming that he had a legal interest – especially considering the unclear legal situation in Bosnia – than to merely state that no legal interest was required at all.

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73 HRC BiH, *Jasmin Odobašić v. RS*, 6 July 2000 (CH/98/575) para. 53. Compare *Camenzind* in section 2.3.1.

74 HRC BiH, *Ljiljana Gogić v. RS*, 11 June 1999 (CH/98/800) para. 50. See section 2.3.3.

75 See section 2.3.1.

76 *Ubović*, para. 149.

77 HRC BiH, *D.K. v. RS,* 10 December 1999 (CH/98/710) para. 31.

78 See: Ian Loveland, 'When is a house not a home under Article 8 ECHR?', *Public Law* 2002, pp. 221-231, see 223 (mentioned in section 2.3.1).

7.3.2 Non-interference

In adjudicating interferences, the Chamber adhered to the test as developed by the European Court on the basis of Article 8: interferences are only allowed when they are in accordance with the law, pursue a legitimate aim and are necessary in a democratic society.[79] The law itself must be foreseeable and accessible. Previously, in chapter 2, I have considered three relevant interferences in relation to post-conflict housing restitution: destruction, eviction and denial of access. Of these three, destruction as such did not play a role in the Human Rights Chamber's case law.[80] This may be explained by the fact that most, though not all, of the destruction tool place during the conflict, whereas the Chamber's jurisdiction has 14 December 1995 as its starting point, the day of the entry into force of Dayton.[81] Since destruction is an instantaneous act, it could not be construed as a continuing violation of Article 8.

Evictions, on the other hand, led to a large number of complaints before the Chamber. The complaints mostly addressed the consequences of an eviction and are therefore equally concerned with a *de facto* denial of access. Only in some cases an eviction as such was complained about and led to a violation of Article 8. This happened when an applicant was evicted in spite of a Chamber order for a provisional measure not to evict. The Chamber held that a violation of such an order could was not 'in accordance with the law' under paragraph 2 of Article 8.[82] By contrast, the European Court of Human Rights would construct a failure to comply with such measures as amounting to a violation of the effective exercise of Article 34 ECHR, the right of individual application.[83]

In Strasbourg many judgments under Article 8 focus on the question whether an interference was 'necessary in a democratic society.' By contrast, before the Bosnian Human Rights Chamber the very large majority of cases were decided under the legality test. In all the cases in which the Chamber addressed the latter issue, a violation of Article 8 was found on that point[84] and therefore it was not necessary to perform the other tests. These decisions concerned both the (lack of) quality and accessibility of the laws on the one hand and the (non-)adherence of the Entities to

79 Walpurga Englbrecht, 'Property Rights in Bosnia and Herzegovina: The Contributions of the Human Rights Ombudsperson and the Human Rights Chamber', in: Leckie (2003) pp. 83-142, see p. 101.

80 As far as I have been able to assess by searching for 'destruction' in the Chamber's case law database.

81 This was decided in the Chamber's first case: HRC BiH, *Josip, Bozana & Tomislav Matanović v. RS*, 6 August 1997 (CH/96/1). See chapter 11 for a more elaborate analysis of this point.

82 *D.K.*, para. 36.

83 ECtHR, *Mamatkulov & Askarov v. Turkey* (Grand Chamber), 4 February 2005 (Appl.no. 46827/99 & 46951/99) para. 128. The difference might be explained by the fact that Annex 6 of Dayton gives the Chamber jurisdiction over alleged violations of the rights contained in the ECHR , but does not enumerate these rights as such. However, in the ECHR itself, the right to individual application is to be found in Section II (the institutional part) of the Convention and not in Section I (rights and freedoms). The Chamber therefore may have considered this to be part of the organizational part of the ECHR. Since the Chamber functioned within its own institutional context, it did not need that part.

84 Englbrecht (2003) p. 101.

those laws on the other hand. In the most extreme cases an eviction had no legal basis whatsoever, for example in *Cecilija Turcinović* a decision to evict was based on references to articles 30 and 47 of a law that counted only 14 articles![85]

The Chamber's decisions first of all focussed on the laws of the Entities and their compatibility with the ECHR. The Federation's housing laws were the first to come under judicial attack. In the *Ivica Kevešević* decision of 10 September 1998, the 1995 amendment of the *Law on Abandoned Apartments* was judged to be in violation of Article 8 on two counts: it was of insufficient accessibility and quality. Both related to the automatic and permanent cancellation of original occupancy rights, unless people lodged a claim within 7 or 15 days from the date of publication of the law. Initially, however, the law was only posted on a single bulletin board in Sarajevo. The law was published in the Official Gazette 15 (sic!) days later. The Chamber held that it:

> must have regard to the large number of persons with a personal interest in the legal provisions in question as well as to the fact that these persons were to be found throughout the country and even abroad. In the Chamber's opinion, it would be wholly unrealistic to expect the contents of a notice posted on a single bulletin board in the capital to come to the notice of such a public. In the circumstances, therefore, publication of the Decision on the bulletin Board of the Presidency building could not suffice to render the law in question 'accessible'.[86]

As to the quality of the law, the Chamber explicitly referred to Strasbourg case law stipulating that a domestic law should meet the criteria of the rule of law.[87] These included safeguards against abuse. The Chamber was of the opinion that the time limits themselves were practically impossible to comply with. It deemed it unacceptable that 'a law should deprive persons permanently of their rights if they do not fulfil a wholly unreasonable condition, such as the time-limit referred to, which could not possibly be fulfilled by the majority of those affected.'[88] By striking down this amendment, the Chamber clearly showed its preference for the robust model of the rule of law, which looks beyond technicalities and into the practical content of rules.[89]

The RS legal framework was equally subjected to the Chamber's scrutiny. The immediate post-war *Law on the Use of Abandoned Property* did not meet the standards

85 HRC BiH, *Cecilija Turcinović v. the Federation of BiH*, 11 March 1998 (CH/96/31) para. 21. There was apparently a mix-up with another law, but the Federation never responded to the Chamber's request to clarify the legal basis. Therefore the Chamber concluded that there was no legal basis for the decision.

86 *Ivica Kevešević*, para. 56.

87 Ibid., para. 57. The Chamber had earlier used this principle in a decision in a death penalty case: HRC BiH, *Stretko Damjanović v. Federation of BiH*, 8 October 1997 (CH/96/30) para. 31. The Chamber *inter alia* referred to: ECtHR, *Malone v. the United Kingdom*, 2 August 1984 (Appl.no. 8691/79) para. 67.

88 *Ivica Kevešević*, para. 57.

89 See section 1.3.

of the European Convention either. In *Esfak Pletilić a.o.*, a large group of applicants tried to regain real property in the Republika Srpska lost during the war. In that case, the Chamber found that the law did not meet the criterion of foreseeability, since the effects of the procedure in the law on regaining possession were unclear. For example, the law allowed for return of property in the context of a settlement between the RS, the Federation, and Croatia,[90] but did not specify what the terms of such a settlement were to be. Neither was there any explanation on how the principle of reciprocity of restitution was to be applied in practice. Moreover, the principle itself formed a bar to repossession. The Chamber stated that the law 'did not provide any safeguards against abuse, but was itself a source of arbitrariness and abuse.'[91] The Chamber concluded that parts of the law therefore did not meet the legality criterion of Article 8. By the time the Chamber ruled in *Pletilić* (10 September 1999), the new cessation laws had come into force. However, the Chamber noted that it did not have sufficient evidence to rule on the compliance of the RS cessation law with paragraph 2 of Article 8.[92] A few months later, in *Mirsada Basić*, the Chamber approved of the cessation law indirectly, holding that it did grant applicants a right to repossess their property.[93] The Chamber thereby gave a very specific interpretation to the legality principle. In this case it almost equalled the principle to an effective right to restitution. Thus it gave the signal that laws should in their contents reflect their purpose *in an effective way.* Simultaneously, it implicitly indicated that the cessation laws themselves could be seen as a step towards better adherence of the Bosnian legal system to the ECHR.

And even when the laws were deemed of sufficient quality by the Chamber, flaws and violations could be found in the lack of adherence of the Entity authorities to those laws. In *Kovačević* the failure of the Federation to decide upon an enforcement request concerning repossession in a timely manner constituted a violation of Article 8. It took the applicant several years to have a claim for repossession decided upon by the authorities, whereas the legal requirement was a decision within thirty days.[94] In *Dragan Malčević* and *O.K.K.* the Chamber dealt with CRPC decisions against respectively the Federation and the RS. In both cases the Entity authorities failed to authorise the execution of CRPC decisions ordering the restitution of housing to the applicants concerned within the time-limit of 30 days provided by domestic law. In both cases a violation of Article 8 ensued, since the Entities' continued interferences with the right to respect for the home were not 'in accordance with the law.'[95] In *Fatima Ramić* the defiance of CRPC decisions went even further. The Federation authorities did act following a CRPC decision which recognised the applicant as the occupancy right holder, but they did so by rejecting the applicant's request for repossession. Since the

90 Article 39 of the RS *Law on the Use of Abandoned Property*.
91 HRC BiH, *Esfak Pletilić a.o. v. RS*, 10 September 1999 (CH/98/659 a.o.) paras. 173-174.
92 Ibid., para. 178.
93 HRC BiH, *Mirsada Basić a.o. v. RS*, 10 December 1999 (CH/98/752 a.o.) para. 151.
94 HRC BiH, *Savka Kovačević v. Federation of BiH*, 11 May 2001 (CH/98/1066) paras. 62-76.
95 HRC, BiH, *Dragan Malčević v. Federation of BiH*, 8 September 2000 (CH/97/62) paras. 51-63; HRC BiH, *O.K.K. v. RS*, 9 March 2001 (CH/98/834) paras. 53-62.

CRPC's decisions were final and were to be recognised as lawful, according to Annex 7 of Dayton,[96] such a rejection was unlawful. Once more a violation of Article 8 was the result.[97] In all these CRPC-related situations the normative work of one Dayton institution tried to support that of another.

Not only an actual eviction, but also the threat of a forcible eviction by the authorities has been qualified as an interference with Article 8. In *Turcinović* the Chamber held that the threatened and attempted eviction of the applicant was an interference of and by itself.[98] This was confirmed in subsequent cases, in another echo of Strasbourg case law.[99] A decision by the authorities to evict was even considered to be a continuing violation as long as it was not revoked.[100] Most interferences of this kind did not pass the first limb of the paragraph 2 test of Article 8. In *Dragan Topić* the Chamber held that the apartment in question was not entered into the records of abandoned property, as was required by RS law. For that reason the threatened eviction did not pass the legality test of Article 8.[101] In *Nenad Miljković* an eviction order to vacate an apartment within three days with an appeal option having no suspensive effect equally constituted a violation of Article 8; the applicant had not been given the opportunity to give his opinion *before* the decision was made, although the Entity law of RS so required.[102]

In a small number of later cases the law, exceptionally, was not the problem. This was the case after the amendments of 1999. When displaced persons were living somewhere legally, but on a temporary permission, the Chamber was very succinct in its handling of the case. An order to vacate the house in question in order to return it to the original inhabitant was dealt with in a mere admissibility decision. In *Buljić* and other decisions, the Chamber declared complaints that such orders violated Article 8 manifestly ill-founded.[103] Mimicking the European Court in the content of its admissibility decisions, the Chamber did assess the case on its merits, albeit briefly. It noted that the applicants' right to use the housing in question had been only of a temporary nature and that the decision to return the home to the owner turned them into illegal occupants. In such circumstances, the Chamber could not find 'that the application raises any issues under the Agreement'.[104] A more correct approach would be to hold that the issue fell within the scope of the notion of home and then to assess the case on its merits. The manner in which the Chamber dealt with these applications may be explained in several ways. First, the usual balancing of interests in human rights cases

96 Article XII(7).
97 *Ramić*, paras. 82-86.
98 *Turcinović*, para. 20.
99 See section 2.5.
100 See e.g. HRC BiH, *Nada Blagojević v. RS*, 11 June 1999 (CH/98/645) para. 49.
101 HRC BiH, *Dragan Topić v. RS*, 5 November 1999 (CH/98/894) paras. 44-45.
102 HRC BiH, *Nenad Miljković v. RS*, 11 June 1999 (CH/98/636) para. 53.
103 See e.g. HRC BiH, *Simo Buljić v. RS*, 7 June 2000 (CH/00/3730); HRC BiH, *Lazar Novaković v. RS*, 4 July 2000 (CH/00/3659).
104 *Buljić*, para. 6.

clearly tilted towards the interests of the original legal owners at the expense of the illegal occupiers in *Buljić* and comparable cases.[105] Secondly, procedural efficiency may have led the Chamber to handle these cases summarily, since an assessment on the merits would have yielded the same results.[106] Thirdly, the Chamber's reference to the (Dayton) Agreement might indicate a bias towards restitution and return, marking the special context in which the Chamber operated.

To conclude on interferences, even the odd cases in which the assessment went beyond the legality test, it was more of a legal extra than a necessity. In *Cecilija Turcinović*, the decision on the mixed-up references to the law, the Chamber held that even if there was a legal basis, the interference was in violation of Article 8. The applicant lived in an apartment over which her son-in-law had entered into a purchase contract. She lived there with his permission. The authorities refused, however, to recognise the purchase contract, in violation of P1-1. The subsequent order to evict the applicant was, according to the Chamber 'designed to make effective the violation of the son-in-law's rights'. This could not be considered as a legitimate aim and for the same reason could not be seen as 'necessary in a democratic society.'[107] In a line of irrefutable reasoning the Chamber thus denied the authorities to do under one article (8) what was unlawful under another (P1-1).

The *Nada Blagojević* decision was another rare case in which the Chamber went beyond the first limb of the paragraph 2 test. Again, a violation had already been found on the basis of the first limb. Nevertheless, the Chamber took a short look at the two other limbs. It held that the aim of the law concerned, the RS *Law on the Use of Abandoned Property*, could be considered to have a legitimate aim, namely the provision of accommodation for refugees and displaced persons. Nevertheless, it held that retrospective nullification of the applicant's tenancy contract with her landlord, 'which she had entered into in good faith, and in accordance with the terms of which she has occupied the apartment since December 1991, cannot be considered to be proportional to that aim.'[108] The decision shows that the use of abandoned housing for sheltering displaced people is a legitimate aim in the aftermath of conflict. An interference justified by such aim will not easily pass the proportionality test however. As *Blagojević* shows, a crucial factor will be the good faith of the current occupier of the dwelling in question – as shown in this case by a legal contract and an abiding with its terms.

Finally, the case of *Milomir Radulović* concerned the occupation of a house with the certified authorization of the owner. When the local authorities issued an eviction order against the occupant on the basis of the RS *Law on the Use of Abandoned*

105 Englbrecht (2003) p. 93.

106 The case load of the Chamber was very high. E.g. more than 1200 inadmissibility decisions in the less than ten years of its existence. See: Manfred Nowak, 'Introduction', in: Human Rights Chamber for Bosnia and Herzegovina. *Digest. Decisions on Admissibility and Merits 1996-2002* (Kehl: N.P. Engel 2003) p. 8.

107 *Cecilija Turcinović*, para. 24.

108 *Nada Blagojević*, para. 52.

Property, Radulović complained that this was contrary to Article 8 ECHR. Although the Chamber found a violation of Article 8 for lack of compliance with domestic law by the authorities, it went on to consider that the accommodation of refugees and displaced persons could serve as a legitimate aim. But in spite of that, 'the eviction of persons from properties which they occupy with the consent of the legal owner, without the provision of compensation or alternative accommodation' could not be considered as being proportional to that aim.[109] In this case, the occupation had been agreed upon two years before the outbreak of hostilities. The Chamber did thus not have to take into account the possibility of a deal having been forced upon the owner. If the agreement would have dated from during the war, a more thorough investigation into the voluntary character of the deal would have been necessary. In any event, the decision shows that the Chamber left the door open for evictions in case of real necessity. *Bona fide* occupiers in such cases would then under the ECHR be entitled to compensation or alternative accommodation.

7.3.3 Positive obligations

Apart from the legality of *interferences* the Chamber has also addressed the issue of *positive obligations* under Article 8. This issue was especially important considering that most people were evicted in the period before the Chamber had jurisdiction and thus in most cases only the subsequent action or inaction of the authorities to help people regain their housing could be taken into account. The leading case on this point is *Mehmed Blentić*.[110] The applicant and his wife had been forcibly evicted by a Serbian refugee in September 1995, at the very end of the war. The applicant was Bosniak. His house was located in Banja Luka in the Republika Srpska. The applicant instituted proceedings before the local Court which ordered the eviction of the refugee. Nevertheless, several attempts to execute the Court's decision failed due to the lack of police assistance for the court's officials, whereas dozens of citizens were obstructing the eviction. The applicant complained that the authorities' inaction violated Article 8. The Chamber explicitly assessed the case in the light of European case law. It held that Article 8 could give rise to positive obligations, that the 'fair balance' test had to be applied, and that in such an assessment the aims mentioned in paragraph two of Article 8 had a certain relevance.[111] These general European principles were again 'translated' into the Bosnian context. The Chamber was of the opinion that:

> The obligation to effectively secure respect for a person's home implies that there must be effective machinery for protecting it against unlawful interference of the kind which

109 HRC BiH, *Milomir Radulović v. RS*, 10 December 1999 (CH/98/1785) paras. 30-32.

110 HRC BiH, *Mehmed Blentić v. RS*, 3 December 1997 (CH/96/17).

111 Ibid., para. 26. With references to the following judgments: ECtHR, *Marckx v. Belgium*, 13 June 1979 (Appl.no. 6833/74); ECtHR, *Airey v. Ireland*, 9 October 1979 (Appl.no. 6289/73); ECtHR, *X & Y v. The Netherlands*, 26 March 1985 (Appl.no. 8978/80); ECtHR, *Velosa Barreto v. Portugal*, 21 November 1995 (Appl.no. 18072/91); ECtHR, *Lopez Ostra v. Spain*, 9 December 1994 (Appl.no. 16798/90).

> the applicant has suffered. In particular there must be effective machinery for restoring possession in accordance with the orders of a court.[112]

The Chamber continued by specifying that the authorities were bound by the positive obligation to take 'effective, reasonable and appropriate measures to deal with the difficulties posed by the assembly of people obstructing the applicant's return to his home.'[113] Put differently, an obligation of due diligence applied. Although the Chamber recognised that an eviction carried out in the face of public opposition may be legitimately delayed for reasons of public order, the authorities are bound to take action to deal with such a situation. In the present case the police had undertaken no action at all, in spite of an Entity law that obliged them to support the judicial authorities in such matters. Moreover, none of the persons responsible for obstructing the court order had been prosecuted. In conclusion, the Chamber held – in particularly strong wording – that 'such a situation is incompatible with the *rule of law* and involves a breach of Article 8'.[114] In the comparable case of *Marija Bojkovski* the Chamber re-emphasized the point that Entities not only were under an obligation to pass laws to protect individuals in accordance with Article 8, but also that they had to implement such laws. 'Otherwise the legislation is not effective', as the Chamber put it.[115] *A fortiori*, more extreme forms of Entity inaction also violated the ECHR. In *Đ.M.*, the applicant tried to reclaim her home under the Federation's *Law on Temporarily Abandoned Real Property Owned by Citizens*. None of the petitions that she sent and none of the proceedings she instituted led to any reaction of the authorities. There was complete silence on the part on their part. The Chamber concluded that this passivity of the authorities amounted to lack of respect for the applicant's home for which no justification had been put forward. Article 8 had been violated.[116] These cases show that the Chamber was of the opinion that the mere existence of legislation which in theory enabled persons to repossess their apartments was not sufficient. Implementation was deemed to be crucial.

It should be noted that the European Court adopted a similar approach, by reading a positive obligation into Article 8 to enforce a national court's eviction orders, in the *later* case of *Cvijetić v. Croatia*.[117] And like the Chamber in *Đ.M.*, the Court held in C*vijetić* that the particularly slow actions of the authorities did not only violate Article

112 Ibid., para. 27.
113 Ibid., para. 28. The Chamber adopted this from the following Strasbourg case, in which the state was obliged to protect demonstrators against violent counter-demonstrators, as far as was reasonable and appropriate: ECtHR, *Plattform Ärzte für das Leben v. Austria*, 21 June 1988 (Appl.no. 10126/82).
114 Ibid., emphasis added.
115 HRC BiH, *Marijha Bojkovski v. Bosnia and Herzegovina & Federation of BiH*, 6 April 2001 (CH/97/73) para. 51. Confirmed in: Kovačević, para. 67.
116 HRC BiH, *Đ.M. v. Federation of BiH*, 14 May 1999 (CH/98/756) para. 91.
117 See section 2.6.

6 for transgression of the trial within a reasonable time requirement,[118] but also of Article 8 separately. In all cases the fact that institutions may be weakened due to a recent civil war is apparently immaterial. The European case was decided in 2004, several years after the Bosnian ones. Without suggesting a causal connection or direct influence between the two, this at least shows that (semi-inter)national adjudicatory bodies can use and interpret the European Convention in the light of the specific needs of a society emerging from conflict.

A due diligence obligation was not only put on the executive, but also on the judiciary. In *M.J.*, the facts of which closely resemble the *Blentić* case, the Chamber held that there should not only be effective machinery for enforcing court orders, but equally for obtaining them in the first place.[119] The applicant in *M.J.* had tried to have several illegal occupants evicted from his apartment with urgency for several years and had submitted all the relevant facts to the national courts. Nevertheless, no hearings were held and not even provisional measures had been ordered. The Chamber noted that the delays had not been explained by the respondent party, in this case the Republika Srpska. It concluded that the situation was incompatible with Article 8 and that the Article had been violated because of the court's failure to deal with the matter with 'sufficient urgency'.[120] Unexplained delays were thus not acceptable.

7.3.4 Some conclusions

The Chamber's case law on Article 8 follows more or less in the trail of its Strasbourg peer. As we have seen above, the notion of 'home' as developed by the Chamber for the most part closely mirrors the one developed by the European Court. Sufficient and continuing links are the main criterion of assessment. Forced evictions due to armed conflict do not break those links as such, as long as the applicant has shown in one way or another his or her intention to maintain that link, e.g. by starting restitution proceedings.

In assessing the legality of interferences and the extent of positive obligations, the Chamber's system of review is the same as the European Court's. However, the emphasis is different. In the Strasbourg context destruction, eviction and denial of access were either succinctly dealt with as so grave that a justification was not possible or assessed more in depth under the third limb – 'necessary in a democratic society' – of paragraph 2 of Article 8. In the Bosnian context, on the other hand, most of the Chamber's efforts centered on the first limb of that test, the requirement 'in accordance

118 The European Court had held in earlier jurisprudence, in the context of Article 6 ECHR, that there was a link between the timely execution of national court judgments and the rule of law (e.g. ECtHR, *Hornsby v. Greece*, 19 March 1997 (Appl.no. 18357/91) para.41). The *Cvijetić* judgment was the first time in which non-execution led to a violation of article 8 ECHR.

119 HRC BiH, *M.J. v. RS*, 3 December 1997 (CH/96/28) para. 26.

120 Ibid., para. 28. Remarkably, the case was not considered under Article 6 ECHR, in the context of the right to access to court. As far as the case shows, the applicant did not complain about a violation on this point.

with the law'. This assessment was performed on two levels. First, in some cases the focus was on the domestic law itself. The Chamber evaluated whether the Entity laws conformed to ECHR standards, both in their quality – containing safeguards against abuse and realistically offering what they were formally developed for – and in their accessibility. The somewhat automatic Strasbourg incantations were thereby given renewed content. Accessibility, for example, was not just a standard formula, but a practical benchmark to assess whether a single bulletin board to proclaim a law with tight deadlines sufficed or not. Second, the adherence of the domestic authorities to the laws was equally scrutinized. This included both the adherence itself and a duty of due diligence, developed under the Strasbourg notion of positive obligations. Throughout, the right to housing restitution as put down in Annex 7 provided a silent background marker in assessing specific situations. Laws were questioned on whether they realistically helped to achieve this goal of restitution.

In only a few cases the third test of paragraph two of Article 8, the necessity and proportionality test, was applied. Like its Strasbourg counterpart, the Chamber did not apply the second and third tests, when an interference did not even pass the first test.[121] The case law shows that interferences with the right to respect for the home are more difficult to justify against those who legally acquired housing and those acting in good faith than against illegal occupants or against those who have only temporary accommodation rights.

The general emphasis on legality reflects the specific situation in which the Chamber operated: a devastated society, in which the institutions of the state had been destroyed or divided or were continuing to work to achieve wartime goals of ethnic separation. In such a context the more subtle balance of interests developed in Strasbourg under the third limb of the paragraph 2 test was not the Chamber's main concern. First and foremost, the Chamber's case law can be seen as an exercise in reconstructing the rule of law. This explains the emphasis on the first limb of the test. It also shows that the Chamber upheld a robust notion of the rule of law, in which it not only held up the Entities to their own standards (the procedural part of the rule of law), but also looked at these standards through a European looking glass (the content-part of the rule of law, in this case focusing on human rights as laid down in the European Convention). This was not merely a negative exercise, since the Chamber also in some cases approved of laws in its decisions. The overall picture emerging from the Chamber's use of the Convention is thus that it was applied in such a way as to pinpoint the specific and most urgent legal aspects of housing restitution in Bosnia.

7.4 HUMAN RIGHTS CHAMBER CASE LAW: PROTECTION OF PROPERTY

Contrary to the approach of the European Court, the Chamber always dealt with complaints under Article 8 and P1-1 separately, although the reasons by which it

121 As an example of Strasbourg case law, see: ECtHR, *M.M. v. the Netherlands*, 8 April 2003 (Appl.no. 39339/98) paras. 45-46.

arrived at its conclusions were at times the same under the two headings.[122] In this section I will first address the Chamber's interpretation of the notion of 'possessions' in the context of P1-1 and subsequently I will look into its assessment of the merits of cases in that context.

7.4.1 The notion of possessions

The Chamber has interpreted the notion of 'possessions' very broadly. Not only real property, but also the following were deemed to fall within the notion of possessions: contractual rights under contracts for the purchase of property, even if these contracts did not of themselves give rise to real rights of property[123]; and the right under a lease to use business premises and the results of efforts to improve the space.[124] More specifically in the context of housing the Chamber had to rule, crucially, on whether occupancy rights fell within the scope of P1-1. These rights, as we have seen earlier, were *sui generis* rights; no precedent existed in the case law of the European Court of Human Rights.[125] In *M.J.* it held that 'an occupancy right is a valuable asset giving to the holder of the right, subject to the conditions prescribed by law, to occupy the property in question indefinitely. In certain circumstances at least it can be transferred.' Therefore, the Chamber was of the opinion that the occupancy right was an asset constituting a 'possession'.[126] As a justification the Chamber referred to the fact that the European Court had given a wide interpretation to the notion and had held that it covered a wide variety of rights.[127] At first sight, the Chamber's reasoning appears debatable. Occupancy rights could not be sold and in that sense did not represent a substantive interest *directly* representing a pecuniary value.[128] On the other hand, three contextual arguments militate in favour of the inclusion of occupancy rights under the protective umbrella of P1-1. In the first place, Central and Eastern Europe under communist rule developed a legal tradition of alternatives to private property rights, the remains of which still lingered in ex-Yugoslav legislation. Occupancy rights were one form of this. By contrast, the ECHR was drafted by countries in which the notion of private property was firmly entrenched. To exclude occupancy rights from the notion of 'possessions' would therefore deprive considerable groups of the protection of P1-1. Secondly, in the specific post-war context of Bosnia, such a conclusion was necessary to provide for pecuniary damages, e.g. because people had to rent alternative

122 For example: *Đ.M.*, para. 96.
123 HRC BiH, *Branko Medan, Stjepan Bastijanović & Radosav Marković v. BiH & Federation of BiH*, 7 November 1997 (CH/96/3 a.o.) para. 32.
124 HRC BiH, *Stanivuk v. Federation of BiH*, 11 June 1999 (CH/97/51) para. 59.
125 Even in *later* European case law, such as *Teteriny v. Russia* (see section 3.2), the protected tenancy rights were different. They included *inter alia* the right to privatize the apartment one occupied.
126 *M.J.*, para. 32.
127 Ibid.
128 See section 3.2.

accommodation for the time they had no access to their original apartment.[129] Finally, an inclusion in the scope enabled an assessment on the merits, something which should always be endeavoured, as argued earlier.[130] Especially, one might add, in the context of biased post-civil war domestic institutions.

Going even one step further the Chamber, in *Darko Prodanović*, held that a rental agreement was equally covered by the notion of possessions. The applicant had concluded a rental agreement during the war with the legal representative of the owner. The agreement would be valid until the return of the owner to the house. He and his family had occupied the house ever since, until they received an eviction order in 1998. The Chamber considered the case under P1-1 *proprio motu* and held that 'the applicant's contractual right is of great value to him, granting as it does the right for he [sic![131]] and his family to occupy the house. This right therefore constitutes the applicant's 'possession' within the meaning of Article 1 of Protocol No. 1.'[132] It seems as if the Chamber used a purely subjective notion of possessions – something clearly excluded by the European Court.[133] After all, a tenancy such as the one in this case never included the legitimate expectation of acquiring property,

The wide notion of possessions developed in Strasbourg was stretched almost beyond credible limits in Sarajevo. There is no clear legal ground for this in the ECHR nor did the Chamber itself provide this in any reasoned way. The only explanation seems to be the specific context of a post-communist, post-war society with national institutions which had lost most of their credibility. In that context the Chamber apparently wanted to offer as much human rights protection as possible. Since its jurisdiction was limited by existing human rights treaties, it had to interpret the substantive provisions of those treaties as broadly as possible. Whereas this may have justified political and moral rationales, the legal basis seems quite tenuous.

7.4.2 Non-interference and positive obligations

The Chamber, in explicit reference to European case law, has evaluated interferences with property rights under P1-1 along Strasbourg lines. It recalled that the taking of property is only compatible with P1-1 when the interference pursued a legitimate aim in the public interest and when there was 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'[134] In other words, a fair balance test applied. In addition, P1-1 gives rise to positive obligations.[135] In this section, I will deal with both interferences and positive obligations simultaneously.

129 See section 7.6.
130 See section 2.3 in the context of the notion of home under Article 8.
131 Official English version of the decision.
132 HRC BiH, *Darko Prodanović v. RS*, 11 June 1999 (CH/98/114) para. 56. See also *Miljković*, para. 57.
133 See section 3.2.
134 *Branko Medan, Stjepan Bastijanović & Radosav Marković*, para. 35. The Chamber referred to: ECtHR, *James a.o. v. the United Kingdom*, 21 February 1986 (Appl.no. 8793/79).
135 *Mehmed Blentić*, para. 32.

This avoids unnecessary duplication, since in the large majority of cases the Chamber simply referred to its findings under Article 8 to conclude that P1-1 had been violated. In addition, the Chamber itself did not seem to use a rigorous division in its decisions. In *Bakir Džonlić*, for example, it qualified a failure of the authorities to enforce its own decisions as an interference instead of a violation of a positive obligation.[136]

The Chamber, as it did under Article 8, focussed in many of its decisions on questions of legality. Interferences with property rights were therefore found to violate the ECHR either because the domestic laws themselves were of insufficient quality or because domestic authorities did not abide by their own rules and regulations. I will not here reiterate all relevant cases, since the reasoning dealt with in the previous section on the right to respect for the home generally applies in this context as well. Just one example may serve to show this. In line with the Strasbourg approach, the Chamber held that not only formal but also *de facto* expropriations fell within the scope of P1-1. This meant that the temporary termination of occupancy right in the Federation due to the 1995 amendment of the *Law on Abandoned Apartments*, which resulted in evictions and thus the impossibility to use the property, could be assessed under P1-1. Since the Chamber had ruled that that law did not meet the standards of the ECHR under Article 8, it concluded in *Ivica Kevešević* that the deprivation of possessions was not 'provided by law' and thus that P1-1 had been violated.[137]

What applied to the legality tests, applied to positive obligations as well: the reasoning under Article 8 and P1-1 was largely parallel and overlapping. The Chamber held that domestic authorities have the duty to enforce eviction orders issued by domestic courts, even when facing public opposition to such action. The reasoning on this point is exactly the same as under Article 8. In the *Blentić* decision the Chamber inferred such an obligation of 'necessary assistance' from one of the Italian ECHR eviction cases.[138] Once again European case law provided the basis for the application of legal rules in the Bosnian context. Similarly, a failure by domestic courts to decide on a basis of urgency in civil cases against illegal occupants breached P1-1.[139]

There is, however, one point in which the economic or pecuniary *added* value of P1-1 as compared to Article 8 clearly surfaces. This is the issue of compensation for property deprivations. The Chamber followed in Strasbourg's footsteps by holding that P1-1 requires 'in general the payment of reasonable compensation upon deprivation of possession of property'.[140] Deviations from this principle could only be made under exceptional circumstances, as the European Court had already held.[141] Connecting this to the situation in Bosnia, the Chamber held that 'a state of war, an imminent threat of war or a state of emergency', categories mentioned in the Constitution of the RS,

136 HRC BiH, *Bakir Džonlić v. RS*, 11 February 2000 (CH/98/697) para. 74.
137 *Ivica Kevešević*, paras. 76-80.
138 *Mehmed Blentić*, para. 32.
139 *M.J.*, para. 33.
140 *Nenad Miljković*, para. 64.
141 E.g. ECtHR, *The Holy Monasteries v. Greece*, 9 December 1994 (Appl.no. 13092/87 a.o.) para. 71, as cited by the Chamber in *Nenad Miljković*, para. 64.

might fall under those exceptions. However, the RS government had formally declared in 1996 that such a state of war or emergency no longer exited. The RS was thus precluded from relying on those very exceptions due to its own actions. On Bosnia's road to normalcy, the Chamber gave the Entity authorities minimal leeway by deciding in this manner.

Deprivations of property required compensation, but *retroactive* deprivations had to conform to even stricter criteria. Cogent reasons should exist to justify such deprivations. This problem of retroactive deprivation came to the fore in a large number of cases on apartments purchased from the former Yugoslav National Army (JNA). The Federation issued a decree on 22 December 1995 which retroactively annulled the purchase contracts.[142] The annulment decree can be explained by widespread feelings in the Federation that the Serb-dominated JNA had played a very active and negative role in the Bosnian war. In the leading case of *Branko Medan a.o.* the Chamber ruled that these annulments amounted to a deprivation of possessions. It went on to assess whether this had been done in the public interest. The Federation argued that the Decree in question was meant to rectify unequal treatment, since 'some members of the JNA had been placed in an especially privileged position in relation to the purchase of their flats and were able to purchase them on terms more favourable than other occupiers of socially owned apartments.' The Chamber, considering the wide margin of appreciation on the issue of what was in the public interested, accepted that equality of treatment in this context could be a legitimate aim,[143] but held that there was no evidence that the applicants 'were in an especially privileged position.' More importantly, the Chamber held that retroactive annulment of existing contractual rights[144] without compensation was disproportionate. It considered this to be a particularly serious interference with property rights and held that it involved 'an infringement of the rule of law referred to in the Preamble to the Convention and carries the danger of undermining legal security and certainty.'[145] A violation of P1-1 ensued. The particular emphasis on the rule of law is again striking and shows where the concerns of the Chamber lay.

142 Englbrecht (2003) p. 114.

143 By contrast, the aim of protecting 'the rights or interests of an ethnic majority in the field of housing' is obviously not a legitimate aim under Article 8, according to: Nico Mol, 'Implications of the Special Status Accorded in the General Framework Agreement for Peace to the European Convention on Human Rights', in: Michael O'Flaherty & Gregory Gisvold (eds.), *Post-War Protection of Human Rights in Bosnia and Herzegovina* (The Hague: Martinus Nijhoff Publishers 1998) pp. 27-69, see p. 60. This amounts to stating the obvious, since I doubt that authorities would ever openly put such an aim forward in legal proceedings.

144 The contractual rights at stake here are contracts of purchase, as opposed to rental agreements in the *Darko Prodanović* case, mentioned in 7.4.1. Thus the *Medan* decision does not seem to me to offer an undue stretching of the concept of possessions under P1-1.

145 *Branko Medan, Stjepan Bastijanović & Radosav Marković*, paras. 34-38. It held *obiter dictum*, in para. 37, that prospective legislation aimed at countering such inequalities could have been proportionate. See also *Milivoje Bulatović*, para. 38.

Not only retroactive nullifications of purchase contracts but also of rental contract were strictly reviewed by the Chamber. In *Nenad Miljković*, the eviction case earlier dealt with in section 7.3.2, the Chamber held that the 'accommodation needs of the large number of refugees and displaced persons on the territory of the Republika Srpska' was without doubt a legitimate aim to justify interferences with property rights. However, the complete absence of compensation meant that the applicant had to bear an 'individual and excessive burden', due to which P1-1 was violated. In passing, the Chamber noted that the provision of the RS *Law on the Use of Abandoned Property*, which automatically declared null and void all contracts between a user or owner who had left the territory of RS and others,[146] constituted a 'massive deprivation of possessions, albeit for the purpose of its allocation to certain categories of persons.'[147] The violation in the individual case was caused by the automatic annulment provision in the law and therefore, the Chamber indirectly held that this provision itself – in as far as it did not provide for compensation – was not in line with the ECHR.

7.4.3 Some conclusions

The Chamber's track record on property rights shows a similar picture as the one on respect for the home: the emphasis is not on how local authorities balanced the right of claimants against occupiers, but on the rule of law. Time and again, the Chamber focussed on whether the authorities adhered to their own rules and to whether the rules in force complied with the ECHR. A debatably overstretched interpretation of the notion of possessions permitted the Chamber to take into account almost any situation in which *de facto* financial implications where at stake for the applicant.

The added value of P1-1 is to be found precisely in such a focus on the financial or economic aspects of housing loss and restitution. Property takings, whether formal or actual, could only be in accordance with the European Convention when compensation was paid. Since the Entities did not provide any compensation at all, the Chamber did not have to deal with more complicated issues of what level of compensation would be appropriate.[148] Cogent reasons would in general be needed to justify such takings. In the case of retroactive annulment of property rights, the balance seems to tilt even further towards legal certainty for the individual as opposed to whatever general interest could be brought forward. The rule of law in such cases seems to take its rightful position as the main justification underlying the individual interest of an applicant. The wider margin of appreciation for authorities under P1-1 never resulted in turning the tables on this point.

146 Article 49.
147 *Nenad Miljković*, paras. 62-67.
148 The Chamber could however order compensation to be paid, as I will discuss in section 7.6

7.5 HUMAN RIGHTS CHAMBER CASE LAW: NON-DISCRIMINATION

I have indicated above that the Dayton Peace Agreement contained an inner tension between human rights protection and a political division along ethnic lines.[149] This is most tangible in the field of equal treatment: the Bosnian political structures were mainly based on ethnicity, whereas the legal structure was firmly entrenched in international norms, of which non-discrimination is a very central one in Dayton. Discrimination is thereby both written into the law and outlawed at the same time, as one commentator aptly put it.[150] Moreover, war-time discriminatory practices continued after peace had been brokered. The Human Rights Chamber was therefore frequently confronted with complaints about discrimination, also in housing matters. Annex 6 to Dayton stipulated that the Chamber 'shall endeavour to accept and to give particular priority to allegations of especially severe or systematic violations *and those founded on alleged discrimination on prohibited grounds*.'[151]

I have argued in Chapter 4 that most indicators on housing lost by minorities during conflict call for strict review of possible discriminatory actions or legislation of states. Nevertheless the burden of proof, especially in cases of indirect discrimination, seemed to be a considerable obstacle. In the following I will assess how the Human Rights Chamber in Bosnia dealt with complaints of discrimination in housing restitution matters. In that policy field, problems of discrimination were especially acute. Although the abandonment laws of both Entities seemed at first glance neutral, their specific provisions had the effect of formalising or stimulating ethnic separation brought about by the armed conflict.[152]

Two important points can be made concerning the Chamber's case law on non-discrimination. The first is that the Chamber gave discrimination a firmer and more prominent place in its assessment of cases than the Strasbourg institutions. The Chamber cited Strasbourg case law by holding that the point of departure was a separate treatment of Article 14 ECHR only in cases in which 'a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.'[153] It added, however, that it had to take into account that the prohibition of discrimination was a central objective of Dayton to which it had to 'attach particular importance.'[154] In many instances this has led the Chamber to deal with an Article 14 issue as the first issue on the merits to look into – every time with specific reference

149 See section 7.2.1.
150 Cornell & Salisbury (2002) p. 397.
151 Article VIII(2-e) of Annex 6 (emphasis added). See also: Neussl (1999) p. 298.
152 Waters (1999) pp. 552-553.
153 See e.g. HRC BiH, *Samy Hermas v. Federation of BiH*, 18 February 1998 (CH/97/45) para. 82. The Chamber cited ECtHR, *Dudgeon v. the United* Kingdom, 22 October 1981 (Appl.no. 7525/76) para. 67, although the older *Airey* judgment was the first in which the Court held this (see section 4.2).
154 Ibid.

to the central importance of the norm of non-discrimination in Dayton.[155] This approach shows that the Chamber interpretation of the ECHR was guided explicitly by the Dayton Peace Agreement.

The second point of importance is that the case law developed over time towards a more and more automatic assumption that discrimination was in fact the underlying reason for a certain policy or law. The cautious start is clear in the first housing discrimination case, *Ivica Kevešević* (10 September 1998). The applicant was of Croat descent and was evicted by the Bosniak municipal authorities on the basis of the Federation's *Law on Abandoned Apartments.* The same day a Bosniak family moved into the apartment. Kevešević claimed that his Croat descent was the only reason for the eviction. He pointed to the fact that all evictions in his town, Vareš, concerned Croats. The Ombudsperson held that the law at first sight did not 'give the impression of being discriminatory as such.' The Chamber did not even refer to the law, but noted that

> The general circumstances in Vareš should be regarded very cautiously. The situation may give rise to discriminatory acts but it must be proved in each case that discrimination has in fact occurred. The applicant has not provided the Chamber with sufficient evidence that it was his national ethnic origin that motivated the authorities to declare his apartment abandoned and to evict him and his family.[156]

For these reasons the Chamber did not find a violation of Article 14. By putting the burden of proof squarely on the applicant and not addressing the indirect discrimination that the *Law on Abandoned Apartments* gave rise to, the Chamber faithfully followed the cautious Strasbourg approach. As I have argued above however, the Law *did* have a discriminatory effect – although not formal discriminatory content – by automatically terminating the specially protected tenancies for all those who did not return within short periods of time.[157] Since the wartime patterns of fleeing were ethnically-based, so were the groups that wanted to reclaim their housing but did not feel safe enough to return in the short term.

The Chamber was heavily divided in *Kevešević*; the finding of no violation was 7 votes against 6. Two of the international members of the Chamber expressed their conviction that discrimination was indeed at the heart of the case.[158] The small voting margin may help explain why the Chamber changed its approach from a cautious one to a 'Dayton approach'[159] within a few months. In *Đ.M.*,[160] a case of a Bosniak's failing

155 See e.g. *Đ.M.*, para. 68; HRC BiH, *The Islamic Community in Bosnia and Herzegovina v. RS*, 11 June 1999 (CH/96/29) para. 153; HRC BiH, *Nurko Šehić v. Federation of BiH*, 5 November 1999 (CH/97/77) para. 53.

156 *Ivica Kevešević*, para. 94.

157 See section 7.2.2.

158 Dissenting opinions of Manfred Nowak and Jakob Möller.

159 As Neussl (1999, p. 208) dubbed it.

160 Dealt with in section 7.3.3.

restitution claims in a Croat canton of the Federation, the Chamber concluded that the applicant had been discriminated against (9 votes against 4). The Chamber reached this conclusion on the basis of the general situation in the canton concerned and not on the individual's specific proof. It held that a pattern of discrimination could be discerned, since none of the Bosniak restitution claims had been decided upon, whereas the authorities swiftly acted on claims of Croats. On this basis the Chamber reached the conclusion that the applicant had been treated differently than people of Croat origin in similar situations and that the authorities had put forward no justification for this nor could the Chamber find one of its own motion.[161] It must be added that the Chamber actively sought information in this case, held a public hearing and questioned witnesses. All the evidence pointed in the direction of discrimination. This shows the increased attention the Chamber started to pay to discrimination issues. Importantly, once a pattern was established in general, the burden of proof to show that a difference in treatment was based on a forbidden badge of differentiation was removed from the individual.

The Chamber's increased sensitivity for discrimination also manifested itself in the assessment of the housing laws. In *Esfak Pletilić a.o.* the Chamber had concluded, by 6 votes against 1, that the RS *Law on the Use of Abandoned Property* (referred to as 'the old Law' in the decision) did not meet the requirements of the European Convention.[162] The same case also concerned a complaint on the discriminatory effects of that ostensibly neutral law. Contrary to its findings in *Kevešević,* the Chamber in *Pletilić* looked explicitly at the discriminatory effects of the law. Since the approach taken in this case is so revelatory of the increased sensitivity, I will cite it here at some length:

> The Chamber notes that the effect of the old Law was to make it practically impossible for persons who were forced to leave their properties to regain possession of those properties. The effect of the old Law was therefore to reinforce the ethnic cleansing which occurred during the war.
>
> Almost by definition all the persons who were forced to leave the territory of the Republika Srspka were members of a minority. Accordingly, those are the persons who will suffer as a result of the fact that the old Law did not provide any real possibility of regaining possession of property which those persons had been forced to leave as a result of the war. The old Law will not be used to prevent persons of Serb origin from returning to Gradiška, as they were not required to leave in the first place. On the contrary, the old Law serves to protect the persons of Serb origin who now occupy property which was considered abandoned under the old Law. Accordingly, the effect of the old Law is twofold: it prevents minority return and protects the position of persons of Serb origin who now occupy the properties concerned in the applications. The Chamber recognises the fact that those persons are themselves refugees and displaced persons and that they themselves would, if they were to seek to return to their homes, face the same sort of difficulties as faced by the current applicants. However, this cannot be used as a justifi-

161 *Đ.M.*, paras. 73-81.
162 See section 7.3.2.

> cation for the passage of the old Law and its application against minority returnees such as the present applicants.[163]

The Chamber therefore ruled that the passage and application of the Law had been discriminatory. Again, and in contrast to the Strasbourg approach,[164] the emphasis lay heavily on the effects and consequences of the laws provisions. The specific context of ethnic cleansing and its aftermath was taken into account to assess the facts of the case. In doing so the Chamber put the ECHR in the Dayton mould in two ways. First, it paid explicit attention to Dayton's call to give particular attention to discrimination cases (Annex 6). Secondly, the Chamber helped to attain the goal of housing restitution (Annex 7) by effectively giving precedence to the interests of the claimants over those of occupying refugees who may have been *de facto* in the same situation of displacement and inability to return home. The interests of the latter could not serve as a justification to discriminate against the former. The Chamber thus helped to unblock a situation which would otherwise be impossible to solve.

The apex of this development towards a 'Dayton approach' was reached in *Rasim Jusufović*, a case of a Bosniak trying to regain possession of his apartment in the Republika Srpska. The Chamber noted that the applicant was legally entitled to reclaim, had tried to do so, but nevertheless faced official obstruction. The Chamber held, unanimously, that the 'only plausible reason' for this was the fact that he was Bosniak. The problems faced by the authorities, such as damaged housing and large numbers of displaced people, could not 'excuse obstruction of persons seeking to regain possession of what they are clearly entitled to, especially when this obstruction is carried out against members of a minority ethnic group to protect members of a majority ethnic group.'[165] Here the burden of proof was completely lifted off the applicant and justifications by the state were not possible at all.

The non-discrimination case law of the Chamber slows an interesting phenomenon: an initial adherence to the approach of the European Court developed into a Bosnian *Sonderweg*, which took full account of the fact that the background of most post-war human rights violations in the field of housing was ethnic cleansing. This resulted in an increased sensitivity for discrimination claims, an alleviated burden of proof for applicants, a recognition of the many instances of indirect discrimination and finally in giving precedence to the first victims of discrimination – the persons reclaiming their housing lost due to ethnic cleansing – at the expense of the interests of occupiers who may have been displaced themselves. The Dayton approach in discrimination cases consequently removed some important obstacles on the road to housing restitution by striking down several discriminatory provisions in the housing laws which worked against refugees and displaced persons.

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163 *Esfak Pletilić a.o.*, paras. 204-205.

164 And more akin to the approach of the FCNM Advisory Committee. See section 4.5.

165 HRC BiH, *Rasim Jusufović v. RS*, 9 June 2000 (CH/98/698) paras. 123-124.

7.6 HUMAN RIGHTS CHAMBER CASE LAW: RESTITUTION AS A REMEDY

As I have argued in Chapter 5, there is as yet no generally enforceable individual right to restitution for human rights violations. Nevertheless, international human rights institutions seem more and more prone to indicate that restitution would be an appropriate or even the preferred remedy for violations. In this section I will shortly survey how the Bosnian Human Rights Chamber has dealt with the issue of restitution as a remedy.

Annex 6 of Dayton provides that the Chamber's decisions should not only indicate whether a breach of obligations of the party concerned has been found, but also 'what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures.'[166] The possibilities to provide redress were thus much larger than those of the European Court of Human Rights.[167] Importantly, the Chamber could order the authorities to repeal laws, although it could not directly annul a law, decision or judgment itself.[168] The forms of redress to a large extent reflected those applicable under general international law and as formulated in the *Articles on State Responsibility*.[169] On the one hand they reflected the obligation for states to immediately cease acts which are contrary to the law. On the other hand they mirrored the additional duty to repair the harm done, both restitution and compensation being possible. In the Bosnian context the choice of means between the various ways to provide reparation was not left to the state. On the contrary, it was the prerogative of the Chamber to order how state or Entities should remedy a breach. Thus, although Annex 6 by itself did not give individuals a right to restitution, it did shift the power to choose which remedy applied from the authorities to an independent human rights mechanism. In that respect at least the interests of the individual were possibly better served than on the international plane under the traditional international law regime. This difference can be explained both by the semi-national and semi-international nature of the Human Rights Chamber and also by the specific post-war context in which it was not deemed wise to entrust potentially biased and ethnically-based authorities with this power.

The above is the situation on paper. But what did the Chamber do in practice? Initially, the Chamber hesitated to fully use its powers. Over time, however, it took a bolder approach and started to order restitution whenever possible: the annulment of acts or decisions, the release of prisoners or the restitution of housing. In addition, it ordered positive measures such as consular support or investigations into disappearances.[170] Interestingly, as Chamber member Manfred Nowak has indicated, the

166 Article XI(1) of Annex 6.
167 Neussl (1999) p. 300; Nowak (2003) p. 12. See also section 5.6.
168 Nowak (2003) p.12.
169 See section 5.2.
170 See Nowak (2003) p. 12, who also refers to relevant case law.

Chamber relied upon the *Basic Principles* developed by Van Boven and Bassiouni[171] in formulating remedies.[172] This shows that the *Principles*, even as a non-binding text, can have a very important function as a kind of consolidated guidebook in the practice of institutions.

In the context of housing the Chamber gave the authorities specific orders on how to remedy violations in multiple ways. When evictions had not yet taken place, but the threat of eviction was contrary to ECHR standards, the Chamber simply forbade the eviction.[173] In the early case of *Mehmed Blentić* (3 December 1997), the Chamber ordered the RS to restore to the applicant the possession of his house without, however, specifying how this should be done most appropriately.[174] Almost a year later, the Chamber's indications became more specific. In the by now familiar case of *Ivica Kevešević* the Federation was specifically instructed to annul the decision 'declaring the applicant's apartment abandoned and to re-instate the applicant into his apartment.'[175] Similarly, in *Darko Prodanovic*, the RS was ordered to 'revoke the decision (…) declaring the applicant to be an illegal occupant and ordering him to vacate the house in question and to take no further steps to disturb the applicant's occupancy of the house in accordance with the terms of his contract with the owner.'[176] When applicants were entitled by law to regain their possessions, the authorities were ordered to issue decisions formalising those rights without delay and to enforce such decisions.[177] Purchase contracts of JNA apartments which had been annulled contrary to ECHR standards, had to be rendered ineffective by whatever legislative or administrative means necessary.[178] Sometimes the Chamber even set tight deadlines for housing restitution, transgression of which resulted in the automatic award of punitive damages for every month that restitution had not yet taken place.[179] And on some very rare occasions, the Chamber ordered the authorities to take measures against officers and other persons who were responsible for discrimination and for the obstruction of minority returns.[180]

The only exception to restitution was when an applicant no longer had the right to reside somewhere. This was the case in *D.K.*, where the Chamber only found a violation of Article 8 ECHR for failure of the authorities to abide by the Chamber's provisional orders – and not because of other reasons. The finding of the violation constituted a sufficient remedy.[181]

171 See section 5.5.
172 Nowak (2005) p. 287.
173 *Milivoje Bulatović*, para. 54.
174 *Mehmed Blentić*, para. 39. See also: *M.J.*., para. 39.
175 *Ivica Kevešević*, para. 97.
176 *Darko Prodanović*, para. 75. See also: *Nenad Miljković*, para. 76.
177 *Esfak Pletilić*, para. 212.
178 *Milivoje Bulatović*, para. 54; *Branko Medan a.o.*, para. 49.
179 *Dragan Malčević*, para. 89.
180 HRC BiH, *Đulba Krvavac & Danica Prbišić v. Federation of BiH*, 5 July 2002 (CH/00/6436 & 6486) para. 97. See Nowak (2005) p. 276 for further references.
181 *D.K.*, para. 45. see also section 7.3.2.

Beyond and on top of orders of housing restitution, the Chamber also awarded compensation for the periods in which applicants had no access to their houses and thus had to seek alternative accommodation.[182] In some cases the Chamber even ordered compensation to be paid for non-pecuniary damage, such as suffering resulting from the *de facto* loss of one's home.[183] Monetary awards could only be given for the period over which the Chamber had jurisdiction, that is: starting in December 1995.[184] However, the Chamber could not in all cases order full compensation as this would have far exceeded the financial capabilities of the recovering post-war authorities. This practical problem limited the Chamber's possibilities of offering reparation.[185]

In its decisions on remedies the Chamber rarely specifically referred to the right to housing restitution of Annex 7.[186] Yet, just like in its assessment on the merits of cases, the Chamber did implicitly give effect to this Annex 7 right. By specifically ordering restitution of housing in numerous instances, it prevented the Entities to enact remedial measures which would be contrary to Annex 7 and the spirit of Dayton as a whole. Such alternative measures would for example be to offer (partial) compensation only or, even more extremely, to enact no remedial measures at all. Although the right to restitution as such could not be invoked before the Chamber, the Chamber itself proved to be a guarantor of the right to restitution in an indirect way. The Daytonian context once again moulded international law to the specific needs of a post-conflict society.

7.7 CONCLUSION

Dayton established a specific right to housing restitution for all those who had lost their dwellings during the war in Bosnia. However, it did not specify how this right had to be weighed against other interests and how it should be applied in specific situations. The norm seemed clear, but was in fact a very open norm. Moreover, existing and newly adopted laws in the wake of Dayton and their application created numerous obstacles for the effective implementation of the right. Legal norms created by the Entities worked against the right to restitution laid down in the peace agreement. They created normative contradictions within a single state and thereby legal uncertainty. This resulted in a situation in which restitution existed as a paper right, but

182 *Bakir Džonlić*, paras. 83-85; *Dragan Malčević*, para. 89; *Fatima Ramić*, para. 108.

183 *Đ.M.*, para. 103.

184 *Nurko Šehić*, para. 89.

185 Dietrich Rauschning, 'Umfang und Grenzen des Menschenrechtsschutzes durch die Human Rights Chamber für Bosnien-Herzegovina', in: K. Dicke a.o. (eds.), *Weltinnenrecht. Liber Amicorum Jost Delbrück* (Duncker & Humblot: Berlin 2005) pp. 551-569, see pp. 568-569.

186 One of those rare exceptions: HRC BiH, *Andrija Miholić a.o. v. BiH and the Federation of BiH*, 7 December 2001 (CH/97/90 a.o.). In that decision the Chamber referred to that Annex 7 right to conclude that 'refugees and internally displaced persons are entitled to reinstatement into their pre-war apartments through the administrative organs, without having to go through the court system, as such, streamlining the procedure.' As a consequence, the Federation was ordered to reinstate the applicants immediately (para. 117).

in which contrary norms were being applied in practice. In such a situation there certainly was no right that could be communicated clearly, in the terms of Diehl, Ku and Zamora, to all the actors concerned.

The Bosnian Human Rights Chamber was the main legal institutions to address these issues – in tandem with the OHR which amended Entity laws – by undertaking what could be called an exercise in normative clarification. In this exercise its jurisdiction *ratione materiae* was limited by the human rights treaties – mainly the European Convention – which it had to apply. As we have seen the Chamber built on the principles developed by Strasbourg, but in determining the scope of provisions it took a very broad and inclusive approach. Although this approach did not always rest on firm legal ground – especially concerning the conception of 'possessions' in P1-1 – it did have an important practical advantage. The Chamber, as an independent semi-international institution, could assess the merits of a case, thereby freeing applicants from the often biased grasp of the Entity authorities.

In assessing the merits, the Chamber's case law revealed a different emphasis than the European Court of Human Rights. By doing so, the Chamber was more than a mere national 'branch' of the European Court. Initial criticism to that effect[187] was countered by the Chamber's incremental and specific development of case law. In most of its cases the Chamber focussed on the legality test to judge the behaviour of the domestic authorities; a test which the authorities did not pass. Both the content and the application of Entity laws and regulations were tested against European norms and the Chamber precisely indicated on what counts the authorities failed. Since many of the individual complaints lodged before the Chamber concerned housing issues, the Chamber's work resulted in countering anti-Dayton legislation. The Chamber could not itself nullify domestic acts, but it could order remedies to that effect.

The balancing of interests of the displaced against those of society in general and against newer occupants specifically were therefore indirectly addressed under the legality test – and only rarely under the explicit fair balance test, as one would rather expect. By striking down 'contra-Dayton' housing laws and their application – both factors which were important obstacles to housing restitution rights and thus worked favourable for the newer occupants of dwellings left behind in the war – the Chamber tilted the scales to the benefit of the former inhabitants. It did so with due respect for the specific problems of post-conflict societies. The Chamber recognised that the housing of other displaced people was a legitimate aim and that some delay in evicting temporary new occupants was allowed in the face of housing difficulties and public opposition. It thus protected the interests of these occupants to a certain degree. However, the Chamber refused to condone the strategy used by all Bosnian parties to have the original occupants bear most of the burden of these problems. Thus the interests of individuals on both sides of the scales were protected and the burden and accompanying duties under the ECHR were placed upon the shoulders of the state and the Entities. Their claim to 'special circumstances' was not given much leeway.

187 See: Gemalmaz (1999) p. 328.

In many respects the normative developments in the Chamber's case law focused on the restoration of the rule of law in a war-torn society. This was reflected in the heavy emphasis on legal safeguards in laws, their accessibility and their application with due diligence. This also became clear from the way in which norms were brought into line with each other. The Chamber strengthened and clarified the Dayton restitution norm by the way in which it applied the ECHR. Simultaneously, it interpreted the ECHR to fit the specific post-conflict context in which it had to operate. In this way, both sets of norms worked in mutually enforcing ways. In passing, the Chamber showed how well the European Convention of Human Rights can be applied to housing restitution issues. By interpreting the European and the Dayton norms in harmonious and non-contradictory ways, the Chamber developed a clear norm over time, including its balanced application in specific instances. The frame of open norms of the peace treaty and the ECHR was filled in such a way that domestic authorities were left with ever decreasing possibilities to ignore them. In addition, enforcement of the Dayton restitution norm was also accomplished by the Chamber's elaborate use of the possibility of ordering remedies. In the case of lost housing it mostly ordered restitution and even accompanying compensation. Again the leeway for the authorities was decreased to the benefit of the individual claimant. A right which individuals had on paper, but could difficultly be enforced directly in practice, was indirectly enforced, amongst others by the work of the Bosnian Chamber. The right to restitution thus existed in Bosnia after Dayton, but its legal significance and applicability only gradually developed. Legal clarification of a norm does not give it automatic effect, however. The institutional framework and the will to apply it are equally of significance. These factors will be addressed in the subsequent parts of this book.

PART II

THE OPERATING SYSTEM

CHAPTER 8
ELEMENTS OF AN OPERATING SYSTEM FOR HOUSING RESTITUTION

8.1 INTRODUCTION

A message needs a messenger to be spread. Similarly, a norm's effectiveness is increased when there is a structure to enforce it, according to Diehl, Ku and Zamora. In the first section of this book the normative framework of the right to housing restitution has been elaborated upon. The availability of an operating system is one of the other conditions for an effective functioning of international law. Diehl *cum suis* have described this system as 'a structure or framework that can support the operation of the law'.[1] The operating system is thus geared towards implementation of norms. This second part of the book will be devoted to the operating system underlying the human right to housing restitution in Europe. In the present chapter I will mainly survey the European structures which may serve to support that right. Again, the emphasis will be on the most successful and elaborate structure in this respect: the European Convention on Human Rights and Fundamental Freedoms.

The specific application of the model to human rights is a possibility explicitly acknowledged by Diehl, Ku and Zamora.[2] The general operating system of international law applies equally to human rights, with specific variations.[3] However, the emphasis may be different, since the effective performance of international human rights law is measured by its effects within states rather than between them. In addition, human rights law is primarily concerned with vertical relationships, those between individuals and the state. One could therefore choose to analyse how an international norm trickles down to the individual. By contrast, I will mainly use an opposite approach. This has the advantage that it permits a focus on the beneficiaries of human rights norms: individuals. Such a choice entails that the effectiveness of norms of international law can best be assessed by looking at the extent to which individuals have the possibility to invoke those norms and to have them enforced, whether on the sub-national, national or international plane. An analysis of effectiveness thus centres on a bottom-up view instead of the other way around. The consequence of such an approach is that I will look at the legal stumbling blocks of the

1 Paul F. Diehl, Charlotte Ku & Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems', *International Organization* vol. 57 (2003) pp. 43-75, see p. 43.
2 See also section 1.5 for this and the following.
3 This will be illustrated in chapters 9 and 10.

operating system that lie on the road between the individual and the right to housing restitution.

8.2 APPLICATION OF THE OPERATING SYSTEM TO HOUSING RESTITUTION

Diehl, Ku and Zamora have identified four main components in the operating system of international law.[4] These are: sources of law, actors, jurisdiction, and courts and institutions. These components exist under general international law, but their specific meaning and elaboration depends on the topic involved. As has become clear in the previous part of this book, there is no single source of law for the topic of housing restitution. Indications towards a developing right to housing restitution can be found in treaties – such as the European Convention on Human Rights – and in compilations of norms that build on both treaties and customary international law. The *Pinheiro Principles* are the most obvious example of this. The *Principles*, as we have seen, have no binding force of themselves, although many of their provisions reflect existing norms from human rights treaties. The same can be said of the resolutions of the UN General Assembly.[5] The variation in the norms component is mirrored in all other elements of the operating system, but especially in the presence or absence of courts and institutions to which individuals can turn with their claims.

The dimension of actors is concerned with rules on determining which actors can have rights and duties and in which way and to which extent they can exercise rights at the international level.[6] This concerns the issue of international legal personality. This personality is dependent on 'the actual attribution of rights and/or duties on the international plane.'[7] There is thus a close relationship between the component of actors and the component of sources of law in the operating system; since attribution can only take place by binding legal procedure, the source of law is relevant. International organisations, for example, are mostly set up under international treaties and may thereby acquire international legal personality in order to carry out their functions effectively. The only exception to the above is the category of states. They have international legal personality on the very basis that they are states. This is a full or original kind of legal personality, which may of course be refined and be filled in by treaties which confer *specific* rights and duties upon states.

What about the main group of actors concerned here, the individuals? In the past century individuals have been bound to duties through international criminal law and have been given rights mainly through international human rights law. In case of violations of rights, however, individuals have generally lacked autonomous standing

4 Diehl, Ku & Zamora (2003) p. 47. See also section 1.5.

5 Although they may be an indication or reflection of international customary law: Diehl, Ku & Zamora (2003) p. 47.

6 Ibid., p. 47.

7 M.N. Shaw, *International Law* (Cambridge: Cambridge University Press 2003, 5th ed.) p. 245; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 2003, 6th ed.) p. 57.

to claim, since this was a right reserved to their state of nationality. The most important and continually expanding exceptions to this situation are the claims procedures set up under international human rights treaties.[8] For housing restitution this means that the main way to enforce a possible right to restitution *at the international level* is under such human rights regimes.[9] Under the European Convention and under the additional protocol to the ICCPR individuals are given an individual right of complaint. The *Pinheiro Principles* do attribute rights to individuals. Consequently, one could argue that even in that specific context, individuals can be seen as actors on the international plane. Nevertheless, the lack of clear and direct legal force of the *Principles* combined with the absence of a supporting institution gives this conclusion not much more than mere theoretical significance as yet.

The component of courts and institutions is closely connected to the component of actors. Very often these are part of, or at least affiliated to, international organisations. This component creates 'forums and accompanying rules under which international legal disputes might be heard or decisions might be enforced.'[10] This creation follows either from decisions of international organisations[11] or from treaties which provide for it. For housing restitution on the international level no court or institution has been created under the *Principles*. Under the various UN human rights treaties supervisory committees have been set up. Although these may give their views on alleged violations in individual cases, these views are not in themselves legally binding.[12] Of all the relevant courts or institutions from which interpretations of norms, dealt with in the first part of this book, emanate, the European Court is the only one delivering binding judgments. State parties to the ECHR are bound to abide by those judgments. The Committee of Ministers, the main political organ of the Council of Europe, supervises whether this indeed happens.[13] As a whole this system forms a strong mechanism for the redress of human rights violations within the European context. The downside, however, is that the European Convention is not tailor-made for the issue of housing restitution nor does it unequivocally contain an individually enforceable right to such restitution.

The last dimension of an operating framework is jurisdiction. Diehl, Ku and Zamora use this label to include two jurisdictional questions. First, in the traditional sense, when and over what issues an adjudicatory institution may decide. Secondly, the operating system question of when a legal issue will be dealt with at the national level and when at the international level. The first is usually dealt with by international

8 Ibid., pp. 232-233.

9 The other would be specific ad hoc claims procedures between countries, such as the Iran-US Claims Tribunal.

10 Diehl, Ku & Zamora (2003) p. 47.

11 E.g. the creation of the International Criminal Tribunal for the Former Yugoslavia by the Security Council in 1993.

12 Nevertheless, they can be seen as the most authoritative interpretations of the treaty concerned; see section 5.4.

13 Article 46 ECHR.

courts as jurisdiction proper. The second, from a human rights perspective, is one of the main principles on the division of tasks between the national and the international level: the subsidiary character of international human rights institutions and the connected primacy of the national legal order for the protection of human rights. For an individual claiming that his or her human rights have been violated this amounts to an obligation to exhaust domestic remedies before turning to an international institution. I will return to this in section 8.4. Both dimensions of jurisdiction regulate the access of individuals to these institutions. To those individuals the boundaries of jurisdiction may thus be legal stumbling blocks.

After having surveyed the various dimensions of the operating system in the context of housing restitution, it has become clear that there is a certain level of discrepancy between the operating and the normative system in this field. Specific global housing restitution norms (the *Pinheiro Principles*) are not supported by fitting institutions or courts. On the other hand, the European Convention is an extensive operating system, but it was not specifically set up to strengthen housing restitution rights. This is not a unique situation; new developments in normative systems without immediate supporting structures in the operating system are a common phenomenon in international law. When new norms are added – and the normative system thus changes – the operating system does not automatically follow suit. Diehl, Ku and Zamora have identified several factors that may influence the chances for change.

The first necessary requirement is some form of necessity: either because of a complete absence of operating arrangements (insufficiency), because new norms are squarely opposed to the existing system (incompatibility), or because the operating system cannot meet the challenge of supporting the new norms (ineffectiveness). One could argue that on the global level at least there is a degree of necessity in the form of partial insufficiency: the *Pinheiro Principles* mainly rely on national procedures and institutions. They stipulate that states should themselves set up housing restitution mechanisms (principle 12.1) which should be in accordance with international law (principle 11). Peace agreements should include restitution procedures (principle 12.6). Such a starting-point in general fits in with the principle that human rights violations should preferably be remedied within the domestic legal sphere. However, it may pose particular problems in post-conflict societies in which the state is unable or unwilling to set up equitable and independent restitution mechanisms. The *Principles* do acknowledge such problems, by providing:

> Where there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes for providing refugees and displaced persons with

> the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.[14]

The *Principles* establish in prudent wording that international help may sometimes be necessary to counter breakdowns of the rule of law. The approach taken has the advantage of leaving room for tailor-made, ad hoc solutions for each situation of large-scale displacement and loss of housing. States *unable* to cope with these problems thus have the possibility to look for help. However, the non-binding character of the *Principles* combined with the wording – 'should' instead of 'shall' – leaves a lot of leeway for *unwilling* states. The case of Bosnia illustrates how this unwillingness may in practice seriously hamper restitution efforts. It equally shows how important it is to lay down a right to restitution in peace agreements.

The second requirement for change is what Diehl, Ku and Zamora call a political shock which prioritizes change on the political agenda. Such a shock may be a specific event such as a war or large-scale abuses of human rights, but may also be – contrary to what the wording 'shock' suggests – a process extending over time, such as global democratization. These processes may cause change only once they gather critical mass or reach a tipping point.[15] In the context of housing restitution such a shock has not yet taken place on such a scale that the necessity was felt to set up a specific operating system. The issue, however, did gather enough momentum to lead to the *Pinheiro Principles* and thus to a nascent normative system. Clearly, such shocks have taken place within national contexts. And in some of those, housing restitution schemes have been part of the agreements ending the hostilities. Looking into such national or semi-internationalised operating systems may therefore provide clues on the interplay between operating and normative systems on a small scale or, put differently, on a lower level of jurisdiction.

On the other hand, the opposition of leading states[16] and domestic political constraints may work against change in the operating system.[17] Apart from these possible changes within the system of international law in a narrow sense, extra-systemic adaptations to the discrepancy between the normative and operating system exist. These include NGO's and transnational networks, soft law mechanisms and the internalization of international law in the national legal orders, often sustained by domestic political or legal processes, such as national legislation or case law. These adaptations supplement or substitute the operating system in flexible ways, but have the disadvantage of being ad hoc and thus offering less legal certainty to individuals.[18]

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14 Principle 12.5.

15 Charlotte Ku & Paul F. Diehl, 'Filling the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System', *Global Governance* vol. 12 (2006) pp. 161-183, see p. 164.

16 In the national context one could replace these with major political actors or sub-national authorities, such as the Bosnian entities.

17 Diehl, Ku & Zamora (2003) pp. 54-62.

18 See generally: Ku & Diehl (2006).

As an intermediate step towards more established and formalized systems of norm enforcement they may play an important pioneering role. This overview of factors which Diehl, Ku and Zamora deem relevant shows how horizontal pressures – states position vis-à-vis each other, transnational networks – influence the moves towards an optimal alignment between the normative and operating systems, and consequently the degree of effectiveness of an international legal norm. In many ways these extra-systemic factors could be seen as part of the third factor Diehl, Ku and Zamora identify: the will of the members of the system to use the law. In addition, vertical processes equally play a role: within states actors may block, induce, or strain the effectiveness of norms, either through political (in)action or by way of internalization of norms. Since human rights are by their very character norms which acquire relevance when they are implemented within national legal orders, these processes within states are especially relevant for the present research. This is an additional reason to take a closer look at such processes by way of the case study of Bosnia and Herzegovina.

The extra-systemic perspective contains most of the activities of international organisations and institutions regarding housing restitution. The political bodies of the Council of Europe, its Commissioner for Human Rights, the Organisation for Security and Cooperation in Europe, the European Union, and even to a certain extent the United Nations, are best seen in this light. In the field of housing restitution they do not so much exercise their rights on the international level, but rather their influence. They have promoted housing restitution in political and other non-legal ways by giving advice or by exerting pressure on specific countries. In this respect they are not so much acting as actors in the formal legal component of the operating system, but acting in transnational networks, sometimes in co-operation with each other or with NGOs, sometimes on their own. Since these efforts have in general not been coordinated nor been aimed at establishing a pan-European operating system for housing restitution, the role of these organisations and institutions can best be studied in country-specific contexts. In those specific contexts a necessity to coordinate may arise in order to achieve common policy goals. The case study of Bosnia offers an opportunity to study how this works in practice.

The actions of the organisations mentioned above outside the formal legal operating system do aim to enforce processes of housing restitution by putting it on the political agenda. This may happen in several ways. The first is bringing together actors in international networks of states, NGOs and international organisations. An example of this is a meeting on internally displaced persons organised by the OSCE in 2004. The meeting's main objective was to 'discuss practical steps the OSCE institutions and participating States can take to alleviate the plight of IDPs [internally displaced persons] in the OSCE area'.[19] One of the three main issues discussed was restitution. Although the meeting concluded with recommendations to the OSCE participating

19 OSCE Supplementary human dimension meeting, *Internally Displaced Persons. Final Report*, 14 December 2004 (PC.SHDM.GAL/15/04) p. 3.

states – one of which was to 'assist the IDPs with the return of their property or tenancy rights and obtaining a fair compensation' – its real added value may lie rather in the bringing together of people with practical experiences in several post-conflict restitution processes, to strengthen practical linkages between international organisations, to exchange best practices and thereby to preserve the institutional memories of field missions.[20] In this way, meetings like these can contribute to a more universal approach to housing restitution, taking full account of the specific necessities of a particular post-conflict situation.

A second example is the leverage provided by accession procedures to international organisations. Membership of the European Union may probably be seen as the most desired of these in the European context. Consequently, the leverage for the Union is rather extensive. The entry conditions to the Union, often referred to as the Copenhagen criteria, have been used in practice to help shape and guide policies in candidate countries.[21] The European Commission delivers annual reports on prospective members. These reports are then used by the Council of Ministers to decide on the pace of accession.[22] And even in the stages preceding accession such as partnership agreements, the EU has used its political clout and its possibility to offer incentives to effect policy changes. In the case of the states of the former Yugoslavia, these association and accession processes were characterized by a policy of conditionality touching upon a very broad range of topics, including human rights.[23] Although these processes were mainly political, parts of the aims to be achieved were of a legal nature. In the context of these formerly Yugoslav states the importance of refugee return and sometimes specifically of housing restitution was emphasized.[24]

These two examples show how extra-systemic tools – that is: tools which do not operate primarily within the operating system of international law, but rather in the fields of politics and policy – may be used to enforce moves towards refugee return and housing restitution after conflict. These tools may therefore by and of themselves contribute to the effectiveness of restitution rights. Since these extra-systematic actions in a way express the will (the third element in Diehl, Ku and Zamora's scheme) to

20 Ibid., p. 55.

21 For this and an overview of accession criteria, see: Christophe Hillion, 'The Copenhagen Criteria and their Progeny', in: Christophe Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart Publishing 2004) pp.1-22, see p. 12.

22 Ibid., 14.

23 Christian Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality', *European Foreign Affairs Review* vol. 9 (2004) pp. 219-245, see pp. 223-224, 226.

24 See e.g. on Bosnia: European Commission, *Bosnia and Herzegovina Progress Report 2005*, 9 November 2005 (SEC (2005) 1422). And: Council Decision 2006/55/EC of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 004/515/EC, *Official Journal L* 35, 7 February 2006, pp. 19-31. See also: Pippan (2004) p. 224.

implement, albeit without only using the operating system, I will deal with them in chapter 12 on the functioning of that third element in the Bosnian case study.

Summarizing: a nascent normative system of housing restitution on a global scale has not yet been matched by an operating system. On a regional scale, within Europe, a functioning operating system exists, but there is no specific normative system – only a more general one: the European Convention. In the previous part of this book, I have pointed out how important clues for housing restitution issues can be found within the general normative system of the ECHR. If indeed the normative system offers possibilities, it is important to assess the legal accessibility – admissibility conditions and jurisdictional boundaries – of the ECHR operating system. Finally, the primary context in which housing restitution should be effected, the domestic legal system, varies from place to place. In post-war Bosnia a normative system building on Dayton as a starting point has been developing. In addition Dayton established an operating system to give effect to the right to housing restitution. The enormous shock of the war caused outside actors, such as leading states and international organisations, to push for an operating and normative system at the same time, in spite of opposition to this in Bosnia itself. In chapter 11 the precise set up of the Bosnian operating system will be looked into.

8.3 THE ECHR AS AN OPERATING SYSTEM WITH BARRIERS

The ECHR itself can be seen as a separate operating sub-system within the broader system of international law. It has its own institutions and framework to ensure the effectiveness of a specific set of norms, but functions under comparable principles of law. The connections with international law appear clearly in the sources of law component of the ECHR operating system. Obviously, the European Convention itself is the main source of law, both procedural and substantive. However, the Court's (and previously the Commission's)[25] case law plays an important role. Although the Court has adopted a 'dynamic and evolutive approach', it does very often adhere to its previous case law.[26] In addition, the Court has made use of international principles of treaty law[27] and of legal and social developments in the state parties[28] to interpret the Convention. With the Convention as the starting point the Court has thus looked both up and down the jurisdictional stairway.

The component of actors in the operating system defines those who have rights and obligations. The states, as contracting parties to the Convention, are the group of actors who bear the obligations under this system. They shall, according to Article 1 of the ECHR, secure the rights and freedoms of the Convention. Apart from obligations,

25 Before the entry into force of Protocol 11 (1 November 1998) of the ECHR, which changed the supervisory mechanisms, the European Commission of Human Rights was the first institution through which cases had to pass.

26 ECtHR, *Christine Goodwin v. the United Kingdom*, 11 July 2002 (Appl.no. 28957/95) para. 74.

27 See e.g. ECtHR, *Al-Adsani v. the United Kingdom*, 21 November 2001 (Appl.no. 35763/97) para. 55.

28 E.g. ECtHR, *Öcalan v. Turkey (Grand Chamber)*, 12 May 2005 (Appl.no. 46221/99) para. 163.

parties have the right to initiate inter-state complaints[29] – a possibility which has rarely been used.[30] The main group of complainants under the Convention system are individuals, groups of individuals or NGOs (and in practice other legal persons as well) who may complain if they claim to be a victim of a violation of an ECHR right by one of the state parties (Article 34). It is this right of individual petition which forms the door of access to the Court for individuals. These two categories, states and alleged victims, are the parties in proceedings before the Court. There is however, a possibility to submit information and thus viewpoints in another way: Article 36. Under this provision a state one of whose nationals is an applicant, has 'the right to submit written comments and to take part in the hearings.' Individuals have the possibility, not the right, to do so on invitation of the Court. This procedure may help and clarify for the Court the context of particular acts or policies of state parties.[31] Thus in the *Blečić* case on Croatian housing restitution, both the OSCE and an NGO intervened and pointed at possible discriminatory policies underlying the refusal to grant housing restitution to the applicant.[32] In post-conflict situations following ethnic cleansing such input could highlight relevant general backgrounds to individual cases. Also, this so-called *amicus curiae* procedure may help to bring in the interests of the current occupants of a house which an applicant is trying to reclaim.[33] If and when Protocol 14 reforming the ECHR operating system will enter into force, the Commissioner for Human Rights of the Council of Europe will be given the explicit right to intervene. One may expect that views submitted by the Commissioner will carry a relatively heavy weight, since that function is itself part of the Council of Europe human rights monitoring system.

The door of access to the Convention's machinery is marked by admissibility criteria enumerated in Articles 34 and 35 ECHR.[34] In the first place, according to Article 34, one needs to be a victim of a violation of a Convention right. This entails that one cannot complain on behalf of the general interest under some sort of *actio popularis*,[35] although one can complain when one risks being directly affected by a

29 Article 33 ECHR.

30 One of the very few cases is: ECtHR, *Cyprus v. Turkey*, 10 May 2001 (Appl.no. 25781/94).

31 Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford: Blackstone Press Limited: 2005, 2nd ed.) p. 56.

32 Respectively: ECtHR, *Blečić v. Croatia*, 29 July 2004 (Appl.no. 59532/00) and the Grand Chamber decision of 8 March 2006 in the same case.

33 Although it is not likely that the Court will often allow such an intervention by a directly affected individual, it did happen in : ECtHR, *Brumarescu v. Romania*, 28 October 1999 (Appl.no. 28342/95).

34 For a much more elaborate overview than what follows here, see e.g. Tom Zwart, *The Admissibility of Human Rights Petitions* (Dordrecht: Martinus Nijhoff Publishers 1994). There are, of course, other relevant issues for the operating system – such as the length of proceedings before the European Court of Human Rights and the impossibility to do fact-finding in each particular case – but I have chosen here to focus on the 'entrance' of the system: under what legal circumstances can an individual get access to that Court?

35 ECtHR, *Klass a.o. v. Germany*, 6 September 1978 (Appl.no. 5029/71) para. 33; and more recently e.g.: ECtHR, *Sanles Sanles v. Spain* (admissibility), 26 October 2000 (Appl.no. 48335/99).

law, even though there has not (yet) been an individual measure of implementation.[36] The status of victim cannot in principle be taken away by national measures favourable to the applicant. For this to happen it is necessary that the alleged breach of the Convention is acknowledged and redressed.[37]

Apart from the victim requirement, a prospective applicant has to meet all the admissibility criteria of Article 35: national remedies have to be exhausted; the application should be submitted within six months after having done so; applications should not be anonymous; they should not be 'substantially the same' as a matter which the Court has previously examined or which has been submitted 'to another procedure or international investigation and contains no relevant new information'; and finally they should not be incompatible with the ECHR's provisions, manifestly ill-founded or an abuse of the right of application.

The requirement to exhaust domestic remedies follows from the subsidiary nature of the Convention: the state parties are given the opportunity to 'put matters right through their own legal system.'[38] This duty for the individual to seek redress at the national level is closely linked to the right to an effective remedy under Article 13 ECHR, to which I will turn in the following section. Thus this restriction on the international level presupposes access to the domestic system.[39] For the individual this means that he or she has to exhaust those remedies that relate to the alleged violations and 'are at the same time available and sufficient. The existence of such remedies must be sufficiently certain not only in theory, but also in practice, failing which they will lack the adequate accessibility and effectiveness.'[40] Thus, the exhaustion requirement is not to be applied with excessive formality.[41] There is no need to exhaust remedies that are 'obviously futile', although mere doubts about the prospects of success are not sufficient to bypass national remedies.[42] As to the burden of proof, the Court has held in the Turkish housing destruction case of Akdivar:

> In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact ex-

36 See e.g. ECtHR, *Dudgeon v. the United Kingdom*, 22 October 1981 (Appl.no. 7525/76) para. 41; ECtHR, *Open Door & Dublin Well Woman v. Ireland*, 29 October 1992 (Appl.nos. 14234/88 a.o.) para. 44.

37 ECtHR, *Amuur v. France*, 25 June 1996 (Appl.no. 19776/92) para. 36.

38 ECtHR, *Akdivar a.o. v. Turkey*, 16 September 1996 (Appl.no. 21893/93) para. 64.

39 This is the procedural aspect of reparation. See chapter 5 for the substantive aspect.

40 ECtHR, *Mifsud v. France* (admissibility), 11 September 2002 (Appl.no. 57220/00) para. 15.

41 *Akdivar a.o.*, paras. 66-67.

42 ECtHR, *Van Oosterwijck v. Belgium*, 6 November 1980 (Appl.no. 7654/76) para. 37. More recently: ECtHR, *Kryachkov v.* Ukraine, 1 June 2006 (Appl.no. 7497/02) para. 19.

> hausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.[43]

Since the rule of exhaustion is not an absolute one, the Court has deemed it essential to take the particular circumstances of individual cases into account.[44] More specifically this means that the Court assesses the existence of formal remedies in the broader 'legal and political context in which they operate as well as the personal circumstances of the applicants.'[45]

This flexibility means that the Court can take the specific problems of post-conflict states into account. The state apparatus may have been weakened to such an extent that national remedies cannot be considered effective. The state may not be willing to implement formally existing remedies, for example because the applicants belong to one of the warring factions of the previous armed conflict. Underlying policies of discrimination may render remedies existing on paper ineffective for particular groups. Previous hostile or obstructive attitudes of authorities towards complainants can thus be included in the assessment when answering this admissibility issue. As has been pointed out in chapter 7, these problems indeed arose in Bosnia in some municipalities in which displaced people started proceedings to regain their homes. In post-conflict situations, it is thus crucial for applicants that the Court takes this background into account in the admissibility phase.

Another aspect of the admissibility criteria which has special bearing on post-conflict societies is the requirement that an application has not been submitted to another international procedure. Countries emerging from war may need temporary internationalised forms of governance to fill gaps in the rule of law. This kind of governance can include semi-international ad hoc institutions to monitor human rights, such as the Human Rights Chamber set up in Bosnia after Dayton. If such institutions are seen as international procedures within the meaning of Article 35, this could effectively close the door to complain subsequently in Strasbourg.[46] On the other hand, if they are viewed as primarily national mechanisms, then this aspect forms no bar on admissibility. I will return to this particular point in chapter 11 on the operating system in Bosnia.

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43 *Akdivar a.o.*, para. 69.

44 *Van Oosterwijck*, para. 35.

45 *Akdivar a.o.*, para. 69.

46 In practice, there does not seem to be any case law rejecting a complaint for this reason. See also: Claire Ovey & Robin White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press 2006, 4th ed.) p. 488.

The admissibility criteria thus determine the width and height of the entrance door to the ECHR institutions. Apart from these legal determinants, practical matters influence the accessibility of the European Court: knowledge or ignorance about its proceedings or even existence, financial means to lodge complaints, distance in time and space from the local level to the point when a judgment is passed in Strasbourg and cooperation or obstruction of national authorities. These determinants, however, fall outside the analytical framework of the operating system and are better researched by sociological means. I will not look into them in the context of this study; as pointed out in the introduction, the present research will focus on *legal* stumbling blocks on the road to housing restitution.

8.4 ECHR REQUIREMENTS FOR THE NATIONAL OPERATING SYSTEM: THE RIGHT TO AN EFFECTIVE REMEDY

Article 13 ECHR, as indicated above, is closely connected to the admissibility requirement of Article 35 to exhaust domestic remedies. It confirms and preserves the subsidiary role of the Convention's supervisory system[47] by guaranteeing that the national systems provide redress for ECHR rights and in that sense it plays a crucial role.[48] The Article provides an additional guarantee of human rights protection.[49] It stipulates: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' This has long been a somewhat dormant provision which the Court interpreted restrictively.[50] Incrementally, however, the Court has started to 'breathe new life' into the Article.[51]

As the text of the Article indicates, the right to a remedy is closely related to a violation of one of the other Convention rights.[52] This does not mean that the Article can only be invoked after one has proved that another ECHR article has indeed been violated.[53] Nevertheless, the complaint one has should be arguable. This excludes nonsensical claims, but the Court has not given a precise definition of what 'arguable' is.[54] The test seems to be whether there is *prima facie* a case to be made.[55] Generally, when a complaint has been treated by the Court on its merits under one of the other

47 ECtHR, *Conka v. Belgium*, 5 February 2002 (Appl.no. 51564/99) para. 84.
48 ECtHR, *Z. a.o. v. the United Kingdom*, 10 May 2001 (Appl.no. 29392/95) para. 103.
49 ECtHR, *Kudla v. Poland*, 26 October 2000 (Appl.no. 30210/96) para. 152.
50 See generally for an extensive analysis of the Court's case law in its first four decades, with an English summary: T. Barkhuysen, *Artikel 13 EVRM: effectieve nationale rechtsbescherming bij schending van mensenrechten* (Lelystad: Koninklijke Vermande 1998).
51 Ovey & White (20060 p. 461.
52 E.g. ECtHR, *Pierre-Bloch v. France*, 21 October 1997 (Appl.no. 24194/94) para. 64.
53 ECtHR, *Klass v. Germany*, 6 September 1978 (Appl.no. 5029/71) para. 64.
54 ECtHR, *Boyle & Rice v. the United Kingdom*, 27 April 1988 (Appl.no. 9659/82) para. 55.
55 Ovey & White (2002) p. 462.

articles, it can be seen as arguable.[56] Additionally, the fact that no violation was found for these other articles does not mean that no arguable claim under Article 13 exists.[57]

The form of the domestic remedy which the Article calls for can in principle be determined by the state parties to the Convention. Thus, the remedy offered should not necessarily be a judicial authority.[58] However, the Court has started to indicate more and more precisely what such remedies should entail. In the context of Articles 2, 3 and 5 the Court has held that the right to an effective remedy in certain circumstances includes the right to an effective investigation and to compensation.[59] For arguable claims concerning forced eviction and property destruction (Article 8 and P1-1) involving the responsibility of the authorities, the Court held in the Turkish case of *Menteş a.o.* that an effective remedy entails 'in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure.'[60] For these extreme interferences, 'the nature and gravity of the interference complained of under Article 8 of the Convention in the instant case has implications for Article 13.'[61] A remedy for unreasonably long trials (under Article 6) is effective when it 'can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred.'[62] This possibility to choose shows that in spite of an increasingly precise interpretation of Article 13, the Court still leaves a rather broad margin for state parties. It also indicates that the scope of rights arising under Article 13 depends on the character of the ECHR right on which the individual relies[63] and the degree of interference with that right.

More generally, a remedy should be accessible[64] and in one form or another it should deal with the substance of the complaint and grant appropriate relief.[65] Remedies offered have to be effective 'in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the

56 E.g. ECtHR, *Messina v. Italy* (no. 2), 28 September 2000 (Appl.no. 25498/94) para. 90.
57 E.g. ECtHR, *A. v. the United Kingdom*, 17 December 2002 (Appl.no. 35373/97) para. 111.
58 ECtHR, *Silver a.o. v. the United Kingdom*, 25 March 1983 (Appl.nos. 5947/72 a.o.) para. 113.
59 See e.g. ECtHR, *Kaya v. Turkey*, 19 February 1998 (Appl.no. 22729/93) para. 107 (Article 2); *Aksoy*, para. 98 (Article 3); ECtHR, *Kurt v. Turkey*, 25 May 1998 (Appl.no. 24276/94) para. 140 (Article 5), concerning respectively arguable claims of killings, ill-treatment and disappearance at the hands of the authorities. See also: Ovey & White (2002) pp. 392-394. These and other Convention articles include procedural aspects, such as safeguards against abuse, but in this section I will focus on Article 13 itself as the main procedural safeguard.
60 ECtHR, *Menteş a.o. v. Turkey*, 28 November 1997 (Appl.no. 23186/94) para. 89; ECtHR, *Doğan a.o. v. Turkey*, 29 June 2004 (Appl.nos. 8803/02 a.o.) para. 106.
61 *Menteş*, para. 89.
62 *Mifsud*, para. 17. See also, on the same principle: ECtHR, *Scordino v. Italy* (No. 1, Grand Chamber), 29 March 2006 (Appl.no. 36813/97) para. 183.
63 ECtHR, *Hasan & Chaush v. Bulgaria*, 26 October 2000 (Appl.no. 30985/96) para. 98.
64 ECtHR, *Said v. the Netherlands* (admissibility), 17 September 2002 (Appl.no. 2345/02).
65 ECtHR, *Chahal v. the United Kingdom*, 15 November 1996 (Appl.no. 22414/93) para. 145.

authorities of the respondent State.'[66] Effectiveness in this sense is not dependent upon a favourable outcome for the applicant[67] – otherwise, the whole subsidiary European system would be superfluous. Importantly, an effective remedy is a remedy that may 'prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.'[68] Finally, there is one important restriction to the scope of the Article: one can complain about acts or omissions of the authorities, but the Article does not require remedies against domestic law. The Court held that this would be tantamount to imposing an obligation to incorporate the Convention into the national legal order.[69]

The short overview above has attempted to show that Article 13 offers a broad, if still somewhat indeterminate protection. What it does clearly express, is that the ECHR operating system works on at least two levels: primarily the national level where wrongs should be put right, and only in the second place at the European level where an applicant ends up if the national authorities have failed to remedy alleged violations of the Convention. I will now turn to two instances in which the Court specifically assessed whether national compensation and restitution mechanisms in the context of societies after conflict could be seen as effective remedies.

The first is the case of *Xenides-Arestis* concerning Northern Cyprus.[70] Myra Xenides-Arestis owned a plot of land and some buildings, including her house, in the coastal town of Famagusta. When Turkish troops took control of this part of Cyprus in 1974, she was forced to leave. In 1998 she complained before the European Court that ever since she was barred from accessing her home and property and consequently was prevented from using and enjoying it. According to the applicant this amounted to a continuing violation of her right to respect for the home, her right to peaceful enjoyment of her possessions and the prohibition of discrimination under the ECHR.[71] During the course of the proceedings, but before an oral hearing in the case had taken place, the authorities of the Turkish Republic of Northern Cyprus (TRNC) took measures to address this issue more in general. The so-called 'Immovable Property Determination Evaluation and Compensation Commission' (hereafter: the Commission) was set up in 2003. The Commission, whose members were appointed by the Council of Ministers of TRNC, could issue binding decisions to award compensation to those individuals who could show that they were the owners of immovable property in the current territory of TRNC before 1974. Restitution, however, was not possible. Nor could compensation be awarded for movable property or for non-pecuniary damages. In addition, those who received compensation lost their title to the property concerned. Individuals were given the right to apply for review of the Commission's

66 ECtHR, *Aksoy v. Turkey*, 18 December 1996 (Appl.no. 21987/93) para. 95.
67 ECtHR, *Soering v. the United Kingdom*, 7 July 1989 (Appl.no. 14038/88) para. 122.
68 *Conka*, para. 79.
69 E.g. ECtHR, *Christine Goodwin v. the United Kingdom*, 11 July 2002 (Appl.no. 28957/95) para. 113.
70 ECtHR, *Myra Xenides-Arestis v. Turkey* (admissibility), 14 March 2005 (Appl.no. 46347/99), followed by a judgment on the merits on 22 December 2005.
71 Articles 8, P1-1 and 14 respectively.

decisions in TRNC courts. Claims should be submitted within two years of the entry into force of the law setting up the Commission. The rights of those who did lodge claims were left to be settled in a future settlement concerning Cyprus.

Turkey, the defendant party in the case,[72] raised the preliminary objection that the applicant should exhaust this new domestic remedy. The applicant contended that acts of the TRNC, such as the setting up of the Commission, were illegal and invalid and that the remedy itself was inadequate and ineffective. The Court rejected the Turkish plea of inadmissibility, since it considered that under Article 35(1) the remedy offered was not adequate or effective. Most importantly, the remedy was confined to pecuniary compensation for immovable property and one could not claim restitution. This aspect alone turned the Compensation Commission into an incomplete 'system of redress regulating the basic aspect of the interferences complained of.' The Court explicitly referred to the earlier cases of *Papamichalopoulos v. Greece* and *Brumărescu v. Romania* in which it had held that if 'the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it.'[73] I have argued earlier that the arbitrary deprivation of housing is in principle a human rights violation of a character allowing restitution.[74] This is not to say that restitution should be effected automatically at the expense of all other interests – including those of more recent occupants – but it does entail that restitution should at least be the preferred (and thus a possible) option.[75]

Apart from the restricted scope of the remedy, the Court pointed at several additional points of concern. In the first place, the law did not address the complaints under Articles 8 and 14. The Court did not make explicit why it came to such a conclusion, but one might surmise that inclusion of non-pecuniary damages would have been necessary. Secondly, the TRNC law on the Commission did not make clear whether those who had already lodged complaints in Strasbourg could still turn to the Commission.[76] Thirdly, the Court uttered its concern about the composition of the Commission; the majority of its members lived in houses owned by or built on plots of land belonging to Greek Cypriots. Interestingly, the Court explicitly suggested in this

72 The TRNC was not recognized internationally and the European Court held Turkey accountable under the ECHR for the acts and omissions of TRNC authorities, since the former country had effective control over the territory. See chapter 9 for an analysis of these kinds of issues.

73 ECtHR, *Papamichalopoulos v. Greece* (just satisfaction), 31 October 1995 (Appl.no. 14556/89) para. 34; ECtHR, *Brumărescu v. Romania* (just satisfaction), 23 January 2001 (Appl.no. 28342/95) para. 20.

74 See section 5.4.

75 The procedural aspect of remedies (availability of institutions) and the substantive one (nature of the remedies offered) are connected, as this reasoning of the Court shows. This connection is reflected in the fact that the Court refers in an admissibility decision on the exhaustion of domestic remedies (a mainly procedural question) to its own judgments on just satisfaction concerning breaches of the European Convention (an issue connected to a considerable extent to the substantive aspect of remedies dealt with in chapter 5). It also shows that the national level in the multi-level operating system of the Convention has both a preventive and a restorative function.

76 Turkey asserted that this *was* possible, of course.

respect that 'an international composition would enhance the Commission's standing and credibility.'

In its judgment on the merits, in which the Court concluded that Article 8 and P1-1 had been violated, it held under Article 46 – the state's duty to execute the Court's judgments – that Turkey should 'introduce a remedy which secures genuinely effective redress' for those violations and one which should be in line with the Court's admissibility decision in the case. The remedy should be provided for all similar cases pending before the Court.[77] The latter issue points again to the fact that the Court aims at retaining its subsidiary role. One can conclude from this that such a remedy would at the very minimum entail some form of access to the property; that the remedy should offer at least the possibility of restitution; and that the law should be clearer on its temporal application. As to the Commission's composition, it should at least not consist of people living in disputed housing. Preferably, as the Court suggested in its admissibility decision, it should – probably at least partly, one may presume – consist of international members, not directly involved in the Cypriot conflict.

The second case in which the Court explicitly assessed post-conflict restitution or compensation mechanisms is *Aydīn İçyer v. Turkey*.[78] The applicant had left his home and village due to the hostilities in the mid-1990s. The facts were disputed; the applicant claimed that he had been forcibly evicted by state security forces, whereas the state held that the villagers had left because of terrorist activities and threats of the Kurdish Workers' Party (PKK). For several years the applicant was prevented by the authorities to return to his village. In July 2004 Turkey developed a remedy, the *Law on Compensation for Losses resulting from Terrorism and the Fight against Terrorism*, under which Damage Assessment and Compensation Commissions (hereafter: the Commissions) were set up. The law enabled persons who had suffered losses because of terrorism or the fight against it to claim compensation. This included compensation for damage to movable and immovable property, compensation for physical injuries, and 'material damage suffered by those who could not gain access to their property.'[79] Members of each provincial Commission were public officials appointed by the governor of that province. One member in each Commission was appointed from among bar members by the local bar association. The Commissions' task was to determine the amount of compensation and prepare friendly settlements. If an applicant refused such settlements, he or she had to apply to regular courts for compensation.

The applicant complained in Strasbourg in January 2002. When the Court had to decide on the admissibility of the case exactly four years later (January 2006), Turkey raised the same preliminary objection as in *Xenides-Arestis*; domestic remedies had not been exhausted, since the applicant had not submitted a claim to the new 2004 Commissions. The applicant stated that he had exhausted the existing domestic remedies

77 *Xenides-Arestis* (merits), para. 40.
78 ECtHR, *Aydīn İçyer v. Turkey* (admissibility), 12 January 2006 (Appl.no. 18888/02).
79 Ibid., para. 45: Section 7 of the law.

at the moment of his application to the European Court. The Court itself held that the 'normal' date of reference to solve this question was the date of application to the Court. Nevertheless, it added, referring to earlier case law, that 'as the Court held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case.'[80] These particular circumstances may exist when the new national remedy in question affords a 'genuine opportunity to obtain redress' for situations in which there is a practice incompatible with the Convention, which in turn has led to numerous applications being lodged in Strasbourg, endangering the European system of human rights protection.[81] The new remedy should then be accessible to those people whose cases were already pending in Strasbourg[82] – otherwise the requirement to revert to the national level would be of no use. In the *İçyer* judgment discussed here, the Court noted that such particular circumstances existed: the situation concerning the internally displaced in south-eastern Turkey was of a systemic nature, the Commissions were set up to remedy this situation and were accessible even for those who had already lodged complaints in Strasbourg and the remedy in itself offered 'reasonable prospects of success'.[83]

The effectiveness of the new remedy was based on several factors. First, the remedy addressed the applicant's core complaint by providing compensation for damage sustained 'as a result of the authorities' refusal to allow him to gain access to his possessions for a substantial period of time'. It should be noted here that, contrary to the *Xenides-Arestis* case, the applicant had been able to return home and thus access or restitution as such were not his complaints. Secondly, Turkey had shown that it was also a remedy that was accessible and effective: it had provided information showing that 170,000 people had already applied for compensation before these Commissions and a number of sample decisions showed that compensation was indeed awarded. As to the composition and proceedings of the Commission, the Court held that there was no problem on that account. There was no potential conflict of interests, contrary to the Cypriot case. Apparently the mere fact that most Commissions' members were civil servants appointed by the governors was not problematic for the Court. Considering the fact that inter-ethnic problems are, as in Cyprus, part of the problem, this is somewhat surprising. It seems to me difficult to argue that the situation in Cyprus is different from the one in south-eastern Turkey to such an extent that the Court advised internationally composed commissions in the former case, but is content with commissions consisting of civil servants in the latter situation. The Court could have, at the very least have assessed whether the interests of one of the main groups of victims, people of Kurdish ethnicity, were somehow represented. This could be shown e.g. by looking at the composition of the Commissions. The Court did not go into that aspect

80 Ibid., para. 72.
81 See e.g. ECtHR, *Brusco v. Italy* (admissibility), 6 September 2001 (Appl.no. 69789/01).
82 Ibid.
83 *İçyer*, paras. 83-87.

however – something which is all the more worrying in the context of inter-ethnic strife.

The applicant had also complained that the Commissions did not provide for adversarial proceedings, but the Court held that this requirement, derived from Article 6 ECHR was not applicable here, since the Commissions were not 'tribunals.' As to the impossibility to claim non-pecuniary damage before the Commissions, the Court pointed at the fact that such claims could be submitted before administrative courts.[84] In conclusion, the remedies offered at the national level were thus deemed to be effective and consequently the applicant was required to exhaust them.

The right to an effective remedy is one of the main features of task division in the operating system of the European Convention. At the same time, it offers individual victims a guarantee that not only the supervisory mechanisms in Strasbourg protect their human rights, but that first and foremost their own states should do so. The system is flexible in that it leaves the state freedom concerning the specifics of the remedies offered. However, the Court has set the basic parameters; the remedy should be accessible, adequate and effective. The adequacy of the remedy does not just include the requirement that the main aspects of the claim are dealt with, but also that the relief offered is appropriate. Compensation for pecuniary damage for example does not suffice to indemnify claimants who complained under P1-1 *and* Article 8, since the latter deals also with more symbolic and psychological aspects of the loss of housing.[85] The margin left to states decreases when fundamental rights and/or particularly grave interferences with those rights are at stake. In the case of housing lost during conflict, I would argue that both these limiting conditions apply. The right to respect for the home is 'pertinent' to people's security and well-being and is of central importance to their 'physical and moral integrity'.[86] In addition, forced and arbitrary deprivations of the home constitute particularly grave interferences with several ECHR rights. The cases dealt with above show that under circumstances when such loss can in any way be ascribed to the state's acts or omissions, restitution should be among the possibilities offered by the national remedy (*Xenides-Arestis*). Moreover, compensation for both pecuniary and other damages should be offered and there should be an effective investigation to find the culprits (*Menteş*). The decisions of remedial institutions should be enforceable (all cases dealt with) and the composition of the institutions should avoid direct conflicts of interests with the subject-matter involved (*Xenides-Arestis*). Within these boundaries, states can set up systems which fit well into their national legal traditions.

Post-conflict states may not always be willing or capable to provide these kinds of effective remedies. In situations of large-scale incapacity the European level will not suffice as a form of redress, because the large number of claims the Court receives in

84 Ibid., paras. 75-82.

85 See also chapter 2.

86 ECtHR, *Gillow v. the United Kingdom*, 24 November 1986 (Appl.no. 9063/80) para. 55; ECtHR, *Connors v. the United Kingdom*, 27 May 2004 (Appl.no. 66746/01) para. 82. See also section 2.4.

general and in such situations specifically, will increase waiting times extensively. In addition, once the European Court has issued a judgment, the implementation phase is left mainly to the national level that failed in the first place. Concerning willingness, issues of partiality or even outright discrimination may be part and parcel of post-conflict societies. As indicated in section 8.3, it is essential in such circumstances that the Court takes 'realistic account of the general and legal political context in which the remedies operate as well as the personal circumstances of the applicant.'[87] Apparently, the Court considered this in its *Xenides-Arestis* judgment, in which it recommended an international composition of the compensation commission, but not clearly in the *İçyer* judgment.[88] The political sensitivity of minority questions and ethnic discrimination may explain why the Court is reticent to deal explicitly with context, unless it is strictly necessary, e.g. for some Article 14 complaints. In general, I would argue that the ordinary division of tasks in the operating system of the ECHR should be reconsidered or at least not be assumed automatically in post-conflict situations. The possibility of third-party intervention may help to raise the awareness of the Court of capability and partiality issues in specific societies emerging from conflict. A more tailor-made solution, which is able both to alleviate the burden of the European Court and to process large numbers of claims on the national level with in-built safeguards against partiality, is even more desirable. I will return to this in chapter 11 on the specific operating system set up in Bosnia after Dayton.

8.5 THE ROAD AHEAD: THE FOLLOWING CHAPTERS

To illustrate how the operating system influences the possibilities for housing restitution, I have chosen two themes to elaborate upon in the next chapters. The first is the rule of non-retroactivity in the context of human rights (chapter 9). The second concerns the geographical scope of human rights obligations of states (chapter 10). These themes have been selected for several reasons. First, both themes may serve to show how the parameters of the operating system of international law interact with the extent of state duties in the specific context of human rights and housing restitution. This also affects the extent of the jurisdiction of the adjudicating courts and institutions in time and space. The limitations on state duties are reflected in the limitations on individual rights. Thus, under specific human rights treaty regimes, the different components of the operating system influence each other's reach.

The second reason for selecting these themes is that both represent major legal stumbling blocks on the road to housing restitution after armed conflict in Europe. In

87 *Akdivar*, para. 69. See section 8.3. See also the partly dissenting opinion of judge Bonello in the *Anguelova* judgment, in which he advocated that the Court should more actively take account of a context of racial or ethnic discrimination: ECtHR, *Anguelova v. Bulgaria*, 13 June 2002 (Appl.no. 38361/97). By analogy one may apply this to (post-)conflict situations of ethnic problems.

88 Practical considerations may have influenced the Court decisions as well on this point: it is easier to set up one (semi-)international commission in Cyprus than compensation commissions in seventy-six Turkish provinces.

the 1990s many European states ratified international human rights treaties, such as the ECHR, only *after* the armed conflict ended. This means that housing lost during conflict cannot always be reclaimed under human rights mechanisms. The issue of non-retroactivity of treaty obligations and its exceptions are therefore pertinent to housing restitution from an operating system point of view. As to geographical scope, conflicts often reshape boundaries and may lead to occupation of territories which formally still are under the jurisdiction of other states. In that context it is essential to know to which state or warring party to turn for housing restitution. For specific complaints under review by human rights mechanisms, these two issues determine the jurisdiction *ratione temporis* and *ratione personae/loci*.[89] The remaining dimension of jurisdiction is jurisdiction *ratione materiae*. That dimension relates to the substance of violations which a supervisory human rights institution may address. A complaint should concern a violation of a right protected by the treaty concerned. This substantive scope of the norms concerning housing restitution has been dealt with in part 1 of this book.

Finally, these themes reverberate in the Bosnian context, to which the final chapter (11) of this part will be dedicated. The internal divisions of territory within the state have direct repercussions for knowing which authority to address in a particular instance. Similarly, the temporal limitations have played a role in determining the jurisdiction of the Bosnian Human Rights Chamber and consequently the possibility for individuals to lodge complaints about violations which started or occurred during the war. Whereas chapters 9 and 10 will focus on the interplay between the global and regional operative systems, the chapter on Bosnia will address the relationships between those systems and the (sub-)national system.

89 Jurisdiction *ratione personae* is concerned with the parties between which the Court may adjudicate. As a case can only be decided on the merits when the state against which the complaint is addressed can be held responsible under international law for possible human rights violations, the issues of *ratione loci* (jurisdiction over a certain territory) and *ratione personae* tend to get treated interchangeably. In this study I will not deal with another aspect of possible relevance for post-conflict housing restitution: the jurisdiction of the Court over acts of UN peacekeeping missions. The Court has held that it has no jurisdiction to review acts of states carried out on behalf of the UN. See: ECtHR, *Behrami & Behrami v. France & Saramati v. France, Germany and Norway* (admissibility), 2 May 2007 (Appl.nos. 71412/01 & 78166/01). This means that housing restitution complaints against such acts will not be declared admissible. See e.g. ECtHR, *Slavisa Gajić v. Germany* (admissibility), 28 August 2007 (Appl.no. 31446/02).

CHAPTER 9
A LIFELINE IN TIME? NON-RETROACTIVITY AND CONTINUING VIOLATIONS UNDER THE ECHR

9.1 INTRODUCTION

The interplay in timing between armed conflicts and adherence to human rights treaties is a diverse and important one.[1] Its importance resides in its relevance to admissibility questions before international supervisory institutions. Its diversity appears from the different situations that are conceivable. In the first one, a state involved in a conflict is a party to such a treaty and continues to be so throughout and after the conflict without derogating at any time. The treaty then applies during the whole period and can be invoked when complaining about human rights violations that occurred during the conflict. This situation poses no particular problems *ratione temporis*.[2] In the second situation a state is party to a human rights treaty, but the state itself dissolves into several new states during the conflict. The question then is whether the old state's treaty obligations are binding on the newly formed states. In the third situation a state only becomes a party after the end of the conflict.[3]

In this chapter I will confine myself to this third scenario.[4] The reason that it is addressed here is that it is applicable to many (post-)conflict regions in Europe, turning a theoretical issue into a practical one. When one looks for example at the wider region of the Bosnian case study, the former Yugoslav republics, the conflict-ratification sequence is striking. Most ratifications of the ECHR followed the conflict instead of

1 A slightly different version of large parts of this chapter was earlier published as: Antoine Buyse, 'Non-Retroactivity and Continuing Violations under the ECHR', *Nordic Journal of International Law* vol. 75 (2006) pp. 63-88.

2 Apart, of course, from possible time-limits as an admissibility criterion. See e.g. Article 35 ECHR: 'The Court may only deal with the matter (…) within a period of six months from the date on which the final decision was taken.' This issue is in some ways closely related to the topic of continuing violations (see para. 8.5).

3 Theoretically, a fourth and fifth situation could be envisaged: (4) human rights violations during conflict take place between signature and ratification of a human rights treaty or between ratification and entry into force. During these periods a state is required to refrain from acts which would defeat the object and purpose of that treaty (see Article 18 of the Vienna Convention on the Law of Treaties); (5) the very rare situation in which a state ratifies a human rights treaty *during* armed conflict.

4 The second situation entails important legal issues of its own (state succession). It is of importance to the region of the former Yugoslavia to the extent that this country was bound by the ICCPR before the start of the conflict. Since the focus in this study is on the ECHR though, I will not deal with this situation.

preceding it.[5] The crucial question in such cases is whether the protection that human rights treaties like the ECHR offer can be applied retroactively. Put differently, whether a state can be held accountable for violations that took place or started before the entry into force of the treaty.

To answer this question I will first focus on (non-)retroactivity in general international treaty law and the exception of the 'continuing situation/violation'. Subsequently I will show that the European Court of Human Rights has adhered to the principle of non-retroactivity and has used the exception of the 'continuing violation' in its case law. I will argue that the slight variations the Court has adopted in using general international law in this respect is both explainable and laudable when one considers the special character of the ECHR as a human rights treaty.

9.2 THE PRINCIPLE OF NON-RETROACTIVITY

The general principle under international law is that treaties do not apply retroactively.[6] The underlying justification for this is legal certainty: by accepting non-retroactivity uncertainties about the temporal application of a rule are avoided or at least decreased.[7] The most quoted phrasing of the principle is Article 28 of the Vienna Convention on the Law of Treaties:[8]

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

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5 Slovenia (28 June 1994), Croatia (5 November 1997), Bosnia and Herzegovina (12 July 2002) and Serbia-Montenegro (3 March 2004). After the break-up of the latter country, the Committee of Ministers of the Council of Europe decided that Montenegro was to be considered a party to the ECHR as of 6 June 2006. Only Macedonia (10 April 1997) ratified the ECHR *before* its short civil war. It should be added that the Bosnian case is special as the ECHR was incorporated into domestic law through the Dayton Peace Agreement (14 December 1995), making it internally applicable years before the possibility arose to lodge a complaint with the European Court of Human Rights.

6 See, among many others: M.N. Shaw, *International Law* (Cambridge: Cambridge University Press 2003, 5th edition) pp. 832-833. He also refers to the leading international case on this issue: PCIJ, *Mavrommatis Palestine Concessions Case*, 30 August 1924 , Series A, No. 2 (1924) p. 35. The International Court of Justice confirmed the case-law of its predecessor on this point in the *Ambatielos* case (*Greece v. United Kingdom*), 1 July 1952, *ICJ Reports* (1952) p. 40.

7 Eric Wyler, 'Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite', *Revue générale de droit international public* vol. 95 (1991) pp. 881-914, see p. 896.

8 *Vienna Convention on the Law of Treaties* (Vienna, 23 May 1969; entry into force: 27 January 1980) United Nations Treaty Series 1155, p. 331. Although ratification of this Convention is not universal, part of its contents are considered to reflect international customary law. The same goes for the specific principle of non-retroactivity: the customary rule of intertemporal law (a fact has to be examined according to the rules existing at the time it occurred) logically entails this. See also: Shaw (2003), p. 429. On intertemporal law and treaty law specifically, see: D.W. Greig, *Intertemporality and the Law of Treaties* (London: British Institute of International and Comparative Law 2001).

Several remarks should be made here. The first is that the principle of non-retroactivity is not carved in stone: it is not a norm of *ius cogens*. On the contrary – and this does not help to make things much clearer – all depends on the intention of the parties. They can always decide that the treaty applies retroactively.[9] By lack of such an intention the general principle enunciated in Article 28 applies. Secondly, the precise meaning of this retroactivity principle is not as clear as it may seem. Facts or acts can occur once or repetitiously and situations can continue to exist.[10] All of these may be relevant factors in ascertaining whether the retroactivity principle forms a bar against taking them into account. Thirdly, although at first sight it may seem to be a subtle difference,[11] one should distinguish between retroactivity of a treaty's substantive provisions and of jurisdiction issues. Even if retroactivity is denied on the first point, acceptance of a form of retroactive jurisdiction in a specific case may offer a 'back-door', as Chua and Hardcastle have dubbed it, to apply a treaty retroactively anyway.[12] This retroactive jurisdiction can be assumed by an international court or other institution, but may of course also be explicitly given under a jurisdictional treaty clause.[13] The case of the Russian prisoner Kalashnikov before the European Court of Human Rights provides a good illustration of this backdoor: the detention of Kalashnikov and proceedings against him started *before* 5 May 1998 (the date of the entry into force of the ECHR in respect of Russia) and continued after that date. The Court in that case did take the period before the critical date into account in assessing whether the length of the pre-trial detention and of the proceedings had been reasonable.[14] Although Russia was only bound from 5 May 1998 onwards, the supervisory institution thus included what happened before that date in its deliberations.

9.3 DISTINCTIVENESS OF HUMAN RIGHTS TREATIES?

After considering general international treaty law, we should now make a short aside and turn to human rights treaties. It is important to establish whether human rights treaties have distinctive features compared to other treaties to such an extent that it

9 Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press 1984, 2nd ed.) p. 85.

10 Paul Reuter, *Introduction to the Law of Treaties* (London & New York: Kegan Paul International 1995, transl. José Mico & Peter Haggenmacher) p. 100. For a thorough discussion of intertemporal law and treaties, see: Albert Bleckman, 'Die Nichtrückwirkung völkerrechtlicher Verträge. Kommentar zu Art. 28 der Wiener Vertragrechtskonvention', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* vol. 33 (1973) pp. 38-55.

11 But see: ECtHR, *Yağiz v. Turkey* (admissibility), 7 August 1996 (Appl.no. 19092/91), discussed *infra*.

12 Adrian Chua & Rohan Hardcastle, 'Retroactive Application of Treaties Revisited; *Bosnia-Herzegovina v. Yugoslavia*', *Netherlands International Law Review* vol. 44 (1997) pp. 414-420, see p. 420.

13 Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press 2000) p. 142.

14 ECtHR, *Kalashnikov v. Russia*, 15 July 2002 (Appl.no. 47095/99).

affects the applicability of the non-retroactivity principle.[15] Put differently, is the *Kalashnikov* case the rule or the exception?

A positive answer to the question of distinctiveness may entail that complaints lodged under human rights treaties may be less hampered by the principle than under international law in general. This theoretical possibility can be deduced from the 'different intention'-clause. The International Law Commission (ILC) in its commentary emphasizes that the particular wording used in Article 28 was preferred over 'unless the treaty otherwise provides' in order to allow for 'cases where the very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects.'[16] It is this nature that I will now address.

The European Court of Human Rights stated in the *Loizidou* case: 'In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction (…).'[17]This quotation illustrates the duality of character of human rights treaties in general. On the one hand the Court here accords the ECHR a *special* character. On the other hand it emphasizes its relationship to the wider framework of international law.

The Vienna Convention, in its Preamble, mentions human rights: 'Having in mind the principles of international law embodied in the Charter of the United Nations, such as (…) universal respect for and observance of, human rights treaties.'[18] Following an interpretational principle from the Convention itself, it can be held that the non-retroactivity principle should not interfere with the individual's enjoyment of his or her human rights or at least be interpreted as favourably as possible in that respect. Article 31 stipulates that one of the factors for interpreting a treaty is its context. Paragraph 2 of the same Article states that the context of a treaty comprises its preamble. For the present research two inferences can be drawn from this. Firstly, human rights treaties seem to be covered by the Vienna Convention, since it would be illogical that the

15 This question is part of a wider discussion about the applicability of general rules of international law to specific legal regimes: Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', *European Journal of International Law* vol. 11 (2000) pp. 489-519, see p. 491.

16 *Yearbook of the International Law Commission* vol. 2 (1966) pp. 212-213, and: Arthur Watts, *The International Law Commission 1949-1998* vol. 2 (Oxford: Oxford University Press 1999) p. 671.

17 ECtHR, *Loizidou v. Turkey* (merits), 18 December 1996 (Appl.no. 15318/89), para. 43. In *Al-Adsani v. United Kingdom*, 21 November 2001 (Appl.no. 35763/97), para. 55, the Court went even a step further by stating: 'The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (…)'. See also: ECtHR, *Banković a.o. v. Belgium a.o.* (admissibility), 12 December 2001 (Appl.no. 52207/99), para. 57.

18 This phrasing was added to the draft of the Drafting Committee by suggestion of the Dutch and Costa Rican delegations. The amendment was adopted by ninety-three votes in favour, no votes against and three abstentions: Egon Schwelb, 'The Law of Treaties and Human Rights', in: W. Michael Reisman & Burns H. Weston (eds.), *Toward World Order and Human Dignity. Essays in Honour of Myres S. McDougal* (New York: The Free Press 1976) pp. 262-290, see pp. 264-265.

Convention would allude to human rights as a principle of treaty interpretation for treaties in general, but would not extend its own scope to specific treaties which concern human rights as such. Secondly, recourse to the statement on human rights from the Preamble when interpreting Article 28 is permitted.[19]

Looking beyond the text of the Vienna Convention, rather diverging views on this issue can be discerned. The first view, represented by Vierdag, offers a sceptical perspective on the purported uniqueness of human rights treaties.[20] After reviewing their presumed special characteristics, he concludes that none of these are unique for human rights treaties and thus that these treaties are solidly anchored in the general body of international law. The first characteristic he discusses is that human rights treaties are more than an international contract, with specified advantages and disadvantages for each of the participating states.[21] Rather, they are intended to serve the common interests of the participants.[22] But in this sense, he contends, there is no conceptual difference between human rights treaties and e.g. treaties for the protection of the environment. Comparable arguments can be made for other characteristics: the implementation in domestic law, reporting duties, obligations *erga omnes* etc. Nevertheless, Vierdag does acknowledge some differences and recognizes that human rights treaties are at least in some of their aspects *leges speciales*.[23] But on the whole the balance tilts towards a preference for considering them as part of general international law.

However, one may object that Vierdag's observations that particular aspects of human rights treaties have parallels in other fields of international law do not logically entail the conclusion that these treaties as an amalgam of these aspects are not unique in any way. The *combination* of characteristics common to human rights treaties can very well be considered to be unique, geared as these treaties are to the protection of human beings.

A second view which is closer to the other side of the spectrum is defended by Craven. He argues that although in general it may be useful to apply treaty law principles to human rights treaties and that international supervisory institutions do

19 I here follow and extend a train of thought suggested by Schwelb (1976) p. 265.

20 E.W. Vierdag, 'Some Remarks about Special Features of Human Rights Treaties', in: *Netherlands Yearbook of International Law* vol. 25 (1994) pp. 119-142.

21 One of the most famous examples, which Vierdag also mentions, is EComHR, *Austria v. Italy*, 11 January 1961 (Appl.no. 788/60), in: *Yearbook of the European Convention of Human Rights* vol. 4, p. 140. See also: ECtHR, *Ireland v. United Kingdom*, 18 January 1978, Appl.no. 5310/71, para. 239: 'Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'.' A more recent example is: ECtHR, *Mamatkulov & Askarov v. Turkey* (Grand Chamber), 4 February 2005 (Appl.nos. 46827/99 & 46951/99) para. 100.

22 In the specific case of human rights treaties this common interest is the protection of the rights of human beings.

23 Vierdag (1994) p. 140. Interestingly, one of his examples on this point is the existence of various specific complaints procedures.

refer to international treaty law, 'that is a far cry from any supposition that the instruments in question can only be understood within that framework, or indeed that they have no salience otherwise.'[24] Going even further, he discards the whole question of differentiation between human rights law and general international law as largely hypothetical. Be that as it may, he does offer some proof for his argument: reciprocity in the classic sense of *quid pro quo* is not really applicable to human rights treaties.[25] The Vienna Convention on the Law of Treaties seems to support this view in relation to the termination or suspension of the operation of treaties: Article 60, para. 5, stipulates that 'provisions relating to the protection of the human person contained in treaties of a humanitarian character' cannot be suspended as a counter-measure against a material treaty breach by another party.[26]

It may not come as a surprise that international supervisory bodies of human rights treaties support Craven's opinion on the distinctiveness of human rights treaties. Apart from the above-mentioned judgment of the European Court in *Loizidou*, the UN Human Rights Committee's views illustrate this. In its General Comment on reservations to the International Covenant on Civil and Political Rights, the Committee underlines the special character of such treaties by denying that they are a 'web of inter-state exchanges of mutual obligations'.[27] That sets them apart from treaties in general. On the other hand, the Committee *does* apply principles from the Vienna Convention in the same comment.[28]

Human rights treaties thus seem to fall to a certain extent in a class of their own, but nevertheless not to fall outside the confines of international treaty law.[29] Notwithstanding its lack of specific references to human rights treaties (except for the above-

24 Craven (2000) p. 519.

25 See also: Rudolf Bernhardt, 'Thoughts on the Interpretation of Human-Rights Treaties', in: Franz Matscher & Herbert Petzold (eds.), *Protecting Human Rights: The European Dimension. Studies in honour of Gerard J. Wiarda* (Köln: Carl Heymanns Verlag 1988) pp. 65-71, see p. 66.

26 Craven (2000) p. 494. The provision mentioned can be viewed as a faint echo of the ILC's discussions about so called 'integral' treaties, 'where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others': G.G. Fitzmaurice, 'Third Report on the Law of Treaties', in: *Yearbook of the International Law Commission* vol. 2 (1958) p. 28.

27 Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, paras. 17-18.

28 Para. 6 ff.

29 Indeed, in the same paragraph (43) from which the above quote from *Loizidou* was taken, the Court stated that 'the Convention must be interpreted in the light of the rules of interpretation set out in he Vienna Convention of 23 May 1969 on the Law of Treaties.' The Court thereby confirmed its earlier judgment in the case of *Golder v. the United Kingdom*, 21 February 1975 (Appl.no. 4451/70), para. 29. The relevant passage is interesting enough to quote extensively: 'The Court is prepared to consider (…) that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive [*sic!*], but its Articles 31 to 33 [*rules on interpretation of treaties, A.B.*] enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion.'

mentioned Article 60), the Vienna Convention offers room for them: many of its provisions mention that its principles should be applied by reference to the object and purpose of the treaty at hand.[30] As this object and purpose of human rights treaties is the protection of human rights,[31] interpreting treaty provisions in line with that protection is a logical step.[32] Relating to the principle of non-retroactivity, this means that the principle should be interpreted as far as possible in harmony with this specific object and purpose. This is a far cry from saying that the principle can be discarded altogether when the interests of human beings are at stake. A clear intention as to retroactive application of human rights treaties is simply not to be found.

There is a possible alternative way out of the cul-de-sac though: Article 28 does not only mention that a different intention may appear from the treaty, but also that it may be 'otherwise established'. Theoretically, this leaves at least some leeway for supervisory organs of human rights treaties in applying the non-retroactivity principle.

Although a certain flexibility in interpretation can thus be construed by using the object-and-purpose train of thought, the non-retroactivity principle is the general rule. To continue along the lines of the *Loizidou* metaphor: human rights treaties may not be situated in a vacuum, but they certainly are of a slightly different composition than the other molecules of international law surrounding them.[33]

9.4 EXCEPTIONS TO NON-RETROACTIVITY

Having concluded that human rights treaties should be interpreted through the prism of general international treaty law, we should now return to the non-retroactivity

30 Ibid.

31 The preamble of the European Convention declares that the Convention serves the aim of 'the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]'. Compare: Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights. Advisory Opinion OC-2/82,* 24 September 1982 (Series-A, no. 2), para. 29: '(…) modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.'

32 There are obviously limits to this approach. As Bernhardt (1988, p. 71) puts it, 'treaty interpretation must not amount to treaty revision.' Golsong evens warns of the dangers of 'exorbitant interpretation' which he especially dislikes in cases concerning not substantive, but procedural provisions. See: Heribert Golsong, 'Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties', in: R.St.J. Macdonald, F. Matscher & . H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers 1993) pp. 147-162, see 150-151.

33 In this sense, see also: Bruno Simma, 'How Distinctive Are Treaties Representing Collective Interest? The Case of Human Rights Treaties', in: Vera Gowland-Debbas (ed.), *Multilateral Treaty-making* (The Hague: Martinus Nijhoff Publishers 2000) pp. 83-87, see p. 87.

principle and its exceptions. Three general exceptions can be distinguished.[34] The first was already mentioned above: retroactive effect can be expressed in or implied by a treaty (the intention clause). The second is customary law: a treaty provision can be applied retroactively if that provision is a codification of customary international law.[35] Here, the subtle difference pointed out earlier between treaty provisions in general and jurisdiction is of importance: this exception is only applicable in the first case. For individuals complaining about human rights violations, this means that the second exception is of no avail to them, as they would need a retroactive extension of jurisdiction. Customary international law cannot create such a competence by itself. What remains is a third exception: the continuing existence or recurrence of situations, acts or facts.[36] It is this exception that may offer possible relief for complainants[37] and it will be the subject of the following sections, with special focus on the case-law of the European Court of Human Rights.

If a sufficient continuum from past to present is deemed to exist, this third exception applies.[38] To grasp the content of this exception as precisely as possible, it is useful to quote from the sixth report on the law of treaties by ILC Special Rapporteur Sir Humphrey Waldock:

> In these cases the treaty does not, strictly speaking, apply to a fact, act or situation falling partly within and partly outside the period during which it is in force; it applies only to the fact, act or situation which occurs or exists after the treaty is in force. This may have the result that prior facts, acts or situations are brought under consideration for the purpose of the application of the treaty; but it is only because of their causal connexion with the subsequent facts, acts or situations to which alone in law the treaty applies.[39]

Notwithstanding Waldock's clarification, many problems present themselves: how does one distinguish a fact or act from a situation? Is a repetition of facts or acts sufficient to call something a situation or is more linkage necessary? Two examples

34 Chua and Hardcastle (1997) pp. 414-415.

35 This customary rule in itself *should* then of course pre-date the acts, facts or situations under review. To be precise: in those cases it is the rule of customary law which is in fact applied, not the treaty provision as such.

36 Technically this third instance is not an exception, but more a clarification of the scope of the principle. For stylistic reasons, though, I follow Chua and Hardcastle's qualification.

37 In a way this relief is of an ironic nature: it means that a possible violation of their human rights continues to exist.

38 The text of Article 28 itself points to this exception: parties are not bound 'in relation to any act or fact which took place or any situation which *ceased to exist* [*my emphasis, A.B.*] before the date of entry into force of the treaty with respect to that party.'

39 UN Doc. A/CN.4/186 and Add. 1-7. Sir Humphrey Waldock, 'Sixth Report on the Law of Treaties', in: *Yearbook of the International Law Commission* vol. 2 (1966) pp. 51-103, see p. 63, para. 3. Waldock's clarification was a reaction to a commentary of Greece, which suggested that the relevant Article should include a more explicit provision on the relation of the non-retroactivity principle and this kind of acts, facts or situations. Waldock deemed the (then draft) Article to be sufficiently clear.

may be mentioned here: someone is not allowed to return to land she owns in an occupied area, although she tries again and again.[40] Should every time she is stopped be considered as a single act or as part of a continuing situation of non-access? In a second example someone is trying to return home to her apartment from which she has been chased. An eviction order against the illegal occupants has been issued by a domestic court, but is not implemented.[41] Should each attempt to achieve implementation through court proceedings be considered separately or as part of a continuum? I will return to these two cases further on when dealing with the case law of the European Court of Human Rights. As the examples show, it is rather difficult 'to determine how a legal rule situates in time the concepts it involves, taking into consideration either the instantaneous or repetitious character of facts and the continuity of situations, as the case may be.'[42]

To cut down some thicket and get a clearer view, it is first of all important to make a double distinction: between acts and facts on the one hand and between the two of these and situations on the other.[43] Following Bleckman, acts can be distinguished from facts in that the first are *imputable* forms of conduct or omission.[44] Whereas the confiscation of a house falls within the first category, a house struck by lightning belongs to the second.

Situations are presumed to be of a longer duration than acts or facts. One may divide these situations into two categories: imputable and non-imputable ones. The former are acts stretched out or repeated over time, the latter are prolonged facts. Thus one could use the notions of continuing acts and imputable situations interchangeably. In absence of a more precise description or distinction in Article 28 itself or in the ILC's commentaries, that seems about all one can say about it. Significantly, at the international conference where the Vienna Convention was negotiated, the delegation of the United States tried in vain to have the passage 'or any situation which ceased to exist' deleted from the text of Article 28.[45] Apart from the argument of possible confusion with 'acts and 'facts', the reason advanced was that it would only give room for claims by states to label acts or facts 'situations' and thus in effect bypass the non-retroactivity principle. Apparently, the possibilities to stretch events from past to present were deemed far greater with 'situations' than with 'acts' or 'facts'. The delegation of Uruguay gave voice to the reasons of the majority of states in favour of maintaining the passage: situations covered more circumstances than acts or facts,

40 ECtHR, *Loizidou v. Turkey* (preliminary objections), 23 March 1995 (Appl.no. 15318/89).
41 ECtHR, *Cvijetić v. Croatia* (admissibility), 3 April 2003 (Appl.no. 71549/01).
42 Reuter (1995) p. 100. The problems mentioned here are raised, but not elaborated upon by him.
43 Bleckmann (197) p. 43 ff.
44 Whether the imputability concerns natural or legal persons is of no importance for the distinction.
45 Sinclair (1984) pp. 85-86. The US amendment was defeated by 47 to 23 votes with seventeen abstentions.

making Article 28 more complete. Moreover, courts generally used the term 'situations'.[46] Thus it made sense to have that wording included in the Article.

In spite of the eventual inclusion of 'situations' in Article 28, the exception to retroactivity essentially applies in the same way to all three categories – acts, facts and situations. This renders a crystal-clear distinction less important, the decisive factor being that the exception only applies if the relevant events are not entirely an affair of the past.[47] Distinguishing is not completely without significance though: since duration itself is an element of a situation, the duration of a situation over time does not endanger the conceptual unity of the situation. The crossing of the line between non-application and application of a treaty is then of lesser difficulty than when something is perceived as a series of acts or facts. In the latter case, sufficient links between the acts or facts will have to be established, otherwise it will not be able to span across the 'application boundary'. There has to be, in Waldock's words, sufficient 'causal connexion'[48] or – approached the other way around – the series should not be divisible into 'selbständige Tatbestände'.[49] For reasons of style, I will use 'situations' for acts, facts *and* situations in all cases discussed where the distinction is not relevant.

One last point on this exception to retroactivity should be made: what happens when there is a continuing legal dispute or procedure about an act that was performed in the past? Bleckmann contends that when the resolution or settlement procedure extends over the application boundary of a treaty, it can be perceived as a continuing situation in the sense of the third exception.[50] In practice, appealing against decisions of a lower court in a domestic situation may thus be seen in that light. It is evident that this dimension of the third exception can be of decisive importance to people trying to reclaim their house in a country that did not adhere to an international human rights treaty before they lost it, but only some time later. The proceedings they engage in may then form their life-line in time under international treaty law.

9.5 THE CONCEPT OF CONTINUING VIOLATIONS UNDER HUMAN RIGHTS TREATIES

For the category of human rights treaties and possible violations of them the problem described in 9.4 presents itself in a slightly different guise. Continuity under general treaty law is a rather neutral concept. By contrast, in the context of human rights treaties, it is mainly relevant in a more negative way: possible wrongful conduct. The

46 Note that the two arguments of the US are in a way in contradiction with each other: if, as the first argument implies, adding the term 'situations' would cause confusion, that confusion could exist if the term meant more or less the same as acts or facts. The second argument, on the other hand, seems to stem from the fear that 'situations' are of a *different* and apparently unwanted nature.

47 The past here being understood as the time prior to the entry into force of a treaty.

48 Waldock (1966) p. 63, para. 3.

49 Bleckmann (1973) p. 45.

50 Ibid.

problem to be dealt with in that case is whether the label of 'continuing violation'[51] can be applied. This problem is parallel to that of continuing *situations*. The same question of when sufficient continuity is deemed to exist, applies. There is an additional element that may bring a solution closer though: a breach always stands in direct relation to an obligation. The former cannot exist without the latter. This concomitant obligation then may provide further clues to solve the problem of continuity.

One may imagine two kinds of state behaviour (and combinations thereof) giving rise to a continuing violation: an act or an omission. A continuing violation taking the form of an act can – in the wording of Article 14 (2) of the ILC's *Articles on State Responsibility* – be defined as 'the breach of an international obligation by an act of State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.' As the Article states, this is only the case when the act continues. By contrast, when an act merely has consequences which extend over time, there is no continuing violation.[52] This does not exclude, to make things complicated, that the consequences themselves may form a violation of another (component of the) international obligation. The second kind of behaviour, the omission as a continuing violation, is not mentioned as such in Article 14, but appears in the Article in two ways. First under paragraph 2, since by using the word 'act' the ILC meant to include both actions and omissions.[53] And later in paragraph 3 which addresses the issue of prevention:

> The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

In itself the label 'continuing violation' is not necessarily connected with the non-retroactivity issue. An applicant can complain about a continuing violation which started *after* the beginning of jurisdiction *ratione temporis*.[54] In the case of the Italian

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51 This is the human rights variant of the international wrongful act of a continuing nature. The notion of a continuing violation can already be found in decisions of the Permanent Court of International Justice, but was first systematicaly used by the European Commission of Human Rights: Paul Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public (problèmes de droit intertemporel ou de droit transitoire)* (Paris: Librairie générale de droit et de jurisprudence 1970) p. 279. Later other supervisory institutions adopted a similar approach. Compare: HRC, *Lovelace v. Canada*, 30 July 1981 (Comm.no. R.6/24) para. 13.1 (loss of Indian status); and IACtHR, *Velásquez Rodriguez v. Honduras*, 29 July 1988 (No. 7920) para. 155 (forced disappearance).

52 *Report of the International Law Commission*, fifty-third session, UN Doc. A/56/10 (not yet published), p. 140. Also to be found in: James Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press 2002) p. 136.

53 Ibid., p. 80. See also Article 2: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission (…)'.

54 It is in these cases that the issue of time-limits as an admissibility criterion, mentioned *supra*, note 1, may be of importance for victims. The continuing violation may for them be the same rescuing life-line that it is in situations of non-application of a human rights treaty. In other words, when the violation

applicant Marcella Ferrari, e.g., the Court found a continuing violation of Article 6(1) ECHR: there was a pattern of violations of the reasonable time requirement in civil cases from 25 June 1987 onwards which still continued on the day of the judgment (28 July 1999).[55] Italy had been a party to the Convention since the very beginning (4 November 1950) and had accepted the Court's jurisdiction in 1 August 1973. The whole continuing situation thus fell within the Court's jurisdiction. By contrast, when the third exception to non-retroactivity is at stake, the question to be answered boils down again to sufficient continuity across the time-limit.[56] The difficulty then lies in establishing exactly what constitutes an instantaneous breach with lasting negative effects on the one hand and a continuing violation on the other.[57] Only in the second instance jurisdiction *ratione temporis* will be assumed.

A short *caveat* should be made here: technically one should not speak of a continuing violation in these cases, but of a continuing situation.[58] Only that part of the situation which takes place after the temporal application of a human rights treaty starts, is a violation. The part of the situation that takes place before that point in time cannot be a violation.[59] In line with the non-retroactivity principle the treaty does not apply yet. But the prior acts, facts or situations can of course, in the instances at hand,

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they complain of is not considered as an act but as a continuing situation at the time of the complaint, the six months period is not relevant; the violation still continues. Since the same principles concerning continuing violations discussed here can be applied to such instances, I will not treat these cases separately.

55 ECtHR, *Ferrari v. Italy*, 28 July 1999 (Appl.no. 33440/96). 25 June 1987 is the date of the first time the Court found a breach in a comparable case: ECtHR, *Capuano v. Italy*, 25 June 1987 (Appl.no. 9381/81).

56 Theoretically, the question of continuity and the question of whether there has been a violation are separate issues. In practice, supervisory mechanisms may treat the two questions together. Under the Convention system a negative answer to one of the questions can result in rejection of the application in the admissibility proceedings, either for *ratione temporis* reasons or because it is clear enough at first sight that no violation of Convention rights has taken place. The complaint can then be dismissed as manifestly ill-founded under Article 35 (3). When this clarity is not established in the admissibility stage, the two questions *will* be treated separately: even if a positive answer is given to the first question – continuity exists – a negative may be given to the second: the situation is not a violation of an international obligation.

57 This distinction is also made in Article 14 of the ILC's *Articles on State Responsibility*. The Commentary, tries to shed some light on the distinction. It states that the mere fact that an act has continuing consequences does not make the act itself continuous. Although these consequences may entail suffering, e.g. for victims of torture, these should be seen in the light of the reparation, a secondary obligation. See: *Report of the International Law Commission*, fifty-third session, UN Doc. A/56/10 (not yet published), p. 140 and Crawford (2002) p. 136.

58 Tavernier (1970) p. 282. See also the preceding note.

59 Roger Pinto, *Les organisations européennes* (Paris: Payot 1965, 2nd ed.) p. 160.

be taken into account for the determination of a violation.[60] In other words, the time-limit is not a jurisdictional blindfold which prevents gazing into the past.[61]

To deal with questions of continuity, one could approach the problem purely on a case-by-case basis. This may have the advantage of doing justice to the specific circumstances in which a victim finds himself. But such an approach, if adapted by supervisory institutions, would not do much for legal certainty. It is therefore useful to look for guidelines to establish the dividing line. I will discuss this issue using the ideas of Joost Pauwelyn,[62] since he treats this question in most detail.

Pauwelyn provides three solutions or tools, as he calls them, to help and solve this problem: focussing on the legal rule involved instead of on its breach; looking at the issue of reparation; and thirdly, assessing whether the legal status of a person is affected during a certain period. The first tool is not to put emphasis on a breach and its effects but rather on the international obligation that has been breached.[63] The rationale for this is that the scope of the obligation determines in which ways the obligation can be breached. This tool focusses on the following question: is the obligation 'targeting a (possibly continuing) *situation* or, on the contrary, a given and instantaneous *fact*'?[64] One may ask whether this does not merely amount to reshuffling the problem instead of providing a useful tool. Partly, this is the case: the problems of interpretation are shifted from breach to obligation.

The advantage of this first tool is that a rule, certainly one laid down in a treaty and interpreted by an international institution,[65] can provide more guidance than the myriad of conceivable circumstances in practice. Certainly in the case of the European Convention on Human Rights, a detailed case-law has arisen from the judgments and decisions of the Court and of the Commission. Two points should be taken into account: Firstly, complete certainty can never be achieved, as new judgments constantly refine, change, and may even increase the contents and scope of human rights obligations. Secondly, for the victim, an emphasis on the obligation may not always be an advantage, as for him the negative effects of an act are more important than whether these consequences can be labelled as a continuing violation of a specified obligation or not. Looking at the specific circumstances without shifting the focus may

60 Compare the quote from Waldock's report in section 8.4. About the possibility to take facts from the past into account when deciding on present disputes, see also: Denise Bindschedler-Robert, 'De la rétroactivité en droit international public', in: *Recueil d'études de droit international. En hommage à Paul Guggenheim* (Geneva: Tribune de Genève 1968) pp. 184-200, see p. 192.

61 See also: ECtHR, *Broniowski v. Poland* (admissibility), 19 December 2002 (Appl.no. 31443/96) para. 74.

62 Joost Pauwelyn, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems', in: *British Yearbook of International Law* vol. 66 (1996) pp. 415-450.

63 See also Wyler (1991) pp. 888-890.

64 Pauwelyn (1996) p. 420.

65 Contrary to a rule of customary international law, the precise content and scope of which is much more difficult to establish.

be more desirable for the individual. This, at the very least, requires that the shift from fact to obligation is not made completely. Both are of importance.[66]

The second tool, is to adopt the perspective of reparations. If cessation of an act or situation is a useful reparation – or the only one for that matter – a continuing violation can be established. On the other hand, so Pauwelyn contends, when restitution or compensation would be a sufficient reparation for both the past and the future, the situation should not be labelled a continuing violation. Although in the context of general international law this may seem a sensible approach, the problem remains that in some situations cessation amounts to restitution. This is the case when a continuing act takes the form of a continuing omission. One may easily imagine a situation of someone who has been chased from his house by a third party and the state authorities have not acted to help the victim get his house back. Eventually, the authorities finally undertake action and effectively help return the house to the legitimate owner. Arguably, two limbs of a right to respect for the home could then be at stake. One is the positive obligation to prevent that someone is chased from his house in the first place, the other to make sure that someone can return as soon as possible when such a thing has occurred. The first is a preventive duty which has been breached. The second can be characterized as a positive obligation to help someone get his house back. A successful act of the state under this second limb amounts both to cessation (of the omission) and to restitution in practice. To counter the disadvantage of the second tool, we had to resort to using the first: looking at the content and scope of the obligation. This takes away an important part of the utility of the second tool.

Finally, the third tool involves yet another theoretical approach:

> [O]ne should assess whether as a legal fiction the act complained of can be said to be repeated, in its entirety, each day since it has been passed (and therefore is a continuing act), or whether only the effects or consequences of the act, which as such has only been passed once (and thus is an instantaneous act), remain intact. In other words, if the act affects the legal status of a person during a certain period in time, it should be regarded as a continuing act.[67]

Essentially, the third tool reformulates the problem instead of helping to solve it. In the example used above, it cannot on its own make the decisive distinction in all cases. The failure to help someone regain his house, for example, cannot be decided with the help of the third tool. It is unclear whether this omission continuously affects someone's legal status or simply has continuing negative consequences. The Gordian knot can only be cut by having recourse to the kind of obligation involved: does it contain a positive obligation on this particular point or not? In other words, by using the first tool.

66 Wyler (1991) p. 909, and Crawford (2002) p. 135.
67 Pauwelyn (1996) p. 421.

As Pauwelyn concedes, the tools he offers are meant to be useful, but he does not claim that they are decisive in all cases. The analysis here has shown that the tool that in fact unites all of them is the first. This is why I will only use the first tool as a yardstick in combination with the specific facts of the case at hand. To see whether and how continuity issues are approached in the practice of international human rights claims procedures, the case-law of the European Court of Human Rights will now be analyzed.

9.6 Application of non-retroactivity under the European Convention on Human Rights

In his partly dissenting opinion in *Cyprus v. Turkey*, judge Fuad noted that 'the concept of continuing violations is well established and readily understood.'[68] Considering the analysis above, this statement may well be questioned. But what is even more problematic is the application of the concept in practice, as Fuad acknowledges. Before looking at this issue, we again have to distinguish the treaty's temporal scope from the jurisdiction of the supervisory institutions.

9.6.1 Temporal scope of the ECHR – the Commission and the Court

Concerning the temporal scope of the European Convention of Human Rights, both the Commission and the Court have always held that 'the Convention only governs facts which are subsequent to its entry into force with respect to the Contracting Party concerned.'[69] The same applies to the protocols. Thus the parties to the Convention are only bound from the ratification date onwards:

> 'All the State's alleged acts and omissions must conform to the Convention and its Protocols and subsequent facts fall within the Court's jurisdiction *even when they are merely extensions of an already existing situation.*'[70]

The Strasbourg institutions did not in any way claim that they invented this principle. Already in one of its first decisions, *De Becker v. Belgium,*[71] the Commission stated

68 Partly dissenting opinion in: ECtHR, *Cyprus v. Turkey*, 10 May 2001 (Appl.no. 25781/94), para. 24.

69 ECtHR, *Trickovic v. Slovenia* (admissibility), 9 November 1999 (Appl.no. 39914/98), p. 3. This was the first judgment in which the new Court, after the entry into force of Protocol 11, explicitly applied this principle. It thereby followed the established case-law of the Commission. See also: Claire Ovey & Robin White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press 2006, 4th Ed.) pp. 21-24 and 485; Jochen Abr. Frowein & Wolfgang Peukert, *Europäische Mensenrechtskonvention. EMRK-Kommentar* (Kehl am Rhein: N.P. Engel Verlag 1996) 551.

70 ECtHR, *Maria Hutten-Czapska v. Poland* (admissibility), 16 September 2003 (Appl.no. 35014/97) p. 16, emphasis added.

71 EComHR, *De Becker v.* Belgium, 9 January 1958 (Appl.no. 214/56), in: *Yearbook of the European Convention on Human Rights* vol. 2 (1960) p. 214 ff. Waldock, the earlier mentioned rapporteur of the

that non-retroactivity was a generally recognized principle of international law. By doing so its case-law was firmly rooted in the broader framework of existing law[72]: non-retroactivity is the rule. Further on in this section I will discuss the exception to this rule the Commission and the Court have used.

9.6.2 Jurisdiction – the Commission

Before the reforms of Protocol 11 (1 November 1998) that changed the supervisory system of the ECHR, the right of individual petition – and thus the possibility for applicants to lodge a complaint with the Commission – only came into being if the state party concerned recognized it. It could do so by making a declaration under former Article 25 ECHR. In some instances states recognized the right of individual complaint years after their ratification of the ECHR.[73] Whether individuals could complain about alleged violations in the intervening period depended upon the content of the state's declaration of acceptance. When an explicit limitation in time was lacking in such a declaration, the European Commission on Human Rights considered itself competent *ratione temporis* to deal with the complaint.[74] Consequently, the questions of whether the state party was bound by the Convention and the question of the Commision's jurisdiction were dealt with in combination in the admissibility stage of the proceedings.[75]

Some state parties did include a limitation in their declaration to the effect that the Commission's jurisdiction was limited to events that took place after the date of the declaration.[76] Complaints about the intervening period were thereby left in a jurisdictional no man's land, except when they could be partially smuggled out of there under the cloak of the 'continuing violation'.[77]

ILC, was presiding the Commission at that time. See: *Yearbook of the European Convention on Human Rights* vol. 1 (1960), p. 110.

72 This is all the more logical when one takes into account that the ECHR did not contain *any* rules on the jurisdiction *ratione temporis* of the Commission, not even in the Articles about admissibility. See, e.g.: Nicolas Antonopoulos, *La jurisprudence des organes de la Convention européenne des Droits de l'Homme* (Leiden: A.W. Sijthoff 1967) p. 29.

73 In the conspicuous example of Turkey, e.g., more than forty years lay between the entry into force of the ECHR (18 May 1954) and the recognition of the right to individual petition (28 January 1987).

74 See e.g.: EComHR, *Varga-Hirsch v. France*, 9 March 1983 (Appl.no. 9559/81) and EComHR, *Demicoli v. Malta*, 15 March 1989 (Appl.no. 13057/87).

75 Max Sørensen, 'Le problème inter-temporel dans l'application de la Convention européenne des Droits de l'Homme', in: *Mélanges offerts à Polys Modinos. Problèmes des droits de l'homme et de l'unification européenne* (Paris: Éditions A. Pedone 1968) pp. 304-319, see p. 307.

76 See also, illustrated with numerous case law examples: Tom Zwart, *The Admissibility of Human Rights Petitions* (Leiden: Martinus Nijhoff Publishers 1994) pp. 134-135.

77 Even this road could be blocked though: Turkey declared that the declaration only extended to facts, including judgments concerning these facts, which have occurred after its deposit. The Commission has subsequently held that it could not examine applications concerning administrative decisions taken before the crucial date, but confirmed by judgments afterwards. See: ibid., p. 135 and Christian Rumpf,

9.6.3 Jurisdiction – the Court

Under the old pre-reform system, the jurisdiction of the Court was also subject to explicit recognition by the state parties.[78] In principle this did not cause much problems: the overwhelming majority of states did not include a temporary restriction in their declarations on this point. Of the four which did – Italy, Poland, the United Kingdom and Turkey[79] – the Court could only consider complaints relating to subsequent events. The Turkish declaration posed a particular problem: the starting date of acceptance of the Court's jurisdiction (22 January 1990) was different from that of the earlier recognition of the right of individual complaint (28 January 1987). Theoretically, the temporal jurisdiction of the Court could differ from the Commission's. Two cases brought before the Court illustrate how this problem materialized. In *Mitap and Müftüoğlu*[80] the applicants complained about the excessive length of their pre-trial detention and of their trial and about the lack of impartiality and independence of the military court that sentenced them at first instance. The pre-trial detention ended with the military court's judgment of 19 July 1989, whereas the entire proceedings ended in 1995. The Court concluded that it could only consider the merits of the complaint about the length of the trial, and then only from 22 January 1990 onwards. In the case of *Yağiz*[81] the effect of this formal approach of the Court was even more negative for the applicant. Mrs Yağiz complained about torture during interrogations by the police which allegedly took place on 15 and 16 December 1989, a month before Turkey's recognition of the Court's jurisdiction. The Court concluded that therefore it could not deal with the merits of the case, even though the ECHR was already binding upon Turkey at the time of the facts complained of.[82]

Thus three categories of countries could be distinguished: (1) The majority of state parties. Their declaration of acceptance of the Court's jurisdiction contained no temporary limitations: the Court could look at every situation complained of, all the way back to the entry into force of the ECHR for the country concerned, just like the Commission; (2) Italy, Poland and the United Kingdom, for which the starting point was the date of the acceptance of the right of individual complaint. Thus also for the second group Court and Commission could consider the same set of facts; (3) Turkey:

'Die Anerkennung der Zuständigkeit des Europäischen Gerichtshofs für Mensenrechte gem. Art. 46 EMRK durch die Türkei', *Europäische Grundrechte Zeitschrift* vol. 17 (1990) pp. 53-56.

78 Former Article 46 ECHR.

79 J. van der Velde, *Grenzen aan het toezicht op de naleving van het EVRM* [Restrictions to the supervision of ECHR obligations] (Leiden 1997) p. 243.

80 ECtHR, *Mitap & Müftüoğlu v. Turkey*, 25 March 1996 (Appl.nos. 15530/89 and 15531/89).

81 ECtHR, *Yağiz v. Turkey*, 7 August 1996 (Appl.no. 19092/91).

82 On these cases, see also: Van der Velde (1997), pp. 242-244 and the case notes of R.A. Lawson in *NJCM-Bulletin* Vol. 21 (1996) pp. 1090-1114.

the time-frame the Court took into account was shorter than that of the Commission: a difference of almost three years.[83]

Through the entry into force of Protocol 11 to the ECHR considerable changes have been brought about. The Commission and the old Court have merged into the new European Court of Human Rights which deals with both the admissibility and merits of a complaint. State parties are obliged to accept the right of individual complaint and the jurisdiction of the Court. Ever since, for new state parties to the Convention, the date of entry into force and the start of the Court's jurisdiction *ratione temporis* are simultaneous. For those countries the difference between temporal application of the Convention and the temporal jurisdiction of the Court is non-existent. And for all other countries the relevant period between the entry into force of the Convention logically recedes into the past as time goes by. Fewer and fewer complaints will thus be likely to concern this particular period of time.

Concluding on the point of jurisdiction we have seen that when states indicated clear temporal limitations, the supervisory organs respected these. On the other hand, when parties to the ECHR left the time frame open, both the Commission and the Court have taken the opportunity to extend their jurisdiction backwards to the moment of entry into force of the Convention. In those instances they thereby gave the declarations of states retroactive effect.[84] When possible the jurisdiction *ratione temporis* was therefore at least not made smaller than the temporal scope of the ECHR, but as large. Still, this means that retroactivity in the sense of crossing the line of entry into force was not achieved in this way. To do so we now have to turn to the issue of continuing violations.

9.6.4 Continuing situations – the Commission

How has the supervisory system of the ECHR dealt with the third exception to the principle of non-retroactivity: situations which took place partly before and partly after the start of its jurisdiction *ratione temporis*.

The Commission used to distinguish between two kinds of continuity: instantaneous acts (occurring before the entry into force of the Convention for the state concerned) with lasting effects and continuing violations, which include the existence of legislation contrary to the Convention.[85] Whereas it would not consider itself

83 The outcome for complainants in this kind of cases against Turkey thus seems rather disappointing. It must be borne in mind that under the old system the Commission could also refer cases to the Committee of Ministers. In the case of Yağiz this happened and resulted in the decision that there had been a violation against her and Turkey had to pay a compensatory sum. See Committee of Minister's resolution DH (99) 20, 18 January 1999.

84 Zwart (1994) p. 138.

85 In the above-mentioned *De Becker* case the Commission for the first time acknowledged a continuing situation. See also: Pauwelyn (1996) p. 422-423.

competent *ratione temporis* in the former cases, it would in the latter.[86] The unclear boundary between the two situations evoked criticism from commentators. Antonopoulos, as early as in 1967, referred to it as 'ni fondée, ni claire'. He argued that lasting effects could themselves be violations of the Convention and that therefore the precise time of the acts that caused them was not decisive, but rather the nature of the effects: violating the ECHR or not. Following this reasoning would be more in line with the spirit of the Convention, he asserted.[87] One year later, Sørensen defended the Commission's distinction.[88] Interestingly, he explained the line in the case-law in exactly the way that Antonopoulos claimed that it *was not*, but *should* be. Sørensen stated that the Commission distinguished in relation to the Convention Article involved. If the relevant Article guaranteed the enjoyment of a certain situation and if the applicant claimed to have been deprived of such enjoyment during a period which endured until after entry into force of the Convention, the Commission would assume jurisdiction. If, on the other hand, the applicant could, after entry into force of the Convention, merely claim to be in an unfavourable situation caused by an act that took place before entry into force, the Commission would not.[89]

When we follow Sørensen's interpretation of the Commission's case-law, then the first tool Pauwelyn mentions was indeed used in practice. This approach, which emphasizes on the nature of the situation after entry into force (in violation of the Convention or not) by looking at the obligation involved, seems both viable and most in line with the interests of the individuals for which the Convention was drafted. Thus the Commission did justice to the special character of the ECHR as a human rights treaty within the acceptable flexibility general treaty law offers.

9.6.5 Continuing situations – the Court

In many ways the approach of the Court follows that of the Commission. For the Court the concept of a continuing situation refers to 'a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims.'[90] If an event merely has significant consequences over time, this is not sufficient to label it a continuing situation.[91]

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86 E.g. EComHR, *Krafft Paridam Heinz Robert von Rigal-von Kriegsheim v. Germany*, 21 May 1998 (Appl.no. 37696/97); EComHR, *Ingeborg Peltzer & Barbara von Werder v. Germany*, 21 May 1998 (Appl.no. 35223/97). In these cases the Commission pointed to the distinction between continuing violations on the one hand and acts in the past, which may have had ongoing negative consequences, but did not amount to a violation on the other hand. The taking of property was juxtaposed to *Loizidou*-type cases of continuing denial of access to one's property.

87 Antonopoulos (1967) p. 36.

88 Not surprisingly so, since he was then a member of the Commission. See: *Yearbook of the European Convention of Human Rights* vol. 11 (1968), p. 46.

89 Sørensen (1968) p. 315.

90 ECtHR, *Posti & Rahko v. Finland*, 24 September 2002 (Appl.no. 27824/95) para. 39.

91 Ibidem, para. 40.

At first sight, the Court seems to draw a clear line between continuing proceedings and continuing violations. If an individual starts domestic proceedings about alleged violations of the ECHR on the domestic level and those proceedings start or continue after entry into force of the Convention vis-à-vis the state against which he complains, the Court does not generally assume jurisdiction on that specific ground.[92] The bar on retroactivity applies. When an act or situation is characterized by the Court as a continuing violation, it does accept jurisdiction.[93] The clarity of the line is somewhat blurred by the fact that domestic court proceedings themselves may also fall under the category of continuing violations.[94] This is the case for example when an applicant complains that his case was not decided within a reasonable time, invoking Article 6 of the Convention. This apparent inconsistency can be explained with the help of Pauwelyn's tool: looking at the obligation involved. Since state parties have the obligation under Article 6 to secure the end of proceedings within a reasonable time, excessive length of the proceedings themselves can be a violation. The element of time itself is then at the core of the breach of the Convention. It should be noted that in that case the complaint the Court considers is the one about length of proceedings and not any possible complaints about situations that gave rise to these proceedings, but took place before the relevant time limit. The latter remain outside the Court's jurisdiction.

Let us now take a closer look at three important cases to assess the relevance of Pauwelyn's tool. The *Loizidou v. Turkey* case, earlier used as an example in section 9.4, is an exponent of continuity between – if we follow Sørensen – the case-law of the Commission and that of the Court. In this landmark case, a Greek Cypriot woman repeatedly tried to gain access to her plots of land in the north of the island, but was prevented from doing so.[95] The Court concluded that this amounted to a continuing violation of Article 1 of Protocol 1 (peaceful enjoyment of possessions), as the land was still Loizidou's property.[96] It rejected any assertion to the contrary, specifically Turkey's contention that the taking of property had started with the occupation of the northern part of Cyprus in 1974 and 'ripened into an irreversible expropriation by virtue of Article 159 of the 'TRNC'[97] Constitution of 7 May 1985.'[98] Apparently, the Court was of the view that in this case the situation was not just an event in the past,

92 ECtHR, *Stamoulakatos v. Greece*, 26 October 1993 (Appl.no. 12806/87) and ECtHR, *Veeber v. Estonia* (No. 1), 7 November 2002 (Appl.no. 37571/91).

93 In cases of a continuing violation the time-limit to lodge proceedings of Article 35 of the ECHR (maximum of six months after the exhaustion of domestic remedies) is not an impediment. See: ECtHR, *Papamichalopoulos a.o. v. Greece* (merits), 24 June 1993 (Appl.no. 14556/89).

94 See, e.g.: ECtHR, *Yağcı & Sargın v. Turkey*, 8 June 1995 (Appl.nos. 16419/90 & 16426/90) para. 40.

95 See: ECtHR, *Loizidou v. Turkey* (preliminary objections), 23 March 1995 (Appl.no. 15318/89). The Court did not decide on the *ratione temporis* question in the preliminary phase, but joined its consideration to the merits of the case.

96 Turkey's objection *ratione temporis* was rejected and the Court held that the denial of access to property amounted to a breach of Article 1 of Protocol 1 by eleven votes to six.

97 Turkish Republic of Northern Cyprus.

98 Para. 35.

such as the closing of the border between the two parts of the island,[99] with negative consequences for Loizidou, but rather a situation of denial of access to property that continued to exist over time. Thus the situation amounted to a continuing violation.[100]

Although the Court does not explicitly address this, Pauwelyn's first tool – looking at the nature and extent of the obligation – in combination with the circumstances of the case would yield exactly the same result. Since the right to peaceful enjoyment of property is of a continuing nature (instantaneous enjoyment would not make sense), an interference with that obligation causes a violation for as long as the owner of the property is barred by the state from using it.

The line in *Loizidou* was continued by the Court in the case of *Ilaşcu.*[101] The Court even took this line of reasoning one step further: in this case Pauwelyn's approach would not only lead to the same outcome, but the Court can at least partly be said to have applied it. The applicant complained about his trial, his detention and the death penalty to which he was sentenced by the authorities of the 'Moldovan Republic of Transdniestria'. This entity, like the TRNC, was not recognised by the international community. The Court examined the *ratione temporis* aspect of the situation in bits and pieces. Partly it did so by looking Article by Article into the situation complained of. This is a rather clear indication that the Court in effect takes the nature of the obligation into account when deciding these issues.[102] If this would not be relevant to the Court, it would suffice to decide the *ratione temporis* issue as a whole instead of subdividing it. On the other hand, the Court's decision about the aspect of the detention, an alleged violation of Articles 3, 5 and 8 ECHR, is taken together. This is an indication that the Court did not purely look at the nature of the obligation, but also at the situation itself: since the detention was still continuing, the three Articles invoked could apparently give rise to a continuing violation.[103] The *Ilaşcu* judgment is in this sense a mixed bag.

The third and most important case in this respect is the Grand Chamber's judgment in the *Blečić* case.[104] According to the Croatian judge in the case, the Court used the case to provide 'some precisions and guidelines regarding the legal test for the Court's

99 See the dissenting opinion of judge Bernhardt joined by judge Lopes Rocha, who submitted this. See also the dissenting opinion of judge Baka, who argued that Loizidou had been expropriated, and the dissenting opinion of judge Jambrek, contending that the Court should, for reasons of judicial restraint in such a political case, *not* have rejected Turkey's preliminary objections *ratione temporis*.

100 The problem in this case is that the 'irreversible expropriation', as Turkey called it, was a legal act from the TRNC. As this entity was not recognized under international law, its legal acts could not be taken into account by the Court. This led the judges to focus on the denial of *access* to the property instead of the impossibility to make use of it caused by the 'expropriation'. For this argument, see: Beate Rudolf, Case note of the *Loizidou* judgment, *American Journal of International Law* vol. 91 (1997) pp. 532-537, see p. 536.

101 ECtHR, *Ilaşcu and others v. Moldova and Russia*, 8 July 2004 (Appl.no. 48787/99).

102 And in this respect it also follows the approach the Commission used to take.

103 The Court characterized the situation as events that were still going on (para. 402).

104 ECtHR, *Blečić v. Croatia* (Grand Chamber), 8 March 2006 (Appl.no. 59532/00).

temporal jurisdiction'.[105] The Court specified that its temporal jurisdiction was to be determined 'in relation to the facts constitutive of the interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction.'[106] Since the precise time of the interference was essential, the Court held that it should generally take into account 'both the facts of which the applicant complains and the scope of the Convention right alleged to be violated.'[107] Thus the approach in this leading case again reflects the combination of a consideration of the facts and Pauwelyn's emphasis on obligations.

The application of these principles to the case at hand led to a surprising conclusion. Whereas the Court had assessed the case on the merits in the original judgment,[108] the Grand Chamber top which the case was referred held the case to be inadmissible *ratione temporis*. This conclusion rested upon the two elements of the general principle. Concerning the obligation involved, the Court held that deprivation of someone's home or property was in principle an instantaneous act. The applicant's situation could thus not be seen as a continuous violation. In that sense the Court implicitly distinguished the case from *Loizidou*-type situations of denial of access – as opposed to formal deprivation/expropriation. Thus it became relevant to establish whether that moment of deprivation had happened before or after the entry into force of the ECHR for Croatia. The Court held that the loss of Blečić' specially protected tenancy came about by the decision of the Supreme Court – before the critical date – and not by the judgment of the Constitutional Court not to quash that judgment – after the critical date. Although the Court apparently based itself on the Croatian legal system to come to this conclusion, the outcome is very debatable.[109] One may indeed justifiably wonder to what extent the Supreme Court's judgment can be accepted as *res judicata*, considering that the Constitutional Court could have quashed that judgment. In this case the applicant thus did not benefit form a lifeline in time.

One possible problem remains from the point of view of Pauwelyn's toolbox. If both the obligation involved and the specific circumstances are important in deciding whether continuity exists, a complete separation of the *ratione temporis* questions in the admissibility proceedings on the one hand and an evaluation of the merits on the other may not be desirable. The Court seems to be aware of this. Only in instances where earlier case-law provides clear guidance that something can be seen either as an instantaneous fact or as a continuing situation, does the Court decide on the issue in

105 Nina Vajić, 'Before … and After: *Ratione Temporis* Jurisdiction of the (New) European Court of Human Rights and the *Blečić* case, in: Lucius Caflisch a.o. (eds.), *Human Rights – Strasbourg Views. Liber Amicorum Luzius Wildhaber* (Kehl: N.P. Engel 2007) pp. 483-505, see p. 484.

106 Ibid., para. 77.

107 Ibid., para. 82.

108 ECtHR, *Blečić v. Croatia*, 29 July 2004 (Appl.no. 59532/00).

109 The elaborate dissenting opinions bear testimony to this.

the admissibility decision. In almost all other cases[110] 'the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits'[111] – enabling the joint consideration of both the nature and scope of the obligation and the circumstances.

9.6.6 Separate facts or proceedings as one continuum

A complicating factor may sometimes come to the fore: the fact that a continuing violation is not a monolithic event, but may consist of a series of proceedings, creates the need for a measuring criterion. When does such a series still form a unity and when are its components to be considered as too losely connected to be taken together? This is of importance when some proceedings took place before the entry into force of the ECHR and others afterwards. Only if these can be understood as a continuum can the Court look at the earlier facts as well, as part of the whole. Otherwise only the latter part can be taken into account.

The Court, in the first judgment where this question explicitly came up, *Phocas v. France*, used the yardstick of 'the necessary continuity'.[112] In that case, the applicant wanted to build appartments on his own land near a crossroads. Due to plans of the French authorities to expand the crossroads, his application for a planning permission was adjourned. After seventeen years of proceedings he was, on his own request, expropriated. The Court considered that as in the whole intervening period he had not been able to develop his property nor had been compensated for that, there was 'the necessary continuity in Mr Phocas's situation for the Court to be able to take into account events that occurred before France ratified Protocol No. 1.'[113] The Court was seemingly rather lenient on this point. In *Phocas* it considered the whole situation as a unity, although separate proceedings about the planning permission and about the expropriation could clearly be discerned. Apparently, the fact that all proceedings concerned the inability to build on the plot of land was sufficient. The Court thus effectively focussed more on the central underlying subject-matter of the complaint than on the formal aspects. In doing so it gave precedence to the effects on the applicant, which continued throughout the whole period.

The yardstick adopted in *Phocas* was used *explicitly* only a few more times by the Court, in admissibility decisions.[114] In *Cvijetić v. Croatia* the applicant tried in three

110 This result was obtained by looking at all the Court's case-law up to 1 July 2004 containing the words 'continuing violation' or 'continuing violations' through the HUDOC search engine. The trend seems to have been continued after that date.

111 E.g. ECtHR, *Gavriel v. Turkey* (admissibility), 1 February 2000 (Appl.no. 41355/98), among many others.

112 ECtHR, *Phocas v. France*, 23 April 1996 (Appl.no. 17869/91), para. 49.

113 Ibid. Compare to Waldock's earlier cited 'causal connexion'.

114 Results obtained by looking for the wording 'the necessary continuity' and 'la continuité nécessaire' in the HUDOC search engine. Search performed on 31 March 2007.

subsequent procedures to get the same national court order enforced.[115] Part of these proceedings took place before the entry into force of the Convention for Croatia, part of them afterwards. The proceedings were so obviously connected that the European Court could easily establish that the *Phocas* threshold had been met. Finally, in *Crnojević v. Croatia* a change in domestic law provided that all proceedings of a certain type were to be stayed.[116] The applicant's case was subsequently stayed, a situation which continued until after the entry into force of the Convention. The Court declared the case admissible. In this last case, there was in effect only one procedure. In declaring the case admissible the Court should therefore not even have taken recourse to the *Phocas* yardstick. Pending proceedings are by definition proceedings that have not ended. Thus it is quite clear that there is continuity in such cases.

What can we conclude from these three cases? First of all, there are a few. Apparently, in other cases either the proceedings were logically connected in the traditional manner – each procedure was an attempt to quash the decision or judgment in the previous one – or the respondent state did not challenge the admissibility on this point.[117] The second conclusion one can draw is the following: these cases show that when procedures are formally separate, but closely connected in content, the Court may view them as a continuous situation. The Court holds the underlying subject-matter to be decisive. Such an approach can only be applauded, as any other would amount to unneeded formalism to the detriment of the applicant.

9.7 THE LINK WITH HOUSING RESTITUTION

Obviously, housing restitution supposes a preceding loss of the residence involved. If this loss, or the failure to regain the residence, can in any way be attributed to the state,[118] the Convention comes into play. The central question on this point is: does the Court view deprivation of residential property as a continuing situation?

Firstly, one can approach this question from the perspective of a residence as a form of property. An expropriation or nationalisation in the past, before the entry into force of the Convention for the country concerned, in principle falls outside the temporal scope of the Convention. The Grand Chamber judgment in the *Blečić* case shows that a termination of a specially protected tenancy falls in the same category.[119]

115 ECtHR, *Cvijetić v. Croatia* (admissibility), 3 April 2003 (Appl.no. 71549/01).

116 ECtHR, *Crnojević v. Croatia* (admissibility), 29 April 2003 (Appl.no. 71614/01).

117 The case of *Piron c. la France* is an example where the Phocas yardstick was only used implicitly: ECtHR, 2 March 1999 (Appl.no. 36436/97).

118 By establishing state interference with the rights protected in the Convention or more indirectly by a failure of the State to fulfill its positive obligations.

119 The Grand Chamber did not specify whether it assessed this under P1-1 or Article 8, but presumably the same conclusion holds for both.

The Court does not consider such acts to be continuing situations,[120] but instantaneous acts. Such a loss of property must be a legal expropriation, i.e. an act with loss of property as the ensuing *legal* effect. Compensation is relevant as well: if the expropriation took place before the critical date but an entitlement to compensation under law exists afterwards, the situation is continuing.[121]

In addition, a legal restitution of property – recognized by law or through judicial decisions – without the practical possibility to dispose of the property concerned does not end a situation of interference with property rights, but prolongs it.[122] Along the same lines continued interferences with property in spite of court orders amount to a continuing situation.[123] So do laws or regulations which themselves infringe property rights and acts or omissions of State authorities that render access to property entirely impossible.[124] In all these cases under Article 1 of Protocol 1 the Court will of course first have to determine whether it considers the applicant to be the owner of the property concerned.

A regulated process of expropriation is a rarity in times of conflict. Most losses of property will be a result of the armed conflict itself, and as often as not caused by non-state actors. If direct state interference is thus not at stake, then the possible positive obligations incumbent on the state are all the more important. This is particularly relevant when the residence involved is occupied by a third party. In a series of Italian cases starting with *Immobiliare Saffi*[125] the ECHR has ruled that the state is under a positive obligation to support and take action to implement a court order requesting the eviction of the occupant. As long as the state fails to do so, there is a continuing situation of omission.[126]

The other way to look at the issue is under Article 8: not property but residence then becomes the core issue. In *Cyprus v. Turkey*[127] the Court established that the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus was a continuing violation of the right to respect for the home.[128]

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120 E.g. ECtHR, *Marginean c. Roumanie* (admissibility), 14 January 2003 (Appl.no. 33359/96); ECtHR, *Todorescu c. Roumanie*, 30 September 2003 (Appl.no. 40670/98); ECtHR, *Cucu c. Roumanie* (admissibility), 6 July 2004 (Appl.no. 47966/99).

121 ECtHR, *Broniowski v. Poland* (admissibility), 19 December 2002 (Appl.no. 31443/96), para. 76.

122 ECtHR, *Satka et autres c. la Grèce* (admissibility), 7 March 2002 (Appl.no. 55828/00).

123 ECtHR, *Pialopoulos a.o. v. Greece* (admissibility), 15 June 1999 (Appl.no. 37095/97).

124 See the case of *Loizidou*, discussed in section 9.6.

125 ECtHR, *Immobiliare Saffi v. Italy*, 28 July 1999 (Appl.no. 22774/93).

126 The context of conflict or its immediate aftermath may play a role in the leeway the Court grants to states. Especially since here it does not concern interferences but positive obligations. Earlier, e.g. in the case of *Brogan a.o. v. the United Kingdom* (29 November 1988, Appl.nos. 11209/84 a.o., paras. 48 and 61-62) the Court held that special circumstances such as the fight against terrorism in Northern Ireland may entail a certain flexibility in adherence to the Convention, although in a very limited way. By analogy, it could be argued that in the aftermath of conflict the state has a slightly longer 'reasonable' period to comply with the positive obligation mentioned here. Eventually, of course, enforcement of domestic court judgments is necessary to comply with the Convention.

127 See section 9.6; para. 175 of the judgment.

128 Reiterated in: ECtHR, *Demades v. Turkey*, 31 July 2003 (Appl.no. 16219/90) para. 37.

However, when residence ends through a legal domestic decision, such as in *Blečić*, this is an instantaneous act and recourse to the concept of continuing violations will then be useless. Finally, the *Cvijetić* judgment discussed above extended the reasoning of the Italian real estate cases to Article 8: the very least a state should do is to enforce court orders for eviction of unlawful occupants.[129]

9.8 CONCLUSION

The issue of *ratione temporis* jurisdiction has been characterized as one the pillars of Strasbourg's case-law.[130] This pillar not only serves as a foundation for the supervisory mechanism of the European Convention on Human Rights, but also functions as a threshold or bar for the admissibility of complaints and thus as a legal impediment for applicants. In the preceding analysis the case-law of the European Court has been discussed in the context of the non-retroactivity principle derived from international law. Three parallels between European human rights law and general international law have emerged from this.

Firstly, the Court recognizes and applies the principle of non-retroactivity, including the third exception to it: the continued existence of acts, facts or situations extending from before to after the entry into force of the Convention. Secondly, the Court (and previously the Commission) makes the distinction between continuing situations and instantaneous acts or facts with continuing effects. The same distinction that is made in general international law, as stated e.g. in Article 14 (2) of the Articles on State Responsibility.[131] Thirdly, in cases where formally separate acts or proceedings are under review the Court considers the underlying subject-matter to be decisive to establish whether the 'necessary continuity' exists. This resembles the yardstick that ILC Special Rapporteur Waldock has labelled 'causal connexion.'

The themes of international law thus resonate in Strasbourg, but with slight variations. These variations represent a certain degree of flexibility in the use of the continuity yardstick: not a strict causal link, but a lenient view of when a sufficient connection between various acts and procedures exists, as the *Phocas* judgment showed. This somewhat softens the barrier of non-retroactivity. What seemed at least to be, in our discussion of the character of human rights treaties, a possibility thus materializes in the case of the European Convention. The principle is often used in ways favourable to the applicant – within the boundaries of the possible – thus creating an effect in line with the purpose of human rights treaties: the protection of the rights of the individual.[132]

129 Para. 53 of the judgment.

130 Dissenting opinion of judge Kovler in: *Ilaşcu a.o. v. Moldova and Russia*.

131 See section 9.5.

132 Whether the Court uses this flexibility with this purpose in mind cannot be concluded from the judgments themselves on this point.

As to the difference between continuing situations and instantaneous acts or facts with continuing effects, the Court's case-law seems largely in line with Pauwelyn's tool: it does look at the content and scope of the obligation involved, but also considers the particular facts under review in establishing continuity. In complicated cases – where the use of any tool is most needed – the two elements are joined in the examination on the merits.

Finally, the constant elaboration and refinement of treaty interpretation by the Court does not only make the Convention a 'living instrument',[133] but also increases the prospects for applicants. This is particularly the case for the Court's constant broadening of the scope of positive obligations. From the perspective of Pauwelyn's toolbox: the broader the scope of the obligation, the bigger the chance that a situation may fall under it. Eventually, it may even be the case that a violation of any Convention right can be conceived of as a continuing violation.[134] Not just in legal theory, but also in the practice of the Court.[135] This opportunity for applicants may be a very different backdoor than Chua and Hardcastle had in mind, but it certainly is one.

Since virtually all European states are now party to the European Convention on Human Rights, the issue of *ratione temporis* jurisdiction in connection with the non-retroactivity of the Convention will probably become of less importance.[136] The decisive point in time will simply lie further and further behind us. It may be a relief to some that this problem of temporality is indeed a temporal one. But, as the case of Cyprus shows, as long as conflicts are frozen or issues dating from before the entry of the Convention are not really brought in line with the Convention requirements, to a certain extent the problem remains. Maybe it is like old soldiers: this problem never dies, it will just fade away.

133 ECtHR, *Tyrer v. United Kingdom*, 25 April 1978 (Appl.no. 5856/72) para. 31.

134 Consider for example torture (prohibited by Article 3 ECHR). In principle this is an instantaneous act. But if the Court would read into this provision a positive obligation to provide healthcare for torture victims, any omission to do so would constitute a continuing situation.

135 Pauwelyn (1996) p. 424. Pauwelyn mentions the decisions and reports of the Commission in the case between Cyprus and Turkey. The Court followed through on this by establishing continuing violations of a number of Convention rights: ECtHR, *Cyprus v. Turkey*, 10 May 2001 (Appl.no. 25781/94).

136 An exception is the six months rule in Article 35 (1) ECHR on the admissibility of complaints. Although this is different concept than jurisdiction, comparable problems of time may be relevant in that context.

CHAPTER 10
BEYOND THEIR GRASP?
TERRITORIAL SCOPE OF THE ECHR

10.1 INTRODUCTION

When one browses a historical atlas the world seems simple. The territories of Charlemagne or Napoleon are clearly delineated. Their empires have a colour different from neighbouring regions. Of course the underlying historical reality had little in common with this schematized presentation of events; territories were heavily disputed, influence differed from one place to another and some regions were part of an empire in nothing more than name. Today's states mostly have a tighter and more organised grip on the territories they encompass, but to a significant degree an atlas still does not cover reality in all its nuances. In a similar vein an applicant who seeks housing restitution cannot just revert to an atlas to look against which state he lodges a complaint before the European Court of Human Rights. Especially in situations of conflict or shortly thereafter it may be unclear under whose jurisdiction a certain city or region falls. One state may have occupied (parts of) the territory of another. Or an area may be under the physical control of insurgents, with or without the help of another state. Even worse, a city may have descended into anarchy with no effective form of government whatsoever. Although the ECHR has been ratified by all members of the Council of Europe and the protection of human rights should thus be ensured throughout the Convention area, reality puts obstacles on the road of effective application.[1] These obstacles do not solely pertain to the temporal scope of the ECHR discussed in the next chapter, but equally to the territorial applicability.

If one loses one's home in the situations of flawed or illegal state control described above, who can be held accountable under the ECHR? This is the question I will look into in this chapter. I will do so by analysing the notion of jurisdiction in Article 1 of the ECHR which defines the scope of the obligations of the state parties: 'The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.'[2] First, I will shortly address the general context of international law on this point. Secondly, I will outline how the territorial scope of other human rights treaties has been developed by international adjudicative institutions. Thirdly, the case law concerning the European Convention itself on this matter will be discussed. Finally, I will assess the implications for housing restitution.

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1 Report of the Parliamentary Assembly of the Council of Europe (PACE), *Areas Where the European Convention on Human Rights Cannot Be Implemented*, Doc. 9730 (11 March 2003).

2 Emphasis added. The French text uses wording 'relevant de leur jurisdiction'.

10.2 THE CONTEXT OF INTERNATIONAL LAW

The European Convention on Human Rights and Fundamental Freedoms falls within the general framework of international treaty law.[3] In spite of its nature as a human rights treaty, the provisions of the Vienna Convention on the Law of Treaties are thus relevant to its interpretation. Article 29 of the latter Convention specifically deals with the territorial scope of treaties. It stipulates: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.' Aust has rightly called this a residual rule.[4] In many cases treaties will specify to which geographical area they apply. And otherwise, Article 29 offers many possibilities to establish the particular geographical scope of a treaty, clues for which can be found in the 'intention' appearing from the treaty or in effect in any other accepted way of legal interpretation ('otherwise established'). Such a different intention can appear *explicitly* in declarations of states at the moment of ratification or in reservations accepted by other state parties – the exception being reservations contrary to the object and purpose of a treaty – and *implicitly*. An example of the latter is when a treaty is regional in character, in so far as that 'context is indicative of the intention of the parties that the treaty should have a limited territorial application.'[5] Article 29 is thus a tool of last resort for legal clarity when all other means fail to provide it. Nevertheless this tool, even in the form of a residual rule, provides us with the basic principle on territorial application; a treaty is binding for a party to it in 'in respect of its *entire* territory'.[6] This does not exclude, it must be added, the application of a treaty beyond the territory of the state party.

The ECHR does not precisely delimit its own territorial scope. Instead, Article 1 provides that the state parties shall ensure the human rights of the Convention to everyone within their *jurisdiction*. Before embarking upon an analysis of this notion in the specific context of the ECHR, it is thus relevant to see what jurisdiction is under general public international law. Generally, jurisdiction is seen as part and parcel of the sovereignty of states and is subdivided into the jurisdiction to prescribe, the jurisdiction to adjudicate and the jurisdiction to enforce or, put differently, legislative, judicial and enforcement jurisdiction.[7] Primarily but not exclusively, jurisdiction is territorial i.e. confined to the territory of the state concerned.[8] Within its territory a

3 See section 9.3.

4 Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press 2000) p. 163. On the genesis of this Article, see: Ralf Günther Wetzel & Dietrich Rauschning, *The Vienna Convention on the Law of Treaties. Travaux Préparatoires* (Frankfurt am Main: Alfred Metzner Verlag 1978) pp. 222-226.

5 Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press 1984, 2nd ed.) pp. 90-92.

6 Emphasis added.

7 Karl Doehring, *Völkerrecht* (Heidelberg: C.F. Müller Verlag 2004, 2nd ed.) p. 352; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 2003, 6th ed.) p. 297.

8 M.N. Shaw, *International Law* (Cambridge: Cambridge University Press 2003, 5th ed.) p. 573.

state's jurisdiction is in principle unlimited with a few major exceptions, such as the partial transfer of sovereignty to another state or international organisation, immunities, respect for norms of *ius cogens* and human rights.[9] Extraterritorial enforcement jurisdiction is only possible with the consent of the state concerned.[10] An important principle on extraterritorial jurisdiction in general is that there should be a 'substantial and genuine connection between the subject-matter of the jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised.'[11] Although jurisdiction is thus mainly territorial, it can be asserted beyond a state's border, albeit in a limited way.

To avoid misunderstandings, which are rather common in the legal minefield of jurisdiction, it should be stressed that the jurisdiction of states described here cannot be equated to the jurisdiction of international courts or tribunals. The latter is primarily of an adjudicative nature and thereby concerns the cases it may decide on. The jurisdiction of the European Court of Human Rights is confined to matters of interpretation and application of the ECHR and its protocols.[12] This jurisdiction is not only limited in time but also in space. The ECHR only concerns issues which fall within the jurisdiction of the state parties to it. Thus in deciding whether it has jurisdiction *ratione loci* or *ratione personae* the Court will sometimes explicitly have to address the question of the jurisdiction of the state under Article 1 ECHR.

10.3 THE TERRITORIAL SCOPE OF HUMAN RIGHTS TREATIES OTHER THAN THE ECHR

Whereas states will usually want to assert their jurisdiction as far as possible – for example in the context of criminal proceedings, economic disputes or in whatever other field where state interests are deemed to be at stake – the tendency in the field of human rights seems to be exactly opposite. When acceding to a human rights treaty, states are inclined to 'consider that such obligations apply to individuals subject to their jurisdiction *in their own territory*'.[13] We see here a first indication of the diverging interpretations which can be given to jurisdiction – extensive or restrictive – depending on whether a state's rights and interests are concerned or by contrast, its obligations. For human rights this contrast is especially relevant, since state obligations in this field work to the benefit of individuals. Any restriction of the obligations due to a restrictive notion of jurisdiction therefore functions to their detriment. Before focussing on the case law of the European Court of Human Rights, it is therefore

9 Doehring (2004) p. 353.
10 Brownlie (2003) p. 306.
11 Ibid., p. 297. Or a 'sufficient nexus' as Oxman dubs it: Bernhard H. Oxman, 'Jurisdiction', in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* vol. 3 (Amsterdam: Elsevier 1997) pp. 55-60, see p. 56.
12 Article 32 ECHR.
13 Antonio Cassese, *International Law* (Oxford: Oxford University Press 2005, 2nd ed.) p. 384. Emphasis added.

interesting to look into the jurisprudence of its peers, since they too form the context of international law in which the European Convention operates.

The Human Rights Committee (HRC) has interpreted the territorial scope of application of the International Covenant on Civil and Political Rights (ICCPR) rather broadly. The scope of state obligations is laid down in Article 2(1) of the Covenant as: 'all individuals within its territory and subject to its jurisdiction'. These are not cumulative requirements;[14] even if a state acts outside its territory the obligations under the ICCPR can still apply as long as it is within the state's power and effective control. The circumstances in which these were obtained – legally or illegally and with or without the acquiescence or consent of the other state – are irrelevant, as the HRC confirmed in its *General Comment* on Article 2.[15] The foundations for this stance had been laid in the Committee's views in the case of *López Burgos v. Uruguay*. The case concerned the abduction of a Uruguayan national from Argentina by Uruguayan security forces. The fact that the abduction took place outside the territory of Uruguay did not bar the Committee from considering the merits of the case, since it held that the reference to jurisdiction in Article 2 did not refer to 'the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.'[16] As a moral and legal justification for this viewpoint, it added that 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[17] The HRC thus seems

14 Theodor Meron, 'The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties', *American Journal of International Law* vol. 89 (1995) pp. 78-82, see p. 79. Although the wording 'within its territory' was added on the initiative of the United States to avoid state obligations over persons outside a state's territory but within its jurisdiction, the HRC has not followed up on this. See: Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Kehl am Rhein: N.P. Engel 2005, 2nd ed.) pp. 43-44.

15 Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

16 HRC, *Sergio Ruben López Burgos v. Uruguay*, 29 July 1981 (Comm.no. 52/1979) para. 12.2.

17 Ibid., para. 12.3. See also, of the same date: HRC, *Lilian Celiberti de Casariego v. Uruguay* (Comm.no. 56/1979) paras. 10.1-10.3. The same approach was used in the HRC's consideration of periodic state reports: Virginia Mantouvalou, 'Extending Judicial Control in International Law', *International Journal of Human Rights* vol. 9 (2005) pp. 147-163, see p. 157; Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in: Fons Coomans & Menno T. Kamminga, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2004) pp. 73-81, see p. 74. For an elaboration and clarification, see the individual opinion of Christian Tomuschat in the *López Burgos* case: '(…) it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.' In his view a state should thus do what it can, but not be obliged to do the impossible. He mentions the example of protection of a state's own nationals abroad; practice makes full guarantees unachievable in those cases, because these nationals also fall

to apply an approach that extends beyond the strict notion of jurisdiction in international law and uses a more contextual or factual approach.[18] It emphasizes the factual relationship between applicant and state, assessing whether the latter has power or effective control over the former. This enables a broad protection and is thus in line with the object and purpose of the ICCPR of protecting human rights.[19]

The International Court of Justice (ICJ) addressed the problem of the extraterritorial application of human rights treaties in an advisory opinion on the wall built by Israel in the occupied Palestinian territories.[20] In assessing whether the ICCPR applied to the Palestinian territories in the sense that these fell within the jurisdiction of Israel, the ICJ looked at the general meaning of jurisdiction in international law, to the case law of the Human Rights Committee and finally to the *travaux préparatoires* of the Covenant. On the first point it noted that the primarily territorial character of jurisdiction does not prevent its extraterritorial exercise. It added that in such exercise it would be 'natural' in the light of the object and purpose of the ICCPR to bind the state concerned to the Covenant's provisions. Secondly, it cited the HRC's case law mentioned above[21] and the Committee's earlier application of the ICCPR to the occupied territories as a practice consistent with international law. Thirdly, the Court referred to the intentions of the drafters as appearing from the preparatory works which pointed in the same direction. The ICJ concluded that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'[22] On the issue of extraterritorial application of human rights treaties the Court's views offer no surprises and can even be said to be somewhat imprecise; exercised jurisdiction makes the ICCPR applicable according to the Court – without any explicit or specific qualification of power or control. In its subsequent assessment of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which contains no jurisdictional clause, the Court offered more clarity. The occupation by Israel of the territories *as an occupying power* bound the country to the provisions of the ICESCR in those territories.[23] This brings the Court closer to the HRC's notions of power or effective control.

The Inter-American Commission on Human Rights (IACHR) also addressed matters of extraterritorial jurisdiction. The Commission has jurisdiction to consider individual petitions both under the American Convention of Human Rights in relation

within the territorial jurisdiction of another state. Translated into the vocabulary of international law this means that a state at the very minimum has a duty of due diligence.

18 Scheinin (2004) 77-78.

19 Nowak (2005) p. 44.

20 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004.

21 But not the *General Comment*. This may be explained by the fact that the *Comment* was written only two months before the publication of the ICJ's Opinion.

22 Ibid., paras. 108-111.

23 Ibid., para. 112. The same conclusion was reached in para. 113 on the Convention on the Rights of the Child without any arguments whatsoever.

to the state parties thereto, and also under the American Declaration on the Rights and Duties of Man.[24] The Convention does contain a jurisdictional clause, in Article 1(1), binding state parties in regard to 'all persons subject to their jurisdiction'.[25] The Declaration does not. The leading case here is *Coard et al. v. the United States* – an application of the Declaration – which concerned the detention of Grenadian nationals by US soldiers during the invasion of Grenada by American and Caribbean troops in 1983.[26] On jurisdiction the Commission held the following:

> While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.[27]

On the basis of this the detention was found to be within the authority and control of the United States. It is important to note that on the one hand the Commission underlines the territorial aspect of jurisdiction, but on the other hand stresses that an assessment of extraterritorial jurisdiction should focus on the authority and control of a person by agents of another state. Control over persons, not territory seems to be decisive. The question of whether a state already gained full or effective control over such a territory is thereby also relegated to the background. It added that 'under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms [human rights norms, *A.B.*] which pertain.'[28] The Commission confirmed the principles elaborated in *Coard* in a case against Cuba. In *Brothers to the Rescue* the Cuban airforce downed two civilian airplanes in international airspace manned by members of an anti-Castro organisation, killing the people in them. The Commission held Cuba accountable, reiterating its views on jurisdiction.[29]

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24 Christina M. Cerna, 'The Extraterritorial Application of the Human Rights Instruments of the Inter-American System', in: Coomans & Kamminga (2004) pp. 141-174, see p. 141.

25 Douglas Cassel, 'Extraterritorial Application of Inter-American Human Rights Instruments', in: Ibid., pp. 175-181, see p. 175. On p. 181 he adds 'while the extraterritorial reach of the American Declaration seems almost unbounded within the Americas, whether it extends to other juridical spaces remains to be tested.'

26 Inter-American Commission on Human Rights, *Coard et al. v. the United States*, 29 September 1999 (Report No. 109/99, Case No. 10.951). Further references on relevant case law can be found in the decision.

27 Ibid., para. 37.

28 Ibid.

29 Inter-American Commission on Human Rights, *Armando Alejandre jr. a.o. v. Cuba ('Brothers to the Rescue')*, 29 September 1999 (Report No. 86/99, Case No. 11.589) para. 23. See Mantouvalou (2005) p. 154 and Cerna (2004) p. 159 ff. for further cases.

The case law of international courts and other institutions which have dealt with the issue of extraterritoriality of human rights obligations shows remarkable similarities. In the first place, a reference to the primarily territorial character of jurisdiction under international law is made by all of them. This once again confirms the interpretation of human rights treaties as part of general international law. Secondly, all three institutions refer to it with wording closer to the realm of morals than of law. They consider extraterritorial application of human rights obligations 'natural' (HRC) or 'required' in certain circumstances. Not doing so would be 'unconsciable' (ICJ). As the ICJ indicates, the object and purpose of human rights treaties play a role in this respect. Thirdly, both the HRC and the IACHR refer not so much to control over a territory, but more broadly to 'power and effective control' (HRC) or to 'authority and control' (IACHR). The International Court of Justice, while citing the HRC's views, takes a less specific approach but also applies a factual interpretation of jurisdiction: it is not the legality of jurisdictional control over a territory that counts, but the factual existence of control. In all cases it is thus the *factual* relationship between the state involved and the individual that is decisive, not the legality of the jurisdiction exercised. In that sense jurisdiction in the context of the extraterritorial human rights application diverges from the general notion of jurisdiction under international law. Whereas under general international law a state would have to show a legal basis for example in exercising judicial jurisdiction, no such legal basis is needed when holding a state accountable for human rights violations outside its territory. Consequently Meron has rightly called the latter 'jurisdiction *or de facto* jurisdiction'.[30] Put differently, as Orakhelashvili argues, there is a difference between substantive jurisdiction – the rules applying to when a state can legally use the prerogatives of its sovereignty – and what he dubs remedial jurisdiction, which refers to jurisdiction in a human rights context.[31] In this context attribution of conduct to the state and thus causation are at stake. This different use of jurisdiction can be explained by the different function it has in the respective fields: in international law jurisdiction is used to define the *rights* of states, but in human rights law it is used to define the scope of a state's *duties*.[32] Although it would be clearer to use a different term for the second kind of jurisdiction altogether – such as control e.g. – I will in the following maintain the notion, since it is the one used by human rights treaties and their supervising institutions. Whenever necessary, I will indicate which of the two types of jurisdiction is being referred to.

30 Meron (1995) p. 81.

31 Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights, *European Journal of International Law* vol. 14 (2003) pp. 529-568, see pp. 539-542. See also: Michal Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', *Netherlands International Law Review* vol. 52 (2005) pp. 349-387, see p. 364.

32 Morten Peschardt Pedersen, 'Territorial Jurisdiction in Article 1 of the European Convention on Human Rights', *Nordic Journal of International Law* vol. 73 (2004) pp. 279-305, see p. 301. Although Pedersen refers to Article 1 ECHR, it is submitted that the same holds true for other human rights treaties.

Suffice it here to stress that the notion of jurisdiction in the extraterritorial application of human rights is prone to considerable confusion due to this dual use of it.

Before we move on to the discussion on the extraterritorial application of the ECHR, it is necessary to emphasize that none of the above supports a claim that a state holds full responsibility under human rights law for any consequence of its acts or omissions outside its own territory.[33] Rather, the short survey of case law in this section has shown that a factual link in the form of power, authority or control is necessary.

10.4 Extraterritorial application of the ECHR by the Commission

As stated above, the scope of state obligations under the ECHR is defined in Article 1 by the phrase 'within their jurisdiction'. In this section and the following one I will assess how the European Commission and Court of Human Rights have interpreted this phrase, with special emphasis on the extraterritorial aspects.[34] In section 10.6 I will turn to the situation in which a state has lost control over part of its own territory and the consequences this has for jurisdiction under the ECHR.

Since the Commission during its existence was the mechanism on admissibility through which applications had to pass, it is in its case law that the first clues as to the extraterritorial meaning of jurisdiction can be found. In *X. v. Germany* the Commission held that in principle acts of functionaries of the embassy of Germany in Morocco could fall within the former state's jurisdiction.[35] Even when a state's nationals are living abroad, the fact that diplomatic and consular representatives of that state perform certain duties with regard to them may entail that state's liability in certain circumstances. It is interesting to note that the Commission used liability instead of jurisdiction, thereby pointing more to a causal link of attribution than to a traditional notion of state sovereignty through the exercise of jurisdiction. In addition it confined the scope of liability to nationals of the state concerned. This is rather surprising from the perspective of the Convention that claims to protect 'everyone' and not just a state's nationals. The restriction here could be explained by the particular context of consular services to which nationals may have a stronger claim than others. An

33 Dominic McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in: Coomans & Kamminga (2004) pp. 41-72, see p. 46.

34 I will not address the so-called colonial clause in the Convention, Article 56, which provides for the voluntary extension of the Convention's territorial applicability by a state party to 'all or any of the territories for whose international relations it is responsible.' Since most former colonies have gained independence since the drafting of the ECHR, the Article is currently of very limited importance. Nor will I go into situations where some kind of extraterritorial effect of the Convention can be found to exist, such as possible state responsibility for expulsion or extradition to a country where there is a real risk of violations of the Convention rights, since these do not really extend a state's jurisdiction extraterritorially and moreover are not relevant to housing restitution. The leading case on this issue is: ECtHR, *Soering v. the United Kingdom*, 7 July 1989 (Appl.no. 14038/88).

35 EComHR, *X. v. Germany*, 25 September 1965 (Appl.no. 1611/62), *Yearbook of the European Convention on Human Rights* vol. 8 (1967) pp. 158-168.

alternative explanation could be a traditional view of jurisdiction, which holds that a state has 'personal' jurisdiction over its nationals even when abroad. Whatever the explanation may be, this restriction to nationals was lifted in later cases.

In *Hess v. the United Kingdom* the Commission addressed the question whether the imprisonment of former Nazi leader Rudolf Hess in a detention centre in Berlin jointly administered by the four occupying powers – the United States, the Soviet Union, France and the United Kingdom – was within the latter's jurisdiction. Referring to the *X. v. Germany* case the Commission held that 'there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention.'[36] Since Hess was obviously not a British national, the narrow rule from the earlier case seems to have been abandoned or seen as just as a particular application of a more general rule. Nevertheless the case was declared inadmissible on the ground that the administration of the prison was in the *common* hands of the four states. The Commission held that such joint authority could not be divided into four separate jurisdictions. Since a person can theoretically fall within the jurisdiction of *several* states under international law,[37] it seems that the rationale of the decision was not so much the indivisibility of jurisdiction in the traditional sense, but rather the lack of real power – and in that respect control – the United Kingdom had to secure the release of Hess, since not all four states were in favour of this.[38]

The Commission shed more light on its approach to extraterritorial jurisdiction under Article 1 in a series of cases concerning the Turkish occupation of Northern Cyprus. The first of these was an inter-state application between Cyprus and Turkey issued just two days before the decision in *Hess*. The Commission specified that the term jurisdiction in Article 1 encompasses more than the notion of territory and means that the state parties have an obligation to secure the Convention rights to 'all persons under their *actual authority and responsibility,* whether that authority is exercised within their own territory or abroad.'[39] Without offering additional explanation, the Commission supported this view by stating that it was clear from the language – especially the French version of the ECHR – from the object of Article 1 and from the purpose of the Convention. It added that state agents, not just diplomatic personnel but also armed forces, can bring any person or property within the jurisdiction of a state party 'to the extent that they exercise authority over such persons or property. Insofar

36 EComHR, *Ilse Hess v. the United Kingdom*, 28 May 1975 (Appl.no. 6231/73), *Decisions and Reports of the European Commision of Human Rights* vol. 2 (1975) pp. 72-76, see. p. 73.

37 Brownlie (2003) p. 310; Jean-Paul Costa, 'Qui relève de la jurisdiction de quel(s) état(s) au sens de l'article 1er de la Convention européenne des droits de l'homme?', in: *Libertés, justice, tolerance. Mélanges en homage au Doyen Gérard Cohen-Jonathan* vol. 1 (Bruxelles: Bruylant 2004) pp. 483-500, see p. 493.

38 Rick Lawson, 'Life after *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights', in: Coomans & Kamminga (2004) pp. 83-123, see pp. 91-92.

39 EComHR, *Cyprus v. Turkey*, 26 May 1975 (Appl.nos. 6780/74 and 6950/75), *Decisions and Reports of the European Commission of Human Rights* vol. 2 (1975) pp. 125-151, see p. 136. My emphasis.

as, by their acts or omissions, they affect such persons or property, the responsibility of the State, is engaged.'[40] According to the Commission the Turkish armed forces on the island fell within this type of situation. The decision showed that not only interferences with human rights may engage state responsibility, but also omissions to secure human rights. The subsequent cases confirmed this stance.

The reach of this case law was not limited to Europe; in the case of *Freda v. Italy* the authorities of Costa Rica handed over the applicant to the Italian police in a Costa Rican airport.[41] The Commission ruled that Freda was within the jurisdiction of Italy *from the moment* he was handed over. Italian jurisdiction under the ECHR thus manifested itself at the other end of the globe.

This short overview of the Commission's case law on territorial jurisdiction shows that it put emphasis on a factual test. Not the traditional exercise of jurisdiction was decisive for the Commission, but the actual authority and responsibility. A link of attribution between a state party on the one hand and persons or property on the other was the defining element. The legality or legitimacy of the exercised 'jurisdiction' was not. Therefore the Commission made no principled distinction between situations in which the consent of the state on whose territory another state acted was present (*Freda*) and those in which it was not (the cases concerning Northern Cyprus). Importantly, it must be added, that the Commission did not go beyond the application of this 'tightly drafted formula'; a general theory on the extraterritorial application of the Convention was not developed. It cautiously proceeded in a case to case manner.[42]

In spite of the 'formula' used, the Commission's case law gives rise to confusion by the wording it uses: liability, authority, responsibility and jurisdiction. In cases where a classic exercise of jurisdiction is concerned with the consent of the other state, such as *Freda*, the Commission confined itself to jurisdiction. When consent was unclear or at least debatable (*X. v. Germany* or *Hess*) liability was used to show the link between the applicant's claim and the state's conduct. Finally, in inter-state cases on Cyprus where a state occupied part of another state, actual authority and responsibility were used. Apparently, when an act or omission attributable to the state exists responsibility arises according to the Commission. But it could convincingly be argued that questions of responsibility, at least under international law,[43] equally concern a breach of an obligation, the assessment of which clearly belongs to the merits of a case. This makes the Commission's mentioning of responsibility in its earlier admissibility decisions rather puzzling. Surely responsibility cannot be equalled to jurisdiction. The decision on admissibility in the 1996 case between Cyprus and Turkey shows

40 Ibid.

41 EComHR, *Freda v. Italy*, 7 October 1980 (Appl.no. 8916/80), *Decisions and Reports of the European Commission of Human Rights* vol. 21 (1981) pp. 250-257, see p. 256. For further references on case law of the Commission on this issue, including the other cases on Northern Cyprus, see: Pedersen (2004) pp. 284-281 and O'Boyle (2004) p. 128.

42 Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction', in: Coomans & Kamminga (2004) pp. 125-139, p. 128.

43 As Article 2 of the International Law Commission's *Articles on State Responsibility* shows.

a more refined approach and offers clarity on this point.[44] The Commission agreed with Turkey that Turkey's 'jurisdiction' in parts of Cyprus and its responsibility under the ECHR should in principle be determined at the stage of the merits. Nevertheless, since it had to make a decision on admissibility it adopted the following approach:[45] it assessed whether the acts complained of were *capable* of falling within Turkey's jurisdiction. In doing so it did not prejudge on the actual responsibility of Turkey for these acts, it only affirmed that the degree of effective control by Turkey of Northern Cyprus was such that this could be the case. If an applicant state could show that there was a possibility of direct or indirect involvement of the defendant state, then a complaint could be declared admissible on this point. Thus a *prima facie* assessment was made in the admissibility stage on the link between state and persons or property without prejudging on the responsibility issue. Under international law this seems to be the correct approach.[46] In simpler cases which do not concern an entire basket of acts and omissions (as in the inter-state case dealt with here), the link and thus the imputability issue *can* be entirely addressed in the admissibility phase. For clarity's sake it would in that context be wise to avoid the use of 'responsibility' and confine oneself to control or imputability.

The Commission's approach resembles that of its international peers in its emphasis on a factual link instead of on the legal exercise of jurisdiction.[47] Although it did not use the notion of control as such in the cases dealt with above, the assessment of state conduct and the results obtained are similar.

10.5 EXTRATERRITORIAL APPLICATION OF THE ECHR BY THE COURT

The Court first held in 1992, in the case of *Drozd & Janousek*, that the 'jurisdiction' in Article 1 was not limited to the national territory of the state parties to the ECHR. Their responsibility could be involved even for 'acts of the authorities producing effects outside their own territory'[48] – a phrase directly borrowed from the Commission's case law. The applicants alleged that they had not received a fair trial before an Andorran Court in which French and Spanish judges sat. The two defendant states held that the situation fell outside their jurisdiction, among others because the judges did not sit in the national court as a French or Spanish magistrate, but as Andorran ones. The Court tested whether the acts of the Andorran courts could be attributed to France and Spain and decided in the negative. Thus it did not go into the substance of the complaints against these two countries on that point, for lack of jurisdiction.

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44 EComHR, *Cyprus v. Turkey*, 28 June 1996 (Appl.no. 25781/94), *Decisions and Reports of the European Commission of Human Rights* vol. 86-A (1996) pp. 104-142, see pp. 130-131.

45 Which was developed by the Court in the *Loizidou* admissibility decision to which I will turn next.

46 See also: Orakhelashvili (2003) p. 547.

47 See also: Haratini Dipla, *La responsabilité de l'État pour violation des droits de l'homme. Problèmes d'imputation* (Paris: Éditions A. Pedone 1994) p. 50.

48 ECtHR, *Drozd & Janousek v. France & Spain*, 26 June 1992 (Appl.no. 12747/87) para. 91.

The next step on extraterritorial jurisdiction is again to be found in a situation concerning Northern Cyprus, the case of *Loizidou v. Turkey*. In its judgment on the preliminary objections of Turkey, the Court assessed whether the acts complained of – denial of access to plots of land Loizidou owned – were capable of falling within the jurisdiction of Turkey. In this case the Court developed principles on jurisdiction in cases of military occupation:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[49]

In the ruling on the merits of the case the Court added that this was in conformity with the relevant principles on state responsibility in international law.[50] In addition it held that in all cases in which the army of the state exercised 'effective overall control' over the (part of) another state and consequently a local administration functioned under the control of the occupying state, it was not necessary to assess whether that state 'actually exercises detailed control over the policies and actions of the authorities' of that local administration.[51] The Turkish occupation of Northern Cyprus was found to be such a case, especially considering the large number of Turkish military personnel on active duty on the island. As a result the Court held that the policies of the Turkish Republic of Northern Cyprus (TRNC) fell within the jurisdiction of Turkey under Article 1. The 2001 judgment the interstate case of *Cyprus v. Turkey* specified that Turkey had to secure 'the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.'[52] The rationale for this was the following:

> In the above connection, the Court must have regard to the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 of the Convention, 'to ensure the observance of the engagements undertaken by the High Contracting Parties' (…). Having regard to the applicant Government's [Cyprus, *A.B.*] continuing inability to exercise their Convention obligations in northern Cyprus, any other finding

49 ECtHR, *Loizidou v. Turkey* (preliminary objections), 23 March 1995 (Appl.no. 15318/89) para. 62.
50 ECtHr, *Loizidou v. Turkey* (merits), 18 December 1996 (Appl.no. 15318/89) para. 52.
51 Ibid., para. 56.
52 ECtHR, *Cyprus v. Turkey*, 10 May 2001 (Appl.no. 25781/94) para. 78. Interestingly, the fact that even the rights in the additional protocols which the occupying country has ratified have to be secured, may theoretically lead to a broader human rights protection (if the occupied country had not ratified the protocols). The reverse situation would probably lead to a decreased protection, since one cannot hold a state accountable for norms to which it has not subscribed, except when these norms are part of customary law and specifically *jus cogens*.

> would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.

So far, the position of the Court is clear. The extraterritorial application of jurisdiction is possible under the Convention. A state party's responsibility can be involved for acts which have effects outside its territory. Responsibility may also arise for acts imputable to the state in areas beyond its borders over which it has effective overall control through its armed forces or through local authorities. This relative clarity vanished with the admissibility decision in the *Banković* case.[53] Since this decision is very elaborate on the issue of jurisdiction and was highly debated in legal doctrine, it is necessary to give it some particular attention.

The case concerned an application of surviving victims and their relatives of the bombing by NATO of the Serbian Radio and Television building in Belgrade during the Kosovo war in 1999. The applicants complained against all state parties to the Convention which were also members of NATO. Among others they complained about violations of the right to life (Article 2 ECHR). The defendant states took the position that the alleged acts fell outside their jurisdiction under Article 1.[54] The Court declared the application inadmissible on this very ground. It arrived at that conclusion in the following way. The Court started to note that there was a 'real connection' between the applicants and the respondent states; the bombardment was an act that had effects outside the territory of those states and was thus an extraterritorial act. Thus the 'essential question' for the Court was whether as a result of that act the applicants and their killed relatives were capable of falling within the jurisdiction of the states concerned.

The Court proceeded to answer this question in three stages. First, it searched to interpret the meaning 'within their jurisdiction' under Article 1 using the rules on the interpretation of treaties as stipulated by Article 31 and 32 of the Vienna Convention on the Law of Treaties. It held that under international law the notion of jurisdiction was primarily territorial and that any extra-territorial exercise of jurisdiction was limited by the sovereignty of other states. Other bases of jurisdiction than this essentially territorial one were exceptional and, according to the Court, required 'special justification in the circumstances of each case'.[55] State practice pointed in the same direction, since none of the state parties had in other circumstances of extraterritorial military missions explicitly derogated from the Convention rights under Article 15. *A contrario*, the Court assumed that the states did not consider such situations to fall

53 ECtHR, *Banković a.o. v. Belgium a.o.* (admissibility decision), 12 December 2001 (Appl.no. 52207/99).

54 Ibid., para. 31. Furthermore, France argued that the bombing was imputable to NATO, but not to its member states (para. 32) and Poland, Hungary and Italy held that national effective remedies had not been exhausted (para. 33).

55 Ibid., para. 61.

'within their jurisdiction'. Moreover, the Court used the *travaux préparatoires* to confirm its interpretation of jurisdiction.

Secondly, it summarized its case law on extraterritorial acts that had been recognised as an exercise of jurisdiction under Article 1. As the most important element – which was in fact a new one, introduced in this case – it noted 'the exercise of all or some of the public powers normally exercised' by a state, whether by way of effective control of a territory through military occupation or by way of consent or acquiescence of the government of the territory concerned. The Court added that customary law and relevant treaty provisions had also recognised extra-territorial exercise of jurisdiction, e.g. for activities of diplomatic or consular agents abroad and for acts on board of craft or vessels registered in the state or flying its flag. All of these were, according to the Court 'recognised instances'.

Thirdly and finally it applied the above to the case at hand. Since this kind of situation was new to the Court it had to examine whether this was one of the exceptions to the primarily territorial notion of jurisdiction. It answered this question in the negative. It rejected the applicants' argument that the degree of control determined the level of obligations. They had argued that since the defendant states had effective control over the airspace above Belgrade, these states were at least bound to secure the main Convention rights such as the right to life. The Court held that this was an unwarranted cause-and-effect interpretation of jurisdiction and that such an interpretation would make jurisdiction 'superfluous and devoid of any purpose'.[56] It equally rejected the applicants' contention, taken from the *Loizidou* case, that a negative decision would create a human rights vacuum contrary to the idea of the ECHR as an instrument of public order. The Court distinguished the situation from that case by the fact that Cyprus had been a party to the Convention whereas the Federal Republic of Yugoslavia was not at the time of the bombing. Thus no new vacuum was created; Belgrade would not normally be covered by the Convention. As a telling *obiter dictum* the Court held that the ECHR was not designed to be applied throughout the world, but in an essentially regional context. Finally, even the applicants' reference to previous admissibility decisions on extra-territorial jurisdiction outside Europe, *Issa* and *Öcalan,*[57] was dismissed, since 'in neither of those cases was the issue of jurisdiction raised by the respondent Government or addressed in the admissibility decisions.'[58] In conclusion the Court found no jurisdictional link between applicants and defendant states and declared the application inadmissible.

The *Banković* decision was very controversial from the start. Although some defended the Court's position,[59] most commentators were highly critical.[60] Since the

56 Ibid., para. 75.

57 ECtHR, *Issa a.o. v. Turkey* (admissibility decision), 30 May 2000 (Appl.no. 31821/96); *Öcalan v. Turkey* (admissibility decision), 14 December 2000 (Appl.no. 46221/99).

58 Ibid., para. 81.

59 E.g. Ress (2003) and O'Boyle (2004).

60 E.g. Orakhelashvili (2003), Lawson (2004), Scheinin (2004), Gondek (2005), and Mantouvalou (2005).

case is so central to the topic under discussion, I will now assess each of the stages of Court's argumentation outlined above.

The first is the interpretation of jurisdiction itself. The Court's reference to the ordinary meaning of jurisdiction as primarily territorial is correct. But the context of the equality of states and the sovereignty of the one as the limit to the jurisdiction of the other is not entirely apt. This approach puts an emphasis on a legal basis for jurisdiction. The Court fails to take into account the slightly different notion of jurisdiction in the context of human rights which puts emphasis on the factual link of control of a state over an alleged victim. The position that the Court's use of the Vienna Convention's principles on treaty interpretation has been 'qualitatively perfect'[61] cannot be sustained in the context of *Banković*. Article 31 (1) stipulates that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Thus the 'ordinary meaning' cannot be separated from the object and purpose. The latter serves as an ancillary tool to confirm or *modify* the initial conclusion on a notion's ordinary meaning.[62] It is submitted that the Court should have done this and would then have come to a different, broader notion of jurisdiction – one that works to the benefit of human rights protection. Not the 'ordinary meaning' of jurisdiction in general is the right one to use, but the ordinary meaning of jurisdiction in the context of human rights. Just as *lex specialis derogat legi generali*, as the famous maxim provides, so too should a special notion be given precedence over a general notion. In this case, the contrary was done; international law was used to limit the distinctiveness of human rights protection.[63]

As to the use of the *travaux préparatoires*, the Court claims it finds clear confirmation of its own stance in them. The clarity of the *travaux* on this point may be doubted, as they can also be used to reach contrary conclusions on the point of extraterritorial jurisdiction.[64] Apart from the point of clarity, their relative weight in treaty interpretation is light. The Vienna Convention mentions them only as a supplementary means of interpretation.[65] The Court itself in other cases has downplayed the role of the *travaux*, stressing the ECHR's character as a 'living instrument' which must be interpreted 'in the light of present-day conditions'[66]

61 Mark E. Villiger, 'Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights', in: Jürgen Bröhmer a.o. (ed.), *Internationale Gemeinschaft und Menschenrechte* (Köln: Carl Heymanns Verlag 2005) pp. 317-330, see p. 330. Significantly he does not mention the *Banković* decision.

62 Sinclair (1984) p. 130.

63 See also: Gérard Cohen-Jonathan, 'La territorialisation de la jurisdiction de la Cour européenne des droits de l'homme', *Revue trimestrielle des droits de l'homme* vol. 13 (2002) pp. 1069-1082. He argues that this restrictive use of international law is part of a more general trend in the Court's case law (see p. 1078).

64 Lawson (2004) p. 88-90.

65 Article 32.

66 ECtHR, *Tyrer v. United Kingdom*, 25 April 1978 (Appl.no. 5856/72) para. 31.

The second stage in the argumentation is the use of the Court's own case law. This is not the strongest point of the decision either. The enumeration of earlier relevant cases is not complete.[67] More importantly, the use made of the case law is awkward. Previous applications are used as examples of 'exceptional circumstances' which are then essentially boiled down to the 'effective control' *over territory* criterion derived from *Loizidou*. This approach seems to ignore the fact that the *Loizidou*-type situations are 'also' an example of extra-territorial jurisdiction, but not the only one.[68] As Orakhelashvili notes, 'the fact that a *Banković*-like decision had not earlier been brought before the Court does not necessarily suggest that such situations do not fall within the scope of Article 1.'[69] In that respect earlier case law is the product of chance rather than of system. To some extent the Court acknowledges that other sources of law than its own case law are equally cradles of extraterritorial jurisdiction. Customary international law is an example it explicitly mentions. Why then not use the criteria for extraterritorial application of human rights developed by the HRC and the IACHR[70] – which as we have seen in section 10.3 all point more or less in one direction? They could have been qualified by the Court as 'recognised instances'. It would, as could have been the case in the first stage of the Court's argumentation, be more in line with the object and purpose of the ECHR.

What about the third stage, the application of the principles to the facts? Here it can be argued that since the developed principles were flawed, their application can yield results of only limited significance. The Court held that the applicant's position was 'tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State (…) is thereby brought within the jurisdiction of that State for the purpose of Article 1.'[71] It is submitted that this is an argumentative mistake which consists of extrapolating someone's views to the extreme and then dismissing them as being too extreme. In fact the applicants were not arguing such a broad interpretation as the Court ascribed to them, but they acknowledged that 'effective control' to some level was always needed for jurisdiction under Article 1 to apply. An unwillingness to accept new exceptions to the primarily territorial notion of jurisdiction seems to have been decisive for the Court. Instead of making a fresh assessment, the Court limits itself to striking down the arguments of the applicants one by one as being irrelevant.

Following this in-depth look at the *Banković* decision, let us return to the overview of relevant case law. After the storm that *Banković* caused, the Court seemed to return to a more accepted course. The element from the latter ruling that seemed to suggest that the Convention was essentially applicable in a regional context was rebuffed in

67 Lawson (2004) p. 110.
68 See *Loizidou* (preliminary objections), para. 62, and Orakhelashvili (2003) p. 545.
69 Orakhelashvili (2003) p. 546.
70 The HRC's *General Comment* and the ICJ's 'Wall' Opinion were drafted and made public more than two years after the *Banković* case.
71 Banković, para. 75.

later case law, albeit only implicitly. The earlier mentioned case of *Issa* concerned the allegation that Kurdish shepherds had been killed during a Turkish military campaign in Northern Iraq. In its judgment the Court significantly did not use the argument of regional context anymore. Instead, it explicitly followed in the footsteps of the Commission and other human rights institutions whose case law it mentioned in holding that:

> a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.[72]

A bit surprisingly after *Banković*, the 'authority and control' test reappears and offers a clearer explanation of that decision. In *Issa* control over an 'area' – as used in *Loizidou* – outside a state's borders has silently been changed into the clearer 'territory'. Control from the air is thus excluded. Two more points are relevant in this case. In the first place, the Court held that even a military operation of just six weeks, such as the Turkish one in Iraq, could lead to temporal overall effective control and thus to jurisdiction for Turkey. Secondly, the fact that application in a territory outside the regional scope of the Convention was accepted – and much more so than in the case of the Federal Republic of Yugoslavia, one may add – reopens the jurisdictional window that *Banković* seemed to have closed almost completely. This latter point, the possible application of the ECHR outside Europe was also accepted in *Öcalan*. The case concerned the arrest of the leader of the Kurdistan Workers' Party (PKK) on an airport in Kenya. The Court held that the applicant was 'under effective Turkish authority' and thus within the jurisdiction of Turkey from the moment he was handed over by the Kenyan authorities. Moreover, the Court noted that 'circumstances of the present case are distinguishable from those in the aforementioned *Banković and Others* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.'[73] Thus arrest abroad comes within the jurisdiction of a state party, but bombing from the air is not. A 'hands on' approach to jurisdiction in the most literal sense of the word! In another case, *Gentilhomme v. France*, concerning events taking place in Algeria, the Court held the complaint inadmissible, but not on the ground that the events took place outside the regional scope. Rather, the lack of French control

72 ECtHR, *Issa a.o. v. Turkey*, 16 November 2004 (Appl.no. 31821/96) para. 71.

73 ECtHR, *Öcalan v. Turkey*, 12 March 2003 (Appl.no. 46221/99) para. 93. Confirmed in the Grand Chamber judgment in the case, 12 May 2005, para. 91.

over the situation was decisive.[74] The same held for a complaint lodged by Saddam Hussein against European states active in Iraq.[75] The Commission's *Freda* decision on Italian jurisdiction in Costa Rica seems through these judgments to have received solid confirmation. The Mediterranean Sea has proven to be no more of a barrier to jurisdiction than the Atlantic Ocean in this respect.

The final case of importance for present purposes is the judgment in *Ilaşcu*.[76] Ilaşcu and the other three applicants in the case complained of the fairness of their trial and their detention conditions in the self-proclaimed Moldovan Republic of Transdniestria (MRT). This region was formally part of Moldova under international law. Russia had a part of its army and military equipment stationed in the region. The applicants directed their claims against both countries. I will deal with the Moldovan jurisdiction in the next section, since that concerns loss of control over a part of a state's own territory. Here I will focus on the jurisdiction of Russia. The applicants claimed that through its army and political support for Transdniestria it had 'effective control' over the territory. In the admissibility phase, the Court decided to join this issue to the merits of the case, since it did not have sufficient information to make a ruling on the point.[77] In the judgment on the merits the Court specified on jurisdiction: 'The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.'[78]

After reiterating that extra-territorial jurisdiction is exceptional, the Court reiterated its 'overall control' criterion from the Northern Cyprus cases. Subsequently, it formulated another exception which it derived from its case law on extradition: 'A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.'[79] A puzzling statement, since this test would seem to bring a *Banković*-like situation within the Court's review: responsibility for the state, even for occurrences outside their jurisdiction. Part of the contradiction may be downplayed by accepting that the Court only uses this in a context of extradition or expulsion, but in that case it would seem strange that the Court used such broad phrasing. Finally the Court added that 'acquiescence or connivance' in acts of private individuals within a state's jurisdiction may engage the latter's responsibility, especially 'in the case of recognition by the State in question of the acts of self-proclaimed

74 ECtHR, *Gentilhomme a.o. v. France*, 14 May 2002 (Appl.nos. 48205/99 a.o.) para. 20. See also: Lawson (2004) pp. 117-118.

75 ECtHR, *Saddam Hussein v. Albania a.o.*, 14 March 2006 (Appl.no. 23276/04).

76 ECtHR, *Ilaşcu a.o. v. Moldova and Russia* (merits), 8 July 2004 (Appl.no. 48787/99).

77 ECtHR, *Ilaşcu a.o. v. Moldova and Russia* (admissibility decision), 4 July 2001 (Appl.no. 48787/99). In order to collect more facts the Court went on a fact finding mission to the region: see Lawson (2004) p. 101.

78 *Ilaşcu a.o. v. Moldova and Russia* (merits), para. 311.

79 Ibid., para. 317.

authorities which are not recognised by the international community.' In that case the acts of such authorities can thus be equalled to those of private individuals.[80]

The Court applied these principles to the case at hand, distinguishing the period before and after Russia's ratification of the ECHR (5 May 1998). In regard to the period before ratification, the Court held that:

> [T]he Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova.[81]

The Court held Russia specifically responsible for the arrest and handing over of the applicants to the Transdniestrian authorities and for their subsequent ill-treatment, since the Russian army was aware that it was handing them over to 'an illegal and unconstitutional regime'.[82] Since military, political and other kinds of support to Trandniestria continued after Russia's ratification of the Convention, the Court concluded that MRT remained 'under the effective authority, or at least under the decisive influence' of Russia. MRT could not survive without it. As a consequence of this line of reasoning the applicants came within Russian jurisdiction under Article 1 and Russia's responsibility was engaged for the situation.[83] The Court's very detailed reasoning in this case shows that for an individual to have his complaints declared admissible on this point, 'overall effective control' is not always necessary. Lower degrees of control, such as effective authority or decisive influence in this case, can be sufficient. In the latter cases, the assessment will be more detailed than in the former – Northern Cyprus-like cases, and the linkage between the applicant and state will have to be looked into very accurately. Here this link was through MRT authorities, considered in this case as 'private' parties, and the Russian army, irrespective of whether this army acted *ultra vires* or not. The case shows that the Court accepts that no legal basis for jurisdiction in the traditional sense is needed, but that a real link between the alleged human rights violator – here primarily MRT – and the defendant state suffices.[84] Perceived from a different angle, the applicants were clearly under the 'effective control' of the private party MRT, since they were detained by them. The connection of responsibility between MRT and Russia was therefore the decisive

80 Ibid., para. 318; part of it referring to the Court's own judgment in the interstate case of *Cyprus v. Turkey*. In addition, the whole *Ilaşcu* judgment is full with explicit references to the ILC's Articles on State Responsibility – another sign of the Court using international law.

81 Ibid., para. 382.

82 Ibid., para. 384.

83 Ibid., paras. 386-394.

84 Ioana Petculescu, 'Droit international de la responsabilité et droits de l'homme', *Revue Générale de Droit International Public* vol. 109 (2005) pp. 581-607, see p. 588.

point. On the one hand the Court stuck to its case law – being arrested is coming under someone's effective control – but on the other it was innovative compared to its earlier judgments in its answer to the question of state responsibility for acts of private parties. International law principles on state responsibility were elaborately used to flesh out the latter issue.

In conclusion, the Court has accepted the possible extraterritorial reach of the Convention. Although the own territory of a state party is the main area in which jurisdiction holds, several extensions of this have been recognized for acts of authorities producing effects outside their own territory. These are firstly the effective overall control over a territory, irrespective of the longevity of that control in time or of the legality of it. In those cases *prima facie* jurisdiction can be accepted and acts of any local authorities under such control can be attributed to the occupying state. Secondly acts of diplomatic, military, or other agents of the state can be within the jurisdiction of a state party to the ECHR. *De facto* agents of the state, such as private parties or non-recognised separatist authorities are included, although for these authority over them by the state, or at least decisive influence, has to be proven.

A 'real connection' between the state and the alleged victim is not sufficient: apart from simple cause-and-effect, control over the victim (or by analogy his home or property) must be shown. Arrest is a clear form of control, but it is arguable that other forms may fall under the notion as well. Whatever the merits of the *Banković* decision, the Court has excluded pure control over airspace: this neither means control over territory nor apparently brings someone under a state's control. This approach raises problems of proof[85] and theory: what if someone is shot before his arrest? And how does one prove that the arrest took place before the shooting? A more factual notion of control, such as the one used by other human rights institutions, offers more human rights protection and more clarity.

As a final note, it is of importance to the present inquiry that the occurrence of armed conflict is not an obstacle to the application of human rights. The rules of humanitarian law are therefore not the only ones that are relevant when fighting erupts.[86] The Court has accepted this by applying the ECHR to military operations across borders, such as in the case of *Issa*. The fact that the *Banković* was declared inadmissible must therefore not be seen as a rejection of the relevance of human rights in times of conflict.

85 Lawson (2004) p. 123.

86 Louise Doswald-Beck, 'Human Rights and Humanitarian Law: Are There Some Individuals Bereft of All Legal Protection?', in: American Society of International Law, *Proceedings of the 98th Annual Meeting* (2004) pp. 353-358, see p. 353. See also: HRC, *General Comment No. 31*, para. 11; ICJ, 'Wall' Opinion, paras. 104-106.

10.6 APPLICATION OF THE ECHR IN AREAS WHERE THE STATE HAS LOST CONTROL

What happens in situations when human rights violations are alleged to occur within a state's territory, but are beyond their grasp? An answer to this question from the perspective of the ECHR will be the goal of this section. At the outset, it is important to stress that in the interest of human rights protection, there should be no legal vacuum;[87] at all times there must be a state one can turn to when seeking redress for a violation of one's human rights. Be that as it may, a state is obviously not responsible for all human rights violations on its territory. It can only be held accountable for acts and omissions having an impact on human rights by state organs and agents[88] and the acts of those over which it has a decisive influence, as the *Ilaşcu* case has shown. For all other alleged violations, the state has certain positive obligations. These differ as to the human right concerned, but often include general preventative duties. In principle the whole of a state's territory is included in its jurisdiction. Loss of control over parts of that territory may reasonably diminish a state's obligations under Article 1, one could argue.

The Commission was the first to have to answer this question. In its 1991 decision in *Ahmed Cavit An a.o. v. Cyprus* it held that the country was prevented from exercising its jurisdiction in the northern part of the island occupied by Turkey. Cyprus' authority was thus limited to the non-occupied part. Consequently it could not be held responsible for the acts of the Turkish Cypriot authorities. The application was declared inadmissible.[89]

This decision seems to rule out responsibility for the state that has lost control, but matters are not as simple as that. A line of reasoning could be set up to argue that a positive obligation to secure human rights as far as possible continues to exist as long as the region concerned is formally still part of the state under international law.[90] In case of foreign occupation or control, the region concerned would then fall under two Article 1 jurisdictions. As pointed out in section 10.4, such plural jurisdiction is possible under international law.

Two judgments are of main importance to the issue at hand. The first is *Assanidze v. Georgia*.[91] The applicant had been convicted and imprisoned by the authorities of the Ajarian Autonomous Republic (AAR). The status of the AAR under the Georgian constitution was not clear, but Ajaria had no separatist aspirations. The Georgian Supreme Court quashed the judgment for part of the conviction and a presidential pardon relieved the applicant of the rest of the conviction. Nevertheless, the local

87 PACE Report (2003) p. 1.

88 See, among many others: Pieter van Dijk a.o., *Theory and Practice of the European Convention on Human Rights* (Antwerp: Intersentia 2006, 4th ed.) p. 17.

89 EComHR, *Ahmet Cavit An a.o. v. Cyprus*, 8 October 1991 (Appl.no. 18270/91).

90 Georg Ress, 'State Responsibility for Extraterritorial Human Rights Violations. The Case of Banković', *Zeitschrift für Europarechtliche Studien* vol. 6 (2003) pp. 73-89, see p. 76 under footnote 15.

91 ECtHR, *Assanidze v. Georgia*, 8 April 2004 (Appl.no. 71503/01).

Ajarian authorities refused to release him. In this highly politicized case – the applicant was a former mayor of the capital of Ajaria – the local authorities thus did not comply with orders from the higher state institutions of Georgia. Assanidze lodged a complaint against Georgia before the European Court of Human Rights. Since the AAR was 'indisputably an integral part of Georgia' and subject to its competence and control, the Court held that there was a presumption of jurisdiction or competence. The Court noted that there were no factors rebutting the presumption, since the AAR had no separatist aspirations, was not controlled by another state and more generally the ECHR applied to the whole of Georgia. Thus the situation complained of fell within the jurisdiction of Georgia. As a rationale for the presumption that the ECHR in principle applies to the entire territory of a state, irrespective of its internal constitutional structure, the Court added:

> But for the presumption, the applicability of the Convention could be selectively restricted to only parts of the territory of certain States Parties, thus rendering the notion of effective human rights protection underpinning the entire Convention meaningless while, at the same time, allowing discrimination between the States Parties, that is to say between those which accepted the application of the Convention over the whole of their territory and those which did not.[92]

The *Assanidze* judgment shows that a state cannot restrict the applicability of the Convention to parts of it territory. Even if acts complained of are within the national system attributable to local authorities, it is still only the state as such which can incur responsibility on the international level.[93] The presumption of jurisdiction or competence can apparently be rebutted in at least two circumstances: foreign control or separatist aspirations. Whereas the former makes sense, the latter barely does. Simple aspirations do not make a state's exercise of jurisdiction impossible. I would argue that *de facto* loss of control to a separatist movement is a more refined and relevant criterion to rebut the presumption. This refinement was brought by the *Ilaşcu* judgment, in which the Court confirmed the presumption principle, but stated that the existence of exceptions to it should be judged with the help of two criteria. First, 'all the objective facts capable of limiting the effective exercise of a State's authority over its territory.' Secondly, the conduct of the state itself. As accepted examples the Court mentioned effective control through military occupation by another state, acts of war, rebellion, or the acts of another state in support of a separatist regime.[94]

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92 Ibid., para. 142.

93 Ibid., para. 150.

94 *Ilaşcu a.o.* (merits), paras. 312-313. An early argument in favor of the presumption principle can be found in: Rick Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century', in: Monique Castermans-Holleman a.o. (ed.), *The Role of the Nation-State in the 21st Century* (The Hague: Kluwer Law International 1998) pp. 91-116, see pp. 114-116.

What kind of obligations remain in respect of territories over which the state no longer has control? In the *Ilaşcu* case, the Court emphasized that in such situations positive obligations towards the people in those areas continue to exist. The state concerned has a duty of due diligence and it should take all appropriate measures which it still can take.[95] The scope of jurisdiction is thus reduced to positive obligations only, according to the Court, due to a constraining reality. Specifically, the state 'must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms guaranteed by the Convention.' The Court then has the task to assess whether the measures taken were appropriate and sufficient and in case they partially or entirely failed, 'to what extent a minimum effort was nevertheless possible and whether it should have been made.'[96]

The explicit limitation of jurisdiction to positive obligations seems superfluous. Indeed, it is logical that when a state lacks control, it cannot interfere. The only remaining obligations are then logically the positive ones. But such an approach does not bar the Court from assessing interferences with Convention rights. One may very well imagine that a state is still able to arrest someone in the disputed area in a short hit-and-run action. In such cases, although no overall effective control exists, there is of course control over the person arrested. Applying the *Öcalan* case by analogy does then entail that such an action falls within the state's jurisdiction.

To summarize, we have seen that a state is presumed to have jurisdiction over its entire territory and thus under the ECHR is bound with respect to that territory. Whereas outside its own borders, jurisdiction only arises under exceptional circumstances, inside its territory the *lack* of jurisdiction is the exception. This exceptional restriction is tested in two steps. First the Court will assess whether factual circumstances such as foreign occupation justify a restriction of jurisdiction to positive obligations. A merely unwilling local authority will not pass this test, as the *Assanidze* judgment has shown. Secondly, the Court will inquire whether the state took sufficient and appropriate measures or has at least done all that it could do, i.e. whether it acted with due diligence. As on other points, the Court has elaborated its case law on this issue in the context of general international law. It explicitly used the ILC's Articles on State Responsibility. Moreover, the presumption of jurisdiction over a state's entire territory is completely in harmony with Article 29 of the Vienna Convention.[97] The approach does not rule out the simultaneous jurisdiction of another, occupying state. In such a way the Court obviously seems willing to avoid a vacuum of protection as much as possible. A flexible use of 'jurisdiction' here is thus favorable to the object

95 Ibid., para. 313.

96 Ibid., paras. 333-334. See also: Gérard Cohen-Jonathan, 'Quelques observations sur les notions de "jurisdiction" et d'"injonction"', *Revue trimestrielle des droits de l'homme* vol. 16 (2005) pp. 768-785.

97 See section 10.2. See also: Liesbeth Lijnzaad, 'Trouble in Tiraspol, Some Reflections on the *Ilaşcu* Case and the Territorial Scope of the European Convention on Human Rights', *Hague Yearbook of International Law* vol. 15 (2002) pp. 17-38, see p. 23.

and purpose of the European Convention. A judicial policy of containment aims at combating the existence of lawless areas.

10.7 THE LINK WITH HOUSING RESTITUTION

How does the above relate to housing restitution? The main factor to be taken into account is the area in which the house in question is located. In addition one has to distinguish between the time of the interference causing the loss of home (destruction, eviction or denial of access) and the time at which the national or European judges decide on the issue. Shifting zones of control during conflict may have the result that the house at stake falls under the control of one state in the first phase and under the control of another in the second. This can influence the scope of jurisdiction and thus of the duties under the ECHR. The jurisdiction question in turn defines to which state an applicant seeking restitution should turn. Finally, there is the issue whether restitution is possible at all or whether the house has been destroyed and compensation is the only possible reparation for the violation of human rights law.

Several situations can be imagined. The first and most straightforward one is the situation in which the house is located within a state's territory *and* within its control; no restraining factors apply. The state then has full jurisdiction and consequently has the double duty of non-interference and positive obligations under the ECHR. If it has not itself caused the loss of home, positive obligations are still relevant. Additionally, any restitution program it sets in place will have to comply with ECHR norms. At the other extreme is the situation outside a state's territory where the state has no control or influence at all;[98] no obligations apply then.

Two intermediary situations are control over an area outside a state's territory and loss of control within a state's territory. In the first case, if the situation can be said to amount to overall effective control the state is fully responsible under the ECHR. The jurisdiction has flowed over the state's borders without changing in scope or quality. I would argue that in addition, by analogy to arrest and ill-treatment during operations outside a state's border, the control of a house by occupying it and then destroying it, would also fall within a state's jurisdiction.[99] When a house is destroyed without prior control over it, e.g. by bombing from the air, the *Banković* decision would seem to deny jurisdiction and thus obligations under the ECHR. As has been argued though, this decision is flawed on several points and offers no persuasive argument to come to such a conclusion. It is submitted then, that such destruction would still fall within the bombing state's jurisdiction. Although restitution would in that case be physically

98 And thus the links of the state with the situation complained of are entirely absent, in contrast to the *Ilaşcu* case.

99 The *moving* of a house over a border, even if physically possible in the case of caravans or mobile homes, seems to be a mere theoretical possibility. However, if such a thing would occur, the state 'controlling' and moving the house would of course be the one under whose jurisdiction these acts would fall.

impossible, an individual could still claim compensation for the incurred loss. The state that controls the 'ground' would still be bound to positive obligations of protection, provided it is itself party to the ECHR of course.

The second intermediary situation occurs when a state loses control over part of its own territory. In such a case the Court has held that a state incurs only positive obligations. When an individual has lost his home in a territory that is formally still part of a state's territory he can, if we apply the principles from *Ilaşcu* by analogy, at least require the state to do its utmost to achieve housing restitution and to ensure as far as possible effective respect for the home and the protection of property against third parties.[100] This would be more an obligation of due diligence than an absolute requirement to obtain results. To a certain extent a legal black hole always remains in all cases in which the acts of local separatist authorities can be neither attributed to the state under which they formally resort nor to any other state which controls them or has decisive influence over them.

If boundaries shift between phase one (loss of the home) and phase two (the moment of judicial decision), the newly controlling power cannot be held accountable for the earlier loss of the home, but *can* be for barring access to someone's home. The link between an individual and his house – whether as home, as property or as both – should be the decisive factor. No decisive relevance should be given to the fact that another state controls the area in which the house is located than the state that caused the initial loss. Only the interference complained of is different: vis-à-vis the first state this would be eviction, vis-à-vis the second denial of access. I would argue that such an approach which offers the highest possible level of protection best suits the object and purpose of the ECHR.

10.8 Conclusion

The legal notions in Article 1 ECHR are not of 'une clarté limpide'.[101] Jurisdiction is probably the best example of this. The lack of clarity may be explained by the diverging interpretations which can be given to jurisdiction. On the one hand, the traditional notion under international law derives from the rights of states which have to be balanced against each other. This entails that jurisdiction is primarily territorial and that a legal basis is necessary for its extraterritorial exercise. On the other hand, the emergence of human rights has given birth to an alternative notion of jurisdiction. In the latter context, jurisdiction defines the extent of a state's obligations to secure human rights. The perspective is that of protection for the individual, not the prerogatives of the state. This protection is the object and purpose of human rights treaties and calls for an extensive interpretation of jurisdiction as opposed to a restrictive one in the traditional context of jurisdiction. Since the rationale is different, the interpretation should be too. The legality or legitimacy of the exercise of jurisdiction becomes

100 See sections 2.6 and 3.5.
101 Costa (2004) p. 483.

irrelevant in the human rights context. Rather the more factual notions of power, authority or control of the state over the individual are decisive. The case law of both the ICJ and of the UN and Inter-American human rights institutions points in that direction.

On the European level the case law of the Commission showed an approach resembling that of its international peers. It applied a broad notion of jurisdiction. The Court's record seems more mixed in this respect. It strongly emphasizes the primarily territorial notion of jurisdiction and although extraterritorial application is not excluded, it requires special justification. In some judgments the Court seems generous in this respect. Effective overall control over a territory is enough to bring it within a state's jurisdiction (*Loizidou*, *Cyprus v. Turkey*). Effective authority and the relatively low threshold of 'decisive influence' (*Ilaşcu*) over local authorities in another country are also sufficient. Even temporary effective control during military operations (*Issa*) or effective authority over specific persons by way of arrest (*Öcalan*) will do. But a lethal attack from the air does not entail jurisdiction (*Banković*), no matter how gravely human rights may be affected. Although the *Banković* decision seems to be the odd one out, the Court has referred to it in later judgments, albeit not on a structural basis.[102] An overview of the Court's case law therefore generates a landscape of uncertainty; on the one hand the Court applies a restrictive territorial approach of jurisdiction taken from the traditional notion in international law. But on the other hand, it does recognize a range of exceptions ranging from full and prolonged control over vast areas to the temporary control over one person. It does not take the final step however. That step would be to formulate a general rule to the effect that 'everyone directly affected by any exercise of authority by [a State] Party in any part of the world' whether legal or illegal would fall under that state's jurisdiction.[103] This would put the Court on the same path as other international institutions and more importantly, it would be more clearly in harmony with the object and purpose of the ECHR. It has been shown that the Court's reliance on the notion of jurisdiction under international law is partially flawed, since it only refers to the traditional views on it and not to *de facto* jurisdiction as developed in the specific context of human rights.

Interestingly, the Court's case law on areas over which the state has lost control offers a clearer picture of jurisdiction. The presumption of jurisdiction for the state over its entire territory and the continuing positive obligations even when control over an area is lost always give the individual at least one state to turn to. For individuals seeking housing restitution this is a comfort, albeit a minor one. A narrow interpreta-

102 E.g. *Assanidze v. Georgia*, paras. 137-138 and 144; *Issa a.o. v. Turkey* (merits), para. 56; *Ilaşcu a.o. v. Moldova and Russia* (merits), paras. 312 and 314, but not in *Saddam Hussein v. Albania a.o.* In a March 2006 opinion, the European Commission for Democracy through Law (the Venice Commission) tellingly mentioned *Issa*, not *Banković*, as the leading case on extraterritorial jurisdiction: Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, 17 March 2006, CDL-AD(2006)009, see note 31 of that Opinion.

103 Concurring opinion of judge Loucaides in *Assanidze v. Georgia*.

tion of the territorial application of a human rights treaty is anathema to the essence of human rights,[104] since it could easily cause holes in the protective cover that the ECHR aims to be.

104 Meron (1995) p. 82.

CHAPTER 11
THE OPERATING SYSTEM FOR HOUSING RESTITUTION IN POST-DAYTON BOSNIA

11.1 INTRODUCTION

The operating system for housing restitution in Bosnia and Herzegovina was part and parcel of the peace agreement of Dayton. It had to function, however, in a context of existing domestic institutions and political forces. In chapter 7 the clashes between European and international human rights norms on the one hand, brought in by the Trojan horse of Dayton, and local Bosnian rules and regulations on the other hand have been expounded. It may not come as a complete surprise that the institutional framework to a certain extent reflected these tensions. Moreover, as we shall see, the division of tasks and competences between the new Dayton institutions themselves were not clear-cut. In this chapter I will explore this institutional dimension of the Bosnian restitution process.

In spite of the normative contradictions between old and new norms, the legal precedence of the explicit Dayton right to housing restitution was clearly established. The interpretation and implementation of that right was left to a myriad of institutions. I will try and map these different institutions that were supposed to form the supportive operating system for the norm. The focus will be on the institutions set up under the Dayton Peace Agreement, with particular emphasis on the main human rights institution, the Bosnian Human Rights Chamber. In addition, I will pay some attention to both the existing national institutions and to international mechanisms and organisations which played a role.

11.2 THE COMMISSION FOR REAL PROPERTY CLAIMS OF DISPLACED PERSONS AND REFUGEES

Annex 7 of Dayton established the right to housing and property restitution for refugees and displaced persons in Bosnia. That same Annex provided for the establishment of a commission which could deal with restitution claims.[1] This Commission for Displaced Persons and Refugees was later more appropriately named the Commission for Real Property Claims of Displaced Persons and Refugees (hereafter: CRPC or the Commission), since it dealt with that particular aspect of refugees' problems.[2] Until

1 Articles VII-XVI of Annex 7.

2 Charles Philpott, 'Though the Dog is Dead, the Pig must be Killed: Finishing with Property Restitution to Bosnia-Herzegovina's IDPs and Refugees', *Journal of Refugee Studies* vol. 18 (2005) pp. 1-24, see p. 5.

the adoption of the so-called cessation laws,[3] the CRPC was the only institution through which proof of ownership could be received, since the domestic authorities refused to process such claims[4] or were not yet fully functioning.[5] In the first few years after Dayton, this turned the CRPC into both a pivotal mechanism and a beacon of hope for refugees and internally displaced persons. Later on, the lack of implementation of its decisions proved to be a bottle-neck for the process of housing restitution.

The divisions in Bosnia after the war and the desire to achieve balance among the actors involved, including a neutral external presence, were reflected in the composition of the nine-member Commission. According to Article IX of Annex 7 four members were to be appointed by the Croat-Bosniak Federation, two by the Republika Srpska and three members by the President of the European Court of Human Rights.[6] The Chairman would be chosen from among the latter three. The only requirement for commissioners laid down in the Annex was that they had to be of 'recognized high moral standing'.[7] Although the terms of Annex 7 did not require it, in practice the members appointed by the Entities were two Croats, two Bosniaks and two Serbs and the internationally appointed members were non-Bosnians.[8] *De facto*, the Commission was thus of mixed Bosnian-international composition.

The CRPC was a public international institution. That is, it had been set up under international law and was thereby legally independent from Bosnia and Herzegovina.[9] The Commission's mandate was to receive and decide upon real property claims – land, housing and other buildings – in situations in which involuntary property transfers had taken place since 1 April 1992 and where the claimant had not yet repossessed such property.[10] Applicants could claim either property to be returned or compensation or even a simple declaration that the property was theirs. The starting date of the Commission's jurisdiction coincided with the start of the conflict in Bosnia

3 See section 7.2.2.

4 Leopold von Carlowitz, 'Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and Herzegovina and the HPD/CC in Kosovo', *Leiden Journal of International Law* vol. 17 (2004) pp. 599-614, see p. 602.

5 Madeline Garlick, 'Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina', *Refugee Survey Quarterly* vol. 19 (2000) pp. 64-85, see pp. 69-70.

6 Article IX of Annex 7. After an envisaged medium-term transfer of the CRPC to the Bosnian authorities, members were to be appointed by the Presidency of Bosnia and Herzegovina (Article IX(4)).

7 Article IX(2).

8 CRPC, *End of Mandate Report (1996-2003)* (Sarajevo 2004), p. 9. To be found at: www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/endofmandate.html.

9 Hans van Houtte, 'Mass Property Claim Resolution in a Post-War Society; The Commission for Real Property Claims in Bosnia and Herzegovina', *International and Comparative Law Quarterly* vol. 48 (1999) pp. 625-638, see pp. 628-629.

10 Article XI of Annex 7.

and Herzegovina.[11] Annex 7 contained no end date.[12] This means that claims about loss of property which had taken place after the end of hostilities could also be dealt with. The Commission was tasked to determine whether the claimant was the lawful owner of a property and what the value of the property was.[13] We have seen earlier that part of the housing in the former Yugoslavia was not privately owned, but consisted of occupancy rights.[14] The problem was that the CRPC's mandate referred simply to claims for real property. Occupancy rights were, however, among the most disputed cases. Pressured by the international community, the CRPC did gather occupancy right claims. Once the cessation laws entered into force, the possibility to lodge claims before the CRPC was explicitly incorporated in Entity laws.[15] Subsequently, the CRPC decided that it would confirm the rights of pre-war occupancy rights holders in its decisions.[16] The cessation laws stipulated that this could be done at any time and that such a move would have the effect of staying the domestic proceedings. In that sense the CRPC functioned as a back-up for Entity mechanisms whenever these ground to a halt. However, the CRPC only accepted claims if the applicant could show that lodging a claim before a local housing body was impossible, if the local authorities did not react to claims or if they had negatively decided on claims.[17] Although there was thus no formal requirement to exhaust local remedies,[18] the criteria used by the CRPC bear resemblance to those of the ECHR; the domestic road should be trodden unless obviously futile.[19] According to Annex 7, the CRPC's decisions were final and were to be recognized as lawful throughout Bosnia.[20] To offer some possibility of recourse against its decisions, the CRPC set up its own reconsideration procedure. In practice this was very rarely used by applicants.[21]

Let us now turn to one of the main elements of the operating system, the sources of law used by the CRPC. In adjudicating claims, the Commission obviously operated within the general context of Annex 7 which recognised the right to housing restitu-

11 CRPC (2004) p. 18.

12 Although the Commission's mandate initially ran for five years (Article XVI of Annex 7) and was later renewed for a three-year period. After that the CRPC's tasks were transferred to the Bosnian authorities: CRPC (2004) pp. 4-9.

13 Article XII.

14 See Chapter 7.

15 Article 23 of the RS *Law on the Cessation of Application of the Law on the Use of Abandoned Property* and Article 14 of the Federation's *Law on the Cessation of the Application of the Law on Abandoned apartments*. See section 7.2.2 for precise references. See also: Van Houtte (1999) p. 635.

16 CRPC (2004) p. 19.

17 CRPC, *Book of Regulations on Confirmation of Occupancy Rights of Displaced Persons and Refugees* (consolidated version, Sarajevo, 8 October 2002) Article 7. To be found at the website mentioned above. Hereafter: CRPC (2002-A).

18 Von Carlowitz (2004) p. 602.

19 See section 8.3.

20 Article XII(7) of Annex 7.

21 CRPC received 2494 requests for reconsideration (0.8 percent of the total number of decisions) and in only 382 cases it reversed its previous decisions. The requests were mostly made by current occupiers of apartments which had been assigned to the former inhabitants: CRPC (2004) pp. 21-22.

tion. The Annex also stipulated that the Commission should 'consider domestic laws on property rights' in developing its own rules and regulations.[22] This does not entail that the Commission was bound by these. Rather, it served to connect the work of the CRPC to the existing legal systems and traditions of the country. One needs to distinguish between domestic laws dating from before the start of the conflict and later ones. The CRPC took the former as the point of departure for its decisions and used conflict of laws principles from the old Yugoslav system in cases such as transfer of property by marriage or inheritance. On the other hand, according to Hans van Houtte, one of the international members of the CRPC, the Commission did not apply the discriminatory war-time laws, since these were inconsistent with Annex 7 by limiting claimant's rights of return and restitution.[23] One may add that an additional reason to disregard them is that these laws were also inconsistent with the European Convention on Human Rights which was directly applicable in Bosnia. As the Bosnian Human Rights Chamber later established, these laws were on many points in violation of the European Convention.[24]

Of course, voluntary legal transactions of property *after* the start of the armed conflict had to be taken into account. These were rare occurrences, however. Many people were forced to sign property transfer contracts[25] or otherwise to accept unfavourable conditions.[26] This phenomenon of forced transfer in exchange for permission to leave one's house alive had been so widespread that Dayton explicitly contained the rule that the CRPC was not allowed to recognize illegal transactions of property 'including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing.'[27] Claimants did not have to furnish proof of a connection between ethnic cleansing and property transfer. The CRPC assumed that any wartime transfer had taken place under duress and thus could be set aside upon request, unless the contrary was proven.[28] This brings us to the burden of proof. This burden was generally low for claimants. Although they were always asked to submit any evidence of ownership or lawful occupation, wartime circumstances of flight and displacement had not always enabled people to take such evidence as they unwillingly left their place of residence. Submission of proof was therefore not a requirement to have a claim decided upon.[29] As a consequence the

22 Article XV of annex 7.
23 Van Houtte (1999) pp. 636-637.
24 See generally chapter 7.
25 Van Houtte (1999) p. 634.
26 CRPC (2004) p. 3.
27 Article XII(3) of Annex 7.
28 Van Houtte (1999) p. 634.
29 CRPC, *Book of Regulations on the Conditions and Decision Making Procedure for Claims for Return of Real Property of Displaced Persons and Refugees* (consolidated version, Sarajevo, 8 October 2002) articles 17-18. Hereafter: CRPC (2002-B). In the case of occupancy rights the system was comparable, although there the caveat was added that if 'the Commission has no access to evidence of the relevant occupancy right, although activities to obtain such evidence were undertaken, the Commission shall

CRPC had to gather evidence itself, a task greatly hampered by the destruction, the moving of and the alterations made in cadastre and property book records during the war. The Commission decided to develop and build a completely new electronic cadastral database out of the ashes of the conflict.[30] Since information on actual ownership was sparse, the Commission relied in most cases on proof of 'lawful possession' which was easier to find.[31] This was the category in Bosnian law used to describe uncontested legal users of real property. It had been widely used before the start of the conflict for lack of complete property records.[32]

Another aspect of the burden of proof was the status of claimants. The Annex 7 right to housing restitution was limited to refugees and displaced persons. Nevertheless, belonging to such a category need not be proven when claiming before the CRPC. Such status was presumed.[33] All of the above taken together, claimants were thus given the benefit of the doubt in several respects concerning the burden of proof.

This relatively easy procedural access to the Commission coupled to a lack of trust in domestic authorities led to a tidal wave of claims. During the eight years of its mandate the Commission received 240,000 claims concerning 320,000 properties. At the end of its mandate, it had decided upon almost 312,000 of the claimed properties.[34] Although staggering, these amounts are still much lower than the expected numbers of claims at the outset.[35] The only way to deal with such quantities within a reasonable time was to maximize the efficiency of claims processing. Consequently, the CRPC worked as an administrative rather than a judicial mechanism: it was a single-party procedure, highly automated and – apart from an intake interview – completely written. Current occupiers of claimed housing were thus not consulted, although the internal appeals procedure was accessible to them.[36]

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refuse the claim with the explanation that the relevant evidence was not available.' (CRPC (2004-A) article 18).

30 CRPC (2004) p. 16. This became the most all-encompassing and technologically advanced in the region (Garlick 2000) p. 74) and was handed over to the Bosnian authorities at the end of the CRPC's mandate (CRPC (2004) p. 34).

31 Ibid., pp. 7 and 17. Recognition of law possession or co-possession made up more than half of all the decisions: 184,255 out of 311,757.

32 Ibid., p. 18.

33 CRPC (2000-B) Article 12. CRPC (2000-A), the CRPC rules on occupancy rights does not contain such an explicit presumption. Nevertheless, one may presume the same applied, since the status of refugee or displaced person was not to be found among the explicit conditions to apply under the latter rules.

34 CRPC (2004) p. 17.

35 John M. Scheib, 'Threshold of Lasting Peace: The Bosnian Property Commission, Multi-Ethnic Bosnia and Foreign Policy', *Syracuse Journal of International Law and Commerce* vol. 24 (1997) pp. 119-142, see p. 125. Scheib indicates that the CRPC initially expected more than 1.5 million claims. This number was probably an unrealistic estimate to start with, considering that around 2.2 million people had fled their homes (see section 7.1), that not every member of a family would claim and that not every one of these refugees *owned* property.

36 Marcus Cox & Madeline Garlick, 'Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina', in: Scott Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Ardsley: Transnational Publishers 2003) pp. 65-81, see p. 73.

For individuals reclaiming their house the CRPC seemed, on paper, to offer a genuine possibility to by-pass failing or unwilling local authorities. The jurisdiction of the CRPC extended to all those who had lost their housing since the start of the conflict. The burden of proof was relatively light and assumptions were made to the benefit of claimants. One had the choice between claiming restitution, compensation or a simple confirmation of ownership[37] or legal possession. Dayton provided for a compensation fund and for the CRPC to sell, lease or mortgage real property.[38] The Commission's independence and impartiality were strengthened by the fact that it was set up under an international treaty and because three of its members were internationally appointed and in practice foreigners not involved in the previous conflict. Over the years the Commission managed to issue decisions in the large majority of cases. Moreover, these decisions were final and binding. Thus most people ended up with at least a formal recognition that the home from which they had fled was theirs.

Unfortunately for many claimants, problems occurred further down the line of the operating system. First of all, compensation never materialized.[39] This was caused by the concern of the international community that compensation instead of restitution would hamper returns and thus the 're-creation of a multi-ethnic Bosnia.'[40] In practice, those who opted for compensation had to claim housing restitution and then sell or lease their dwelling to obtain *de facto* compensation.[41] Secondly, implementation was a real problem. The CRPC had been given no mandate under Dayton to enforce its decisions. The parties to Annex 7 – the state of Bosnia and Herzegovina, the Federation, and the Republika Srpska – were responsible for its implementation. Article VIII specifically required them to cooperate with the CRPC and to 'respect and implement its decisions expeditiously and in good faith, in cooperation with relevant international and nongovernmental organizations having responsibility for the return and reintegration of refugees and displaced persons.' As concluded earlier, housing issues fell within the responsibility of the Entities.[42] In spite of this, in the first few years after Dayton local authorities in many places refused to implement CRPC decisions.[43] Reasons mentioned for this refusal by these authorities themselves were that they had nothing to do with an international body which was not a part of domestic legislation or that there were no clear procedural ways to implement the decisions.[44] As a reaction to this the operating system was adjusted. The 1998 the cessation laws installed a claims procedure parallel to that of CRPC, by taking away legal impediments such as

37 Or 'legal possession' as discussed above.
38 Article XIV of Annex 7.
39 Leopold von Carlowitz, 'Resolution of Property Disputes in Bosnia and Kosovo: The Contribution to Peacebuilding', *International Peacekeeping* vol. 12 (2005) pp. 547-561, see p. 550.
40 Eric Rosand, 'The Right to Compensation in Bosnia: An Unfulfilled Promise and Challenge to International Law', *Cornell Journal of International Law* vol. 33 (2000) pp. 113-158, see pp. 130-131.
41 Von Carlowitz (2004) pp. 613-614.
42 See section 7.2.2.
43 Von Carlowitz (2005) p. 550.
44 Garlick (2000) p. 77.

unreasonable claim submission deadlines. In October 1999 the Office of the High Representative imposed laws in both Entities which re-iterated the Annex 7 obligation to enforce CRPC decisions and which installed specific administrative procedures, if necessary backed by local courts, to do so.[45] This made the process less dependent upon the political whims of local authorities and thus helped to strengthen the rule of law. However, it also showed that the creation of the CRPC as a by-pass to the biased post-war domestic system was only partially successful. For implementation claimants were dependent on that same domestic system, which had control over the actual housing stock.[46]

The bottom line may very well be that the CRPC's role was primarily one of establishing the legal situation. This was complicated in itself, but certainly not the most difficult hurdle to take in the complex process of housing restitution. Practical resistance to implementation by local authorities and the humanitarian need to re-house temporary occupants led to much more problems.[47] Nevertheless, until restitution was possible in practice, the CRPC at least was a 'useful repository of claims'[48] and provided many claimants with an internationally endorsed recognition of their link – ownership, possession or occupancy right – with their home.[49] Domestic authorities with other policy goals than restitution could not nullify CRPC decisions; the decisions were final and binding.

11.3 THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

The constitution of Bosnia and Herzegovina (Annex 4 to Dayton) established the Constitutional Court of Bosnia and Herzegovina. The Court has nine members: four appointed by the Federation, two by the Republika Srpska, and three by the President of the European Court of Human Rights. The latter three could not be citizens of Bosnia nor of any of its neighbours.[50] The jurisdiction of the Court has several dimensions. First, it has exclusive jurisdiction in disputes between the Entities, between the state and an Entity and between institutions of the state. Secondly, it has 'appellate

45 *Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees*, 27 October 1999, Official Gazette RS 2000 and Official Gazette FBiH 2000. Entry into force 28 October 1999, that is almost immediately after the official promulgation by the OHR. Although in fact two laws were imposed – one for each Entity – their contents were exactly the same. For a full list of additional adjustments to these laws, also imposed by the High Representative, see the website mentioned above.

46 Cox & Garlick (2003) p. 75.

47 Ibid., p. 74.

48 Philpott (2005) p. 5.

49 Garlick (2000) p. 76. For a more skeptic view, concluding that the CRPC's added value in the restitution process was questionable precisely because of the lack of implementation, see: Rhodri Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice', *New York University Journal of International Law and Politics* vol. 37 (2005) pp. 441-553, see p. 508.

50 Article VI of Annex 4 contains all the provisions concerning the Constitutional Court.

jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.' Thirdly, it has jurisdiction over issues referred by lower courts concerning 'the existence of or the scope of a general rule of public international law pertinent to the Court's decision.'[51] Finally, it functions as the institution for judicial review, since it can test whether Entity laws are compatible with national laws, with the constitution or with the ECHR. The decisions of the Constitutional Court are final and binding. It has the power to order the 'manner of and the time-limit for the enforcement' of its decisions.[52] It has for example ordered the eviction of illegal occupants with the goal to re-install the original inhabitants, if necessary with the use of force.[53]

This chapter deals with the Bosnian operating system for housing restitution. Why then pay attention, albeit succinctly, to the Constitutional Court? The reason is twofold: it has jurisdiction over human rights and until the incorporation of the Human Rights Chamber (HRC) into it, the Constitutional Court had parallel jurisdiction to consider human rights issues. Since one of the main points of departure of this study is that housing restitution can be assessed from a human rights perspective, it is thus necessary to look at the place of this Constitutional Court in the operating system. The main problem until the incorporation of the HRC, was the overlapping jurisdiction of the two judicial institutions. To which of the two should an individual turn and should one of the two have power of review over the other?

The problem was signalled as early as 1996 by the Council of Europe Venice Commission in one of its opinions.[54] The Commission remarked that a hierarchy was impossible, since the decisions of both the Human Rights Chamber and the Constitutional Court were both final and binding under Dayton.[55] On other counts, the situation was less clear. Annex 4 the Constitutional Court was given appellate jurisdiction over 'any other court in Bosnia and Herzegovina.' The HRC was clearly a court, but it was not clear at the outset whether it was a national court in the sense of Annex 4.[56] Manfred Nowak, one of the international members of the HRC, argued that the Human Rights Chamber was a judicial body *sui generis* and could thus not be subordinated to a national constitutional order. It had been established under an international treaty and

51 Ibid., Article VI (3)(b) and (c) respectively

52 Constitutional Court of Bosnia and Herzegovina, *Rules of Court*, rule 74(4).

53 Constitutional Court of Bosnia and Herzegovina, decision of 24 September 1999 (No. U-6/98).

54 An independent group of experts established by the Council of Europe, which can give non-binding opinions on constitutional law matters. It was set up in 1990 to assist European states in their transition to democracy.

55 Venice Commission, *Opinion on the Constitutional Situation in Bosnia and Herzegovina with Particular Regard to Human Rights Protection Mechanisms*, 18 November 1996, CDL-INF(1996)009, para. 4.4.2.

56 James Sloan, 'The Dayton Peace Agreement: Human Rights Guarantees and their Implementation', *European Journal of International Law* vol. 7 (1996) pp. 207-225, see p. 215.

a majority of its members was foreign.[57] In 1998 the Venice Commission specifically dealt with the question of review of HRC decisions by the Constitutional Court.[58] It reiterated its earlier 1996 conclusion, but also added that the ECHR human rights machinery consisted of an inextricably linked normative and operating part. Since the ECHR directly applied in Bosnia but the country was not a party to it, the European Court had no jurisdiction as yet. The Venice Commission held that the HRC was a quasi-international temporal body to protect human rights for a transitional period until Bosnia acceded to the ECHR. The HRC was therefore the national operating system equivalent of the European Court. It would therefore be illogical to put it hierarchically in a lower position than the Constitutional Court. Rather the two institutions had overlapping jurisdictions, but were different in nature. Neither of them should thus be subordinated to the competences of the other.[59]

A few months after this opinion, the question arose in practice before the Constitutional Court in a series of cases in which it was asked to review HRC decisions. It held that human rights in principle fell within the competence of both institutions. Since Annex 4 (on the Constitutional Court) and Annex 6 (on the HRC) were adopted simultaneously, they should be considered to supplement each other without a specific hierarchy. The HRC was not 'any other court' in the sense of Annex 4. Although the two mechanisms functioned in parallel and applicants could thus to a certain degree choose between these alternative remedies, which could possibly develop conflicting case law, this problem was only of a temporary nature. After all, the HRC would eventually be completely incorporated into the Bosnian legal order. The Court concluded that it had no appellate jurisdiction over the decisions of the Human Rights Chamber.[60] Later, the HRC came to the same conclusion for reverse situations.[61] The two institutions thus courteously gave each other legal space and declined to take precedence over one another.

The developments described above led to a parallel human rights claims system. The problem of possible contradictory case law did not emerge in practice, however. The large majority of people with human rights complaints turned to the HRC, whereas the Constitutional Court mainly dealt with constitutional matters in a more narrow sense.[62] These did sometimes touch upon housing restitution cases. A clear

57 Manfred Nowak, 'Shortcomings of Effective Enforcement of Human Rights in Bosnia and Herzegovina', in: Wolfgang Benedek a.o. (eds.), *Human Rights in Bosnia and Herzegovina after Dayton. From Theory to Practice* (The Hague: Martinus Nijhoff Publishers 1999) pp. 95-106, p. 99.

58 Venice Commission, *Opinion on the Admissibility of Appeals against Decisions of the Human Rights Chamber of Bosnia and Herzegovina*, 17 October 1998, CDL-INF(1998)18.

59 Ibid., para. 4.

60 Constitutional Court of Bosnia and Herzegovina, decision of 26 February 1999 (Nos. U 7-11/98).

61 HRC BiH, *Merima Sijarić v. Federation of BiH*, 6 June 2000 (CH/00/4441) paras. 9-14; HRC BiH, *Momčilo Knežević v.RS*, 11 October 2001 (CH/99/2327) paras. 8-13. The Chamber used the discretion it had under article VIII(2) of Annex 6 not to accept an application.

62 One of the rare examples of a decision on housing restitution is: Constitutional Court of Bosnia and Herzegovina, decision of 24 September 1999 (No. U-6/98). In this case the Court correctly concluded that since an interference with the right to respect for the home had not been in accordance with

example is the review of a 2004 draft state law concerning refugees and displaced persons. The draft included a shift of the burden of proof to people claiming that they had exchanged property during the war under duress. The Constitutional Court struck down the proposed law, concluding that it was contrary to the return of refugees, a 'vital interest' of the constituent peoples of Bosnia. From an operating system point of view, it is interesting that the Court explicitly referred to case law of the HRC on the burden of proof and thus sought to prevent the production of contradictory jurisprudence.[63]

The foregoing shows that a division of tasks came into being.[64] As we will see in the following section, the HRC was eventually incorporated into the Constitutional Court, thereby forestalling future contradictions and removing this parallel feature of the operating system.

11.4 THE COMMISSION ON HUMAN RIGHTS

The keystone, in many respects, of the Bosnian system of human rights protection after Dayton, was the Commission on Human Rights. The Commission was set up under the Agreement on Human Rights (Annex 6 of Dayton), but was also mentioned in the Constitution. The latter stipulated that in order to achieve the goal of having the state and the Entities ensure the highest level of human rights protection, there would be a Human Rights Commission.[65] Its goal was therefore to assist the Bosnian parties in honouring their human rights obligations under Dayton. The drafters of the Dayton Peace Agreement envisaged the Commission's operating system as a temporal substitute for the Strasbourg one.[66] Without it only the normative part, the direct applicability of the rights and freedoms contained in the ECHR, would exist without any enforcement machinery. It was meant to be operative until Bosnia ratified the ECHR, which eventually happened in July 2002.[67]

The Commission was in fact the common denominator for two related but different institutions: the Office of the Ombudsman and the Human Rights Chamber. Their task was to consider 'alleged or apparent violations' of the ECHR and its protocols and 'alleged or apparent discrimination' in the enjoyment of any of the rights mentioned in a range of international human rights treaties, 'where such violation is alleged or

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domestic law, it could not be justified under paragraph 2 of Article 8 ECHR. Thus this Article had been violated. The HRC would have dealt with the complaint in exactly the same way. See section 7.3.2.

63 Constitutional Court of Bosnia and Herzegovina, decision of 28 May 2004 (No. U-2/04), also known as the *Mustafa Pamuk* case.

64 Manfred Nowak, 'Introduction', in: Human Rights Chamber for Bosnia and Herzegovina, *Digest. Decisions on Admissibility and Merits 1996-2002* (N.P. Engel: Kehl 2003) pp. 1-22, p. 16

65 Article II(1) of Annex 4.

66 Viktor Masenkó-Mavi, 'The Dayton Peace Agreement and Human Rights in Bosnia and Herzegovina', *Acta Juridica Hungarica* vol. 42 (2001) pp. 53-68, see p. 61. But see section 11.4.5 on the text of Dayton itself.

67 The Chamber's institutions continued to function until the end of their prolonged mandate on 31 December 2003.

appears to have been committed by the Parties, including by any official organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ.'[68]

11.4.1 The Office of the Ombudsman

The non-judicial of the two institutions was the Office of the Ombudsman. Many of its cases concerned property issues and evictions.[69] The Ombudsman – or Ombudsperson as it was generally called, not in the least because the first Ombudsman was a woman[70] – was appointed by the Chairman-in-Office of the OSCE 'after consultation with the parties' and could not be a citizen of Bosnia and Herzegovina or any neighbouring state.[71] After the envisaged transfer of the institution to the domestic authorities the latter requirement would cease to apply and the Bosnian presidency would appoint the Ombudsperson. The safeguards for independence evident in the appointment requirements were explicit: 'The Office of the Ombudsman shall be an independent agency. In carrying out its mandate, no person or organ of the Parties may interfere with its functions.'[72]

The Office of Ombudsperson was primarily an investigative institution and a fact finder. It could investigate indications of human rights violations falling within its mandate either on its own initiative or in response to complaints. In order to facilitate this investigative task, Annex 6 provided that the Ombudsperson was to have access to all official documents and files and could require 'any person, including a government official, to co-operate by providing relevant information, documents and files.'[73] Complaints could be lodged by persons, NGOs or groups of individuals and curiously even by the state and the Entities claiming to be a victim of human rights violations.[74] The respondent party could be the state, the Entities or combinations thereof. The Ombudsperson could, at his or her own discretion, decide which allegations of human rights violations to investigate and in what priority, although Annex 6 did indicate that those concerning 'especially severe or systematic violations' and those involving

68 Article II of Annex 6. The parties to this Annex were the Republic of Bosnia and Herzegovina, the Federation, and the Republika Srpska.

69 Manfred Nowak, 'The Human Rights Chamber for Bosnia and Herzegovina adopts its first judgments', *Human Rights Law Journal* vol. 18 (1997) pp. 174-177, see p. 176 (hereafter referred to as: Nowak (1997-A).

70 Mehmet Semih Gemalmaz, 'Constitution, Ombudsperson and Human Rights Chamber in 'Bosnia and Herzegovina'', *Netherlands Quarterly of Human Rights* vol. 17 (1999) pp. 277-329, see p. 291; Masenkó-Mavi (2001) p. 61. The first Ombudsperson was Ms. Gret Hallller, a Swiss diplomat.

71 Article IV(2) of Annex 6.

72 Article IV(4).

73 Article VI(1).

74 Article V(2).

discrimination on prohibited grounds should be given particular priority.[75] In practice the Ombudsperson used the admissibility criteria of the ECHR rather than immediately undertaking investigations.[76]

On the basis of the investigations made, the Ombudsperson could decide whether human rights had been violated or not. The state authority at issue had the duty to explain in writing how it would comply with the Ombudsperson's recommendations. In case of non-compliance, the Ombudsperson could forward his or her findings to the High Representative. Although the recommendations were not legally binding, the respondent party had a procedural duty to react to them. Additionally, the High Representative could use his political clout. Another mechanism to force compliance was to refer the case to the judicial part of the Human Rights Commission, the Chamber. The Ombudsperson could do this at any stage of the proceedings, could initiate proceedings before the Chamber himself and could even intervene in any Chamber proceedings.[77] If the 'soft' way of finding a friendly settlement failed, the legally 'harder' method of judicial proceedings could thus be embarked upon.

Completely in line with the generally complicated Bosnian system, full of duplications, the work of the national Ombudsperson was supplemented by Entity ombudspersons. In the Federation an ombudsman office started to function early on, in January 1995, soon after the Federation itself had been formed. According to the only numbers I have been able to find – in an article by Sarajevo law professor Jasna Bakšić-Muftić which does not provide any sources for the numbers mentioned – this office achieved an increasing degree of compliance with its recommendations.[78] The Office of the Ombudsman of the Republika Srpska was only established in 2000. Compliance rates were comparatively lower, but the Serbian office could boast successful mediation in 85% of its cases.[79] In an attempt to prevent diverging practice and in response to demands from the Federation's ombudsperson office, the Office of the Ombudsperson changed its rules of procedure. As a result, it could not only refer its own cases to the

75 Article V(3). The prohibited grounds of discrimination are mentioned in Article II: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property birth or other status.

76 Manfred Nowak, 'Lessons for the International Human Rights Regime from the Yugoslav Experience', *Collected Courses of the Academy of European Law. Book 2: The Protection of Human Rights in Europe* vol. 8 (1997) pp. 141-208, see p. 185 (hereafter referred to as: Nowak (1997-B). This approach has been criticised by the Venice Commission. It advised in 1999 that the Ombudsperson institution restrain itself to more characteristic ombudsman's work. The quasi-judicial role, including the 'procedural constraints' (such as the ECHR-like admissibility criteria), should be left to genuinely judicial bodies: Venice Commission, *Preliminary Proposal for the Restructuring of Human Rights Protection Mechanisms in Bosnia and Herzegovina*, 18-19 June 1999, CDL(1999)019e-fin-rest, para. 1.3.

77 Article V of Annex 6.

78 E.g. 70% of its recommendations were complied with in 2001 and 83% in 2002. The majority of complaints concerned the returnee issues. See: Jasna Bakšić-Muftić, 'Role of Human Rights in Peace Agreements Concerning Bosnia and Herzegovina', *East European Human Rights Review* vol. 11 (2005) pp. 133-208, see pp. 161-162. Since no sources for these compliance rates are mentioned in the article, we should be careful to give them too much weight.

79 Ibid. Compliance rates were 48% in 2001 and 58% in 2002.

Human Rights Chamber but also cases communicated by its sister institutions in the Entities.[80] In the divided Bosnian system this formed an additional link of cohesion.

The eventual transfer of the Dayton Ombudsperson institution to the Bosnian authorities in 2003-2004 would not easily have won a legal or democratic beauty contest. The *Law on the Human Rights Ombudsman of Bosnia and Herzegovina*[81] was drafted by the Ombudsperson office itself and subsequently imposed by the High Representative for lack of parliamentary approval in 2001.[82] The law provided for a three-year transitional Ombudsperson, functioning in the same way as the Dayton one.[83] From 1 January 2004 onwards, three ombudspersons would take over. They would be appointed by the Bosnian parliament[84] and not by the presidency, as Dayton provided. This has been criticised since it would divide the institution among ethnic lines and thus be a step backwards instead of forwards.[85] Although the first three ombudspersons under the new law were indeed a Bosniak, a Bosnian Croat and a Bosnian Serb, ongoing efforts in the subsequent years were aimed at gradually establishing a singe ombudsperson for the whole of Bosnia instead of nine.[86]

The Office of the Ombudsperson held broad powers under Dayton, but its recommendations, as indicated above, were not binding. In the hostile post-conflict environment opportunities for friendly settlements may not always have been abundant, to put it mildly. In practice, many applicants circumvented the Ombudsperson and directly applied to the Human Rights Chamber. One of the main reasons for this was that in the first few years of its existence compliance with the ombudsperson's recommendations was low.[87] As of July 2000, this rate was 36 percent as compared to 67 percent for decisions of the Chamber.[88] According to the Ombudsperson's annual report of 2003 compliance had reached 'satisfactory' levels and was even 'very good' in relation to recommendations on the Bosnian court system.[89] Yet, no specific statistics accompa-

80 Gret Haller, 'The Human Rights Regime in Bosnia and Herzegovina in the European Context', in: Benedek (1999) pp. 25-29, see pp. 26-27.

81 Official Gazette of the Republic of Bosnia and Herzegovina, no. 32/00.

82 Nowak (2003) p. 18.

83 Article 41 of the *Law on the Human Rights Ombudsman of Bosnia and Herzegovina*.

84 Article 9.

85 Nowak (2003) p. 18.

86 Three for each of the Entities and three for the state level. See e.g. Venice Commission, *Opinion on the Draft Law on Amendments to the Law on Ombudsman for Human Rights*, 8-9 October 2004, CDL-AD(2004)031, para.

87 Nowak (2003) p. 3.

88 M. Cox & C. Harland, 'Internationalized Legal Structures and the Protection of Internally Displaced Persons', in: J. Fitzpatrick, *Human Rights Protection for Refugees Asylum-Seekers, and Internally Displaced Persons* (Ardsley: Transnational Publishers (2002), pp. 521-540, see p. 532, as cited in: Walpurga Englbrecht, 'Property Rights in Bosnia and Herzegovina: The Contributions of the Human Rights Ombudsperson and the Human Rights Chamber towards their protection', in: Leckie (2003) pp. 83-142, see p. 138. In this case, a bit more certainty can be given than for the Entity ombudspersons, since both Nowak *and* Cox & Harland independently mention the low implementation rate.

89 The Human Rights Ombudsman of Bosnia and Herzegovina, *Compilation for Annual Report 2003*, pp. 1-3.

nied these assertions. As a caveat in its 2002 report, the Ombudsperson indicated that more than 90% of its caseload related to property and that, although specific compliance rates *could* be given, in property cases these would not show the very important aspect of *why* implementation occurred.[90] Thus it chose not to provide statistics on this point.

Another reason for the circumvention of the Ombudsperson is that the procedures took a relatively long time. This was partly due to the legalistic approach taken by the Ombudsperson, using Strasbourg admissibility criteria and written procedures between the parties.[91] As early as 1997 this approach was criticized from the inside by Jessica Simor, one of the legal advisors of the Ombudsperson itself.[92] She advocated that the Ombudsperson take a genuine 'ombuds'-approach, which would entail investigating actively and representing and assisting individuals in proceedings. The mere duplication of the Strasbourg – and by consequence Human Rights Chamber – admissibility criteria meant that applicants were discouraged first to apply to the Ombudsperson instead of going directly to the Chamber. Simor rightly pointed out, in my view, that the Dayton mandate permitted a more active approach, since it explicitly gave the Ombudsperson wide investigatory powers.[93] The second Ombudsperson, who took office in 2000, seemed more willing to take such an approach. Although the Ombudsperson was arguably the institution with the broadest mandate of all Dayton human rights institutions,[94] its practical functioning was hampered both by its own (initial) approach and, more importantly, by unwilling domestic authorities against which the Ombudsperson could not issue binding decisions.

11.4.2 The Human Rights Chamber

The other branch of the Human Rights Commission was the Human Rights Chamber (HRC) whose case law on housing restitution we have extensively surveyed in chapter 7. The Chamber was the judicial one of the two Commission institutions.[95] It

90 The Human Rights Ombudsman of Bosnia and Herzegovina, *Annual Report 2002*, p. 6.

91 Nowak (2003) p. 3.

92 Jessica Simor, 'Tackling Human Rights Abuses in Bosnia and Herzegovina: The Convention Is up to it; Are its Institutions?', *European Human Rights Law Review* (1997) pp. 644-662. See also: Manfred Nowak, 'Individual Complaints Before the Human Rights Commission for Bosnia and Herzegovina', in; Gudmundur Alfredsson a.o. (eds.), *International Human Rights Monitoring Mechanisms. Essays in Honour of Jakob Th. Möller* (Martinus Nijhoff Publishers: The Hague 2001) pp. 771-793, see p. 780.

93 Ibid., pp. 651-652.

94 Donna Gomien, 'The Human Rights Ombudsperson for Bosnia and Herzegovina', in: Alfredsson (2001) pp. 763-770, see p. 767.

95 It would have been clearer to have called it a Human Rights *Court*, but this term was avoided both because the Serbian negotiators at Dayton were against it and because the 1994 peace agreement between Bosniaks and Croats to establish the Federation envisaged a Federation Human Rights Court. Such a court never came into existence, however. See respectively: Gro Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff Publishers: Leiden 2005) p. 71 and Nowak (1997-B) p. 187.

functioned from March 1996 until the end of its prolonged mandate on 31 December 2003.

The composition of the fourteen-member HRC was as follows: four of its members were appointed by the Federation, two by the Republika Srpska, and eight by the Committee of Ministers of the Council of Europe. Since the latter were not allowed to be citizens of Bosnia – or of any neighbouring state – the majority of the Chamber's members were foreigners, including its president. The members were to possess 'the qualifications required for appointment to high judicial office or be jurists of recognized competence.'[96] Annex 6 provided for the possibility to sit in panels of seven to deal with cases.[97] After having initially functioned as a plenary, the Chamber in 1998 established such panels.[98]

Cases reached the HRC through referral by the Ombudsperson or directly. The state and the Entities had recognized the individual right of application by signing Annex 6.[99] The Chamber could decide which applications to accept and, like the Ombudsperson, could choose in what priority to address them. Nevertheless, under Annex 6 it had to 'endeavor to accept and to give particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds.'[100] Simultaneously, priority had to be given to requests for provisional measures.[101] The Chamber's freedom of choice was limited in other ways as well, many of which resembled the admissibility criteria of the European Court of Human Rights.

The first relevant factor was the exhaustion of domestic remedies. The Chamber had to take into account whether effective remedies existed and whether applicants had demonstrated that these remedies had been exhausted.[102] In doing this, it applied the criteria and burden of proof assessment developed by the European Court in cases such as *Akdivar*.[103] This meant that it required remedies to be available not only in theory, but also in practice. Inactivity of the authorities in the face of human rights complaints or absence of thorough and effective investigations into alleged violations[104] meant that remedies were not effective. Excessive fees to be paid for judicial proceedings in restitution cases and the non-suspensive effect of appeals against evictions could be

96 Article VII of Annex 6.
97 Article X(2) of Annex 6.
98 Nowak (2003) p. 14.
99 Rona Aybay, 'A New Institution in the Field: The Human Rights Chamber of Bosnia and Herzegovina', *Netherlands Quarterly of Human Rights* vol. 15 (1997) pp. 297-545, see p. 538.
100 Article VIII(2-e) of Annex 6.
101 Article VIII(2-f).
102 Article VIII(2-a).
103 See e.g. HRC BiH, *Radosav Marković v. BiH and Federation of BiH*, 4 February 1997 (CH/96/9) and HRC BiH, *Krstan Čegar v. Federation of BiH* (admisssibility), 11 April 1997 (CH/96/21). See also section 8.3.
104 HRC BiH, *The Islamic Community in Bosnia and Herzegovina v. RS*, 11 June 1999 (CH/96/29) paras. 145-149.

reasons for the Chamber to come to the same conclusion.[105] As to the administrative proceedings introduced by the cessation laws, the Chamber held that they could 'in principle qualify' as an effective domestic remedy. In specific cases, however, undue delays under these laws and failure to uphold legal deadlines made the Chamber conclude that such ineffective remedies could not be expected to be exhausted.[106] The case law on exhaustion of remedies reveals a flexible and changing assessment by the HRC. In the first few years of its functioning, the Chamber acknowledged that domestic remedies were mostly non-existent or ineffective. Both the exhaustion requirement and the six months rule were therefore applied with leniency. Eventually, as the domestic institutions appeared to function with more effectiveness, the HRC could afford to be stricter.[107]

Secondly, an application should be lodged within six months after the final domestic decision. Thirdly, applications which did not substantially differ from earlier ones or which had been 'submitted to another procedure or international investigation or settlement' were not to be addressed by the Chamber. The same held for applications that were incompatible with Annex 6,[108] manifestly ill-founded or an abuse of the right of petition.

Finally, the Chamber could 'reject or defer further consideration if the application concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases' or any other Commission established by Dayton.[109] Concerning the latter, one could think for example of the CRPC. The case law of the Chamber shows that this did not happen in practice. Even if an applicant's case was also pending before the CRPC, the Chamber usually declared the case to be admissible.[110] In *Đ.M.* for example, the applicant tried to reclaim her home and had lodged claims both with the CRPC and the HRC. The Chamber held that it could declare the case admissible, since the applicant had 'raised several complaints substantially different from the subject matter which she has brought before the Annex 7 Commission.'[111] In that particular case, applicant Đ.M. had complained about the lack of action of the authorities and possible discrimination. And even if the CRPC had already issued a decision – as opposed to a pending case – the Chamber used the same line of reasoning.[112] A possible inefficiency through

105 E.g. HRC BiH, *Nada Blagojević v. RS*, 11 June 1999 (CH/98/645) para. 45; HRC BiH, *Božidar Gligić v. RS*, 8 October 1999 (CH/98/1198) para. 44.

106 HRC BiH, *Dušanka Onić v. Federation of BiH*, 12 February 1999 (CH/97/58) paras. 39-41.

107 Nowak (2003) p. 7; Englbrecht (2003) p. 98.

108 This is connected to the Chamber's jurisdiction; see section 11.4.4.

109 Article VIII(2-a-d).

110 Nowak (2003) pp. 7-8.

111 HRC BiH, *Đ.M. v. Federation of BiH*, 14 May 1999 (CH/98/756) para. 59. See also section 7.3.3.

112 HRC BiH, *Rasim Jusufović v. RS*, 9 June 2000 (CH/98/698) paras. 72-73. In the same case, the Republika Srpska also argued that the case was inadmissible because it was pending before the Office of the Ombudsperson. The applicant had, however, asked the Ombudsperson to discontinue its work on the matter, so that the Chamber could deal with it. Since this is what the Ombudsperson did, the HRC saw no reason to declare the case inadmissible on that account (para. 71).

overlapping or contradictory competences between CRPC and HRC therefore failed to materialize.

Several arguments weigh in favour of a flexible approach to admissibility criteria of human rights institutions in post-conflict situations.[113] The human rights violations in those cases are often widespread and of a particular gravity. Existing state institutions, as the reader may by now be well aware, are often either incapable of dealing with human rights complaints or even unwilling, especially when it concerns applications from opposing groups during the conflict. Bosnia was no exception. Annex 6 seemed to give at least the possibility for flexibility, since Article VIII stipulated that the criteria mentioned above were to be taken into account by the HRC in deciding which applications to accept. By contrast, the language of the ECHR leaves the European Court much less choice; Article 35 ECHR on admissibility criteria contains formulations such as 'may only deal with' and 'shall declare inadmissible.'[114] This difference implies that the HRC had a certain margin to weigh these criteria in a broader context. As illustrated above, notably in the context of the exhaustion of domestic remedies, this is indeed what happened in practice, with changes and adjustments over time. In this respect, the legal obstacles the individual faced were thus tailor-made to the situation: reasonable instead of insurmountable.

Once an application had been declared admissible, the Chamber could try and reach a friendly settlement.[115] Such a friendly settlement was binding upon the parties.[116] One may expect that a settlement is an unlikely prospect in polarized post-conflict states. The practice of the Chamber shows the validity of such an expectation in the case of Bosnia. During its entire existence, the Chamber managed to reach only one amicable resolution, in an employment discrimination case.[117] The contentious issue of housing restitution was thus among the many other human rights topics for which no amicable solutions were reached.[118] Nevertheless, it is arguably still good to include the option of friendly settlements; not *every* single claim is automatically so contentious to be unsolvable.

In dealing with the merits of cases the Chamber, in contrast to the CRPC, acted as a judicial institution. Both parties were heard based on the principle of equality of arms, mostly in a written procedure. On the basis of its findings, the Chamber then decided in a reasoned decision whether there had been a violation of Annex 6 and thus

113 See chapters 8-11 for a more elaborate analysis on this point.

114 Obviously, judges always have some freedom of interpretation, but the differences in language between Annex 6 and the ECHR show that the text which judges interpret does limit their margin of interpretation.

115 Article IX of Annex 6.

116 HRC, *Rules of Procedure*, Rule 44(5).

117 See Nowak (2003) p. 10. The case concerned was: HRC BiH, *Mirjana Malić v. Federation of BiH*, 25 May 1998 (CH/97/35).

118 In the case of *Kevešević*, exceptionally, the agent of the Federation had offered to enable an evicted applicant to return home as an amicable solution, but never followed through. The Chamber consequently dealt with the case on the merits: HRC BiH, *Ivica Kevešević v. Federation of BiH*, 10 September 1998 (CH/97/46).

mainly of one of the ECHR rights. It further indicated which steps the defendant party concerned was obliged to take to remedy the breach. As indicated in chapter 7 this included a wide array of possibilities, including compensation and restitution.[119] Although the Chamber's case load was much smaller than that of the CRPC – thousands of cases compared to hundreds of thousands[120] – the Chamber's method was much more labour-intensive due to its judicial approach. By contrast, as mentioned, the CRPC used a quicker administrative approach.[121] To cope with the large number of applications, the Chamber resorted to several efficiency enhancing methods: it joined similar applications to decide on them in one decision and resolved major contentious issues such as the housing legislation in leading cases. In these more important cases public hearings were held. The leading cases did little to alleviate the workload of the Chamber on the short term, but once implemented – for example by changing discriminating legislation – benefited many similar cases.[122]

As mentioned before, the Chamber's decisions were final and binding. As in the case of the CRPC, there was a possibility for internal review. If applications had been decided upon by a panel of seven, one of the parties to the case could ask for a review of the decision by the plenary.[123] This had to be done within a month after the decision had been communicated to the parties.[124] In total, the Chamber only made nine decisions on review.[125]

The parties were obliged to 'implement fully' its decisions.[126] In the first few years of the Chamber's existence, compliance rates were low – even given the fact that the Chamber had issued very few decisions at the time – and 'constituted a major challenge to its effectiveness and credibility.'[127] As a result of increased involvement of the High Representative in assuring implementation and monitoring by the OSCE the situation got better. Especially interim measures and compensation orders were generally complied with, whereas more far-reaching orders proved to be more difficult

119 See section 7.6

120 In its first six years (1996-2001) e.g., the Chamber received 8,481 applications. See: Englbrecht (2003) p. 37. In total the number was 15,169 applications, from the beginning until the end of its mandate in 2003. 6,243 were resolved during the Chamber's mandate period and thus 8,926 were still pending: Nowak (2003) p. 26. The pending cases were transferred to the Constitutional Court (see section 11.4.5). Of the 239 decisions on the merits, around 100 decisions or 40 percent of the total concerned return and restitution issues: Dietrich Rauschning, 'Umfang und Grenzen des Menschenrechtsschutzes durch die Human Rights Chamber für Bosnien-Herzegovina', in: K. Dicke a.o. (eds.), *Weltinnenrecht. Liber Amicorum Jost Delbrück* (Duncker & Humblot: Berlin 2005) pp. 551-569, see p. 554.

121 The difference in approach can be explained by the different mandates of the two Dayton institutions; whereas the CRPC had to ascertain ownership or legal possession, the Chamber faced the relatively more complicated task of balancing individual rights against the general interest.

122 Rauschning (2005) p. 567; Nowak (2003) p. 11.

123 Article X(2) of Annex 6.

124 HRC, *Rules of Procedure*, Rule 63(3).

125 Nowak (2003) p. 14.

126 Article XI(3 & 6) of Annex 6.

127 Nowak (2003) p. 15.

to implement.[128] By the year 2000 the rate of implementation was, as indicated in section 11.4.1, around two-thirds of the total. In September 2001 the Federation Entity was even fully complying with the decisions of the Human Rights Chamber.[129]

The influence of the Chamber's decisions reached further, however. Decisions were used as precedents both by the Chamber itself and by the parties to Annex 6, including domestic courts. They also served as arguments in the hands of the international community to advance property legislation reform.[130] In spite of these positive effects, it is clear that the Chamber as a safeguard on top of the domestic system was not able to completely fulfil all the expectations of offering reparation for any post-1995 human rights violation. In that context it should be emphasized that the domestic authorities, however flawed, were the primary responsible parties for securing human rights with the Dayton institutions formally assuming only a supporting role.[131]

The main preliminary conclusion one can draw from the above is that the different components of the operating system functioned more effectively when they supported each other. On the one hand, compliance with the Chamber's decisions increased when others used their clout to make that happen. On the other hand, other institutions could use the Chamber's decisions as independent yardsticks to further reforms compliant with the rule of law.

11.4.3 The Human Rights Chamber and the right to an effective remedy

The Human Rights Chamber operated, just like the European Court of Human Rights, as a subsidiary institution for the protection of human rights. Since it was largely modelled on its European counterpart, one would expect it to function in a very comparable way. However, there are two important background differences that led to specific legal questions: the post-Dayton Bosnian administrative and judicial structure was very complex and, secondly, the Chamber was much more closely connected to the Bosnian structures than the ECHR to its state parties:[132] the HRC was simultaneously part of and separated from the domestic system, somewhat like a watchdog connected with a chain to the ones it is supposed to watch. In this sub-section I will address how the HRC gave form to its subsidiary nature in this context.

The subsidiary nature implies primacy for the domestic authorities to put wrongs right. This is reflected in the dual elements of the operating system: exhaustion of domestic remedies and the concomitant right to an effective remedy as guaranteed by

128 Nowak (2001) pp. 777, 790-791.

129 Timothy Cornell & Lance Salisbury, 'The importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina', *Cornell International Law Journal* vol. 35 (2002) pp. 389-426, see p. 409.

130 Englbrecht (2003) p. 141.

131 Articles I-II of Annex 6.

132 Both in practical terms – it functioned in Bosnia itself – and formally, since it had a function under the Constitution. It was at the same time detached, since it was not subservient to any Bosnian institution and because of its composition (most members were internationally appointed non-Bosnians).

Article 13 ECHR. In many respects, the case law of the Chamber faithfully followed its European counterpart. This also applied to Article 13,[133] with one important specification. The Chamber precisely formulated in which ways it would assess whether a remedy was effective in the leading case of *Saša Galić*:

> 'Effectivenes' in the context of Article 13 comprises 4 elements: institutional effectiveness, which requires that a decision-maker be independent of the authority at fault for the alleged or actual violation; substantive effectiveness, which requires that the applicant be able to raise the substance of the right at issue before the national authority before which he is seeking the remedy; remedial effectiveness, which requires that the national authority be capable of finding a violation of the right or rights of the applicant which are at issue and material effectiveness, which requires that any remedy the applicant may have awarded in his favour may be such that the applicant may take effective advantage of it.[134]

In substance this concise and clear formulation does not differ from the case law in Strasbourg. Nevertheless, it seems particularly suited for the problems inherent to the Bosnian operating system of human rights protection: weak enforcement of judicial decisions, lack of independence of decision-makers, and numerous legal and practical requirements barring access to justice.

The case of *Nenad Miljković*[135] illustrated the multiple factors which could render domestic remedies ineffective. The housing commission of the RS Ministry had threatened to evict the applicant and his wife for being illegal occupants of a house, although the applicant had entered into a rental agreement with the owner of the house. Miljković appealed to the Ministry, but did not get a response. In assessing whether Article 13 ECHR had been violated, the Chamber considered the following. First, if the applicant would appeal to the second instance organ within the Ministry, there would be no institutional effectiveness, since the housing commission was itself part of the Ministry. Secondly, starting administrative proceedings before the RS Supreme Court was not realistic considering the high fee involved, 'in view of the fact that the applicant is currently unemployed'.[136] Thirdly, the decision to evict directly and automatically followed from RS law, which the Supreme Court could not declare unconstitutional. Material effectiveness was thus equally lacking. In conclusion, the Chamber ruled that Article 13 had been violated. In other cases the Chamber found

133 See e.g. Gemalmaz (1999) p. 307. For example, in the case of *Samy Hermas* the Chamber held that Article 13 included a duty of a thorough and effective investigation for arguable claims of Article 3 violations: HRC BiH, *Samy Hermas v. Federation of BiH*, 18 February 1998 (CH/97/45) paras. 108-110. see also: HRC BiH, *H.R. & Mohamed Momani v. Federation of BiH*, 5 November 1999 (CH/98/946) para. 123.

134 HRC BiH, *Saša Galić v. Federation of BiH*, 12 June 1998 (CH/97/40) para. 56.

135 HRC BiH, *Nenad Miljković v. RS*, 11 June 1999 (CH/98/636).

136 Ibid., para. 71. This was also relevant in deciding on the admissibility of cases, which emphasizes the close connection between the exhaustion of effective remedies and the right to an effective remedy; see section 11.4.2.

that the lack of any response from the authorities to housing restitution claims,[137] the lack of sufficient action undertaken to reinstate an applicant in his home in the face of public hostility,[138] or the failure to give an applicant the decision authorizing eviction – which meant that he 'could not be expected to know to which body he should submit any appeal' or what to base it on[139] – also violated Article 13.

This short overview shows that the case law of the Chamber on this point completely followed the European Court's line that remedies should be effective 'in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities'.[140] The *Galić* formula therefore should not be seen as an attempt to take a different path than Strasbourg. Rather, I would argue that it provided an easily graspable version of the minimum requirements for a national human rights operating system. In this way the Chamber presented the domestic authorities with a kind of authoritative and concise, but complete explanation of what Article 13 entailed, without having to wait for the different aspects of the Article to come before the Chamber at random in the cases it had to decide upon. In a post-conflict context this was probably a wise way to proceed, considering that the rule of law had to be re-established almost from scratch.

11.4.4 Jurisdiction of the Human Rights Chamber

One of the main elements of any operating system is jurisdiction. The jurisdiction of the Human Rights Chamber was limited *ratione materiae* to complaints concerning violations of the ECHR and to discrimination issues for a range of human rights treaties mentioned in the Appendix to Annex 6 of Dayton.[141] To mention just one example, a claim of an applicant claiming a right to be housed was rejected, since the ECHR does not contain such a right. Nor was it relevant that Article 11 of the International Covenant on Economic, Social and Cultural Rights did specify a right to housing. This treaty, mentioned in the Appendix to Annex 6 could only be invoked in relation to discrimination, which was not the case in the specific situation involved.[142]

The jurisdiction *ratione personae* defined the parties between which the Chamber could adjudicate. This was the same as that of the Ombudsperson,[143] which meant that applicants could be persons, NGOs, groups of individuals, the state and the Entities claiming to be a victim of human rights violations. The victim requirement meant that

137 *Đ.M.*, para. 95.
138 HRC BiH, *Neđo & Saveta Trklja a.o. v. Federation of BiH*, 10 May 2002 (CH/00/6444 a.o.) para. 86.
139 *Saša Galić*, para. 58.
140 ECtHR, *Aksoy v. Turkey*, 18 December 1996 (Appl.no. 21987/93) para. 95. See also section 8.4.
141 Article II (2) juncto Article VIII (1) of Annex 6. See also
142 HRC BiH, *S.K. v. RS*, 14 May 1999 (CH/98/1387) paras. 12-13.
143 With the slight difference that the Ombudsperson could also initiate proceedings before the Chamber and could intervene in any proceedings: article V(7) of Annex 6. In practice the Ombudsperson referred very few cases to the HRC: Nowak (2001) p. 788.

one could not complain on behalf of others,[144] unless one was acting, mostly as close family, 'on behalf of alleged victims who are deceased or missing'.[145] Defendants could be the state and/or the Entities. They were responsible for the lower levels of administration.[146] No matter how decentralised or quasi-autonomous local authorities were, the Chamber's system of jurisdiction ensured that it was only the state, the Federation, and the RS which would be held accountable in the proceedings. Thus a plea by the Federation that the Federation's constitution provided that housing matters were the responsibility of cantons and districts and that it was therefore not responsible under Annex 6, was rejected by the Chamber.[147]

The legal situation was different for acts or actions *exclusively* within the mandate of international organisations (OSCE, UNCHR) or institutions with functions under Dayton. These actors fell outside the Chamber's jurisdiction altogether.[148] This approach could lead to ironic results. In the case of *Andrija Miholić*, the Federation objected to being held responsible for a provision in one of the cessation laws which had been inserted by the High Representative. The Chamber held that the High Representative had substituted himself for the Federation authorities and that the law concerned was still in nature a Federation law. Thus, the Federation could be held accountable.[149] From the perspective of democratic or legal accountability this position of the High Representative is of course highly unsatisfactory. Nevertheless, the Chamber was legally correct, since Annex 6 did not contain the possibility of complaining against the High Representative before the HRC. In addition, the applicant in the case at least had one level of the administration to turn to, since the Federation Entity *was* held accountable.

The complex Bosnian legal situation and the concomitant division of overlapping competences caused applicants to be uncertain against whom to complain. This did not preclude the Chamber from holding other or more defendant parties accountable than those which the applicant indicated.[150] For housing issues, the defendant party was in the large majority of cases one of the two Entities, since this field of policy fell under their responsibility.[151] Only exceptionally was the state's responsibility involved, for the reason that it was responsible for the acts of the state organs of the pre-Dayton

144 See e.g. HRC BiH, *CD Coalition Deputies v. RS*, 13 March 1999 (CH/98/938) para. 12.

145 Article VIII(1) of Annex 6. See e.g. HRC BiH, *Vlado Podvorac a.o. v. BiH and Federation of BiH* (admissibility), 14 May 1998 (CH/96/2 a.o.) para. 49, in which the widow of the applicant was regarded as the applicant, instead of her deceased husband.

146 Article II(2) of Annex 6.

147 HRC BiH, *Branko Medan a.o. v. BiH and Federation of BiH*, 3 November 1997 (CH/96/3 a.o.) paras. 28-30.

148 Gemalmaz (1999) p. 298. See e.g. HRC BiH, *Adnan Suljanović a.o. v. BiH and RS*. 14 May 1998 (CH/98/230 a.o.) paras. 42-43.

149 HRC BiH, *Andrija Miholić a.o. v. BiH and Federation of BiH*, 7 December 2001 (CH/97/60 a.o.) paras. 126-133, containing references to other comparable cases. See also: Englbrecht (2003) p. 96.

150 Gemalmaz (1999) p. 299; Englbrecht (2003), p. 95.

151 See section 7.2.2. E.g. HRC BiH, *Bosilijka Jokić a.o. v. BiH and Federation of BiH*, 8 February 2002 (CH/99/3071 a.o.) para. 84.

Bosnian state, which had continued to function temporarily in the weeks after Dayton.[152]

The constitutional, and thus functional, division of competences determined which of the parties to Annex 6 were held accountable in each particular case. But what happened when the territory where the impugned acts or omissions occurred was disputed? The problem presented itself in the most obvious way in the case of *Azra Zornić*, in which all three Annex 6 parties were involved.[153] The case concerned a claim for housing restitution of an apartment located on territory disputed between the Entities. The Dobrinja neighbourhood of Sarajevo was *de jure* part of the Federation according to Dayton, but *de facto* under the control of the Republika Srpska.[154] The Chamber assessed the responsibility of each of the three defendant parties separately. It did not hold the state responsible for the alleged failure of the Entities to help the applicant.[155] The HRC – using an argument by now familiar to us – remarked that the Constitution did not give the state competence to deal with housing restitution. Additionally, the Entities were under 'separate and individuals obligations to secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms'.[156] Regarding the Republika Srpska, the Chamber noted that Dobrinja was under the Republika's 'effective control'. It was immaterial, according to the Chamber whether the area was located inside or outside the territory of the RS. Even in the latter case, the Entity would be responsible for acts producing effects outside its own territory, as the Chamber put it in a direct and explicit reference to the Strasbourg *Loizidou* judgment.[157] Finally, the Federation was also held accountable. Although the Chamber acknowledged that the Federation had no *de facto* power in the area, it was at the minimum under the positive obligation 'to act in accordance with its own law in determining the applicant's claims.'[158] Rather than being comparable to a duty to use influence over areas over which one no longer has control, as the European Court required in the later case of *Ilaşcu a.o.,*[159] this concerned an internal procedural duty for the Federation.

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152 HRC BiH, *Milivoje Bulatović v. BiH and Federation of BiH*, 7 November 1997 (CH/96/22) paras. 49-52.

153 HRC BiH, *Azra Zornić v. BiH, RS, and Federation of BiH*, 8 February 2001 (CH/99/1961).

154 The problem was due to a difference between the ceasefire line and the – apparently mistaken – Inter-Entity Boundary Line on the official Dayton map.

155 But see the separate opinions of Nowak a.o. and of Masenkó-Mavi, who all do hold the state accountable for failure to take steps to enforce the constitutional right to housing restitution.

156 Ibid., para. 100.

157 Ibid., paras. 81-83. Reference to: ECtHR, *Loizidou v. Turkey* (preliminary objections), 23 March 1995 (Appl.no. 15318/89). See also section 10.5.

158 Ibid., para. 107.

159 ECtHR, *Ilaşcu a.o. v. Moldova and Russia* (merits), 8 July 2004 (Appl.no. 48787/99) para. 313. Note that this case was decided three years after the Chamber's *Zornić* case. See also section 10.6 for an extensive analysis. Nowak, in his separate opinion in the *Zornić* case, does argue that a positive obligation exists for the Federation to try and secure human rights in its *de lege* territory, even when the area is factually out of its control. This argument convincingly foreshadows the European Court's *Ilaşcu* line of reasoning.

The other case in which questions of formal and legal control over a certain area arose, was *Bisera Spahalić a.o.*[160] It concerned the restitution of several houses located in the disputed area of Brčko. During the Dayton negotiations no agreement could be reached on this area, which was under the factual control of the RS. Following an arbitral award, the district became self-governing on 8 March 2000 and fell directly under the state instead of the Entities. The Chamber determined the following concerning responsibility for human rights violations: for each specific policy field the responsibility shifted at the moment that the *de facto* control or authority was transferred from the RS to the district and thereby indirectly to the state.[161] Although in this case the transfer was relatively orderly – in contrast to situations of conquest and occupation – the principle applied is the same: the effective control over a certain area is the defining element in determining responsibility. Once again, 'Sarajevo' closely follows Strasbourg's trail.

The final dimension of jurisdiction is its temporal aspect.[162] The Chamber's jurisdiction *ratione temporis* was clarified early on. In its very first decision, the HRC noted that Dayton had entered into force on 14 December 1995 and that it could, 'in accordance with generally accepted principles of international law', not be applied retroactively. Consequently, the Chamber held that it was not competent to consider events that took place before that date. The only exception consisted of continuing situations.[163] As in general international law and the case law of the ECHR, the Chamber thus distinguished between instantaneous acts and continuing situations.[164] The Chamber generally followed this line. The killings, expulsions, and the destruction of buildings that had taken place during the war fell outside the Chamber's jurisdiction.[165] Justifiably so from a legal point of view, I would argue, since these are clearly instantaneous acts. From a humanitarian perspective these gravest of human rights violations of course call for some form of remedy, but unfortunately the HRC was simply not established to address these war-time violations. By contrast the threat of the execution of the death penalty and the continuous adjournment of court proceedings were seen by the Chamber as continuing situations, even though the first relevant

160 HRC BiH, *Bisera Spahalić a.o. v. BiH and RS*, 7 September 2001 (CH/00/4116 a.o.).

161 Ibid., paras. 107-119.

162 The Chamber only addressed this issue in relation to the ECHR, as far as I have been able to find. The former Yugoslavia had been a party to all existing universal human rights before the start of the Bosnian conflict. Upon its independence, Bosnia deposited notifications of succession to those treaties with the UN Secretary-General, with effect from 6 March 1992. However, this difference with the ECHR is not relevant for the practice of the HCR, since its mandate only began on 14 December 1995, even with respect to the UN human rights treaties. See also: Rauschning (2005) p. 552.

163 HRC BiH, *Josip, Bozana & Tomislav Matanović* (admissibility), 13 September 1996 (CH/96/1).

164 See section 9.8. See also: Nowak (2001) p. 782.

165 *The Islamic Community in Bosnia and Herzegovina*, para. 133.

act – the death sentence and the application to the domestic court respectively – took place before the crucial date.[166]

The Chamber's decisions in housing cases conformed to this approach. In *Dušan Eraković* the Chamber held that the impossibility to return to one's pre-war home was a continuing situation and thus fell within its jurisdiction, even though the direct cause of this impossibility was an instantaneous act: the declaration of abandonment of an apartment. It thus considered itself competent to consider the case 'in so far as this situation has continued past 14 December 1995. In doing so the Chamber can also take into account, as a background, events prior to that date.'[167] In a later case it ruled similarly for an applicant whose house had been declared *temporarily* abandoned.[168] However, when all contested acts concerning someone's house took place before the crucial date and the applicant clearly gave up an occupancy right voluntarily, the Chamber declared the case inadmissible *ratione temporis*.[169]

The Chamber's approach almost completely focused on the facts and not on the extent and nature of the human rights obligation involved. Pauwelyn's proposed toolbox is not clearly used.[170] In the case of involuntary loss of housing during the conflict followed by a continuing impossibility to return to it, applications have generally been declared admissible.[171] Legal conceptions then do play a role, but only very implicitly. The housing in question is apparently still seen as the applicant's home and thus worthy of protection under Article 8. If the state bars returns – an interference – or refuses to evict temporary occupants – an omission in relation to a positive obligation – the situation involved is a continuing one. The fact that these assumptions remain implicit makes the Chamber's approach more factual and less theoretical than that of the ECHR. The result is not radically different, however.

11.4.5 The end of the story? Integration of the Human Rights Chamber into the Constitutional Court

Throughout its existence the Bosnian Human Rights Chamber was plagued by lack of funds, although the situation got better over time.[172] Towards the last years of its

166 Respectively: HRC BiH, *Sretko Damjanović v. Federation of BiH* (admissibility), 11 April 1997 (CH/96/30) and HRC BiH, *Stjepan Bastijanović v. BiH and Federation of BiH* (admissibility), 4 February 1997 (CH/96/8).

167 HRC BiH, *Dušan Eraković v. Federation of BiH*, 15 January 1999 (CH/97/42) para. 37.

168 HRC BiH, *Mirjana Matić v. Federation of BiH*, 11 June 1999 (CH/97/93) para. 51.

169 HRC BiH, *Lj.P. v. Federation of BiH* (admissibility), 15 October 1998 (CH/98/651) paras. 12-14.

170 See section 9.5.

171 See the decisions mentioned above.

172 Nowak (2001) p. 776, 785. In 2002, for example, the Chamber's budget was 3.6 million Bosnian Konvertible Marks (KM) which approximately equals 2.4 million United States Dollars (see: HRC BiH, *Annual Report 2002*). In the same year the budget of the Ombudsperson was 1.9 million KM or 1.3 USD (The Human Rights Ombudsman of Bosnia and Herzegovina, *Annual Report 2002*). The CRPC's budget, as far as information is available, was 6 million USD in 2000 and had decreased to 3.9 million

existence, however, problems increased again as the international community embarked upon an exit strategy. This strategy focused on a transfer of tasks thus far performed by (semi-)international institutions to the domestic authorities. For the Human Rights Chamber this resulted in a gradual dissolution and integration into the Constitutional Court. The advantage was that all final appeals concerning human rights were vested in a single body.[173]

Annex 6 of Dayton provided in Article XIV that five years after the entry into force of the Dayton Peace Agreement, 'the responsibility for the continued operation of the Commission shall transfer from the Parties to the institutions of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above.' At the end of 2000, its mandate was extended for a further three years, until 31 December 2003.[174] In September 2003 the parties signed an agreement pursuant to Article XIV, drafted by the Office of the High Representative, which provided the following: the Chamber's work would be taken over by a new Human Rights Commission within the Constitutional Court.[175] This Commission's role was to work on an interim basis, functioning until the end of 2004 at the latest, to deal with the almost 9000 pending claims of the Chamber.[176] Human rights cases submitted after 31 December 2003 would be decided by the Constitutional Court as such.[177] The interim Commission within the Constitutional Court, symbolically and in contrast to the old Chamber, counted a majority of Bosnians – three out of a total of five members.

The transfer of responsibilities and dissolution of the Human Rights Chamber was enacted in spite of strong objections from the Chamber itself. The objections were both practical and theoretical, all focussing on a decreased protection of human rights for Bosnia. In practical terms, the Bosnian institutions were deemed not yet to be ready to take over the responsibilities of the Chamber. The downsizing of the amount of judges and a concomitant lowering of the budget were said to be detrimental to the effective work of the interim Commission:[178] it would have to decide more cases in a year than the Chamber in the entire eight years of its existence.[179] From a theoretical and legal perspective, the dissolution was justifiably contested. Indeed, the text of

USD in 2003 (Philpott (2005) p. 23). Considering the thousands of cases these institutions had to process, these budgets are not very high.

173 See also: Venice Commission, *Merger of the Chamber of Human Rights and the Constitutional Court of Bosnia and Herzegovina*, 3 April 2000, CDL-INF(2000)8, p. 2; Venice Commission, *Opinion on the Constitutional Situation in Bosnia and Herzegovina with Particular Regard to Human Rights Protection Mechanisms*, 18 November 1996, CDL-INF(1996)009, para. 4.4.2.

174 Nowak (2003) p. 18.

175 Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, 22 & 25 September 2003. To be found on www.hrc.ba.

176 Rauschning (2005) p. 566; Nowak (2003) p. 19.

177 Para. 5 of the aforementioned Agreement.

178 Nerma Jelacic, 'Bosnia: New Human Rights Body under Scrutiny', *Balkan Crisis Report* No. 464 (16 October 2003) www.iwpr.net.

179 Nowak (2003) p. 19.

Dayton did not establish the Human Rights Chamber as an interim body[180] and Article XIV of Annex 6 relates to a possible transfer of the *'continued* operation'[181] of the Chamber from the international level to the domestic authorities. One could argue that the Bosnian human rights situation has entered the European mainstream with the formal entry into force of the ECHR and start of the jurisdiction of the European Court of Human Rights on 12 July 2002. Eventually, the human rights of Bosnians are thus still guaranteed an international institution. Nevertheless, the procedural bars to arrive in Strasbourg are higher than those of the Chamber. Moreover, the Chamber had much wider powers to provide redress for victims. Finally, as argued, the Bosnian constitutional setup did not provide for the dissolution of the Chamber. The decision to do so is thus contrary to the Dayton.[182] For a post-conflict state such as Bosnia which, according to its own constitution is to ensure the highest level of internationally recognized human rights',[183] this would seem to be a more than unfortunate development.

In practice, however, the situation turned out to be less dramatic than it seemed at the time of transfer to the Constitutional Court. The Commission within the Court dealing with the heritage of HRC cases brought the work to a near-end within three years. By December 2006 only 450 of the more than 9000 claims were still pending.[184] Thus, even though the theoretical objections still apply, in practice at least the Chamber's worries did not materialise.

11.5 OTHER INSTITUTIONS INVOLVED

The Dayton structure gave an explicit role to several other international institutions. The office of the UN High Commissioner for Refugees (UNHCR) was entrusted with the overall coordination of the return of refugees and displaced persons.[185] The parties to Annex 7 were obliged to enable returns and provide repatriation assistance in accordance with UNHCR plans and to give UNHCR and other organizations unrestricted access to all refugees and displaced persons.[186] The UNCHR was thus mainly given a practical rather than a legal role in the returns process. It even reconstructed destroyed housing.[187] Since restitution and returns were so closely connected, the

180 See also Article II(1) of Annex 4 (the Constitution). All of this in spite of the claimed intentions of Dayton's drafters; see section 11.4.

181 Emphasis added.

182 Nowak (2003) p. 19.

183 Article II(1) of Annex 4.

184 Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, *Monthly Statistical Summaries; December 2006* (www.hrc.ba/commission).

185 See Article III(1) of Annex 7.

186 Articles II(1), IV, and III(2) respectively.

187 Marcus Cox, 'The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina', *International and Comparative Law Quarterly* vol. 47 (1998) pp. 599-631, see p. 624.

UNHCR did cooperate with other institutions to speed up the restitution process in practice.[188]

The Organization for Security and Co-operation in Europe (OSCE), together with the 'United Nations High Commissioner for Human Rights, and other intergovernmental or regional human rights missions or organizations' was given the general task to closely monitor the Bosnian human rights situation. The parties to Annex 6 joined to give them 'full and effective facilitation, assistance and access.'[189] Direct institutional links with the Bosnian human rights bodies existed in several ways; the Chairman-in-Office of the OSCE appointed the Bosnian Ombudsperson and the Human Rights Chamber forwarded its reports on friendly settlements and its decisions to the OSCE.[190] In the summer of 2002 the High Representative delegated his own function of closely monitoring the implementation of the decisions of the Chamber to the OSCE.[191] Like the UNHCR, it took an active role in the restitution process in practice, as we will see in the following chapter.

The United Nations Mission in Bosnia and Herzegovina (UNMiBH) was less directly involved in the restitution process. It was responsible for the International Police Task Force (IPTF). IPTF had the obligation to report on human rights violations.[192] Concerning restitution, IPFT could issue non-compliance reports against local police officers who refused to assist in lawful evictions. This could result in decertification – and thereby dismissal – of those officers.[193]

A pivotal role was given to the High Representative (often referred to as OHR, Office of the High Representative). He was given the task of coordinating the civilian aspects of the Dayton Peace Agreement.[194] His powers were very extensive for an international representative in a foreign country, since the parties were obliged to fully cooperate with him and, importantly, he was 'the final authority in theatre' concerning the interpretation of those civilian aspects.[195] His political guidance came from the socalled Peace Implementation Council (PIC), a body of involved countries and organizations, which was established in December 1995. In the German city of Bonn, in 1997, PIC authorized the High Representative's interpretation of Dayton to the effect that he could make binding decisions – which in practice included introducing or amending legislation – when the Bosnian parties failed to agree on issues in the implementation of Dayton or when domestic decisions were contrary to Dayton.[196]

188 See chapter 12.
189 Article XIII(2) of Annex 6.
190 Articles IV(2), IX(2), and XI(5) respectively.
191 Nowak (2003) p. 15.
192 Article VI(1) of Annex 11.
193 Philpott (2005) p. 8.
194 See Article I of Annex 10 and SC Res. 1031, 15 December 1995, para. 26.
195 Articles IV and V of Annex 10 respectively.
196 OHR, *PIC Bonn Conclusions*, 10 December 1997, conclusion XI.

This possibility became known as the 'Bonn powers' of the High Representative.[197] He used these powers several times to amend legislation on housing restitution and to remove obstructive officials.[198] In practice, OHR could thus overrule unwilling local authorities and put the restitution process on the right track when it tended to deviate from the requirements of Dayton too far.

Apart from the involvement of international actors, the process of housing restitution was heavily dependent on domestic institutions. Although this strengthened 'local ownership' of the restitution process, many domestic organs were reluctant or unwilling to further that very process. Especially minority returns were not very popular within many domestic institutions which have been characterized by one observer 'as a playground of nationalist policies.'[199] Yet, under Annex 7 the parties – the Bosnian state and the two Entities – had recognized the right to housing restitution. They were also bound to cooperate with Human Rights Commission and to 'respect and implement its decisions expeditiously and in good faith, in cooperation with relevant international and nongovernmental organizations having responsibility for the return and reintegration of refugees and displaced persons.'[200]

The responsibility for housing issues lay with the Entities and not with the central state. Between the Entities important differences existed in the way these issues were dealt with. This was to no small extent due to the difference in organization. The Republika Srpska was strongly centralized and had only two levels of governance: the Entity and the municipalities. By contrast, the Federation was highly decentralized and functioned on five levels: municipalities, districts, cities, cantons and the Federation itself. Each canton had its own constitution. Human rights institutions were differently organized and there was no coordination between the Entities on this point.[201]

Housing restitution in the Republika Srpska was the responsibility of the Ministry for Refugees and Displaced Persons (MRDP). Under RS law the MRDP was responsible for processing restitution claims. The Ministry had branch offices in the municipalities, which were also responsible for the protection of refugees and IDPs from elsewhere. This sometimes resulted in conflicts of interests, since those groups were often housed in properties which were to be returned to the original inhabitants. Since the branch offices were directly answerable to the MRDP, external pressure on the central Entity level had relatively direct effects on the local level.[202] On the other hand, the structure of the Federation made this much more difficult, since the cantons were

197 Charles B. Philpott, 'From the Right to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina', *International Journal of Refugee Law* vol. 18 (2006) pp. 30-80, see p. 38.

198 Nowak (2003) p. 15.

199 Masenkó-Mavi (2001) p. 67.

200 Article VIII of Annex 7.

201 Nedjo Milicevic, 'The Role and Relationship of the Constitutional and Non-Constitutional Domestic Human Rights Enforcement Mechanisms', in: Michael O'Flaherty & Gregory Gisvold (eds.), *Post-War Protection of Human Rights in Bosnia and Herzegovina* (The Hague: Martinus Nijhoff Publishers 1998) pp. 13-25, see p. 14 and p. 23 for a precise and elaborate description.

202 Philpott (2005) p. 41; Philpott (2006) pp. 5-6.

highly autonomous. Even though restitution legislation was enacted on the Federation level, implementation was the responsibility of the cantons and municipalities. In many of the latter, two different offices dealt with claims, one with social housing and one with private property. The cantons did not always provide them with sufficient resources to do their work, however.

The 1998 cessation laws in both Entities enabled claimants to directly turn to local administrative authorities for housing restitution. Previously, one had to go to court with very little chances of success since many cancellations of occupancy rights and transfer of property had been made in accordance with the wartime laws. In the alternative, one could claim with the CRPC, but as indicated above implementation was lacking for decisions of that body. Under the cessation laws claims were to be filed in the municipality in which the housing was located. No proof of title was necessary, although submission of such proof obviously made the decision easier to make. The authorities were obliged to issue a decision to the claimant within 30 days.[203] At the start, the process was only an administrative one for claims over housing which had been re-allocated under the wartime legislation. Other cases, such as illegal occupation, were still decided upon by courts. The 1999 amendments to the cessation laws brought the latter into the administrative process, which allowed for a more rapid processing of claims.[204]

The differences in housing restitution systems between the Entities, the changes in the restitution legislation, and the duplication of work with the CRPC made the operating system far from efficient. Moreover, as we will see in the next chapter, active obstruction on the part of domestic authorities compounded this. Only when the international actors mentioned above changed their mainly monitoring role into a more unified and pro-active approach did the restitution process gain pace.

11.6 Tested from above: the link between the Bosnian and European human rights operating systems

One specific part of the operating system has not been dealt with yet: the link between the Bosnian housing restitution process and the machinery of the European Court of Human Rights in Strasbourg. As mentioned in section 11.4.3, the Bosnian Human Rights Chamber had been set up to help and ensure the highest level of human rights in Bosnia and Herzegovina and its function was subsidiary to domestic institutions. Its decisions were final and binding. Initially, the Chamber was the only semi-international independent human rights institution the Bosnians could turn to. The situation changed with the start of the European Court's jurisdiction at Bosnia's accession to the ECHR on 12 July 2002. Depending on whether the Human Rights Chamber would be considered as a national or an international institution, the European Court could or could not deal with claims which had already been adjudicated by the Chamber.

203 See section 7.2.2 for the precise references to this legislation.
204 Philpott (2006) p. 42.

The question arose and was solved by the European Court in the case of *Jeličić* in 2005.[205] The case concerned the inability of the applicant to recover foreign currency assets from a Bosnian bank account. During the proceedings at the national level, the applicant received a court judgment ordering her savings to be paid to her. Since this did not happen, Jeličić lodged a claim with the Bosnian Human Rights Chamber. The Chamber held on 11 February 2000 that the failure by the authorities of the Republika Srpska constituted a violation of Article 6 and P1-1 ECHR.[206] Since even this decision did not solve matters, the applicant pursued her case in Strasbourg. The Bosnian state argued that the case should be declared inadmissible under Article 35(2)(b) ECHR. This article provides that the Court shall not deal with applications which are substantially the same as a matter that 'has already been submitted to another procedure of *international* investigation or settlement and contains no relevant new information.'[207] Bosnia argued that the HRC was exactly such an international mechanism.[208]

The Court held that to assess whether the HRC was an international body, it had to take the legal character of its founding instrument as the point of departure. Nevertheless, it considered four factors concerning the essential nature of the body to be determinative: its composition, competence, funding, and place – 'if any' as the Court added – in an existing legal system. As to the starting point, the founding document of the HRC was Annex 6 of Dayton. Although the signatories to this Annex were only the state of Bosnia and its Entities, the parties to Dayton itself were several *states*: Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia. Since this made Dayton clearly an international agreement and since the Annexes formed an integral part of it, the Court was of the opinion that these Annexes were thus also international treaties. Although I agree with the outcome of the Court's reasoning, it would be more correct to say that Dayton as a whole was an international agreement and that therefore the HRC had been set up under such an international instrument.

The other factors, which the Court had dubbed 'determinative', mostly pointed in the opposite direction. As to the HRC's composition the Court noted that the majority of its members were foreign and that the international members were appointed by the Council of Europe. The purpose of this, according to the Court, was to 'reinforce [the Chamber's] appearance of impartiality and to bring to the Chamber knowledge and experience of the Convention and its case-law.' The composition was thus assessed

205 ECtHR, *Jeličić v. Bosnia and Herzegovina* (admissibility), 15 November 2005 (Appl.no. 41183/02).

206 HRC BiH, *Ruža Jeličić v. RS* (merits), 11 February 2000 (CH/99/1859).

207 Emphasis added.

208 Interestingly, Bosnia did not raise the issue of inadmissibility *ratione temporis*, even though all domestic proceedings had taken place before the date on which the European Court's jurisdiction began (12 July 2002). It is not clear whether this was because it accepted that situation amounted to a continuing violation or because it supposed that the direct effect of the ECHR since Dayton (1995) made such an objection impossible. Although the latter argument would take away much of the rationale of excluding the European Court's jurisdiction, I would still argue that the declaration of being bound by the norms of the ECHR, as included in Dayton, and the start of the Court's jurisdiction are not the same thing.

from a teleological rather than a formal perspective. The Chamber's competences, the second criterion, only related to the human rights obligations of *Bosnian* authorities. The Chamber's competence was therefore essentially that of a domestic body. Concerning funding, the Court held that although in practice external donors funded much of the Chamber's functioning, the Bosnian parties bore the formal financial responsibility for the Chamber. Finally, as to the last criterion, the Court found that the Chamber had its place in the legal system of Bosnia, albeit a 'particular' one. Even the OSCE's supervision of the execution of Chamber decisions did not alter its 'essentially domestic character', since it was 'a factor explained by the post-war context of the establishment of the Chamber.'

In conclusion, the Court declared the case admissible, holding that – notwithstanding the international treaty by which the Chamber had been created – most factors considered made it a national rather than an international body. Chamber proceedings should thus be seen as part of the domestic remedies of Bosnia. The Court confirmed its stance in later admissibility decisions concerning the decisions of the HRC's successor, the Human Rights Commission within the Constitutional Court[209] and concerning judgments of the Constitutional Court.[210]

The case law of the Convention institutions in this context is relatively scarce. The European Commission of Human Rights, when it still existed, expressed the view that 'another procedure of international investigation' in what is now article 35(2)(b) ECHR referred to 'judicial or quasi-judicial proceedings similar to those set up under the Convention' and which were set up by states.[211] In the last year of its existence, 1998, the European Commission clarified further on this point by holding that both the form of the procedure – the possibility to lodge a petition – and the powers of the body involved – could it investigate or not and could it attribute responsibility? – were relevant factors.[212] The European Court adhered to this approach by holding that under article 35(2)(b) more than a formal verification was needed; it should examine 'where appropriate' the nature of the supervisory body, the procedure followed and the effect of these decisions.[213] To a considerable extent, the *Jeličić* decision followed this approach, since the nature or character of the Bosnian Human Rights Commission and the effect of its decisions – they were only directed at the Bosnian authorities – were assessed. The procedure followed did not play an explicit role, probably because it had been so obviously been modelled on the procedure of the European Court itself. Thus the conclusion of the Court in *Jeličić* is largely in line with earlier case law. Nevertheless, the Court's reasoning seems somewhat unsteady by focussing on formal factors for some criteria (funding) and on the underlying reality for others (composition, place in the domestic system).

209 ECtHR, *Suljagić v. Bosnia and Herzegovina* (admissibility), 20 June 2006 (Appl.no. 27912/02).
210 ECtHR, *Mirazović v. Bosnia and Herzegovina* (admissibility), 16 May 2006 (Appl.no. 13628/03).
211 EComHR, *Lukanov v. Bulgaria*, 12 January 1995 (Appl.no. 21915/93).
212 EComHR, *Varnava a.o. v. Turkey*, 14 April 1998 (Appl.nos. 16064/90 a.o.).
213 ECtHR, *Decision on the Competence of the Court to Give an Advisory Opinion*, 2 June 2004, para. 31.

As to another government objection, that the applicant had failed to exhaust domestic remedies by not applying to the Constitutional Court, the Court held that the applicant had the freedom to choose between various available domestic remedies. An application before the HRC therefore sufficed. Implicitly, the Court confirmed the earlier analysis that the HRC and the Constitutional Court formed parallel procedures in human rights cases in the Bosnian context.[214]

In the later case of *Janković* the Court considered a complaint about an eviction. The applicant in the case had applied to the Human Rights Chamber, but only after the eviction took place, instead of asking for an interim measure against the announced eviction. Moreover, he later withdrew his complaint.[215] The European Court held that Janković had failed to exhaust domestic remedies, since the HRC could have provided an effective remedy for the alleged human rights violation: 'had the applicant applied earlier [to the HRC] and had he not withdrawn his case, his eviction could have been suspended and/or he could have been afforded redress.'[216] In passing the Court followed the HRC's assessment of the ineffectiveness of another Bosnian judicial remedy by holding that the system to enforce CRPC decisions did not work.

The approach of the European Court of Human Rights towards the Bosnian operating system shows on the one hand that it was not prepared to recognize the semi-international Daytonian institutions as its peers in the sense of Article 35(2)(b) ECHR. In spite of the formal character of the Chamber as an international institution, its focus on one particular legal order and its practical work support the Court's conclusion on this point. On the other hand, the European Court did recognize the value of the Human Rights Chamber; it considered it to be an effective remedy on the national level and accepted the HRC's views concerning the effectiveness of other Bosnian remedies. In its assessment the Court showed its awareness of the special post-conflict nature of the Bosnian system. Simultaneously, it integrated the *sui generis* HRC in the European system of human rights. For the individual seeking housing restitution this means that the road to Strasbourg is still open,[217] even if he or she has received a HRC decision. Choosing to take that road will nevertheless prolong proceedings even more and, additionally, the possibilities of the European Court to offer redress are more limited than those the Bosnian Human Rights Chamber had.

11.7 CONCLUSION

The Bosnian operating system as it has existed since the Dayton Peace Agreement is far from simple. The specific operating systems for housing restitution and human

214 See section 11.3.

215 It remains unclear what the reason for this withdrawal was.

216 ECtHR, *Janković v. Bosnia and Herzegovina* (admissibility), 16 May 2006 (Appl.no. 5172/03).

217 It must be noted that the dissolution of the Chamber and the integration of (part of) its competences in the Constitutional Court has brought the Bosnian system closer to an 'ordinary' European national operating system than it was in its initial Daytonian form.

rights are no exceptions, as the overview above has shown. Three kinds of institutions were involved in the Daytonian housing restitution process: international institutions, domestic ones, and the mechanisms established by the Dayton Peace Agreement itself. The international institutions mainly had a facilitating and monitoring function, but this role proved important in pushing the process forward, as we shall see in the next chapter.

The Daytonian institutions had specific, but partly overlapping functions.[218] The CRPC and the Human Rights Commission both dealt with housing restitution cases, albeit from different angles. The CRPC was set up to deal with restitution claims. Due to implementation problems of its decisions, its role was limited to establishing to whom housing belonged. The Human Rights Commission, i.e. the Ombudsperson and the Human Rights Chamber, approached the issue in a judicial instead of an administrative way. Their task was to help the Bosnian authorities to uphold human rights, to decide if human rights violations had occurred, and eventually to offer redress to victims. Especially the Chamber had an impact on the legal aspects of the restitution process by specifying which domestic laws and regulations were contrary to human rights. It did so by applying international human rights conventions – predominantly the ECHR – to the local situation.[219] In that sense it was a true 'internationales Menschenrechtsgericht vor Ort',[220] an international human rights court on the spot. Access to justice for individuals was relatively easy concerning both the CRPC and the HRC. The CRPC did not require claimants to submit extensive proof. The HRC applied its admissibility criteria with largesse. This flexibility fits in well with the difficult post-conflict reality of refugees and displaced persons. In the complicated legal situation of post-war Bosnia, the victims – not the authorities – were given the benefit of the doubt.

Apart from the CRPC and the HRC, the Constitutional Court could also deal with housing restitution cases. Like the HRC its main approach was judicial. Contradictions in case law did not develop between the various institutions, however. Two reasons account for this. The first is that individuals seeking redress in the huge majority of cases turned to the HRC and not to the Constitutional Court. The second is the respectful attitude of the institutions towards each other. They refused to overrule each other's decisions. Nevertheless, all institutions eventually faced the same problems. In the first place, they all struggled to function properly for lack of funds and other resources.[221] Secondly, no matter how binding their decisions were in theory, they were dependent upon the local authorities for implementation. Only in some cases did the High Representative step in by using his Bonn powers. In most instances, however, the housing restitution process faced a wall of unwillingness erected by the local Bosnian

218 See e.g. Van Houtte (1999) pp. 630-631.
219 Englbrecht (2003) pp. 141-142.
220 Rauschning (2005) p. 569.
221 Englbrecht (2003) p. 138; Nowak (2003) p. 4. See also section 11.4.5.

authorities. Especially in the first few years, implementation proved to be the Achilles' heel of housing restitution efforts in Bosnia.

Whereas the complicated operating links between the Dayton institutions created less problems than expected due to a spirit of relative benevolence and cooperation, the situation was very different for the domestic institutions. On that level the operating differences did produce important problems in practice. Relations between the Entities were hostile, but the organizational differences between the RS and the Federation compounded matters. Within the Federation the highly autonomous cantons did not submit easily to the authority of the Entity. Local restitution mechanisms were only set up several years after Dayton and under heavy pressure of the international community.

For Diehl, Ku and Zamora an operating system is a framework that can support the operation of legal rules.[222] Such a system should be geared towards the implementation of the rule involved. As we have seen, the Bosnian housing restitution system was far from perfect in this respect, with parallel institutions, overlapping jurisdictions, and problematic local mechanisms. Nevertheless, it had its strong points as well: a safety net of institutions which served both to adjudicate claims, to monitor compliance and to provide redress when necessary. The independence of these Daytonian institutions was guaranteed in theory and practice by their semi-international composition, especially in those institutions in which the international members were in the majority – these 'outsiders' could not be pressured by local politicians to act in a certain way. Decision-making for submitted claims was done at an unprecedented speed considering the extent of the housing problems in Bosnia, the lack of resources and the generally difficult post-conflict situation. The Bosnian housing restitution process seems to confirm Diehl, Ku and Zamora's submission that an operating system is a necessary but not sufficient factor. Implementation on the ground, or put differently the *will* to implement – the third factor they mention – is an essential factor as the Bosnian experience has shown. In the next chapter, we will turn to that third factor.

The Dayton Peace Agreement was a peace treaty. Although it contained a constitution for Bosnia, it was never meant to offer a permanent solution. Many of its provisions and institutions existed to pacify the country, to rebuild it, and to deal with the consequences of the armed conflict, including the loss of housing and property. As indicated above, several of the Daytonian institutions have therefore been abolished or integrated into Bosnia's domestic system once they had fulfilled their role or once there was no sufficient support anymore to lengthen their existence – depending on the outlook one takes. These changes have simplified the operating structure, but not to a sufficient extent. Post-Dayton Bosnia with its asymmetrical federal structure is still somewhat of a constitutional nightmare. It may come as no surprise, therefore, that several attempts to reform and simplify the Bosnian structures as they emerged from

222 See section 8.1.

Dayton have been undertaken.[223] The future will show to what extent those possible changes will bring Bosnia closer to a mainstream constitutional state which guarantees human rights through clear structures and strong institutions.

223 See e.g. R. Bruce Hitchner, 'From Dayton to Brussels: The Story Behind the Constitutional and Governmental Reform Process in Bosnia and Herzegovina', *Fletcher Forum of World Affairs* vol. 30 (2006) pp. 125-134. And: Council of Europe Parliamentary Assembly, Res. 1513, 29 June 2006, *Constitutional Reform in Bosnia and Herzegovina*.

PART III

APPLICATION IN PRACTICE

CHAPTER 12
HOUSING RESTITUTION IN PRACTICE

12.1 INTRODUCTION

Annex 7 to the Dayton Peace Agreement has been called 'the most radical provision in the entire accord, since full implementation could amount to a flat-out reversal of the course of the war.'[1] Small wonder, then, that the parties of Dayton resisted the implementation of the right to housing restitution included in that Annex for minority returnees.[2] They pursued, in the words of the first High Representative, Carl Bildt, 'peace as a continuation of war by other means'.[3] The immediate aftermath of the war showed the persistence of ethnic cleansing[4] and violent resistance against minority returns, both by the authorities and private parties.[5] Even when return movements started to gain pace, at the beginning of 2000, official estimates were that implementation of Dayton's housing and property restitution provisions would take up to forty years.[6] Five years later, in the summer of 2005, the situation had fundamentally changed. Over 90 per cent of housing restitution claims had been resolved.[7] Although a complete reversal of the pre-war ethnic situation has not occurred, the Bosnian restitution process has given many Bosnians the choice to either return to their homes or to sell them. Property disputes have been settled by legal means, thereby removing one of the main sources of future conflict.

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1 Elizabeth M. Cousens, 'Making Peace in Bosnia Work', *Cornell International Law Journal* vol. 30 (1997) pp. 789-818, see p. 801. A slightly adapted version of large parts of this chapter will also be published as: Antoine Buyse, 'L'union fait la force. Post-Conflict Housing Restitution in Bosnia and Herzegovina', in: Roel de Lange (ed.), *Transitional Justice* (forthcoming).

2 People who belonged to a different ethnic group than the majority in which their original pre-war house was situated.

3 Carl Bildt in a speech in Washington in 1997, as cited in: Jessica Simor, 'Tackling Human Rights Abuses in Bosnia and Herzegovina: The Convention Is up to it; Are its Institutions?', *European Human Rights Law Review* (1997) pp. 644-662, see p. 645.

4 Rhodri Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice, *New York University Journal of International Law and Politics* vol. 37 (2005) pp. 441-553, see p. 486.

5 Cousens (1997) p. 807.

6 Property Law Implementation Plan – Non-Negotiable Principles in the Context of the Property Law Implementation, 1 March 2000, to be found at: www.ohr.int/plip.

7 Charles B. Philpott, 'From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina', *International Journal of Refugee Law* vol. 18 (2006) pp. 30-80, see p. 31.

This change from stagnation and hostility to relative success in less than a decade is remarkable. In the previous parts of this research I have described the developments in the normative and operating elements of the Bosnian housing restitution system which helped to effect this change. These developments did not come about by chance, but were the result of deliberate interpretations of existing rules, the adoption of new ones, and organisational changes. To put it differently, there was a will – at least among part of the actors involved – to push restitution forward, either as an aim in itself or as a necessary condition for the return of refugees and other displaced persons. This brings us to the third essential factor for the effectiveness of a legal rule, as identified by Diehl, Ku and Zamora: 'the political consensus and will of the system's members to use the law.'[8] I have argued in chapter 1 that the contents of this third factor can be derived from the actions of the relevant actors over time. Such an approach enables a description of the developments in this consensus and will. In that respect, this dynamic method is especially suited for a situation as the Bosnian one which underwent such a great change.

In this chapter I will trace the developments in the third factor for the first decade after Dayton. Diehl, Ku and Zamora's mentioning of 'consensus' implies that cooperation and coordination between the actors in the field, or the lack thereof, are very relevant. The description will therefore include this interaction of actors and the underlying interests which explain that interaction. This analysis aims to show how the right to housing restitution was transformed from a paper tiger to an enforceable right in the reality of post-war Bosnia.

12.2 THE FIRST POST-WAR YEARS: OBSTRUCTION AND LOW PRIORITY FOR HOUSING RESTITUTION

Writing at the beginning of 1999, lawyer Timothy William Waters noted that the Dayton operating system had 'proven singularly incapable of creating any meaningful resolution of outstanding property issues, let alone the return of individual refugees.'[9] At that moment the tides were changing and precisely these issues were starting to be addressed with more resolve. This change followed upon a period in which little progress had been made. In general, the obstacles to return were immense. First, there were very basic security problems, such as attacks on returnees and the setting on fire of their houses.[10] Secondly, the overall atmosphere was rarely conducive to return. Apart from harassment, this included many instances of discrimination, of propaganda

8 Paul F. Diehl, Charlotte Ku & Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems', *International Organization* vol. 57 (2003) pp. 43-75, see p. 43.

9 Timothy William Waters, 'The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution', *Harvard International Law Journal* vol. 40 (1999) pp. 517-592, see p. 519.

10 Peter Neussl, 'Bosnia and Herzegovina Still Far from the Rule of Law. Basic Facts and Landmark Decisions of the Human Rights Chamber', *Human Rights Law Journal* vol. 20 (1999) pp. 290-302, see p. 294.

in the media,[11] and a general lack of employment opportunities.[12] Thirdly, restitution claims faced a wall of unwillingness at the local level. Many municipalities were dominated by nationalist ethnically-based parties which used their powers to the benefit of their own ethnic group and, more generally, were tainted by corruption.[13] In this respect, one should distinguish between the three main ethnic constituencies. The Bosniak authorities were very supportive of returns of their own ethnic group to their former homes, which would help this biggest of the three groups to regain numerical strength in areas lost in the war.[14] This interest stemmed from their failed war-time attempts to maintain Bosnia's territorial integrity.[15] Support for non-Bosniak returnees to Bosniak-held areas was also given, except when it encroached upon the interests of the own group. This would happen for example when the homes to be returned to would be occupied by Bosniak displaced persons who had no where else to go. The Bosnian Croats, a much smaller group, were mostly resisting returns – in both directions – since it would water down the numerical overweight they had in the areas they controlled. The Bosnian Serbs adopted the same stance. Both groups actively discouraged minority returns and even threatened and intimidated people of their own ethnicity who wanted to return home. And both groups offered incentives to returning refugees of their own ethnicity, such as housing and jobs, to settle in majority areas.[16] With the coming to power of a coalition of more moderate parties in the Republika Srpska (RS) in 1998, the Serb stance softened. Although no active steps were undertaken to quicken returns, the RS government at least started to accept the goal of return and restitution in its rhetoric.[17] All of this shows that the (im)possibility of return and restitution was very closely linked to the political climate. Among the domestic authorities there was barely a general 'will' to implement the right to housing restitution and the extent to which it existed varied between the three ethnic political elites and also developed over time.

Resistance to return and restitution surfaced in many kinds of practical obstruction tactics, such as the ignoring of claims. On top of these tactics came the existing

11 Madelyn D. Shapiro, 'The Lack of Implementation of Annex 7 of the Dayton Accords: Another Palestinian Crisis', *American University International Law Review* vol. 14 (1998) pp. 545-597, see p. 569. She gives several specific examples of this.

12 Marcus Cox, 'The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina', *International and Comparative Law Quarterly* vol. 47 (1998) pp. 599-631, see p. 623.

13 Madeline Garlick, 'Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina', *Refugee Survey Quarterly* vol. 19 (2000) pp. 64-85, see p. 70.

14 According to the official 1991 census 43,5% of Bosnians were 'Muslims' (currently referred to as Bosniaks), 31.2% 'Serbs' and 17.4% 'Croats'. See: Ayaki Ito, 'Politicisation of Minority Return in Bosnia and Herzegovina – The First Five Years Examined', *International Journal of Refugee Law* vol. 13 (2001) pp. 98-122, see p. 100.

15 Anne Charbord, *Human Rights of Internally Displaced Persons in Bosnia and Herzegovina* (Wien: Verlag Österreich 2005) p. 236.

16 Ibid., p. 237.

17 Ito (2001) pp. 106-111.

wartime housing legislation and the cancellation of occupancy rights on the basis thereof.[18] In thousands of instances, according to the former head of the OSCE department of human rights, loyal members of the nationalist parties were awarded apartments declared abandoned without having to give up their other real estate. This resulted in so-called multiple occupancy, a phenomenon which expounded the housing shortages in Bosnia.[19]

Finally, to effect restitution temporary occupants had to be evicted. Under the humanitarian guise of providing shelter to the displaced, much abandoned housing had been reallocated to people of the own ethnic group.[20] Since many of these had no other place to go to, not only local authorities but equally part of the international community was justifiably concerned about their real humanitarian needs.[21] But the problem was that real emergency situations were abused for political purposes. In the immediate aftermath of the war, a shelter for everyone was thought of as more important than 'each his own shelter'. This prevented any quick developments in that respect.

In the first few years, return movements slowly began with displaced persons returning to reconstructed housing.[22] The reason that these were the first instances of returns, is that the problem of evicting and re-housing temporary occupants did not play a role in those cases. Restitution as such was not at stake. Nevertheless, with an estimated 18% of housing completely destroyed and 60% partially damaged,[23] it is clear that the reconstruction itself presented a formidable challenge. Although international organisations and international NGOs provided funding for much of the reconstruction effort, funding was channelled through local authorities. The latter formally distributed funds according to one's place on a waiting list.[24] In practice the reconstruction process was often used to allocate funding and materials to political supporters and members of the ethnic majority. Ethnic segregation was thus consolidated

18 See chapter 7.

19 Lynn Hastings, 'Implementation of the Property Legislation in Bosnia Herzegovina', *Stanford Journal of International Law* vol. 37 (2001) pp. 221-254, see p. 227. See also: Lene Madsen, 'Homes of Origin; Return and Property Rights in Post-Dayton Bosnia and Herzegovina', *Refuge* vol. 19-3 (2000) pp. 8-17, see p. 9.

20 Williams (2005) p. 476.

21 Garlick (2000) p. 78; Madsen (2000) p. 11; Timothy Cornell & Lance Salisbury, 'The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina', *Cornell International Law Journal* vol. 35 (2002) pp. 389-426, see p. 402.

22 Paul Prettitore, *The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study*, paper prepared for BADIL Expert Forum (22-23 May 2003) p. 16.

23 Laurel Rose, Joachim Thomas & Julie Tumler, *Land Tenure Issues in Post-Conflict Countries. The Case of Bosnia and Herzegovina* (s.l.: Deutsche Gesellschaft für Technische Zusammenarbeit 2000) p. 3. Estimates were notoriously difficult to make and led to differing results. Marcus Cox & Madeline Garlick, 'Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina', in: Scott Leckie (ed.), *Returning Home: Housing and Property Restitution Rigbts of Refugees and Displaced Persons* (Ardsley: Transnational Publishers 2003) p. 68, e.g. state that one third of all housing had been destroyed during the war.

24 UNHCR, *Extremely Vulnerable Individuals: The Need for Continuing International Support in Light of the Difficulties to Reintegration Upon Return* (Sarajevo 1999) pp. 10-11.

instead of reversed.[25] Well-intentioned and practically-driven policies by the international community to give local authorities ownership of the process thereby resulted in unwanted consequences. Reconstruction was just one reflection of a central weakness of Dayton: the provisions on return and restitution in the peace treaty relied primarily on the parties whose wartime goals they sought to counter.

The very hesitant start of the restitution and return process was not only caused by the negative attitudes of many local politicians and bureaucrats, but also by the lack of priority given to the issue by the international presence in Bosnia. Under the first High Representative, Carl Bildt, his office (OHR) concentrated on stabilization, security and elections, whereas return and restitution were seen as issues amongst dozens of others.[26] The UNHCR initially focussed on the relatively promising task of majority returns. From mid-1996 onwards it also started with confidence building measures for minority returns, such as sponsored visits across the Inter-Entity Boundary Line. Important though these measures were in restoring confidence among the displaced, they did not counter the resistance of political forces against returns.[27] The CRPC, which started in March 1996, was virtually the only other institution which actively engaged in the restitution process in the first years after the war.[28]

Apart from the efforts of UNHRC and the CRPC, international involvement on the issue was characterized by a lack of priority and by the absence of a sustained and systematic effort to tackle the problem.[29] Probably the best formal reflections of this are the conclusions of the Peace Implementation Council (PIC[30]). The first one, in London in December 1995, essentially mirrored Dayton itself, by mentioning 'the protection and promotion of human rights and the early return of refugees and displaced persons' as one amongst a myriad of peace goals.[31] Later PICs in 1996 expressed concern over the lack of progress on the twin issues of return and restitution, re-emphasized the priority of returning the displaced to their homes,[32] and called upon the parties to amend property laws inconsistent with the right to return and to restitution.[33] In none of them, these admonitions were accompanied by sanctioning mechanisms or other forms of conditionality. Carrots and sticks were conspicuously absent.

The results of this slow start were unpromising. To mention just one example: by the end of 1997 merely 35,000 of the 400,000 Bosnians who had returned home had done so to an area where they constituted a minority. The large majority thus chose the

25 Charbord (2005) p. 238.
26 Ito (2001) p. 113; Charbord (2005) p. 237.
27 Ito (2001) pp. 115-116.
28 Hans van Houtte, 'Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina', *International and Comparative Law Quarterly* vol. 48 (1999) pp. 625-638, see p. 626.
29 Garlick (2000) p. 69.
30 See section 11.5.
31 OHR, *PIC London Conclusions*, 8 December 1995, para. 3.
32 OHR, *PIC Paris Conclusions,* 14 November 1996, para. 7.
33 OHR, *PIC Florence Conclusions*, 13 June 1996, paras. 15 and 32; OHR, *PIC London Conclusions*, 5 December 1996, para. 13.

easier and safer way out of displacement, return to a 'majority area'. Most of the minority returnees were elderly people or individuals instead of families, which did not bode well for sustainable return in the long run.[34] Even worse, in the summer of 1998 the continued displacement and the selective returns had turned Bosnia into a state in which *de facto* ethnic segregation was higher than at the end of the war.[35]

12.3 UNITED WE STAND, DIVIDED WE (RE-)ACT

The goal of reversing ethnic cleansing was a shared one among the international actors involved in post-Dayton Bosnia. However, on the extent to which this should be pursued at the expense of other, more short-term goals such as security and shelter for all the displaced – including illegal occupants – there was disagreement. Especially in the first years the day-to-day operations of the OHR, the UNHCR, the CRPC, the OSCE and others were influenced by balancing the different goals. One can add to this their different mandates and interests.[36] The UNHCR for example was more focussed on providing shelter, whereas the OSCE stressed the importance of individual human rights. In practice these goals could clash, e.g. where a restitution claim would result in the eviction of a temporary occupant without alternative accommodation. Moreover, apart from the divergence in goals, there was a lack of effective coordination. On the local level this resulted in duplication of monitoring and of steps taken on behalf of the international community towards the local authorities in the fields of restitution and return. Besides inefficiency, this approach sometimes had the particularly negative consequence that international institutions were played off against each other by domestic Entity policy makers.[37] The list of cases requiring urgent restitution delivered by one international organisation would then be used against another one, with the excuse that not everything could be done simultaneously. This in turn resulted in the slowing down of the process or even in total stagnation in some municipalities. In the face of stagnating returns, the call for a more coherent and co-ordinated approach was therefore increasingly felt.

In January 1997 efforts were undertaken to increase the pace of returns. A Reconstruction and Return Task Force (RRTF) was established, functioning under the OHR, with the participation of the UNHCR, the World Bank, the European Commission, and others.[38] Its main task was to coordinate the return efforts and to establish more efficient links between return and reconstruction endeavours. It was also meant to support 'brokered breakthroughs in minority returns movements at local level', as the Bonn Peace Implementation Council put it.[39] Nevertheless, duplication did not entirely

34 Cox (1998) p. 623.
35 Waters (1999) p. 526.
36 Cox (19980 p. 631.
37 Williams (2005) p. 509.
38 Charbord (2005) p. 251.
39 OHR, *PIC Bonn Conclusions*, 10 December 1997, conclusion III.

disappear since RRTF field presence was partly built up in parallel to that of the UNHCR.[40]

On a higher political level, the first clear sign that the international community was willing to increase the pressure on all Bosnian authorities in implementing Dayton was the outcome of the Peace Implementation Council in Sintra, Portugal, in May 1997. This meeting explicitly introduced conditionality, making international help dependent upon cooperation and commitment to the Peace Agreement.[41] The result was that the OHR, as the figurehead of the international community, joined the UNHCR which had been promoting return efforts from the start.[42]

In the field of return and restitution conditionality was used on both the local and the Entity levels. For the former, aid for infrastructure and the rebuilding of housing was made contingent upon the acceptance of returns, especially minority returns. For the latter, reconstruction aid depended on amendments in the property laws that were barring restitution.[43] Ito has rightfully labelled this a 'lopsided approach' since this new emphasis on return failed to adequately address the underlying political unwillingness.[44] In that sense the actions undertaken by the international community were very much of a reactive character.[45] A stronger effort to attack the root causes of the problem by changing the stance of local political actors was undertaken half a year after Sintra by adding negative conditionality to the earlier positive one. Amendments in the property laws were demanded under the threat of sanctions. The Steering Board of PIC moreover recommended that these amendments should be a precondition for Bosnia's admission to the Council of Europe.[46] A further step was taken at the December 1997 Bonn PIC, at which the High Representative was effectively given a general right to introduce or amend legislation and to dismiss public officials.[47] Interestingly, the Bonn PIC re-stated the demand for immediate property law amendments, but at the same time noted a 'change in attitude and limited progress' in some parts of Bosnia concerning minority returns.[48]

This change of attitude may have had to do with the practical steps taken under the aegis of the UNHCR. These steps were part of the broader and very pragmatic approach which focussed on returns rather than restitution in the first few years after Dayton. The pragmatism led to a furthering of the easiest category, majority returns. A push factor behind this development was the pressure from many western refugee-

40 Ito (2001) p. 116.
41 OHR, *PIC Sintra Conclusions*, 30 May 1997, paras. 7-8. See also: Cornell & Salisbury (2002) p. 407.
42 Charbord (2005) p. 241.
43 OHR, *PIC Sintra Conclusions*, 30 May 1997, paras. 46 and 49. See also: Cox (1998) p. 615; Ito (2001) p. 113.
44 Ito (2001) p. 115.
45 Hastings (2001) p. 233.
46 OHR, *PIC Steering Board Statement on Property Laws*, 6 November 1997.
47 See section 11.5.
48 OHR, *PIC Bonn Conclusions*, 10 December 1997, conclusions I and III respectively.

harbouring states that wanted to send people back as soon as the conflict had ended.[49] The steps which were taken included pilot projects, reconstruction efforts, and the targeting of specific areas for returns.[50] Since minority returns were lagging far behind, the UNHCR decided in March 1997 to establish the Open Cities Initiative. This plan consisted of rewarding those municipalities that showed a clear commitment to minority returns. They could qualify for reconstruction and other economic aid.[51] It is a clear example of the conditionality approach introduced at Sintra and was thus popular with international donors, since the initiative seemed a viable way to reverse ethnic cleansing.[52] Cities could lose the status when they ceased to cooperate. In practice, this well-intentioned plan did not bear fruit. An evaluation by the International Crisis Group showed that the Initiative made no real difference in the number of minority returns: recognition did not lead to an increase in the return speed. In addition, significant minority returns took place to non-recognized cities. The reason for the poor results may have been that monitoring was not very intensive and that municipalities were judged on their promises rather than on actual results delivered.[53]

Another example of the pragmatic approach – and one with a high symbolic value – was the Sarajevo Declaration of 3 February 1998. The aim was to re-establish Sarajevo as an open and multi-ethnic city by encouraging minority returns, with the specific goal of 20,000 returnees in 1998.[54] As with the Open Cities Initiative, aid was linked to the achievement of results.[55] The declaration identified the obstacles blocking returns, among which the existing property laws, and demanded rapid changes. For the property laws deadlines for change were set; the Federation authorities had to implement changes by 17 February and 1 March 1998.[56] The Declaration welcomed the newly established Sarajevo Housing Committee, which was tasked to reallocate housing to pre-war inhabitants and identify instances of double occupancy.[57] The Committee's work was meant to counter discriminatory housing policies, *inter alia* by including observers from international organisations.[58] Again, the results were disappointing. Halfway the year, only 859 returns had occurred. These returns can be explained by the heavy international pressure applied and the personal commitment of the head of the housing authority to the process. Positive outcomes were thus very much dependent on the circumstances instead of reflecting a coherent strategy. In December 1998 Sarajevo disbanded its municipal housing authority under the cloak

49 Charbord (2005) p. 237.
50 Ibid., p. 242 ff.
51 Cox (1998) p. 625. See also: Eric Rosand, 'The Right to Compensation in Bosnia: An Unfulfilled Promise and Challenge to International Law', *Cornell Journal of International Law* vol. 33 (2000) pp. 113-158, see p. 1114.
52 Charbord (2005) p. 250.
53 International Crisis Group (ICG), *Minority Return or Mass Relocation?*, 14 May 1998, pp. 17-20.
54 OHR, *Sarajevo Declaration*, 3 February 1998, para. 4. See also: Neussl (1999) p. 293.
55 Ibid., para. 6.
56 Ibid., para. 8.
57 Ibid., paras. 12-13.
58 ICG (1998) p. 29.

of restructuring its administration.[59] Consequently, aid to Sarajevo was suspended by major donors such as the European Union and the United States, because the 20,000 number had not been met. In other parts of Bosnia the situation was even worse.[60] The goal of the RRTF for 1999 had been 120,000 minority returns, but only 41,007 were counted in practice.[61] It became clear that a new approach was called for.

12.4 CHANGING THE LEGAL STRUCTURES

All the initiatives mentioned above failed to adequately address the war-time property laws which barred restitution.[62] In this sense, they formed additional examples of a reactive, ad hoc approach. The conditionality method sometimes even sent a negative signal, making it seem as if cooperation with return efforts was an option, rather than a legal obligation under Dayton.[63] Nevertheless, several PIC meetings and the Sarajevo Declaration did stress the importance of changing the property laws. It was a reflection of the insight among international actors that major return efforts would eventually fail if property re-assignment continued unabated. A returnee could not legally return under the Entity laws if his former place of habitation was no longer his. Even the UNHCR, which from the start had focussed on practical return plans, came to see that property restitution was the most practical way to accomplish returns.[64]

As early as April 1997 the Office of the High Representative decided to take matters in its own hands and sent draft cessation laws to both Entities. For many months negotiations dragged on. The deadlines set for the Federation in the Sarajevo Declaration were not met. Eventually, the Federation adopted cessation laws which entered into force on 4 April 1998.[65] The Republika Srpska followed months later, in December of the same year, with its own cessation legislation. The cessation laws marked the start of a shift from a return-based approach, which included political bargaining, to a rights-based approach in which restitution came to the fore. Although international discourse presented the laws as a requirement for returns, these laws started the process of the individual assertion of restitution rights.[66]

The legal viability of the direction of the changes made was stressed by the decisions of the Human Rights Chamber. In December 1997, when the cessation laws had been drafted but not yet adopted, the HRC asserted that occupancy rights fell

59 Hastings (2001) pp. 234-235.
60 Waters (1999) p. 560.
61 Charbord (2005) p. 252. Part of the failure was caused by external factors, such as the start of NATO attacks on Serbia in the Kosovo war from March 1999 onwards. This resulted in a refusal of the Republika Srpska to cooperate with the international actors in Bosnia for many weeks.
62 Ibid., p. 251. See there also for other ad hoc approaches to speed up returns.
63 Hastings (2001) p. 233-234. Charbord (2005) p. 253.
64 Charles Philpott, 'Though the Dog is Dead, the Pig must be Killed: Finishing with Property Restitution to Bosnia-Herzegovina's IDPs and Refugees', *Journal of Refugee Studies* vol. 18 (2005) pp. 1-24, see p. 6.
65 Hastings (2001) p. 230; Charbord (2005) p. 282.
66 Williams (2005) pp. 486, 491.

within the scope of the notion of possessions in the sense of P1-1 ECHR.[67] This meant that people with occupancy rights did not only have a house to return to in the sense of Article 8 ECHR, but also a possession subject to restitution. The Chamber's decision provided support for the OHR's idea that occupancy right holders should also be able to reclaim their former housing under the cessation laws. At the end of 1998, when the amendments had been made, it held that existing property laws both in the Federation and the Republika Srpska did not meet ECHR standards.[68] And in 1999, it assessed that the old laws had reinforced 'the ethnic cleansing which occurred during the war' by making property restitution impossible in practice.[69] Although the Chamber operated separately from the law amendment efforts, its decisions underscored the importance of a legal structure which was not in violation of human rights norms. In addition, the case law filled the frame of the general Annex 7 rights to restitution and return.[70]

Implementation formed the Achilles heel of the cessation laws. Partly, this was due to explicit deviations from the original OHR proposals. Especially the RS cessation law contained so many requirements for restitution that it effectively blocked returns in practice.[71] The problem in general was that even though the cessation laws voided all previous property reallocations – which solved one problem – the balancing in practice by local authorities of the rights of the former inhabitants with the current occupants served to counter real restitution. Thus the first step of the restitution process, deciding to whom a certain dwelling belonged, was made easier, but the second step, enforcement of such decisions, was not. Moreover, local authorities made restitution dependent upon actual return.[72] Thus they would not provide restitution to those refugees or displaced persons who tried to reclaim housing, but felt it was not safe enough to re-occupy the house in practice. This was another factor halting returns in spite of the cessation laws. Finally, evictions were not 'covered in detail' by the cessation laws and failed to materialise.[73]

Another practical problem was the administrative claims process that had been established. In this context, the mostly hostile stance of local authorities materialized in several ways: the mere submission of restitution claims was rejected, illegal fees for the filing of claims were charged,[74] and in some municipalities a policy of administrative silence was adopted. This entailed the refusal to react to restitution claims or even to acknowledge their existence.[75] Local housing offices were sometimes allocated so little money by the municipalities that they had to work without computers, telephones

67 See section 7.4.1.
68 See section 7.3.2.
69 HRC BiH, *Esfak Pletilić a.o. v. RS*, 10 September 1999 (CH/98/659 a.o.) para. 204.
70 Williams (2005) p. 497.
71 See section 7.2.2.
72 Philpott (2006) p. 44.
73 Hastings (2001) p. 230. E.g. it was not completely clear when the police had to attend evictions.
74 Prettitore (2003) p. 17.
75 Cornell & Salisbury (2002) p. 406.

or electricity.[76] In the municipality of Mostar, the housing board had no staff at all.[77] Higher up in the hierarchy, the Entities initially failed to react to requests for information from the Human Rights Chamber in restitution cases and often missed deadlines.[78]

The combination of resisting authorities and the reactive steps of the international actors made implementation of the cessation laws a failure in the first year of their existence.[79] As a result, the international community tried to circumvent the unwilling authorities by directly addressing the population through information campaigns. The right to file restitution claims was widely advertised on billboards and in the media and through information sheets distributed even to Bosnian refugees in other countries.[80] Although this helped to open up one end of the restitution pipeline by instigating a wave of claims, it only worsened the congestion further down the stream. It did not address the unwillingness of the authorities, even if it undoubtedly increased the pressure by the mere force of numbers.

Facing the obstructive position of domestic leaders, the High Representative decided to take a more pro-active approach and started making use of his Bonn powers. On 13 April 1999, the High Representative decided to cancel all newly created occupancy rights created since the start of the war. This served to undo the legal effects of the ethnic segregation policies.[81] As described in section 7.2.2, the High Representative amended the existing laws several times. The changes were based on signals coming from international officers in the field which alerted the OHR of the precise loopholes in the legislation used by local authorities.[82] An important goal of the 1999 amendments was to increase the effectiveness of the claims system and to harmonize it between the two Entities. It also further turned the process into an administrative one, since the 1999 amendments covered not only housing reallocated under war-time laws but also property that had been illegally occupied. All were now to be dealt with by local housing offices.

This decentralisation and shift away from courts may at first glance seem to go against the trend of a bigger emphasis on rights and rule of law. However, both the reasons and the results of the amendments were in line with the trend; the courts had been overburdened and due to their war-time politicisation were certainly not seen as more neutral than administrative authorities. Furthermore, the emphasis on local housing authorities ensured a quicker processing of claims than under one central authority and it had the advantage of local knowledge of the situation.[83] The problem of political resistance, an experience from earlier on in the process, was partially addressed by the amendments' precision. An example is the redefinition of refugees

76 Prettitore (2003) p. 17.
77 Madsen (2000) p. 10.
78 Cornell & Salisbury (2002) p. 406.
79 Charbord (2005) p. 313.
80 Hastings (2001) p. 231.
81 Charbord (2005) p. 297.
82 Personal communication with Massimo Moratti, legal officer, OSCE Mission in BiH, 26 January 2004.
83 Philpott (2006) p. 42.

and displaced persons in the amendments. Whereas earlier this was based on subjective interpretations of the reason for leaving one's home, the 1999 changes qualified everyone who had left his or her home between 30 April 1991 and 4 April 1998 as belonging to those two categories. In a separate decision in October 1999 the High Representative limited the categories of individuals which had a right to alternative accommodation. Local authorities in many instances used this right to postpone evictions, on the grounds that alternative housing was not (yet) available.[84] In these and other ways the tighter reins of the law decreased the possibility for political manoeuvring at least to some extent. Even though this approach was still reactive in the sense that it addressed specific obstructions by the authorities, a change had occurred. Instead of mere local bartering, the legal changes provided for a unified country-wide approach.

12.5 Implementing change: the Property Law Implementation Plan (PLIP)

12.5.1 Backgrounds of the PLIP

The loopholes in the property laws had not been the only problem in the return and restitution process. The other main hurdle on the road was the lack of implementation of the rules. Changing the rules through the amendments was not sufficient as long as the laws were not applied at all or only in discriminatory ways. The low level of returns was driving the international actors in Bosnia to action. The first sign of a coherent and more active approach was the establishment of so-called double occupancy commissions. In the spring and summer of 1999 such commissions were established in many Federation and RS municipalities. The double occupancy commissions were composed of international staff and representatives from local housing authorities. They were tasked to systematically investigate all alleged cases of double occupancy in order to promote restitution and return.[85] Some progress was made through this method, mainly because it had two advantages. First, no alternative accommodation was needed for the evictees, since they had several houses – as the term double occupancy suggests. Second, there was little sympathy among the population in general for double occupants. That decreased the chances of popular resistance against evictions in those cases.[86] Because the commissions were addressing the relatively easy cases, they still reflected to some extent the pragmatic approach. But their systematic handling of all double occupancy cases in a municipality also signalled a shift to more hands-on tactics geared towards implementation of the laws.

84 Charbord (2005) pp. 295-298. The dates mentioned in the first example are the start of the war and the entry into force of the cessation laws in the Federation.

85 Hastings (2001) pp. 238-239. The international staff consisted of representatives of the OHR, the OSCE, and the UNHCR.

86 Personal communication with Paul Prettitore, legal officer, OSCE Mission in BiH, 27 January 2004.

A really comprehensive plan for implementation of the property laws matured later in 1999. The catalyst or immediate cause for action was a statement of Alija Izetbegovic, the Bosniak member of the three-person presidium of Bosnia and Herzegovina. On 8 September 1999 a newspaper reported that he had called for resistance against evictions of people who could not return to their homes. This statement was generally seen as approving of property law violations and thus potentially disastrous for the return and restitution process. Within a day, the Ombudsperson, the OSCE and the High Representative reacted in condemnatory statements. The High Representative asked Izetbegovic for a clarification. Immediately after their talk, Izetbegovic publicly stated that he had been misunderstood.[87]

The incident was the last straw for an international community that had observed the low level of restitution with rising impatience. On 22 September 1999 the OHR, the UNHCR, the OSCE, and the United Nations Mission in Bosnia and Herzegovina (UNMiBH) set up the Property Law Implementation Plan (PLIP). The CRPC had observer status. The organisational aim of the PLIP was to bring together all the activities of the different organisations and agencies involved in the implementation of the property laws. The procedural aim was to (re-)build the rule of law by reforming the property restitution system and making it non-discriminatory both on paper and in practice. Finally, the material aim of the PLIP was to implement the property restitution laws by ensuring that 'all outstanding claims by refugees and displaced persons to repossess their properties are resolved.'[88]

12.5.2 Organisational structure of the PLIP

Under these common goals each of the partners in the PLIP had its own reasons to participate. The OHR, as the formal coordinator of the civilian aspects of Dayton, was naturally involved, both for the protection of human rights (Annex 6) and return and restitution (Annex 7). It had already been implicated in these matters directly through the Reconstruction and Return Task Force. RRTF now continued to play a central coordinating role inside the broader PLIP structure. The UNHCR was very much focussed on returns of refugees and other displaced persons under its own general mandate and under Annex 7. The OSCE, operating as a monitor of human rights under Annex 6, saw the PLIP as an opportunity to strengthen the right to respect for the home and the right to the protection of property specifically and the rule of law more generally. The UNMiBH was primarily involved through its management of the International Police Task Force (IPTF). The IPTF's mandate under Dayton included not only advising and training Bosnian law enforcers, but also monitoring and reporting violations of human rights.[89] Since local police were obliged to assist evictions, the IPTF and thus the UNMiBH had a stake in the PLIP process. Finally, the CRPC was

87 Hastings (2001) pp. 242-243.
88 PLIP Inter-Agency Framework Document, 15 October 2000.
89 Respectively Articles III and VI of Annex 11 of the Dayton Peace Agreement.

also interested in the PLIP. It realised that the implementation of its own decisions depended on proper implementation of laws by the Bosnian authorities.[90] Since the goals of return and restitution were more or less conflated under the PLIP all participants could support it.[91] Restitution was seen as a precondition for returns or, as PLIP's Framework document phrased it, it enabled people 'to make a free choice whether or not to return.'[92] Even the PLIP partners who were mainly interested in the returns could thus identify with the Plan. The Property Law Implementation Plan seemed suitable to address all their concerns simultaneously.

How did the PLIP function in practice? Its main organisational rationale was to avoid duplication of work and to present a unified face to the Bosnian authorities on all levels. In order to achieve this, the PLIP was characterized by both horizontal and vertical coordination.[93] The horizontal coordination took place through the so-called PLIP Cell, weekly meetings of all PLIP participant organisations in Sarajevo. The difference with earlier meetings – for those had existed – was that the focus was very much on practical problems of implementation arising from experiences in the field. Uniform and Bosnia-wide solutions for problems arising locally were devised during the meetings and then communicated to both PLIP field officers and Bosnian authorities. Horizontal coordination problems on the local level were solved by making one field officer of an international institution responsible in each municipality. This countered earlier experiences of institutions being played off against each other. The OSCE and the UNHCR provided the overwhelming majority of these so-called focal point officers, with the OHR and the UNMiBH being responsible for the remainder.[94] These local PLIP officers monitored the activities of the housing offices and provided guidance to the latter's staff, coordinated the international activities in the municipality in relation to housing restitution, and gathered statistics about the rate of property law implementation from the local authorities.[95] The focal point officers ensured vertical coordination by reporting to the central PLIP Cell and implementing the guidelines they received from it.

12.5.3 PLIP's methods of action

Actions to advance implementation were taken on all fronts: in the fields of law, policy and politics, resources, and information. Many ideas had already been tried before the

90 Philpott (2005) pp. 6-8; Philpott (2006) p. 43.
91 Williams (2005) p. 512.
92 PLIP Inter-Agency Framework Document, 15 October 2000. This document was not only devised for internal use, but also functioned as a message to others about the international community's approach to property restitution. See: Williams (2005) p. 526.
93 Williams (2005) p. 508.
94 Personal communication with Massimo Moratti, legal officer, OSCE Mission in BiH, 26 January 2004. See also: Philpott (2005) p. 9.
95 PLIP Inter-Agency Framework Document, 15 October 2000.

formal start of the PLIP, but were now given new impetus.[96] A new medium helped to strengthen the old message. An example is the establishment of property commissions throughout Bosnia.[97] Often these were continuations of existing double occupancy commissions but with a broadened mandate covering all housing and property restitution cases.

It is important to note that the reasons for establishing the PLIP went beyond internal Bosnian resistance to returns. External incentives also played their part. After several years of slow progress on returns and restitution, international enthusiasm for the Bosnian peace process was declining. Attention and thus potentially funding was starting to shift to other regions of conflict. At least for some time, the PLIP helped to counter this trend. A legal officer at the OSCE Mission in Bosnia put it this way: 'New packaging for old strategies and aims, a hint of progress, and a catchy new acronym rekindled interest.'[98]

The first field of action of the PLIP, the amending of the property laws, has been dealt with in the previous section. Changes and specifications continued to be made throughout the development and implementation of the PLIP. In the field of policy and politics, the second field of action, the High Representative used his Bonn powers as he had done in the field of legal amendments.[99] One month after the 1999 amendments, on 29 November, he dismissed twenty-two officials.[100] Nineteen of them were removed from office for refusing property law implementation and resisting the return of refugees and displaced persons more generally. The dismissed had worked in functions as diverse as mayors, governors of cantons and heads of municipal housing offices.[101] One example is the dismissal of the head of the housing authority of Foca/Srbinje, Milan Kecman. He was accused of blocking property law implementation by storing restitution claims without processing or examining them and of requiring claimants to supply additional documents in contravention of the law.[102] Another example, in which the direct effect of a dismissal can be seen, is the decision to remove Kemal Brodilija, the mayor of the city of Kakanj from office. He was dismissed because he had abused his power, for example by instructing the municipal housing secretary to cancel all evictions.[103] He even kept all draft eviction decisions to himself so that they could not be signed by the local housing authority. Immediately after his dismissal from office, the decisions were issued and the repossession of

96 Philpott (2005) p. 9.
97 Charbord (2005) p. 301.
98 Philpott (2005) p. 9.
99 Prettitore (2003) p. 13.
100 Hastings (2001) p. 245.
101 Williams (2005) p. 504. The decisions themselves can be found on www.ohr.int/decisions.
102 OHR, *Decision removing Mr. Milan Kecman from his position of Head of OMI in Foca/Srbinje*, 29 November 1999.
103 OHR, *Decision removing Mr. Kemal Brodilija from his position of Mayor of Kakanj*, 29 November 1999.

housing finally started in Kakanj.[104] More removals followed in September 2000, when the High Representative – in cooperation with the OSCE – dismissed another fifteen officials.[105] Beyond these dismissals, the PLIP partners sent joint letters to local prosecutors, asking them to prosecute obstructive housing officials under Entity laws. This resulted in several convictions.[106]

The High Representative's use of his Bonn powers in this respect was not totally uncontested. The majority of officials he dismissed were democratically elected politicians. Like the imposed amendments of laws, the dismissals went against democratic principles. Nevertheless, the prevailing opinion among the international community was that to give formal democracy free reign – in a context of lack of protection of the interests of minorities – would amount to condoning the discriminatory policies of nationalist politicians that were in violation of human rights.[107] A short-term intrusion with democracy was considered necessary to ensure a more lasting form of democracy which would be more in line with human rights. From a constitutional point of view, the measures show how much of an international protectorate Bosnia had in fact become at that point in time, with the international actors interfering as would-be platonic philosopher-kings for the benefit of society as a whole.[108] Considering the high level of political resistance against property law implementation there was probably no alternative to the adopted strategy in the short run. The dismissals showed that the international community was now seriously addressing one of the root causes of resistance against returns and restitution: the attitude of local politicians and officials.

The third way in which the PLIP tried to achieve its goals was by increasing both the human and material resources of especially the local housing offices. This happened through the training of local staff to make them familiar with the new property legislation.[109] Another element of the third tool was to resolve the financial and material shortages which the municipal housing authorities faced. Sometimes this was caused by insufficient funding being allocated to housing matters,[110] but in other cases, mainly in the Republika Srpska, the problem reflected a broader lack of financial means.[111] From 2000 onwards the government of the United States donated more than 1.5 million USD to the RS Ministry for Displaced Persons and Refugees, which in turn redistributed it to local housing offices. The money was used both for additional

104 Hastings (2001) pp. 245-246.
105 E.g. OHR, *Decision removing Dragutin Djordjevic from his position as Head of the Housing Office of Bosanska Gradiska/Gradiska*, 7 September 2000. See also: Hastings (2001) p. 250.
106 Hastings (2001) p. 248.
107 Ibid., p. 245.
108 For a forceful critique of the international intervention in post-Dayton Bosnia, see: David Chandler, *Bosnia: Faking Democracy after Dayton* (London: Pluto Press 1999).
109 Charbord (2005) p. 301.
110 See section 12.4.
111 Hastings (2001) pp. 232 and 248.

personnel and adequate resources.[112] This kind of capacity-building measures took away some of the very practical obstacles to restitution; more and better-trained staff working with more and better equipment meant that a larger volume of claims could be processed and decided upon.

The fourth method of the PLIP to further its own goals was information. Instead of negotiating behind closed doors, the PLIP approach was characterized by heavy reliance on publicity and openness. The PLIP Inter-Agency Framework Document noted: 'Given the deliberate lack of transparency among municipal authorities, it is important that administrative processes are demystified.'[113] The removal of officials mentioned above was one of the ways to publicly show that the international community was serious about housing restitution. To the broader public, it showed that every Bosnian was to respect the housing and property laws, even those in power. The PLIP also used information as a tool in two direct ways: to inform the public at large about its rights and duties under the property laws and, secondly, to monitor the progress of implementation.

The public information campaigns were devised out of concern that the domestic authorities, with their generally less than enthusiastic support for restitution, might misinform their own citizens about the contents of the property restitution scheme or even not inform them at all.[114] The first large campaign, entitled *Postovanje* (Respect), was launched in May 2000 using billboards, leaflets, television and radio. It had been developed by the OHR and the OSCE in cooperation with the UNHCR. The title of the campaign referred to respect for property rights and the right to return specifically, and human rights and the rule of law in general. The dual aim of the *Postovanje* campaign was to inform people of the consequences of the 1999 amendments and also to convince them that, four years after the end of the war, property restitution could and would be implemented. Computer animations in television commercials showed couples discussing the pros and cons of returning home and finally deciding to leave the apartments they occupied.[115] The second campaign, *Dosta je* (It's enough), ran from December 2000 to February 2001. Using practical examples which had arisen from experiences in the field, the campaign addressed several obstacles to implementation. The main one was the reluctance of temporary occupants to return to their own homes and thereby allowing others to return. *Dosta je* tried to clarify that local authorities were responsible for the provision of alternative accommodation. The campaign indicated that their failure to live up to that responsibility would not postpone evictions. This countered an excuse often used to stall property law implementation.[116] The title of the campaign reflected widespread feelings of frustration and

112 Ibid, p. 249; Prettitore (2003) p. 17. See also: PLIP Inter-Agency Framework Document, 15 October 2000.

113 PLIP Inter-Agency Framework Document, 15 October 2000.

114 Hastings (2001) p. 231.

115 www.ohr.int/ohr-dept/rrtf/pics/prop-leg-claim-proc/respect.

116 Charbord (2005) p. 313.

impatience over the pace of restitution attempts.[117] The taking of measures based on information from the field, as the *Dosta je* campaign did, is a trait common of many PLIP activities. In this sense the bottom-up methodology of the information campaigns is comparable to that of the legal amendments.

The other aspect of the information management of the PLIP was the compilation of statistical information. Starting May 2000, local housing offices were required to provide information on the percentages of restitution claims decided upon. This information was collected by PLIP's focal point officers and then centrally processed in Sarajevo.[118] The compiled statistics for each municipality were made public on a monthly basis.[119] The statistics showed the number of claims made for both specially protected tenancy rights and for private property. Initially, they also showed the number of repossessions, which meant cases in which housing was vacated and the original inhabitant had picked up the key. From January 2003 onwards, not repossessions but 'closed cases' were mentioned. Closed cases were instances in which a decision on restitution had been taken, the dwelling had been vacated and sealed and the original inhabitant had been notified that he or she could repossess it. The formal reason for this shift was that the actual repossession was irrelevant for the performance of housing authorities in implementing the property laws,[120] which was what the statistics tried to measure. From an analytical perspective, the change in the way the statistics were presented also reflects the broader shift from an emphasis on returns to one on restitution.

Each statistical overview also contained percentages, originally of the number of repossessions compared to the number of claims, later the ratio of closed cases related to the total number of claims. This was the so-called implementation rate, the final and main benchmark to measure progress within the PLIP. From November 2003 onwards the statistics of positive and negative decisions on restitution claims were presented separately.[121]

The statistical approach enabled the PLIP partners to measure progress in detail. The central PLIP Cell could use this information to take targeted action. In this way the information element of the PLIP could be used to supplement and sustain the policy element. In addition the statistics helped to show both international donors and the Bosnian population itself that progress was made. It should be noted, however, that the PLIP statistics showed the progress in restitution, not in returns. Although the UNHCR did compile return statistics of its own, the two sets of data were not joined.

117 www.ohr.int/ohr-dept/rrtf/pics/prop-leg-claim-proc/dostaje.
118 PLIP Inter-Agency Framework Document, 15 October 2000.
119 Philpott (2005) p. 9.
120 PLIP Statistics Guidelines, 25 November 2002.
121 I have not been able to find the reason for this. Since this addition shows that in general the overwhelming majority of claims resulted in a positive decision for the claimant, it might have served to instil confidence among claimants – apart from the more immediate reason of monitoring decision outcomes of local housing authorities. Since the PLIP statistics are extremely extensive, I have chosen not to include them here. They can be accessed through the internet (www.ohr.int/plip).

The UNHCR data suggest that between 1 January 1996 and 31 October 2006, the number of returning refugees was 442,687 and the number of other returning displaced persons 572,707.[122] On a grand total of approximately more than 1.2 million refugees and more than 1 million other displaced persons,[123] this means that roughly half returned. However, these figures do not clarify whether all refugees returned to their original homes or whether they resettled elsewhere in Bosnia. As a result, it is not possible to evaluate in detail to what extent closed cases or even repossessions were followed by actual return to the house involved. Thus, no clear picture arose on whether Dayton's Annex 7 goal of restitution *and* return was achieved through the PLIP. Part of the reason for this may have been that the success on the return issue was a very sensitive one for the international community.[124] It was much easier to claim success on the number of restitution requests processed than on sustainable returns. In the context of waning international enthusiasm, as mentioned above, the international actors had a clear interest in presenting successes. The PLIP statistics provided the perfect means.

12.5.4 The chronology principle

The Property Law Implementation Plan was explicitly presented as an 'evolution' from earlier ad-hoc strategies to an endeavour to strengthen the rule of law.[125] This evolution entailed Bosnia-wide policies instead of using different strategies and solutions for different regions. The laws were to be applied neutrally and consistently.[126]

A central aspect of the rule of law strategy was the gradual enforcement of the chronology principle. This principle related to the manner in which restitution claims were dealt with: they were to be processed in the order in which they had been submitted. Chronology had been formulated as one of the non-negotiable principles of the PLIP early on, in March 2000.[127] Although it was not explicit in the property laws, it was implied, for example in the requirement that claims be processed within thirty days.[128] Since this failed to produce results, the 2001 amendments to the property laws made the chronology requirement explicit.[129] To strengthen the implementation

122 UNHCR, Returns Summary to Bosnia and Herzegovina from 01/01/1996 to 31/10/2006, to be found at www.unhcr.ba.

123 See section 7.1.

124 Personal communication with Massimo Moratti, legal officer, OSCE Mission in BiH, 26 January 2004.

125 PLIP Inter-Agency Framework Document, 15 October 2000.

126 Williams (2005) p. 526.

127 PLIP Non-Negotiable Principles in the Context of the Property Law Implementation.

128 Williams (2005) p. 524. See also section 11.5.

129 For the Federation: OHR, *Decision Enacting the Law on Amendments to the Law on the Cessation of the Application of the Law on Abandoned Apartments*, 4 December 2001; OHR, *Decision Enacting the Law on Amendments to the Law on the Cessation of Application of the Law on Temporary Abandoned Real Property Owned by Citizens*, 4 December 2001. For the RS: OHR, *Decision Enacting the Law on*

of this the PLIP agencies agreed in 2002 – in the so-called *New Strategic Direction* document – to focus their own work even more on the chronology principle.[130] The fact that such a decision was necessary indicates that the PLIP agencies themselves had not been fully adhering to the principle.[131] The OSCE, with its focus on human rights and the rule of law, was the most vocal supporter. It instructed its field officers to insist on chronology.[132] Other participating organisations were less enthusiastic.

Throughout, several exceptions to the chronology principle were applied. The 2001 amendments allowed for exceptions if 'provided by law'. This was 'primarily meant to ensure that double occupant cases could still be dealt with in expedited *ex officio* proceedings.'[133] Thus the first and very general exception was the continued prioritisation of cases of double occupancy. Although this exception obviously ran counter to the principle, it was of decreasing importance since the number of double occupants was dwindling.[134] The 'provided by law' phrase enabled the High Representative to impose further exceptions, since his decisions were legally binding. He used this power to provide for a second and third exception. In April 2002 he decided that restitution of the homes of police officers belonging to ethnic minorities could be prioritised.[135] This exception was sponsored by the UNMiBH, with its police supervision task, and was adopted in recognition of the fact this would increase the feeling of security among minority returnees.[136] In August of the same year, another exception was made for people living in the generally crowded collective or transit centres.[137] This allayed the concerns of UNCHR about the vulnerable situation of the people in those centres.[138] The exceptions were in a way trade-offs with the PLIP partners, whose commitment to chronology was strengthened by meeting their concerns. In contrast to earlier prioritisation of special cases, these exceptions were implemented under a legally binding framework: the decisions of the High Representative.

Amendments to the Law on the Cessation of Application of the Law on the Use of Abandoned Property, 4 December 2001.

130 PLIP – A New Strategic Direction: Proposed Ways Ahead for Property Law Implementation in a Time of Decreasing IC Resources, 12 September 2002, section 3.

131 See on chronology and other principles, ibid.: 'These must now become the PLIP's central policy tenets and be followed up rigorously and consistently.' The very wording suggests that until that time, such was not the case.

132 Williams (2005) p. 535.

133 Ibid.

134 Philpott (2006) p. 56.

135 OHR, *Decision Prioritising, as an Exception to the Chronological Order Rule, the Repossession of Property by Returning Police Officers*, 30 April 2002.

136 Philpott (2005) pp. 12-13.

137 OHR, *Decision on the Use of Collective/Transit Centre Space in Bosnia and Herzegovina to Promote the Phased and Orderly Return of Refugees and Displaced Persons*, 1 August 2002. The exception was an indirect one which did not disrupt chronology for the following reason: occupants of houses of people living in collective centres could be dealt with under the first exception by treating them as double occupants, since they were offered the space vacated by the original residents who vacated the collective centres to return to their home. See: Charbord (2005) p. 294; Philpott (2006) p. 56.

138 Philpott (2005) p. 13.

A fourth exception emerged in practice. Orders of domestic courts or the Human Rights Chamber did not take chronology into account. When they would conclude that violations of the law had occurred in individual cases, they could order prioritised reinstatement of those claimants into their houses.[139] Such prioritisation clashed with the chronology principle. Nevertheless, this *de facto* exception, I would argue, strengthened rather than weakened the rule of law, since the (timely) implementation of judicial decisions is a very important aspect of a functioning rule of law. With the CRPC decisions the situation was different. Those only affirmed ownership or tenancy of a certain dwelling, but the enforcement was in the hands of local authorities. Therefore, the latter could process them in the chronological order of the claims they had received themselves. Anyhow, it was unofficially estimated that around 85% of claimants filed their claims with both the CRPC and the local housing authorities.[140]

The chronology principle was generally advantageous to the restitution process and the rule of law. Apart from the advantage of increased transparency and predictability about whose claim would be handled when, chronology also sped up the processing of claims and helped to shield local housing officers from political pressure on the one hand and bribes from claimants on the other hand.[141] The clearer the rules, the less space remained for political manoeuvring. In that respect, chronology helped willing housing officials to process difficult cases even if local forces were opposed to it.[142] In addition, even the exceptions to chronology were now based on the law instead of on ad hoc policies.

12.6 THE TOUGH PART: ENFORCEMENT THROUGH EVICTIONS

Even with laws and coordinated policies in place, the most difficult element of the restitution process remained to be dealt with: evictions. A 2002 PLIP policy document predicted that the chronology principle and intensified monitoring would decrease resistance during the processing phase, but increase it in the subsequent step of enforcement through evictions.[143] Enforcement in the face of obstruction from the authorities or the population required the use or at least presence of force. Problems arose concerning the latter element.

The first legal evictions occurred in the summer of 1998 in Sarajevo. Although the OSCE monitored them, the number of successful evictions was very low. The main reason was that the police, formally responsible for the enforcement of administrative and judicial decisions, did not cooperate. To make matters worse, weak enforcement was accompanied by strong resistance. Anti-eviction demonstrations, often organised

139 Philpott (2006) pp. 73-74.
140 Ibid., p. 74.
141 Charbord (2005) p. 294. See also: PLIP – A New Strategic Direction: Proposed Ways Ahead for Property Law Implementation in a Time of Decreasing IC Resources, 12 September 2002, section 3.
142 Philpott (2005) p. 12; Philpott (2006) p. 58.
143 PLIP – A New Strategic Direction: Proposed Ways Ahead for Property Law Implementation in a Time of Decreasing IC Resources, 12 September 2002, section 3.5.3.

by war veterans' organisations or political parties, gathered at the places where evictions were scheduled.[144] The police did not act to disperse these demonstrations. Finally, people who were due to be evicted often left temporarily, leaving the elderly and children behind. This helped to render evictions 'more provocative and often prevented them from occurring.'[145] It became clear, as with other aspects of the restitution process, that a more pro-active international approach was necessary. The question was by whom this could be done.

The first and most obvious provider of physical clout to facilitate restitution was SFOR,[146] the multinational military force led by NATO. Under Dayton SFOR was responsible for the implementation of the military aspects of the peace agreement.[147] Initially, SFOR stuck closely to its peace-monitoring mandate and declined to become involved in the civilian aspects of Dayton.[148] NATO member states did not consider the organisation as an appropriate tool to perform civilian police functions.[149] US Secretary of Defence William Cohen defined the tasks of SFOR in purely military terms: the prevention of renewed violence, the separation of combatants, and the monitoring of frontlines. Offering security to groups of returnees, let alone to individual cases, was not among those tasks.[150] However, over time SFOR got more involved. Starting in 1999, the year of the goal of 120,000 minority returns, it began to place its troops in areas where returns occurred. Since the key actors in SFOR and in the OHR were the same ones, the United States and the larger (Western) European states, it is not surprising that these things happened simultaneously. The setback was that as SFOR was taking on this role, its size was being decreased. The return movements on the other hand were on the rise. This double development meant that SFOR could impossibly play its positive role in all areas where returns were taking place. Nevertheless it was able to apply political pressure in favour of returnees in some places.[151] On the whole, its role in the return and restitution process remained limited. It did not participate in the day-to-day process of enforcing evictions.

Since the problem of implementing eviction orders lay primarily with local police forces, it was logical that the International Police Task Force (IPTF) undertook action. Already in May 1999 the IPTF, after consultation with the OSCE, advised the domestic authorities that local police officers should attend and assist legal evictions.[152] In

144 Hastings (2001) p. 234.
145 Charbord (2005) p. 308.
146 Until 21 December 1996 – and thus also in the peace agreement – it was called IFOR (Implementation Force).
147 Article I of Annex 1(A).
148 Charbord (2005) pp. 237-238.
149 John. M. Scheib, 'Threshold of Lasting Peace: the Bosnian Property Commission, Multi-Ethnic Bosnia and Foreign Policy', *Syracuse Journal of International Law and Commerce* vol. 24 (1997) pp. 119-142, see p. 135.
150 Hugo Stokke, 'Human Rights as a Mechanism for Integration in Bosnia-Herzegovina', *International Journal on Minority and Group Rights* vol. 13 (2006) pp. 263-284, see p. 271.
151 Ito (2001) pp. 118-119.
152 Hastings (2001) p. 240.

addition non-compliance reports were compiled, when police officers refused to implement eviction orders.[153] Non-compliance could result in dismissals.

The OSCE drafted guidelines on the role of the police during evictions for the Federation in June and for the RS in October 1999. They were sent to the domestic authorities, by the OSCE, the OHR, the UNHCR, and the UNMiBH together, to stress the unity of the international community on this point. In both cases the guidelines emphasized that police officers were legally required under their own Entity laws to attend evictions and to enforce eviction decisions. The OSCE also instructed its field officers to take a very principle stance in line with the rule of law approach. No exceptions to the eviction process were tolerated. Even when the OSCE was informed of 'sympathetic' humanitarian cases threatened with eviction, it refused to halt the eviction for that reason. The rationale was that once an exception would be condoned, the very real risk existed that local authorities would use that as a precedent to postpone many other evictions.[154] The no exceptions-policy also applied to local prosecutors and judges. In the fall of 2000, the OSCE started to verify whether there were cases of double occupancy among these groups. Whenever this was confirmed, eviction followed. This had the double advantage of publicly showing that the law applied to everyone, even to the guardians of the law, and of making the judiciary more independent. The latter effect had a very specific political nexus. Previously, local authorities had postponed evictions of these groups as long as they cooperated in their decisions with the policies of the parties in power. Once evictions had taken place, this method of pressure automatically ceased to exist.[155]

The High Representative played his part in countering obstruction to evictions as well. On 10 November 1999, the National Assembly of the Republika Srpska adopted formal conclusions on the halting of evictions during winter. Six days later, the High Representative, once again using his Bonn powers, annulled these conclusions for being inconsistent with the 1999 amendments of the property laws.[156] Although reactive, this step was arguably taken under the rule of law approach, since it had legal force instead of merely being the result of political negotiations.

No matter how necessary actions such as the one taken by the High Representative were to push evictions and thus eventually to enforce the right to housing restitution, they carried a certain risk. Direct interferences with local policies could be perceived as just as political as the obstruction tactics of local authorities. In a sense they were indeed political, since the reversal of ethnic cleansing through housing restitution and the return of the displaced was a political goal of the international actors in Bosnia. The difference, however, was that over time the international community incrementally cloaked its actions within the rule of law. This happened both substantially, by

153 Prettitore (2003) p. 17.
154 Content of the guidelines as cited in: Hastings (2001) p. 240-242.
155 Ibid., p. 246.
156 OHR, *Decision Annulling the RSNA Conclusion Proclaiming a Winter Ban on Evictions*, 16 November 1999.

bringing legislation in line with human rights, and procedurally, by laws or legally enforceable decisions instead of mere reliance on political pressure. Nevertheless, the international actors were very much aware that they should not be seen as using double standards, being strict towards domestic authorities but not towards themselves. In the context of evictions and occupancy of claimed housing, this led international organisations to oblige their own employees to comply with the property laws. An example is the November 1999 policy of the OSCE on this point. All its employees living in housing which had been claimed in the restitution process were required to leave. It was assumed that the OSCE staff had incomes high enough to pay for alternative accommodation.[157]

As these developments show, in the field of eviction policies domestic resistance led to a united international response. Here we find a clear sign of a will or consensus among the *international* actors to implement restitution rights. This unified approach had several positive consequences. First, it helped to turn the right to housing restitution into more of a reality by tackling the most difficult cases. Second, the way in which this was done shows a growing commitment to legality and the rule of law. Thirdly, by the very fact that evictions started, the arena for resistance was reduced. Every person evicted was a person that could not be manipulated as easily as before, as the example of the judiciary illustrates. Apparently, within the broader notion of will or consensus, it is not even necessary that *all* actors align their actions. A unified approach of the most powerful actors – in this case the international ones – using carrots and sticks, can achieve results even in the face of open obstruction by other actors, in this context part of the domestic political elite and part of the population.

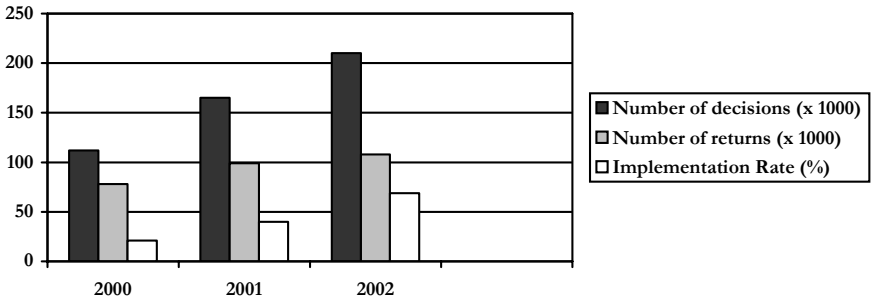
As to the possible negative effects of the push for evictions, those were very limited. In practice, it turned out that no one was rendered homeless by the evictions. Once the PLIP partners started to heavily insist on implementation of restitution decisions, local authorities very often found solutions for the earlier apparent lack of alternative accommodation.[158] Even when formally alternative accommodation was not available, evictees seemingly always found a place to stay, even if only temporarily.[159]

12.7 TIME TO HARVEST: THE RESULTS OF THE PLIP

The new initiatives taken in the course of 1999, brought together under the umbrella of the PLIP, seemed to deliver in the course of the following year. As the International Crisis Group (ICG) noted, by 2000 there was a surprising reversal in minority returns.[160] The level of minority returns as a percentage of total returns rose from 54.6

157 Hastings (2001) pp. 246-247.
158 Williams (2005) p. 539.
159 Philpott (2006) p. 58.
160 International Crisis Group (ICG), *The Continuing Challenge of Refugee Return in Bosnia and Herzegovina*, 13 December 2002, p. i.

in 1999 to 86.5 in 2000 and remained around that level for the years to follow.[161] These figures are telling, since minority returns are an indication that confidence in the security level in return areas was on the rise, whereas obstruction to it was becoming less effective. The ICG mentioned the Property Law Implementation Plan as the reason that such obstruction was overcome, even in 'hardline' municipalities.[162] Apart from a rising percentage of minority returns, the processing of claims also quickened. This can be seen both in the increasing number of decisions issued and the rising amount of repossessions, which meant that the housing in question had been vacated. To mention just a few examples, in December 2000 the local housing authorities had issued 111,723 decisions. This figure rose to 165,094 in 2001 and 209,841 in 2002. In the same period the implementation rate rose from 21% in 2000 through 40% in 2001 to 69% in 2002 (see charts). The difference with the slow progress achieved in the first sixteen months after the entry into force of the cessation laws is notable. In July 1999 only 27,503 cases had been decided, representing a mere 4% implementation rate.[163]



The numbers are shown in the chart. As an additional illustration I have added the numbers of returnees (both refugees and internally displaced persons) for the same years: 77,954 (2000), 98,865 (2001) and 107,909 (2002).[164]

Many reasons for this quickening of the process have been adduced in studies on the Bosnian housing restitution process. If one identifies the local authorities[165] as the main obstacles to restitution, as the present study has done, then an insightful way to explain the quickening is to look at two sets of linkages. The first one is mostly internal: the relationship of power and pressure between the local housing authorities and the judiciary on the one hand and the broader local administration and political elite, sometimes supported by public opinion, on the other hand. The second linkage

161 Charbord (2005) p. 440.
162 International Crisis Group (2002) p. 9.
163 Charbord (2005) p. 314.
164 Ibid., p. 440.
165 Of course with variations depending on the specific municipality.

is external: the pressure exerted from the outside on the local authorities. The two linkages are distinct, but also in many ways interrelated.

During the implementation of the PLIP, the internal linkage showed a decline in both the possibilities by domestic political elites for interference with the mechanisms and institutions involved in property restitution, and also in the will to do so. The possibilities to interfere decreased as the housing authorities, but the police forces as well, were given more precise rules and roles in the restitution process. The clearer the laws and guidelines became under which they were required to operate, the smaller their margin of appreciation. This meant in effect that political actors were less free to force them to take a different path of action. The changes in the property laws and other shifts towards the rule of law, such as the chronology principle, were the main external forces that defined the playing field for interaction between domestic actors. The evictions of judges from contested property, as we have seen, also served to make them more independent. There are some indications in the case law of domestic courts from 2001 onwards that laws were increasingly interpreted in line with Annex 7 of Dayton.[166] The will of local politicians to interfere also decreased. This was for some years the consequence of election results, with more moderate parties ruling over much of Bosnia in the period 2000-2002. After 2002 the nationalist parties regained the upper hand.[167] But even then, resistance did not reach the heights of the first post-war years. The coordinated international pressure exerted through the PLIP in a way enabled local authorities to take a different position. They could 'state that there was nothing that they could do, without losing face vis-à-vis the parties or their electorates. They were thus buffered from political pressure and were more willing to carry out their duties.'[168]

The PLIP galvanized and unified the external pressure of the international actors on the domestic authorities. The previous, loosely coordinated, political and diplomatic attempts to achieve results through conditionality were gradually replaced by a rule of law approach. The same developments that influenced the internal linkages also played an important role in the external ones: changes in the property laws and ever more strict guidelines. Conditionality did survive, however, in the foreign relations of Bosnia and Herzegovina. The application to become a member state of the Council of Europe was made conditional on 'full implementation of the property laws and full abidance with decisions of the Commission for Real Property Claims.'[169] Finally, the dismissals of officials by the High Representative represented the most extreme form

166 For a short overview, see Philpott (2006) p. 61.

167 See generally: International Crisis Group, *Bosnia's Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building*, 22 July 2003.

168 Charbord (2005) p. 314.

169 Council of Europe Parliamentary Assembly Opinion No. 234 (2002), *Bosnia and Herzegovina's Application for Membership of the Council of Europe*, 22 January 2002, para. 15 (v)(d). See also: Philpott (2006) p. 32. Bosnia acceded to the Council of Europe on 24 April 2002. It is almost impossible to assess to what extent the accession process pushed property law implementation forward, but at least it is another pointer to the new unified stance taken by the international actors involved in Bosnia.

of external pressure: these actions removed obstructionists from their formal bases of power.

Simultaneously with this international pressure, bottom-up forces became stronger as well. In spite of domestic political unwillingness, a growing number of refugees and other displaced persons started to lodge claims for restitution, either with or without a CRPC decision to support the claim. The sheer number of these may have made these claims more difficult to ignore,[170] not just in practically – masses of people visiting the housing offices – but also symbolically: it showed that many were seeking to reclaim housing and were not content to leave things as they were.

Aside from changes in the linkages of power, the progress in the implementation of the right to housing restitution was also due to factors inherent in the PLIP approach itself. The initial emphasis on double occupancy cases made for some quick successes. These were of high symbolic importance, since they showed that evictions and ensuing restitution could and would happen. Once the process had started, the statistics, including the implementation rates, made the pace of restitution transparent and may even have created a kind of 'competitive dynamic' between the municipalities.[171] Finally, the country-wide approach of the PLIP, which developed legal instead of merely political solutions for problems encountered in the field, helped to achieve substantial progress.[172] As a result, by June 2005 more than 93% of restitution claims had been settled and property restitution had been completed in 126 out of 131 municipalities.[173] Nevertheless, as indicated in section 12.5.3, only half of all the refugees and displaced returned. This shows that more than mere restitution is necessary to bring about a reversal off war-time displacement. Factors supporting sustainable returns, such as access to education and employment, are equally necessary.[174]

12.8 THE UNDERLYING SHIFTS: FROM RETURNS TO RESTITUTION, FROM PRAGMATISM TO RULE OF LAW

Before continuing to look into how the process of property restitution was concluded, let us now briefly interrupt the chronological description to assess the underlying shifts that the previously described developments reflected. This is necessary, since these shifts help to explain the problems encountered at the end of the process.

Under the surface of the results of the restitution process, two connected shifts took place. First, the legal changes that started with the cessation laws[175] marked the shift from solving the Bosnian displacement problem through direct promotion of returns to restitution. Restitution was defined as a precondition for returns. This shift would

170 Garlick (2000) pp. 79-80.
171 Williams (2005) pp. 510-511.
172 Ibid., p. 508.
173 Philpott (2006) p. 31.
174 See section 12.9.
175 See section 12.4.

have changed nothing, if domestic resistance had continued unabated. As described in the previous sections, this resistance was countered in multiple ways. A recurring theme in the new approach was the rule of law. This is the second shift that took place: the initially pragmatic, but very political approach of the international actors was changed into a rule of law approach to the problem. This helped to make the process more neutral and less prone to abuse.[176] Everyone was to abide by the laws: obstructive officials were removed from office, politicians illegally occupying housing could not participate in elections, police officers were required to vacate illegally occupied housing and the same held true for the staff of international organisations.[177]

The shift from return to restitution was far from unproblematic, however. From the start the cessation laws were meant to implement Annex 7 of Dayton and seen as a prerequisite for returns. This had the advantage for claimants that their rights took precedence over those of later occupants. The disadvantage, on the other hand, of the ongoing link between restitution and return was the possibility for abuse by local authorities. They often interpreted the laws in such a way as to make restitution dependent upon actual return.[178] This turned the goal of the property restitution process upside down: instead of using restitution as a means to promote returns – as the international actors wanted – the restitution-return link made restitution impossible for all those not returning immediately. The international actors reacted in 2001 by decoupling return from restitution. This was an ironic step, since it relinquished return as a condition in order to achieve returns in the long run.[179] Through the PLIP the international actors instructed local housing offices to stop inspecting reclaimed apartments to see whether the claimant had actually returned. In December of that year, the High Representative interpreted the notion of 'repossession' of housing in a more limited way: collecting the keys, later even by proxy, was sufficient to repossess one's former home.[180] As part of the 2001 property law amendments, *physical* re-occupation was removed as a legal requirement to repossess an apartment over which one had pre-war tenancy rights.[181] Tenancy rights were now given equal status in this respect as private property, for which no re-occupation was required from the start. These kinds of steps put restitution on an even clearer rights-based track,[182] deviating more and more from returns as a goal. The international actors were thus visibly starting to shift their preferences.

Another clear sign that return and restitution were being increasingly decoupled was the issue of the two-year rule. On 17 July 2001, the High Representative amended the provision in the Federation legal system which provided that repossessed apart-

176 Philpott (2006) p. 75.
177 Charbord (2005) pp. 300-301; Ito (2001) p. 118. See section 12.6 on the example of OSCE staff.
178 Philpott (2006) p. 44.
179 Williams (2005) p. 519.
180 Ibid., pp. 49-50.
181 Philpott (2005) p. 10. The six decisions of 4 December 2001 on this matter can be found on: www.ohr.int/decisions.
182 Williams (2005) p. 509.

ments could be privatised and subsequently sold only after two years. The rule had been discriminatory; people of the majority ethnicity in an area did not have to flee during the war and thus could sell at any moment, whereas displaced people reclaiming their home had to wait for the full two years before being able to sell. The legal change allowed those who did not wish to return to resettle elsewhere, using the money obtained from the selling.[183] In this sense the shift from return to restitution gave claimants more of a choice, which is in line with the character of the right to housing restitution as a right instead of an obligation.

Similar problems occurred in the parallel shift from pragmatic to rule of law-based approaches. Once it became clear that the 'battlefield' between the international actors and obstructive domestic actors shifted from political negotiations to the law, obstruction strategies were adapted to fit the shift. Resistance to restitution now took the form of using loopholes in the laws or interpretations that fitted the authorities' own purposes. Such tactics relied on the same rule of law approach advocated by the international actors through the PLIP.[184] Reacting to these tactics, the PLIP participants reverted to more legal amendments, formal interpretations and guidelines.[185] This goes to show that the rule of law approach was not free from political influence, even if it was *less* political than the older pragmatic approach. Nevertheless, it had the advantage of being country-wide and more predictable.

The shift was towards a robust notion of the rule of law. That is, one which had a normative content: international human rights law. Previously, during and just after the war, Bosnia's domestic system to some extent reflected a thin model of the rule of law.[186] After all, the property systems of the Entities had been fairly predictable. Ethnic status was decisive and to which group one belonged or was seen to belong defined ones rights in practice. Property restitution was based on the principle of reciprocity. The interests of the authorities were almost consistently given precedence over the interests of the individual.[187] Nevertheless, that system did not ensure all the requirements of the thin notion of the rule of law, since it did not clearly include individual remedies against abuses of state power. As has been argued in section 1.3 of this book, the robust notion of the rule of law is more conducive to a lasting peace, since it includes better possibilities for peaceful conflict resolution. In this sense, the shift towards a much more comprehensive rule of law through the legal amendments and the PLIP helped to achieve more than housing restitution alone.

The double shift from return to restitution and from pragmatism to the rule of law resulted in an increasing emphasis on human rights and individual choices to make use of them. This was clear in 1999 with the restoration of pre-war occupancy rights

183 Charbord (2005) p. 318. Ironically, the two year rule had initially, in 1999, been introduced by the High Representative himself.

184 Philpott (2006) p. 55.

185 E.g. OSCE's guidelines on the role of police officers during evictions, as mentioned in section 12.6. See also: Philpott (2005) p. 4.

186 On the two types of rule of law, see section 1.3.

187 Waters (1999) pp. 569-578.

through the legal amendments and even more so in 2001 with the introduction of harmonised and viable claiming procedures. The latter amendments emphasized the importance of transparent decision-making and implementation processes and thereby again strengthened the possibility for individuals to use their individual right to housing restitution. One of the main stumbling blocks on the road to a free and informed choice in these matters had been the practical difficulty to obtain compensation. In the first years after Dayton, compensation was seen by the international actors as a policy that would reward the nationalist politicians opposing returns. In addition, the prevailing view was that the reversing of war-time ethnic cleansing would not be achieved if compensation would be offered and used by many of the displaced.[188] The same line of reasoning was used when discussing the option of relocating the displaced instead of letting them return.[189] Therefore, most resources were invested in the restitution effort.[190] This choice for restitution over compensation has limited the options for refugees and other displaced persons. Those who were unwilling or unable to return were initially left with few alternatives. In practice, however, people did opt for compensation by selling or subletting their reclaimed houses. The real estate market became the venue for many to obtain compensation.[191] Amendments, such as the deletion of the two-year rule, facilitated this. Increased individual choice in these matters meant, however, that not all people who re-obtained their former dwellings did indeed return. This proved to be a divisive factor among the international actors in the closing years of the restitution process.

12.9 THE FINAL STAGE: CONSENSUS DISSOLVES

The rate of implementation of the property laws was unevenly divided over the country. The general progress made could amount to near completion in one municipality, but very slow developments in another. In addition, not all restitutions were followed by sustainable returns. Although precise figures are lacking, it seems that considerable groups of people returned only temporarily or just sold their house as soon as they could. Some of the few statistics available – on reconstructed, not repossessed houses – suggest that three quarters of all pre-war inhabitants returned once their housing was reconstructed, but one quarter only did so with part of the family.[192]

The lack of fully sustainable returns can be explained by the broader context of returns: low employment opportunities, difficulties in accessing social benefits such as pensions, local schools that were often far from open towards minorities, and the

188 Rosand (2000) pp. 130-131.

189 Catherine Phuong, 'At the Heart of the Return Process: Solving Property Issues in Bosnia and Herzegovina', *Forced Migration Review* vol. 7 (2000) pp. 5-7, see p. 7.

190 Madsen (2000) p. 13.

191 Philpott (2005) p. 21.

192 ICG (2002) pp. 10-11. These statistics come from research conducted by the international Housing Verification Unit which physically verified around 34,000 out of 111,000 reconstructed dwellings.

failure to simultaneously return farm land and businesses. Behind much of this was not just the difficult economic situation in post-war Bosnia, but also the enduring patterns of discrimination in all areas mentioned. By failing or deliberately refusing to address these matters, local authorities could cooperate with the restitution process without having to fear full returns.[193] Once it became clear that restitution was not always followed by returns – and that 're-mixing of the largely ethnically homogenous territories they controlled'[194] would not fully happen – many nationalist municipalities started to cooperate better with the PLIP. In the course of 2002 and 2003 this led to high implementation rates in some very nationalist Croat and Serb-controlled areas, even surpassing the implementation of Bosniak municipalities that had verbally committed themselves to restitution but were slower to implement.[195] Formally, many municipalities could now claim to meet the requirements of the PLIP. But lacking sustainable returns, this meant that Annex 7 was in practice only partially implemented. This problem may very well prove to be the main negative outcome of the return and restitution process.

The divergence between returns and restitution also had its effect on cooperation within the PLIP, since it endangered the common base for cooperation of the international participants. Although many of the main players in Bosnia's post-conflict reconstruction effort were involved, the Property Law Implementation Plan had always been more than a rigid compromise between them. Under the guise of a coordinated effort to effect both restitution and return, a shift towards a rights- and restitution-based approach, as described in the previous section, is palpable in the very name of the project. Moreover, the shift also becomes apparent from the relative influence and commitment of the various actors over time. The most important change is the growing role of the OSCE. Building on its initial role of monitoring elections, the organisation had established a very extensive field presence of human rights officers. These local officers were often the first international actors to whom individuals turned when complaining about human rights violations. Once returns started to occur and the massive obstruction by local authorities became tangible, housing restitution complaints became the bulk of the work of these OSCE officers. As a result, from the start of 1999 – and therefore even before the establishment of the PLIP – the OSCE became the dominant international actor on the local level concerning these issues. The role of the OSCE grew even more in the course of that same year when the International Police Task Force no longer intervened in property cases directly and handed over its files to the OSCE.[196] In line with its mandate of rebuilding the rule of law and monitoring human rights, the OSCE viewed the housing question through a human rights

193 Ibid.

194 Williams (2005) p. 464.

195 Ibid., pp. 464-465. An example is the previously obstructionist town of Bijeljina, in which implementation surged from 49% in 2002 to 91% in 2003. The same developments could be discerned in Croat hard-line areas: ibid., pp. 540-541.

196 Philpott (2005) p. 8. IPTF did maintain a stake in restitution through its supervision of local police officers.

prism. This position turned the OSCE into one of the driving forces behind the double shift mentioned above.

Tensions among the PLIP partners increased over the years as the double shift occurred. The more the emphasis on restitution and the rule of law increased, the more uneasy the position of return-committed actors as the UNHCR and the CRPC, with an Annex 7 mandate, became. The CRPC started to press for prioritization of its own cases with local housing offices, in contradiction to the chronology principle. Additionally, the UNHCR faced a reduction in its field offices. It therefore increasingly chose to focus on its traditional tasks: protection of refugees and other displaced persons and providing accommodation for them. Its call for an exception to the chronology rule – one of the main bones of contention among the PLIP agencies – should be seen in this context.[197] The UNMiBH, through the IPTF, was a smaller player in the whole with a specialised police-related mandate. Thus, the OHR had to take the lead in maintaining consensus – an ever more difficult task as restitution and return were separated.[198]

When the tensions in policy were also reflected in practice, consensus really started to dissolve. The achievements of the restitution process showed that returns did not always follow restitution.[199] What had been clear in theory now became visible on the ground: restitution may be a necessary condition for return, but not a sufficient one. The previous conflation of return and restitution in the PLIP that had offered a guise for cooperation for all international actors was now lost.[200]

This was not the only reason for the dissolution of consensus and commitment to the restitution process among the international actors. The same pressures that had led to the development of the PLIP – decreasing outside interest and thus funding for Bosnia – also played their part.[201] In 2001 and 2002 the Peace Implementation Council called for the 'streamlining' of the implementation of the civilian part of Dayton, which included Annex 6 and 7.[202] As a result each PLIP partner was under more pressure to report to donors on its own specific role and contribution to solving the Bosnian refugee and restitution issue. This hampered the existing cooperation. The more the goal of the whole was being achieved, the more the parts were returning to their own interests.

It was under these difficult circumstances that the final phase of the PLIP was implemented. Municipalities worked towards substantial completion[203] of the property law implementation process, as measured by the PLIP statistics. Implementation was

197 Ibid., pp. 14-16.
198 Williams (2005) p. 468.
199 Philpott (2005) p. 2.
200 Williams (2005) pp. 512-513; Philpott (2005) p. 20.
201 ICG (2002) p. 40.
202 See e.g. OHR, *Communiqué by the PIC Steering Board*, 28 February 2002. See also: Philpott (2005) p. 14.
203 'Substantial' was used, since completion of all cases was impossible; there was no deadline on reclaiming private property and thus new claims could still be submitted.

considered to be substantially completed when '[a]ll pending claims made for property under the property laws, including requests for enforcement of CRPC decisions, have been resolved, in the sense that a decision has been issued and all subsequent steps required by law have been taken.'[204] Moreover, municipalities were obliged to allocate sufficient resources to deal with future claims or requests for enforcement in accordance with the law.[205] From the fall of 2003 onwards, PLIP partners started to verify substantial completion.[206] By the summer of 2004 all but two municipalities had completed implementation and 90 out of 130 had been formally verified.[207] The PLIP had achieved its formal goal.

The official conclusion of international involvement in the restitution process had already come earlier, on 1 January 2004. The domestic authorities were given the sole responsibility for Annex 7 of Dayton, whereas this had been a shared responsibility until then. The CRPC and the OHR/RRTF handed over their mandates and tasks under Annex 7 to the Bosnian actors in the restitution process. The UNMiBH's mandate had already expired a year earlier, on 31 December 2002.[208] After the transfer, the OHR restricted itself to a purely monitoring role.[209] Local RRTF offices were closed, but the Ministry for Human Rights and Refugees of Bosnia and Herzegovina opened regional centres, charged with the coordination of returns.

Almost ten years after Dayton, the restitution process had been brought to a relatively successful end. Nevertheless, it cannot be sufficiently emphasized that PLIP completion did not mean that Annex 7 had been fully implemented. Restitution was only part of the puzzle. The creation of sustainable conditions for return, another key element of Annex 7,[210] was a goal that was much more difficult to reach, let alone to measure, but equally important in undoing the effects of the conflict. Although the implementation of the right to housing restitution was an important and necessary step, the amount of time and resources it took has distracted attention from creating the conditions for sustainable returns.[211] The latter challenge received more attention once property restitution had been implemented. In a January 2006 report to the UN Secretary-General, the High Representative concluded that the domestic institutions had been effective and successful in taking up their responsibilities. Even so, he emphasized that for truly sustainable returns to occur, attention should be broadened

204 PLIP Municipal Guidelines for Substantial Completion of Property Law Implementation, 28 May 2003, para. 1.
205 Ibid., para. 6. Other requirements, regarding the storing and sharing of information were included in the same document.
206 Williams (2005) p. 542.
207 OHR, *Banja Luka and Donji Vakuf Last Municipalities in Bosnia to Complete Property Repossession* (press release, www.ohr.int/plip), 27 July 2004.
208 Willliams (2005) p. 469.
209 www.ohr.int/archive.
210 Article II of Annex 7.
211 Philpott (2006) pp. 17-18.

from housing issues to employment, education and other matters.[212] This concern echoed a 2005 report of his representative on the human rights of internally displaced persons, Walter Kälin, on the situation of IDPs in Bosnia.[213] He emphasized that the restitution of property was only one of three necessary conditions to ensure sustainable returns. Of the other two, physical safety had mostly been ensured, but adequate economic, social and political conditions were still partially lacking. Even within the realm of housing and property restitution, the most vulnerable groups – women, children, Roma – experienced huge difficulties in reclaiming their homes, for lack of valid property titles and legal representation.[214] These are exactly the points on which domestic and international NGOs, such as the Bosnian Helsinki Committee and Human Rights Watch, criticised the international actors: the emphasis on the success of the PLIP and the restitution process hid the problems with sustainable return. International disengagement started before the domestic authorities showed clear commitment to facilitate returns.[215]

As a final note on the theory of Diehl, Ku and Zamora, the developments in post-Dayton Bosnia have shown that some refinement of the criterion of will or consensus is called for. Complete consensus of *all* actors involved is not necessary. When the most powerful or influential ones achieve consensus or at the minimum work towards the same aim through their actions, a norm may become effective. This can even occur when less influential actors resist effective implementation of that norm. By studying the underlying interests, one may be able to explain the emergence or dissolution of such consensus.

212 UN Security Council, *Twenty-Ninth Report of the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations*, 3 February 2006, UN Doc. S/2006.75, para. XII.

213 Walter Kälin, *Specific Groups and Individuals: Mass Exoduses and Displaced Persons*, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Addendum: Mission to Bosnia and Herzegovina, UN Doc. E/CN.4/2006/71/Add. 4.

214 Ibid., paras. 34 and 38-41. On the specific difficulties for women to enjoy housing rights, see: Ingrid Westendorp, *Women and Housing: Gender Makes a Difference* (Antwerp: Intersentia 2007).

215 Williams (2005) pp. 470-473.

CONCLUSION

CHAPTER 13
CONCLUSION

13.1 INTRODUCTION

> *We checked the yard inch by inch and found that it was ours. One after the other we entered, and the yard was still as we knew it – no changes in it. Then we proceeded toward the shelter and looked inside. We found strange creatures there. I entered and found that our sitting places were occupied.*[1]

George Orwell's famous *Animal Farm* was not the only fable written during the Second World War. In 1943 the Palestinian author Ishaq Musa al-Husayni published *Memoirs of a Hen*, from which the quote above is taken. The story recounts the life of a hen moving from the countryside to the city and finds herself facing all kinds of new problems. One day she returns to her shelter and finds another hen family installed there. When she asks when they will leave, the other family tells her they do not know. Instead of chasing them by force or moving away herself, the hen – without showing any emotion – urges her children to leave to other places. In real life, such a flexible and even utopian reaction to uninvited newcomers into one's house will be extremely rare. Rather it may be the source of new conflicts.

The present attempt to define and assess the possibilities to render the right to housing restitution more effective was based on the premise that housing restitution is conducive to structural peace after armed conflict. This conduciveness may work in two ways: by solving restitution issues the choice to return home after displacement may become easier and by applying a human rights approach to restitution the robust form of the rule of law may be strengthened. The research has been undertaken in full cognizance of the fact that the legal aspect of housing restitution is only a small, but nevertheless essential, element of the broader efforts to rebuild post-conflict societies. It is to these efforts that I hope to contribute by having explored the topic of housing restitution rights.

In this concluding chapter, I will summarize the findings from the previous three parts of this book: the normative framework, the operating system, and the will to implement the norm, by way of the case study on Bosnia and Herzegovina. The usefulness of Diehl, Ku and Zamora's theory will be assessed based on these findings. Finally, I will formulate a number of recommendations on the right to housing restitution.

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1 Ishaq Musa al-Husayni, *Memoirs of a Hen* (Toronto: York Press 1999, transl. George J. Kanazi) p. 63.

13.2 THE RIGHT TO HOUSING RESTITUTION: INCOMPLETE EMERGENCE

There are two ways to approach the right to housing restitution, either one can see it as part and parcel of a right to reparations following a human rights violation. Or one can perceive it as a right of its own. In this study both possibilities have been looked into. Under the first approach, I have first tried to explore what kind of situations would amount to a violation of the European Convention on Human Rights by exploring how the European Court assesses cases concerning the following rights: the right to respect for the home (Article 8 ECHR), the protection of property (P1-1), and non-discrimination and minority protection (predominantly Article 14).

The Court has interpreted the notion of 'home' under Article 8 in an ever-broadening way over the years. The most decisive element in this notion is attachment or, put differently, the existence of 'sufficient and continuing links' between an applicant and his or her dwelling. Having some kind of legal interest in the house involved is a strong indication for such a link. The Court's case law seems to indicate that forced displacement does not automatically break the link. An intention to return to one's former house as soon as possible would seem to be sufficient to bring such a situation within the scope of Article 8.

Although Article 8 does not include a right to a home nor a full-fledged right to restitution, the Court's interpretation of the European Convention does offer certain minimum safeguards for people who have lost their houses. The Convention is not concerned with the quality of housing as such, but state parties are obliged not to cause people to fall under a certain minimum level of decency. If the state, through its actions or through a conscious failure to act, causes people to lose their homes and become either homeless or obliged to live in inhuman or degrading conditions without any compensation or alternative lodging being provided, Article 8 will most probably be violated. The initial legal occupation or ownership of the former home is a relevant factor in such cases. The balancing of these facts and consequences is taken into account under the fair balance test, which is part of the third step of testing the legality of interferences with the home: there should always be (1) a legal basis, (2) a legitimate aim should be pursued, and (3) the interference needs to be necessary in a democratic society. The same fair balance test is applied in instances of positive obligations for the state.

Considering the three situations which may lead to the loss of housing – destruction, eviction and denial of access – the Court has held the following. Destruction of housing will – in the context of conflict as opposed to peacetime demolitions for e.g. safety of building reasons – be almost impossibly for the state to justify. The same goes for evictions: in principle the standard test applies, but it will be very difficult for the state to pass in a context of armed conflict. Again, the issue of whether the people involved have legally or illegally lived in the house at stake is a relevant factor. Legal occupation weighs in favor of the evictees under the fair balance test, whereas illegal occupation works against them. Other factors of relevance are the availability of alternative accommodation, the conduct of the applicants and the authorities, and the

existence of sufficient safeguards.[2] As to complete denial of access to one's house, this will not be easily seen as a proportionate interference, especially when it is enforced over a prolonged period of time. Summarizing, the state's behavior in all these cases may not be automatically unjustifiable, but it will often be unjustified.

As a final note on positive obligations, the lack of a general obligation for states to offer housing restitution is somewhat mitigated in certain cases. When an applicant has obtained a national court order to effect restitution, the state should implement such an order. Similarly, when third parties block access to someone's home, the state is obliged to take reasonable measures to allow the applicant to enjoy the use of his or her home. Thus, the state should both enforce its own decisions and regulations and offer reasonable protection against interferences by third parties.

The notion of possessions, as protected under P1-1, has equally been interpreted in an expansive way by the Court. The concepts of home and possessions are distinct, but overlapping. There are other similarities, apart from the contents of the notion. Like Article 8, P1-1 does not include a right to property restitution. In addition, the Court applies the same fair balance test in both cases and uses approximately the same balancing factors. Although the level of protection offered by P1-1 seems to be slightly lower than the one under Article 8, P1-1 does have added value in several respects. First, possessions under P1-1 represent a pecuniary value, which entails that compensation may be more easily calculated than could be done under the more symbolic notion of the home. Secondly, the mere fact that a building is recognized as property may be a strong indication for recognizing it as a home under Article 8. Thirdly, and most importantly, through collusion the two provisions strengthen each other; in the balancing of interests, those people for whom the dwelling involved is both their home and their property are in the strongest position.

Finally, the prohibition of discrimination of Article 14 ECHR helps to focus on one of the underlying problems of loss of housing during conflict: the specific targeting of certain groups. Although the Article is accessory in nature and can thus only be invoked if the complaint comes within the ambit of one of the other substantive Convention articles, it does offer additional protection. Whenever a state treats persons in analogous situations differently, it will have to put forward an objective and reasonable justification for such treatment. This means that the distinction made should serve a legitimate aim and be proportionate. The margin of appreciation is decisive for the level of scrutiny applied by the European Court of Human Rights. I have argued that in post-conflict housing restitution cases, a narrow margin – and thus strict scrutiny – is called for.

Apart from the prohibition of discrimination, the European system of human rights also contains specific safeguards for minorities. The core document of binding legal obligations in this respect is the Framework Convention for the Protection of National Minorities. As opposed to the ECHR, this Convention is tailor-made to take the specific needs of minorities into account. This entails that it contains explicit positive

2 The latter factor is largely included in the first two limbs of the paragraph 2 test under Article 8 ECHR.

obligations to achieve effective equality in fact instead of merely in law. It also prohibits acts of ethnic cleansing. The supervisory body, the Advisory Committee, has even held that the right to return of displaced persons should be a permanent entitlement without deadlines. The European Convention on Human Rights, on the other hand, contains no specific provisions geared towards minorities, with the exception of Article 14. Consequently, the Court's case law on minority issues is a mixed bag. The Court seems to recognize the vulnerability of minorities, but does not generally apply strict scrutiny in cases concerning minority issues. Especially in a post-conflict context in which the individual may have lost faith in the neutrality of the state, such strict scrutiny on the European level would be desirable. As has been suggested, the Court's jurisprudence and thereby the Convention's provisions would become more relevant for the specific needs of minorities if the observations of the Advisory Committee, as a specialized fact-finder would be taken into account. This would strengthen the coherence of the European human rights protection system: reference to other European norms, as the Advisory Committee already does, not only strengthens the inter-institutional legitimacy of those norms, but also helps to preclude inconsistent standards within the same legal space.

Summing up, the European Convention contains no general right to restitution. Nevertheless, the case law of the Court contains many indications on when the loss of housing during armed conflict could be seen as a human rights violation on the part of the state. This is an essential element in the construction of a housing restitution right based on the reparations approach. Restitution has been shown to be the preferred form of reparation for breaches of international law. Although restitution may not be possible for all kinds of human rights violations, it can often be done in the case of housing matters. The obligation on states under international law to provide restitution can and should be transposed on the relations between states and individuals. This has not, however, led to a concomitant enforceable right to restitution for these individuals. Even in the European context, where an individual can turn to an international court to seek justice, no such right exists. The European Court of Human Rights has increasingly indicated in its case law that states are under a duty to offer *restitutio in integrum* whenever possible, but has not unequivocally ordered restitution. Nevertheless, its ever more specific indications may form an important step in that direction.

The second way to approach the right to housing restitution is to perceive it as a right of its own. For lack of specific European rules on the issue, this part of the analysis has focused on the global level and particularly on the quest for a rule of customary international law. As has been shown, the emergence of the right to housing restitution can be traced back to the broader right to return. This human right is firmly rooted in international human rights law and international humanitarian law. Developments since the 1980s and 1990s testify to a deepening and a broadening of the right. A deepening towards the more specific rights to return to one's home and even to housing restitution as such. This deepening can be found in resolutions and recommendations of United Nations bodies and in peace agreements. The broadening concerns a widening of the scope from refugees to other categories of displaced persons. State

practice on the issue is not uniform, not even in the states especially affected. Nor is the right to housing restitution a right which can be generally invoked as yet, either nationally or internationally. Nevertheless, there is a trend towards the formation of a customary rule of law. The apex of these broadening and deepening tendencies are the UN *Principles on Housing and Property Restitution for Refugees and Displaced Persons*.

The *Principles* are not a binding text, but an authoritative statement from a UN body of human rights experts. In part, they reflect existing human rights law, in part experience from post-conflict countries. The *Principles* proclaim the right to housing restitution as a distinct right which applies to all categories of displaced persons. They formulate the rights and interests of all possible stakeholders in restitution processes in detail. As the analysis in this study has shown, this proclamation of an autonomous right is probably more than can be defended in the sense that it is still *de lege ferenda*. In spite of that, the *Principles* are an important statement of soft law which may serve as a guidebook for both international organisations and states. Thus, and this is of importance for the formation and effectiveness of new international norms in a broader sense, they may be effective without being binding in the traditional way.

The evolving and emerging right to housing restitution, especially in its specified form in the *Principles*, largely lives up to the requirements of a norm which is sufficiently developed to be communicated clearly, as Diehl, Ku, and Zamora's theory requires. This in itself shows that their strict allegiance to binding law, as formulated in their original theory, may be too strict. The combination of emerging or soft law with good implementation may equally render international norms effective. In practice, as long as the right to housing restitution is not legally binding, either through a treaty or customary law, the importance of including it in peace agreements or national legal systems will nevertheless be of great help.

The latter happened in Bosnia and Herzegovina at the end of the armed conflict in the 1990s. A specific right to housing and property restitution was incorporated in the Dayton Peace Agreement. In addition, the European Convention of Human Rights was made directly applicable in the Bosnian legal system. The Bosnian Human Rights Chamber joined the two in its case law. On the one hand, this filled in the very general and broad frame of the Dayton restitution right. On the other hand, it applied the ECHR norms – sometimes with more flexibility than Strasbourg would do – to a post-conflict situation. In emphasizing the legality test when assessing interferences with housing and property, the Chamber focused on the restoration of the rule of law. Domestic laws and practices contrary to human rights were pinpointed, assessed, and struck down when necessary. The interests of both claimants and occupants were guaranteed within a normative structure firmly built on existing European human rights. Finally, the Daytonian restitution right was given normative emphasis, since the Chamber could order and actually did order restitution as a form of reparation. All of this shows that it is important to add flesh to the bones of restitution rights by interpreting and applying them in the light of existing human rights norms.

13.3 THE OPERATING SYSTEM: STUMBLING BLOCKS AND DISCREPANCIES

The operating system is the constellation of sources of law, actors, jurisdiction, courts and institutions which support the effectiveness of the norm involved. On the issue of housing restitution we are faced with the availability of global, but non-binding norms and the existence of a regional European operating system of human rights which is relatively effective and strong, but not specifically geared towards restitution in post-conflict situations. In addition, sometimes restitution schemes exist on the national level in post-conflict states. These may contain restitution rights, but their application may not always happen in balanced, effective, or non-discriminatory ways.

Such discrepancies between the normative and operating systems are a common occurrence in international law. Often, the development of new norms may precede the emergence of connected operating systems. Diehl and Ku have identified the factors of necessity and political shock as elements which may help to bring the two systems more in line with each other. Extra-systemic actions, such as the emergence of formal and informal networks of actors – states, NGOs, international organisations, and others – may help the build the critical mass necessary to effect such a change.

In the case of housing restitution the discrepancy is clear. Apparently, the elements of necessity and political shocks have not been present to a sufficient extent on a global level. On a national level, however, operating systems of housing restitution have emerged in some post-conflict states. In those cases, however, there is always the danger that in the end the state is unwilling or unable to effectively implement housing restitution. From a human rights perspective it is therefore all the more important that a legal safety net exists *outside* the state. The operating system of the ECHR is the most suitable net in the European context. Thus, it is essential to assess the legal stumbling blocks encountered by individuals when they turn to that European safety net.

Our analysis has shown that the European system of human rights protection is built on the assumption that, first and foremost, the state is the guarantor of such rights. The Convention institutions only play a subsidiary role. This manifests itself in several ways. First, the state is obliged to offer an effective remedy on the national level for human rights violations. Although the exact form of the remedy can be chosen by the state, it should always be accessible, adequate and effective. In the case of loss of housing in violation of ECHR norms, specific criteria have been established: restitution should be included in the remedies offered at the national level; compensation for both pecuniary and non-pecuniary damage should offered; an effective investigation should be undertaken if the culprits are unknown; the remedial decisions should be enforceable, and the composition of the relevant institutions should avoid conflicts of interests. The latter may be partially guaranteed by a semi-international composition of such institutions, or at least of the highest level thereof.

The legal stumbling blocks for individuals in this operating system can be predominantly found in the admissibility criteria and in the limits of jurisdiction of the main supervisory institution, the European Court of Human Rights. In this study two

specific problems of specific relevance for housing restitution have been looked at more closely: the temporal and geographical scope of human rights obligations of states under the ECHR. As has been shown, the Court squarely places itself within the broader framework of general international law. It does so with cognizance of the specific character of the ECHR as a human rights treaty. However, the degree to which this permeates the case law differs. Sometimes, in the case of the temporal scope, some flexibility is applied. But there are limits to this, as the Grand Chamber *Blečić* judgment showed. In the case of the geographical scope of the Treaty, the Court seems less favourable to the individual than its regional and global peers. For both problems studied here, procedural rules become real stumbling blocks whenever the Court to strictly applies general international law, for example in explaining jurisdiction. Although such close connections to the operating system of international law might be applauded for reasons of broader coherence, I would argue that human rights issues may sometimes call for a different approach. From a human rights perspective, the protection of the individual is central, not the prerogatives of the state. Thus, this specific object and purpose of human right treaties deserves emphasis when interpreting concepts such as jurisdiction.

The main challenge of the operating system in post-conflict situations is the magnitude of the problem. Human rights violations during – and often also immediately after the end of – the armed conflict are often massive, both in gravity and numbers. This means that the European safety net will not usually suffice. The European Court of Human rights is already over-burdened. In addition the time between application and decision of a case is very long. If neither the ordinary national nor the European systems are sufficient, then specific solutions are called for. Such solutions should be intermediate: both in time and in level. Intermediate in time, because they would exist only for a certain number of years in order to deal with the human rights violations resulting from the armed conflict. Intermediate in level, because they would be semi-international in several respects. First, in their composition to guarantee independence. Secondly, in the help offered by outsiders – international organisations and states – to establish and support them. Thirdly, in the norms they apply, to make sure that the country's return to normalcy in general is accompanied by a (re-)embedding in the applicable regional and global human rights norms. This would help to ensure both the coherence of the operating system and would serve to prevent that merely victor's justice is being done. If need be, the European Court can provide specific indications on the parameters of an acceptable restitution scheme by way of a pilot judgment.

Another important challenge is the issue of implementation. Whether the post-conflict state is weak, divided, or unwilling, implementing restitution decisions will often be the litmus test of an effective system. It is therefore essential that the operating system provides both for the possibility of restitution and for mechanisms to implement it. In the final analysis, when these are in place, all depends on the will to actually enforce restitution rights. This requires consensus among at least part of the actors involved, as the Bosnian case study has shown.

Finally, I would argue that the post-conflict context calls for a specific awareness among supervisory institutions of the vulnerable situation in which victims find themselves. This awareness may entail that admissibility conditions are applied with some flexibility. This is indeed what has been done by the Daytonian institutions in Bosnia and Herzegovina. Moreover, it may entail that the problems at the core of the conflict, such as ethnically driven eviction policies, are duly taken into account when assessing a human rights complaint. Put differently, information on the broader background of an individual case is especially valuable in a post-conflict context. Two existing ways to achieve this may be used. The first is an increased acceptance of third party interventions before the Court. These third parties, such as NGOs or international organisations, may provide important input. The second way is to make use of inter-institutional information sharing with other Council of Europe institutions. Just as the Court already takes the reports of the Committee for the Prevention of Torture into account, it could also benefit from the information in the reports and opinions of the Advisory Committee of the Framework Convention for the Protection of National Minorities. A third, future way may also be relevant: under Protocol 14 of the Convention 'the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.'[3] All of this may help to render the strong ECHR system more sensitive to the particular challenges of post-conflict situations.

In conclusion, any operating system supporting the right to housing restitution in post-conflict situations should contain ingrained awareness mechanisms such as the ones mentioned above, both concerning the particular context of human rights within international law as well as the specific issues at stake in post-conflict situations.

13.4 THE BOSNIAN EXPERIENCE

The Bosnian restitution process – like any other for that matter – took place in very unique circumstances, contingent upon many factors. First, the Dayton Peace Agreement entrenched an extremely wide array of international human rights into the new Bosnian constitutional system.[4] Although this did not always translate into full human rights protection in practice, it at least provided a common point of reference to which all warring parties had agreed and which the international actors could use as a yardstick. Importantly, the right to housing and property restitution was explicitly included. In addition, semi-international institutions such as the Human Rights Chamber and the CRPC were set up to underpin this system. The system could also

3 Article 13 of Protocol 14.

4 Timothy William Waters, 'The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution', Harvard International Law Journal vol. 40 (1999) pp. 517-592, see p. 536.

function relatively well, because pre-war property records were to a large extent still available.[5]

Moreover, the degree of international intervention, power and influence was very high. The formal powers of the High Representative are the clearest aspect of this. No unified domestic force or strong central state existed to oppose this international intermingling in internal affairs. The Bosnian war had not resulted in a clear winner; each of the three warring parties was in a minority position. The international interference was not only intense in power, but also in means. The lack of means of the Daytonian institutions mentioned in the previous chapter does not adequately reflect the broader context. In the ten years after Dayton approximately 19 billion USD of external funds flowed into Bosnia. Finally, the fact that Bosnia is situated in Europe probably played its part in several respects. It kept the country 'on the European agenda', not in the least because of the large number of refugees that had sought refuge elsewhere on the continent. The same countries which were powerful members in the international organisations such as the UN, the OSCE and the EU were therefore directly confronted with the consequences of the Bosnian conflict. This probably provided an extra incentive for more and longer involvement than in the average post-conflict country. The proximity to European governance structures such as the Council of Europe, and further down the road the European Union, functioned as pull factors for domestic Bosnian authorities which for economic and/or political reasons wished to be included in them.[6]

These relatively beneficial factors made more progress on restitution possible than could have been done in many other societies. By having investigated such a relatively successful case study, the minimum requirements for success have in a way come to the surface. Stripped from many of the additional difficulties other countries face, the Bosnian experience provides a relatively unhindered look at some of the core challenges of implanting housing restitution rights in post-conflict states.

The developments described in chapter 12 show that for the implementation of the right to housing restitution in Bosnia more was needed than just that right itself and/or an operating system to support it. In addition, a will or consensus to implement that right – as Diehl, Ku and Zamora have argued – was necessary. The Bosnian housing restitution effort revealed that such a consensus is not necessary among *all* actors, but at least among the more influential ones. In addition, unwillingness or obstruction of the remaining actors needs to be overcome in one way or another, either by forcing them to act or by sidelining them. Looking at the underlying interests and mandates of the actors involved can help to explain why and when consensus emerges and dissolves.

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5 Charles B. Philpott, 'From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina', *International Journal of Refugee Law* vol. 18 (2006) pp. 30-80, see p. 76.

6 Rhodri Williams, 'The Significance of Property Restitution to Sustainable Return in Bosnia and Herzegovina', *International Migration* vol. 44(3) (2006) pp. 39-59, see pp. 52-53.

The double shift from return to restitution and from pragmatism to the rule of law was never entirely made. The complexities on the ground always called for compromise. The exceptions to the chronology principle are a vivid example of this. Even when the rule of law was taken as a beacon to guide the course of all actors, political pressure was often still necessary to obtain results. Nevertheless, the shift to the rule of law was an essential one in two respects: it made the restitution process less political and more based on individual choice. Secondly, as a broader lesson for all post-conflict housing restitution processes, the inclusion of a rule of law approach in dealing with this specific issue helped to strengthen the rule of law in Bosnia more generally. The approach helped to support the notion that laws apply everywhere and to everyone, even to the powerful. The police was there to enforce the laws. Failure to abide by the laws resulted in sanctions.[7] Remedies against human rights violations existed and decisions on those matters were increasingly enforced. Since the restitution process affected hundreds of thousands of persons on a population of a few million, these positive effects had a substantive impact in terms of numbers. This in itself is an important reason to advocate an increased focus on these elements of post-conflict reconstruction efforts, instead of only emphasizing criminal law approaches to punish the main perpetrators. Justice is not only done on a big stage, but also in those matters which are very close to daily life. Housing matters are a clear example.

13.5 LESSONS FROM BOSNIA

Although it is difficult to generalise from one case study, the Bosnian restitution process does offer some pointers on how the right to restitution can be more effectively secured. Strong cooperation and coordination by the international actors involved is necessary to ensure the implementation of human rights in the face of obstructive domestic authorities. This should be coupled to an effective system of carrots and sticks vis-à-vis those authorities.[8] The adjudication on human rights benefited from international input, both in terms of knowledge and independence. By contrast, the large-scale decision-making and implementation of restitution claims only started to work when the emphasis shifted from the CRPC to the domestic municipal claims system. It shows the importance of providing for a good system of implementation. Moreover, integration into the domestic structures helped to foster a rule of law approach within that very system. A completely detached, semi-international mechanism does not have that advantage. In addition, a good tool to measure progress – in the Bosnian case the PLIP statistics – can be very helpful to see how well restitution works[9] and which specific regions or municipalities need to be pressured more to implement restitution rights. Finally, the Bosnian example reveals that housing

7 Anne Charbord, *Human Rights of Internally Displaced Persons in Bosnia and Herzegovina* (Wien: Verlag Österreich 2005) p. 314.
8 Philpott (2006) p. 77.
9 Ibid.

restitution can never be fully planned in advance; a flexible system, using bottom-up input from practice to adjust itself, is necessary to deal with unexpected challenges.

Perhaps the most important lesson for the future is a dual one: the Bosnian experience has shown that housing restitution should be treated as a rule of law issue from the start[10] and should thus be separated, at least partly, from the broader return issue to achieve results. This implies a countrywide application of legal rules and the abidance of everyone with those rules. The former means that, instead of negotiating restitution with willing authorities and ignoring unwilling ones, the restitution process should be presented and implemented as a rights-based one instead of merely a political option. The latter – everyone has to respect the law – helps to strengthen the credibility of the approach taken and is valuable as a goal in itself: to rebuild the rule of law.

Simultaneously, however – and this is where the efforts in Bosnia were less successful – the broader obstacles to sustainable returns should be tackled. Restitution facilitates returns but does not guarantee them.[11] In Bosnia, 'return of property to people has not always resulted in the return of people to property.'[12] A well-organised restitution process may end the 'legal limbo' but not necessarily the societal one.[13] Therefore, investments should be made in rebuilding the economy to provide employment for returnees. Security should be guaranteed. Education should be made accessible and detached from the ethnic policies or ideologies of those in power. In general, access to government services should be provided in a non-discriminatory manner. All of these problems require a sustained effort on the part of both domestic and international actors. They are difficult to achieve, but necessary to make the right to housing restitution effective in practice.

Connected to the latter point is the paradox of time. On the one hand quick action as soon as the conflict has ended is needed. The longer people live in conditions of displacement, the less likely they are to return. On the other hand, the international actors that choose to become involved in a post-conflict society need to commit themselves to the post-war reconstruction effort for a longer period of time.[14] Especially the broader conditions surrounding restitution are very difficult to secure quickly – with the possible exception of security. Thus, expectations or formal goals should

10 See also: Charbord (2005) p. 442.

11 Philpott (2006) p. 79.

12 Rhodri Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice, *New York University Journal of International Law and Politics* vol. 37 (2005) pp. 441-553, see p. 445.

13 Charles Philpott, 'Though the Dog is Dead, the Pig must be Killed: Finishing with Property Restitution to Bosnia-Herzegovina's IDPs and Refugees', *Journal of Refugee Studies* vol. 18 (2005) pp. 1-24, see pp. 18-19.

14 It is telling that as early as 1998 one observer noted: 'The continued involvement of the international community, and its ability to adhere to common policy goals, will be an extremely important influence in determining whether the right to return can be realised, or is allowed to die quietly.': Marcus Cox, 'The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina', *International and Comparative Law Quarterly* vol. 47 (1998) pp. 599-631, see p. 620.

fit the design of restitution and return programmes. Sufficient funding should be allocated.[15]

A successful restitution process offers the legal possibility for individual choice. But to enhance the possibilities to choose, the broader context of returns should always be taken into account. From a human rights perspective, the ultimate yardstick in these matters is not whether everyone returned to his or her former home, but whether each is given a 'free and informed choice' both legally and in practice between return and relocation.[16] In the Bosnian situation, the rule of law approach – as compared to the earlier return approach – favoured individual choice. Restitution was thereby turned more into a right, instead of being the only option. Although the choice was partially limited by the fact that almost no help for relocation was provided,[17] claimants could choose to sell returned property. This was a *de facto* and self-provided compensation that was not formally offered. Considering the fact that this option only materialised once the shift from return to restitution was made, it becomes clear that the interests of those who never planned to return were initially not well protected.[18] A formal compensation mechanism would have done this, as was guaranteed in Dayton. Annex 7 indicates that all refugees and displaced persons have the right to 'be compensated for any property that cannot be restored to them.'[19] The fact that the international actors did not actively push the signatories of Dayton to provide such compensation, shows that the former were more interested in reversing ethnic cleansing as a political goal than in offering a full and open choice for all the displaced.

In conclusion, the Bosnian restitution process is a mixed blessing from a human rights perspective. Much more has been achieved than in many other post-conflict societies, but it has not been completely sufficient. An analysis of the process has shown that restitution issues can be tackled more effectively when the main actors align their efforts and enable domestic ownership which respects human rights. On the other hand, a full *de facto* restoration of pre-war circumstances is not really possible. Therefore, rather than merely maintaining the moral high ground by advocating a reversal of ethnic cleansing, international actors should focus their actions on securing the right to housing restitution in a rule-of-law manner. In addition they should tackle the broader problem of sustainable return in order to enable a real choice to be made between return and relocation and between restitution and compensation. Housing restitution has proven to be a key step in promoting humans rights in post-conflict Bosnia,[20] but it is certainly not the only step to be taken.

15 Philpott (2006) p. 76.
16 Williams (2005) pp. 449-450.
17 Charbord (2005) p. 321.
18 Philpott (2006) p. 80.
19 Article I(1) of Annex 7.
20 Philpott (2005) p. 14.

13.6 ASSESSING THE THEORY

This research started with the question how the right to housing restitution could be secured more effectively in European post-conflict situations. In order to answer this question, the research has been based upon and structured along the lines of a theory on the effectiveness of international legal rules. Diehl, Ku and Zamora have argued that three requirements have to be fulfilled in order to achieve effectiveness of an international norm: a sufficiently clear legal norm, a supportive structure, and the will or consensus of the system's members to use the law. They developed this theory to yield insights into the interplay of international relations and international law. As I have argued, it can also be used to answer the main research question. Three reasons have been adduced. First, the notion of an operating system has the flexibility to accommodate the diversity in institutions and sources of law in the field of property restitution. Secondly, the absence of a single legislator is a characteristic which the international legal order and post-conflict societies have in common. Thirdly, the three authors of the theory have explicitly included the field of human rights as a possible area of application of their theory.

The theory has functioned as a useful structuring device in approaching the issue of housing restitution. Especially for a topic on which no single treaty exists, it is necessary to go beyond the traditional norms-institutions-implementation triad, since this implies a strong connection between the three. Such a connection is neither an automatic nor a straight-forward one in the field of housing restitution, with its multitude of norms and institutions involved. By separating the analysis of the normative and the operating structures, it was possible to focus on the different developments within those two structures. To be able to give more than a superficial analysis of the third requirement, the will or consensus to use the law, it was essential to focus on one specific post-conflict situation. This enabled an in-depth look into the interplay of the three requirements in practice.

What about the sufficiency of the three requirements to achieve the effective functioning of a legal norm? The case study of Bosnia and Herzegovina seems that these three are indeed sufficient. No indications for a fourth or fifth requirement have been found. Nevertheless, the case study has yielded several refinements. Concerning the normative system, the central question was whether a right to housing restitution existed in a form that could be 'communicated clearly'. This depends largely on the context and set of norms one looks at. The case law of the European Court of Human Rights has proved to be an important tool of clarification of the general norms of the ECHR. Since this is a binding treaty and the judgments of the Court are equally binding, this set of norms lives up to Diehl, Ku and Zamora's demand that only binding norms count. The downside is that the Court's case law is necessarily a reflection of the cases it receives rather than a systematic analysis and interpretation of the Convention's provisions. At the other extreme, the very systematic, but not (yet) entirely legally binding *Pinheiro Principles* exist. Between these two there are country-specific peace treaties which may sometimes include – usually rather gene-

ral – restitution rights. The case study of Bosnia has shown that the combination of these three different streams of norms may be the most promising way forward. The binding norm of the peace treaty can be taken as the starting point, with adjudication in specific cases guided by regional and/or global human rights norms and inspired by the body of experience included in the *Pinheiro Principles*. For the model this means that restricting oneself to merely binding norms may be too narrow a vision.

The operating system is the second element of importance. When assessing the effectiveness of a human right, it is useful to consider the situation from the perspective of the individual. This involves that the perspective to study the elements of the operating system is bottom-up rather than top-down. Put differently, the legal stumbling blocks for the individual who tries to enforce his or her right become central. Additionally, apart from the formal competences of the various institutions involved in a specific operating system, their stance or attitude towards each other is a key determinant for the effectiveness and smooth functioning of the system. Especially when mandates overlap, this 'softer' element of the system can have an important positive or negative impact. This applies both to horizontal coherence between institutions on the same level, but also to what I would call systemic coherence. The latter refers to the coherence between the general system of international law, the system of international human rights, and the specific field of post-conflict governance systems. As for example the discussion on the issue of jurisdiction has shown coherence should not be a goal in itself. Although it is important, some form of flexibility may be needed to accommodate for the specific object and purpose of human rights and the particular context of post-conflict situations. In conclusion one should, when using the model, be very aware of issues of perspective and coherence.

Finally, the element of will or consensus of the system's actors to use the normative and operating systems can also be refined. As the Bosnian case study has shown full consensus among all actors involved is not required. When the most powerful or influential ones achieve consensus or at least work towards the same goal through their actions, a norm may become effective. This may happen even in the face of resistance of less influential actors. The emergence or dissolution of such consensus may be studied and explained by looking into the underlying interests.

The model of Diehl, Ku and Zamora is a helpful tool to study the effectiveness of human rights norms in post-conflict states. It helps to structure the analysis and to explain changes over time concerning such effectiveness. Nevertheless, the model should only be used with full awareness of the specific context at hand.

13.7 CONCLUDING RECOMMENDATIONS

The above has partly been a mapping exercise of the vast and not always coherent field of housing restitution rights. This leads to a number of recommendations in need of further refinement by studying other cases of housing restitution processes.

The first recommendations are normative. As long as the right to housing restitution has not been included in a global or regional human rights treaty, it is very

important to incorporate it in peace agreements. This applies to all situations in which a conflict has caused large-scale displacement. A legal solution to restitution issues as opposed to a merely political one is essential, not only in ensuring equity but also in helping to rebuild the rule of law. This helps to prevent that the local domestic actors perceive restitution and return rights as a bartering chip rather than as a legal obligation. Additionally, the right should be treated as a right and not as an obligation. This means that it can be seen as one of the prerequisites for return, but that the choice whether to return or not should be left to the individuals involved.

Since the right to restitution itself is a very open norm, inclusion in a peace treaty should always be accompanied by an interpretation clause. This should at least refer to the *Pinheiro Principles*, but preferably also to existing binding norms in human rights treaties. Such an accompanying provision ensures that the interests of the claimants are balanced in a fair way with those of the current occupants of a dwelling. In addition, it guarantees that not just the rights but also the duties of all stakeholders – including international actors such as other states and international organisations – are taken into account, especially those of vulnerable groups. This leads us to the first set of recommendations:

- Formulate restitution solutions in a legal way, in accordance with human rights norms.
- Include the right to housing restitution for refugees and other displaced persons in post-conflict peace agreements.
- Guarantee interpretation of such a right in the broader context of human rights in order to ensure a fair balancing of the interests involved, including those of the most vulnerable groups.

As to the operating system, it is crucial to ensure a system which is both impartial and effective. Impartiality is important, since post-conflict states may often be tainted, either by victor's justice or by local power-brokering along political, ethnic or religious dividing lines. The inclusion of international elements in post-conflict restitution institutions can provide such a guarantee. Since it will often be impossible and also resource-inefficient to do this on all levels and in all institutions, it should at least be done at the highest level of restitution or human rights institutions. At other levels the presence of international observers, functioning as local warning systems and transmitters of knowledge, may be sufficient. Whenever matters go wrong, the highest level *with* its international elements can then function as a safety valve. Restitution institutions should also function in a transparent way. This includes the treatment of claims in chronological order to exclude favoritism or the eternal deferral of certain claims.

The effectiveness of an operating system is dependent upon the implementation of restitution in practice. Thus attention should be given at the outset to enforcement of restitution decisions. Ideally, enforcement should be done by local domestic authorities. This prevents that the restitution process remains an alien one to the society at issue. Considering the large scale of restitution processes, such domestic local enforce-

ment of higher judicial or administrative decisions may also help to rebuild a normally functioning rule of law.

Each post-conflict situation is different. The obstacles to restitution may therefore also vary. Resistance against implementation of restitution efforts may take various shapes over time. In order to counter this resistance, flexible local warning systems – by way of observers or otherwise – need to be set in place. In this way, experiences from the field may find their way to the national level and to other regions within the same state and beyond. Moreover, the same channels can be used to spread best practices.

The process of restitution should not be an indefinite one, since the mere stagnation may be a basis for renewed conflict. Therefore, the transition from a temporary post-conflict operating system to a normalised state of affairs should also receive attention, including from outside actors. This will help to secure the gains made in rebuilding the rule of law. Eventually, any post-conflict restitution institution should be smoothly integrated into a more permanent state system. Lingering claims can then still be dealt with, but a return to normalcy is simultaneously made possible. Such a transition is a difficult step which requires attention in the very phase when international interest is moving towards other regions of more pressing conflict or crisis. Therefore, it is fundamental to:

- Ensure impartiality by temporarily including international elements at the highest levels of restitution and human rights adjudicatory institutions.
- Ensure effectiveness by giving due emphasis to the enforcement by local authorities of restitution decisions.
- Include flexibility in the housing restitution process in order to be able to tackle obstacles as they arise over time.
- Ensure a smooth inclusion of post-conflict operating system elements into the system of state governance by providing sufficient outside help and resources.

Finally, everything depends on the will to use the norm of the right to housing restitution, as included in a peace agreement. Since the interests of the actors involved – international organisations, other states, international and local NGOs, domestic authorities, and individual citizens – may widely vary, it is essential to build coalitions to achieve the goal of restitution. This may happen both in formal ways, such as the Bosnian Property Law Implementation Plan, but also in informal ways. The best result is guaranteed when *all* actors work towards the same aim, but in practice this will be a rare occurrence. Therefore it is wise to lobby, convince, and induce as many parts as possible of the domestic state institutions, both nationally and locally, of the necessity and advantages of housing restitution. It should be perceived and acted upon as an integral element of post-conflict reconstruction efforts. In this respect it is good to be aware of the fact that a post-conflict state is rarely a monolithic structure – even less so than a 'normal' peacetime state. Information campaigns to inform both the

displaced and those occupying other people's dwellings of their rights are an important device to strengthen housing restitution rights in practice.

- Build formal and informal coalitions of those favoring housing restitution.
- Increase awareness among all actors of the importance of housing restitution in rebuilding of the rule of law and for structural peace.

In the final analysis, as I have emphasized above, the effective implementation of the right to housing restitution is only one piece of a larger jigsaw puzzle. The interconnections of the legal dimension with the social, economic and psychological aspects of sustainable returns need to be explored further. More academic research into the practical effects of housing restitution rights in the broader context of post-conflict reconstruction is certainly called for. After all, the average displaced person will probably not possess the largesse and stoicism of the Palestinian hen. Rather he or she may carry the justified demands of the likes of Krstina Blečić to repossess her home.

SAMENVATTING

Voor een individu is het verlies van huis en haard een van de meest ingrijpende gevolgen van een gewapend conflict. Als de wapens zwijgen, is het terugkrijgen van de eigen woning dan ook een belangrijk doel, zowel symbolisch als materieel. Het recht op huizenteruggave (restitutie) is echter zelden formeel in wetgeving vastgelegd. Bovendien zal de betreffende woning vaak ofwel zijn verwoest ofwel bezet worden gehouden door anderen. Deze studie richt zich op de juridische obstakels die teruggave bemoeilijken. Daarbij zijn aanbevelingen geformuleerd om huizenteruggave in de toekomst effectiever te laten verlopen.

De achtergrond van dit onderzoek vormt het veranderende karakter van gewapende conflicten sinds het einde van de Koude Oorlog. Deze verandering ligt niet zozeer in de opkomst van *interne* gewapende conflicten, maar meer in de toegenomen inmenging van internationale organisaties in conflicten en in de veranderde rechtvaardiging voor conflicten – kort gezegd van ideologisch gedreven naar identiteitsgedreven conflicten. Dit laatste houdt in dat de rechtvaardiging voor gewapende conflicten – niet gelijk te stellen aan de oorzaak ervan – steeds meer gezocht moet worden in gepercipieerde groepsidentiteiten. Dit betekent dat de partijen in een conflict menen dat de vijand niet 'bekeerd' kan worden, maar moet worden verdreven of geëlimineerd. Het verjagen van mensen uit hun huizen wordt daarmee een middel in de strijd om gebieden te 'zuiveren'. Deze laatste ontwikkeling maakt huizenteruggave na conflicten problematischer dan vroeger. Tegelijkertijd biedt de toegenomen internationale bemoeienis kansen om een grootschalig proces van huizenteruggave, als onderdeel van het herstel van mensenrechtenbescherming en de rechtsstaat, toch te doen slagen.

De centrale vraag in dit onderzoek is hoe het recht op huizenteruggave voor vluchtelingen en andere ontheemden in Europese post-conflictsituaties effectiever kan worden verzekerd. Het gekozen perspectief is dat van de mensenrechten, specifiek het Europees Verdrag voor de Rechten van de Mens (EVRM). Het onderzoek gaat uit van de veronderstelling dat een mensenrechtelijke aanpak van huizenteruggave op twee manieren bijdraagt aan vrede na een gewapend conflict. Ten eerste doordat het oplossen van juridische claims op woningen een van de obstakels voor terugkeer wegneemt. Ten tweede doordat grootschalige juridische restitutieprocessen, indien ze plaatsvinden volgens internationale mensenrechtennormen, een belangrijke bijdrage kunnen leveren aan de wederopbouw van de rechtstaat in de vaak politiek en juridisch verzwakte post-conflictstaten. Deze aanpak biedt meer perspectieven voor een duurzame wederopbouw en minder kansen op hernieuwde gewapende conflicten dan puur politieke compromissen, waarbij bijvoorbeeld groepen vluchtelingen worden uitgewisseld.

De onderzoeksvraag wordt beantwoord met behulp van een theorie van Paul Diehl, Charlotte Ku en Daniel Zamora op het gebied van de leer der internationale organisaties. Zij stellen dat er drie noodzakelijke voorwaarden zijn voor het effectief functioneren van een norm van internationaal recht: (1) een voldoende ontwikkeld juridisch concept, (2) een ondersteunende structuur en (3) de politieke wil en consensus van de verschillende actoren in een systeem om de norm toe te passen. Het onderzoek is gestructureerd aan de hand van deze voorwaarden. Hoewel de theorie oorspronkelijk ontwikkeld is voor toepassing op het *internationale* niveau, is zij in deze studie gebruikt om de implementatie van internationale normen *binnen* een post-conflictstaat te analyseren. Het ontbreken van sterke centrale autoriteiten en de relatieve anarchie die daarmee gepaard gaat, zijn immers kenmerken die de internationale rechtsorde met een dergelijke staat gemeen heeft.

In het eerste deel van dit onderzoek wordt gekeken naar de vraag of het mensenrecht op huizenteruggave bestaat. Daarbij wordt allereerst de jurisprudentie van het Europees Hof van de Rechten van de Mens (EHRM) geanalyseerd aan de hand van de drie voor dit onderzoek meest relevant bepalingen: het recht op eerbiediging van de woning (artikel 8 EVRM), de bescherming van eigendom (artikel 1 Eerste Protocol) en het verbod van discriminatie (artikel 14). Uit deze analyse blijkt dat het EVRM impliciet noch expliciet een algemeen recht op huizenteruggave bevat. Wel kan dit recht in bepaalde gevallen ontstaan als het verlies van de woning is toe te rekenen aan de staat. Ook is de staat verplicht om, wanneer juridisch is vastgesteld dat iemand de rechtmatige eigenaar of huurder van een woning is, deze claim tegenover derden te helpen afdwingen. De staat is dus verplicht tegen illegale bezetters van woningen op te treden op verzoek van de rechtmatige eigenaar of huurder, zo blijkt uit de jurisprudentie van het EHRM. De toegevoegde waarde van het recht op bescherming van eigendom boven het recht op eerbiediging van de woning is beperkt, onder andere omdat de staat onder artikel 1 Eerste Protocol een ruimere beleidsvrijheid wordt toegestaan. Wel kan het feit dat een huis iemands eigendom is een claim onder artikel 8 sterker maken.

Het verjagen van mensen uit hun huizen tijdens gewapende conflicten kan onder andere zijn ingegeven door etnische, nationale of religieuze motieven. Diezelfde drijfveren kunnen restitutie na afloop van het conflict bemoeilijken. Een voorbeeld is het discriminatoir toepassen van restitutiewetgeving. Daarom is in dit onderzoek ook gekeken naar het verbod op discriminatie in het EVRM. In de context van gewapende conflicten en hun nasleep is in veel gevallen een strikte rechterlijke toets noodzakelijk. Verschillende elementen wijzen in die richting. Ten eerste kan het gaan om een niet of nauwelijks te rechtvaardigen onderscheid op grond van ras of etnische afkomst. Ten tweede is de onschendbaarheid van de woning een van de belangrijkste mensenrechten. Ten derde staat er voor mensen die hun woning hebben verloren veel op het spel. Discriminatie in een concreet geval zal echter vaak moeilijk te bewijzen zijn, vooral inzake de discriminatoire uitwerking van op het oog neutraal overheidsbeleid, ook al heeft het EHRM het gebruik van statistisch bewijsmateriaal toegestaan. Om de specifieke belangen van minderheden in restitutiezaken niet uit het oog te verliezen,

is het aan te raden dat het Hof meer gebruik gaat maken van binnen de Raad van Europa aanwezige expertise, onder andere de rapporten van het Adviescomité van het Kaderverdrag inzake de Bescherming van Nationale Minderheden.

Na het in kaart brengen van de rechten die bij het verlies van huis en haard potentieel worden geschonden, wordt in deze studie ingegaan op de internationaalrechtelijke gevolgen van een schending. Voor elke schending van internationaal recht is een staat in principe verplicht rechtsherstel te bieden. In de doctrine geldt restitutie als de vorm van rechtsherstel die de voorkeur verdient. In de praktijk wordt, voor zover er überhaupt rechtsherstel wordt gegeven, vaak overgegaan tot compensatie of een andere vorm van genoegdoening. De regels omtrent rechtsherstel zijn oorspronkelijk ontwikkeld in de context van betrekkingen tussen staten. Zij kunnen daarnaast ook worden toegepast tussen staten en individuen. De uitspraken van internationale mensenrechtenorganen tonen dit aan. Daarbij wordt zelden gekozen voor restitutie, omdat dat bij veel mensenrechtenschendingen, zoals bijvoorbeeld foltering, eenvoudigweg praktisch niet mogelijk is. Bij het verlies van de eigen woning kan dat echter meestal wel. Restitutie zou in dit geval dan ook de voorkeur verdienen.

De verplichting voor staten om rechtsherstel te bieden heeft nog niet geleid tot een onomstreden algemeen inroepbaar *recht* op rechtsherstel voor individuen. Wel zijn in het kader van de Verenigde Naties de Basisbeginselen en Richtlijnen over het Recht op Rechtsmiddelen en Rechtsherstel voor Slachtoffers van Grove Schendingen van de Rechten van de Mens en het Internationale Humanitaire Recht ontwikkeld. De Richtlijnen stellen het slachtoffer centraal, maar geven geen duidelijke voorkeur aan restitutie. Bovendien zijn de Richtlijnen niet formeel juridisch bindend. Toch kunnen zij, als gezaghebbend, door de Algemene Vergadering aangenomen, politiek document, een positieve invloed hebben op een opkomend recht op rechtsherstel.

In de Europese context is het EHRM van oudsher terughoudend geweest in het toekennen van rechtsherstel. De primaire verantwoordelijkheid voor rechtsherstel ligt in het EVRM-systeem binnen de nationale rechtsstelsels. Staten hebben wel de vrijheid de vorm van rechtsherstel te kiezen die zij wensen. Het EVRM geeft het Hof de mogelijkheid – maar legt niet de verplichting op – tot het geven van billijke genoegdoening indien dit op nationaal niveau niet of slechts gedeeltelijk mogelijk is. In de laatste decennia heeft het Hof steeds vaker financiële genoegdoening toegekend en nog recenter is het in sommige gevallen zelfs overgegaan tot het aanbevelen van restitutie – opvallend genoeg vooral in zaken waarbij het gaat om teruggave van bezit, waaronder huizen. *De facto*, maar niet formeel, is daarmee de beoordelingsvrijheid van staten verder ingeperkt. Deze ontwikkeling heeft echter geen recht voor individuen op rechtsherstel bij het EHRM opgeleverd.

Ook een specifiek recht op huizenteruggave bestaat nog niet onder het internationale recht. Omdat er geen wereldwijd verdrag bestaat dat dit recht bevat, is in dit onderzoek nagegaan of er een norm van international gewoonterecht op dit vlak bestaat. Het recht voor vluchtelingen om terug te keren naar het land van oorsprong is sinds de Tweede Wereldoorlog steeds breder erkend. In toenemende mate wordt geaccepteerd dat dat ook het recht op terugkeer naar de eigen woning omvat. In verklaringen en

resoluties van internationale organisaties en in sommige vredesverdragen wordt sinds de jaren negentig ook gesproken over een concreet recht op huizenteruggave. Steeds vaker wordt dat niet enkel toegekend aan vluchtelingen maar ook aan intern ontheemden. Net als bij het algemenere recht op rechtherstel is ook voor het recht op huizenteruggave een recent VN-document opgesteld, de Principes inzake Teruggave van Huis en Bezit voor Vluchtelingen en Intern Ontheemden (de Pinheiro Principes, vernoemd naar hun opsteller). Opnieuw gaat het om een niet-bindende tekst, ditmaal aangenomen door de sub-commissie voor de rechten van de mens. Door de relatief nauwkeurige formulering leent dit document zich goed voor toepassing in de praktijk. De hier besproken trends zijn echter nog niet zo algemeen of uniform dat van een gewoonterechtelijke norm kan worden gesproken. Een internationaal recht op huizenteruggave bestaat dus nog niet, maar is wel in opkomst.

In Bosnië-Herzegovina is na afloop van het gewapende conflict in 1995 in het vredesverdrag van Dayton een expliciet recht op huizenteruggave opgenomen. Bovendien zijn de normen uit het EVRM en een aantal andere mensenrechtenverdragen middels het vredesverdrag direct van toepassing verklaard in heel Bosnië. De Bosnische Mensenrechtenkamer heeft het recht op huizenteruggave in haar jurisprudentie uitwerking gegeven. Daarbij is het EVRM-kader zeer nuttig gebleken, zowel om de plichten voor de overheid te preciseren als om de belangen van oorspronkelijke en nieuwe bewoners af te wegen. De speelruimte voor autoriteiten die onwillig stonden tegenover huizenteruggave werd daardoor steeds verder beperkt. Het algemeen geformuleerde recht uit het vredesverdrag is daarmee concreet vormgegeven bij het beoordelen van specifieke gevallen van mogelijke mensenrechtenschendingen. Tegelijkertijd zijn ook de bestaande mensenrechtelijke normen van het EVRM goed toepasbaar gebleken op een post-conflictsituatie.

Het bovenstaande onderzoek naar het bestaan van een internationaal mensenrecht op huizenteruggave leidt tot een drietal aanbevelingen. Ten eerste moet voorkomen worden dat huizenteruggave verwordt tot een pion in een politiek onderhandelingsspel. Daarom is het belangrijk restitutie van huizen op een juridische manier vorm te geven volgens internationale mensenrechtennormen. Ten tweede is het belangrijk het recht op huizenteruggave voor vluchtelingen en andere ontheemden in vredesverdragen op te nemen, omdat er nog geen algemeen geaccepteerd internationaal recht op huizenteruggave bestaat. Zo kan toch worden gewaarborgd dat personen die hun huis tijdens een gewapend conflict zijn kwijtgeraakt dit via juridische weg kunnen terugclaimen. Ten derde is het belangrijk om zeker te stellen dat een dergelijk recht wordt geïnterpreteerd in het licht van bestaande mensenrechtennormen, zoals bijvoorbeeld het EVRM. Dit kan ervoor zorgen dat alle relevante belangen eerlijk worden afgewogen bij de beoordeling van concrete gevallen.

Het tweede deel van dit onderzoek richt zich op de ondersteunende structuur die noodzakelijk is voor een effectieve toepassing van de norm. Daarbij wordt gekeken naar het Europese (het EVRM) en het nationale niveau (Bosnië-Herzegovina) vanuit het perspectief van de juridische obstakels voor personen die proberen hun huis terug te krijgen. Het is daarbij opvallend dat er discrepanties bestaan tussen de normen en

de ondersteunende structuren. De meest specifieke wereldwijde normen op het gebied van huizenteruggave, de Pinheiro Principes, worden niet ondersteund door een algemeen implementatiesysteem. Het EVRM daarentegen kent wel een sterk ondersteunend systeem, maar bevat geen specifiek recht op huizenteruggave. Post-conflictstaten, ten slotte, nemen soms wel een recht op huizenteruggave in vredesverdragen op, maar de ondersteunende structuur is door het gewapende conflict vaak verzwakt of verwoest en bovendien ook vaak partijdig of gewoonweg onwillig om huizenteruggave uit te voeren. Het is dus zaak de meest effectieve elementen uit de verschillende niveaus – mondiaal, Europees, nationaal – samen te brengen of in ieder geval elkaar te laten versterken. Allereerst moet dit gebeuren op het nationale niveau, omdat primair daar mensenrechten moeten worden verzekerd. Indien na afloop van een gewapend conflict nationale ondersteunende structuren (tijdelijk) niet meer voldoen, is het noodzakelijk aanvullende waarborgen aan te brengen. Dit kan door intensief internationaal toezicht te houden of door het instellen van interim-organen die de naleving van mensenrechten verzekeren, eventueel deels internationaal samengesteld om onpartijdigheid te garanderen. Dergelijke organen kunnen tevens in een andere speciale behoefte van post-conflict staten voorzien: het behandelen van zeer grote aantallen claims.

Daarnaast bestaat in Europa het in mondiaal perspectief relatief zeer sterke EVRM-systeem. Dit kan dienen als extra vangnet, indien het nationale niveau nalaat adequaat rechtsherstel te bieden. Dit subsidiaire karakter wordt onderstreept door artikel 13 EVRM, dat het recht op een effectief rechtsmiddel op nationaal niveau garandeert. Het EVRM geeft individuen de mogelijkheid om hun klacht over vermeende mensenrechtenschendingen te laten beoordelen door een internationaal hof. Dit Europese Hof van de Rechten van de Mens kan juridisch bindende uitspraken doen. Hoe sterk dit systeem ook is, het werpt toch obstakels op voor personen die rechtsherstel zoeken als ze hun huis hebben verloren. In dit onderzoek wordt nader ingegaan op enkele van dergelijke obstakels die relevant zijn voor post-conflictsituaties: de temporele en geografische reikwijdte van het EVRM.

De temporele grenzen van het EVRM en de temporele jurisdictie van het EHRM, die daarmee nauw is verbonden, zijn gestoeld op het basisbeginsel van non-retroactiviteit: het EVRM heeft in principe geen terugwerkende kracht. Aangezien veel Europese staten pas na afloop van gewapende conflicten partij zijn geworden bij het EVRM, kan in principe niet worden geklaagd over schendingen van mensenrechten die tijdens dat conflict hebben plaatsgevonden. Het non-retroactiviteitsprincipe kent echter een belangrijke uitzondering: indien de schending kan worden gekwalificeerd als doorlopend in plaats van eenmalig, dan kan de zaak alsnog door het EHRM worden beoordeeld. Het kan dus van belang zijn het verlies van huis en haard te presenteren als een voortdurende schending. Doorslaggevend voor het oordeel van het Hof in dergelijke zaken is de aard en inhoud van de rechtsregel die potentieel geschonden is en de feiten die aan die mogelijke schending ten grondslag liggen.

De geografische reikwijdte van het EVRM is op twee manieren relevant in post-conflictsituaties. Ten eerste als een Verdragsstaat (een deel van) een andere Verdrags-

staat bezet. Ten tweede als een Verdragsstaat het gezag verliest over een deel van het eigen grondgebied. Artikel 1 EVRM bepaalt dat de aangesloten Verdragsstaten de rechten uit het Verdrag moeten verzekeren aan een ieder die 'ressorteert onder hun rechtsmacht.' Volgens het traditionele internationale recht begrensde rechtsmacht of jurisdictie het gebied waarover een staat rechtmatig gezag mocht uitoefenen. Meestal viel dit samen met het eigen grondgebied. Binnen de mensenrechten heeft zich gaandeweg een andere visie op jurisdictie ontwikkeld, waarbij feitelijke controle of macht van de staat over personen doorslaggevend is. De rechtmatigheid van die macht speelt daarbij geen rol. In de jurisprudentie van het EHRM is deze bredere opvatting van jurisdictie niet systematisch overgenomen. Het Hof ziet jurisdictie nog steeds primair als territoriaal en slechts bij uitzondering als toepasbaar op extra-territoriale situaties. Daarmee is het Europese Hof terughoudender dan andere regionale en wereldwijde mensenrechtenorganen. Als een staat de effectieve controle heeft over een gebied buiten de eigen landsgrenzen, dan is hij gehouden daar de EVRM-rechten te verzekeren. Omgekeerd blijft bij het verlies van controle over een deel van het eigen grondgebied de presumptie bestaan dat de staat rechtsmacht uitoefent. Als dit feitelijk niet zo blijkt te zijn, blijven er toch positieve verplichtingen voor de staat bestaan – in dit geval de inspanningsverplichting om mensenrechten zo veel als feitelijk mogelijk is te waarborgen.

In Bosnië-Herzegovina is de ondersteunende structuur voor het recht op huizenteruggave opgezet onder Dayton. Een speciale commissie inzake claims over onroerend goed van ontheemden en vluchtelingen (CRPC) had de taak uit te maken aan wie een bepaalde woning toebehoorde. Een ombudspersoon en een mensenrechtenkamer hadden het mandaat uitspraken te doen over klachten inzake mensenrechtenschendingen. Al deze semi-internationale instanties hadden te maken met vergelijkbare problemen: tegenwerkende lokale overheden waardoor beslissingen, vooral in de eerste jaren na de oorlog, nauwelijks werden geïmplementeerd; steeds veranderende obstructietactieken van diezelfde overheden die erop waren gericht de positie van de eigen etnische groep te versterken; grote aantallen ingediende claims; een tekort aan fondsen en personeel; en ten slotte het opereren in een ingewikkeld nationaal systeem waarin bevoegdheden in hoge mate waren gedecentraliseerd. Bij het aflopen van de mandaten van deze Dayton-instellingen verliep de overdracht van bevoegdheden aan de nationale autoriteiten verre van vlekkeloos, onder andere omdat internationale hulp sterk werd verminderd voordat alle claims waren behandeld.

Deze Bosnische ervaringen leiden, op het punt van de ondersteunende structuur, tot een viertal aanbevelingen. Ten eerste is het van belang om de onpartijdigheid van de ondersteunende structuur te verzekeren door het aanbrengen van een internationale aanwezigheid in restitutie- en mensenrechtenmechanismen op het hoogste nationale niveau. Ten tweede moet de nadruk liggen op effectiviteit door bijzondere aandacht te schenken aan de implementatie van restitutiebeslissingen door de autoriteiten van het land zelf. Ten derde is het zeer nuttig om het proces van huizenteruggave flexibel te maken om zo in te kunnen spelen op praktische, politieke en juridische obstakels die gaandeweg opduiken. Ten slotte is het belangrijk om een goede overgang van tijdelij-

ke post-conflict instituties naar permanente, nationale organen te bewerkstelligen. Op de lange termijn moet respect voor mensenrechten immers deel gaan uitmaken van het bestaande nationale rechtssysteem en niet enkel daarbuiten bestaan als een van buitenaf opgelegd, geïsoleerd functionerend systeem.

In het derde en laatste deel van dit onderzoek wordt onderzocht hoe het proces van huizenteruggave in Bosnië in de praktijk is verlopen en welke lessen daaruit kunnen worden getrokken. Dat gebeurt aan de hand van de derde voorwaarde die Diehl, Ku en Zamora onderscheiden voor de effectieve werking van een rechtsnorm: de politieke wil of consensus van de verschillende actoren in een rechtssysteem om de norm toe te passen. Om deze voorwaarde in Bosnië te bestuderen is gekeken naar de belangen van de verschillende actoren bij het proces van huizenteruggave die hun handelwijze kunnen verklaren.

In de eerste jaren na het vredesakkoord van Dayton (1995) verliep het proces van huizenteruggave zeer moeizaam. Lokale autoriteiten, gedomineerd door respectievelijk Serviërs, Kroaten en Bosniaks – de benaming voor Bosnische moslims – werkten weliswaar mee aan de terugkeer van vluchtelingen en ontheemden van hun eigen 'etnische' groep, maar blokkeerden de terugkeer van anderen op allerlei manieren. Tegelijkertijd probeerden internationale actoren, zoals betrokken Europese landen en de VN-vluchtelingenorganisatie UNHCR terugkeer juist te bevorderen. Deels gebeurde dit met het doel de etnische zuiveringen ongedaan te maken. Dit was precies de reden waarom locale Bosnische autoriteiten de terugkeer van minderheden tegenwerkten. Het indienen van restitutieclaims werd bijna onmogelijk gemaakt en terugkerende minderheden werden gediscrimineerd of zelfs bedreigd. Naast deze internationaal-politieke nadruk op terugkeer – in plaats van restitutie op zich – werden de eerste jaren gekenmerkt door een pragmatische aanpak. Waar mogelijk werden met Bosnische machthebbers politieke overeenkomsten gesloten om terugkeer mogelijk te maken. Dit had tot gevolg dat er in sommige regio's veel vooruitgang werd geboekt en in andere in het geheel niet. Bovendien werd het terugkeerproces daarmee een politieke speelbal in een groter spel van onderhandelingen. Huizenteruggave was bovendien geen prioriteit in het verwoeste Bosnië, waar veiligheid en economische wederopbouw wedijverden om politieke aandacht. De bestaande aanpak van het restitutieprobleem leidde ertoe dat er vier jaar na Dayton nauwelijks nog vluchtelingen terugkeerden.

Onder de internationale actoren begon aan het einde van de jaren negentig het besef door te dringen dat de bestaande inspanningen niet genoeg vruchten afwierpen. Tegelijkertijd werd het belang van huizenteruggave als deel van een structurele vreedzame oplossing van de Bosnische problemen steeds duidelijker. Dit leidde gaandeweg tot een dubbele verandering. Ten eerste werd de expliciete koppeling tussen juridische teruggave van huizen en daadwerkelijke terugkeer van vluchtelingen losgelaten. Ten tweede werd de pragmatische aanpak grotendeels vervangen door een aanpak gebaseerd op de principes van de rechtsstaat. De eerste verandering betekende enerzijds dat het lokale verzet tegen teruggave minder hevig werd en anderzijds dat vluchtelingen meer dan tevoren de keuze werd gelaten om hun herkregen huis al dan

niet opnieuw te betrekken of juist te verhuren of te verkopen. De tweede, nauw ermee verbonden verandering betekende dat men niet meer uitging van politieke onderhandelingen met lokale machthebbers, maar dat men huizenteruggave presenteerde als een juridisch proces en restitutie als een recht – geheel in lijn met het vredesakkoord.

Om deze koersverandering in de praktijk te brengen werden discriminatoire lokale restitutiewetten aangepast of vervangen door de Hoge Vertegenwoordiger, onder het verdrag van Dayton aangesteld als hoogste civiele machthebber over Bosnië. Bovendien ontsloeg hij overheidsbeambten die restitutie tegenwerkten. Daarnaast kregen gemeentelijke huizenbureaus extra materiële steun, zodat meer restitutieclaims konden worden verwerkt. Ten slotte begonnen in 1999 verschillende internationale actoren – de Hoge Vertegenwoordiger, CRPC, UNHCR, de VN-missie in Bosnië en de Organisatie voor Veiligheid en Samenwerking in Europa (OVSE) – structureel samen te werken in het *Property Law Implementation Plan* (PLIP). Dit plan behelsde dat in elke gemeente één persoon namens de internationale gemeenschap verantwoordelijk was voor het toezicht op het restitutieproces. Dit voorkwam dat verschillende instanties door lokale autoriteiten tegen elkaar werden uitgespeeld. De lokale PLIP-vertegenwoordigers gaven knelpunten door aan het centrale PLIP-overleg in Sarajevo dat op basis daarvan algemeen beleid formuleerde. De aanpak van PLIP werd gekenmerkt door een sterke nadruk op publiciteit en transparantie: middels media-campagnes werden de Bosniërs op hun restitutierechten gewezen en de door PLIP bijgehouden voortgangstatistieken per gemeente werden elke maand gepubliceerd. Het PLIP weerspiegelde een politieke consensus onder de belangrijkste actoren om het recht op huizenteruggave te implementeren.

De samenwerking binnen het PLIP verslapte na enkele jaren, onder andere wegens teruglopende fondsen en meningsverschillen over het uiteindelijke doel van het restitutieproces. Toch zijn er belangrijke resultaten bereikt. Door PLIP werd de druk op de lokale autoriteiten verhoogd. Van onderaf nam de druk evenzeer toe, doordat grote aantallen ontheemden claims voor huizenteruggave begonnen in te dienen. Uiteindelijk zijn de meeste van de honderdduizenden restitutieclaims afgehandeld en zijn de beslissingen in deze zaken voor meer dan 90% geïmplementeerd. Daarbij moet wel worden aangetekend dat niet elke vluchteling of ontheemde daadwerkelijk terugkeerde naar zijn woning. In veel gevallen koos men voor verkoop of verhuur.

Het relatieve succes van het Bosnische proces van huizenteruggave kan worden verklaard door de unieke context: een zeer grote mate van internationale bemoeienis, de aanwezigheid van veel externe financiële steun, en het feit dat de oorlog geen duidelijke winnaar had opgeleverd – geen enkele van de drie grootste groepen (Serviërs, Kroaten en Bosniaks) vormde een meerderheid. Deze positieve uitgangspositie maakt het mogelijk de kernproblemen en -oplossingen van huizenteruggave te duiden, bij afwezigheid van bijkomende complicerende factoren. Uit de Bosnische ervaring vloeien dan ook twee praktische aanbevelingen voort. Ten eerste is het raadzaam voor internationale actoren om formele en informele coalities te smeden tussen al diegenen die streven naar huizenteruggave. Ten tweede is het belangrijk om het bewustzijn

onder alle actoren te vergroten van het belang van huizenteruggave voor de wederopbouw van de rechtsstaat en het bewerkstelligen van duurzame vrede.

Ten slotte dient altijd in ogenschouw te worden genomen dat implementatie van het recht op huizenteruggave slechts een noodzakelijke, maar niet een voldoende voorwaarde is voor de duurzame terugkeer van vluchtelingen en ontheemden. Een fysiek veilige omgeving en sociaal-economische factoren, zoals non-discriminatoire toegang tot onderwijs, arbeid en sociale voorzieningen zijn evenzeer onontbeerlijk. De samenhang tussen de juridische en de andere aspecten van terugkeerprocessen verdient dan ook nadere bestudering.

RÉSUMÉ

La perte de son toit est, pour l'individu, un des effets les plus prégnants que puisse avoir un conflit armé. Aussi, une fois les armes tues, n'aura-t-il de cesse – tant par nécessité matérielle que pour des raisons affectives – de récupérer son logement. Or, rares sont les pays où le droit à la restitution du logement fait l'objet d'une législation formelle. Par ailleurs, le logement à récupérer sera, dans bien des cas, soit détruit, soit occupé par d'autres. C'est le propos de cette thèse de décrire et d'analyser les obstacles juridiques à la restitution du logement et de formuler ensuite des recommandations pour accroître l'efficacité du processus de restitution.

Le sujet de la thèse trouve son origine dans l'évolution de la nature des conflits armés depuis la fin de la guerre froide. Ce qui est nouveau, ce n'est pas tant l'apparition de conflits armés internes que l'ingérence croissante des organisations internationales dans les conflits et leur motivation même : les considérations purement idéologiques ont fait place à la volonté de défendre une identité. En d'autres termes, la justification des conflits armés – à ne pas confondre avec leur cause – réside de plus en plus dans la perception d'identités de groupes. Les parties au conflit ne partent plus du principe que l'ennemi doit être gagné à leur cause, mais qu'il doit être chassé ou éliminé. Chasser des populations de leur maison devient ainsi un instrument dans la lutte pour l'« épuration » d'une région. La restitution des logements à l'issue du conflit s'en trouve ainsi plus problématique que jamais. Mais, dans le même temps, l'ingérence internationale accrue ouvre des perspectives nouvelles pour la réussite du processus de restitution dans le cadre du rétablissement des droits de l'homme et de la restauration de l'État de droit.

La question majeure à laquelle s'efforce de répondre cette thèse est celle de savoir comment assurer de façon plus efficace le droit des réfugiés et autres personnes déplacées à la restitution de leur logement dans des situations d'après-conflit en Europe. La perspective choisie est celle des droits de l'homme, plus particulièrement de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (ci-après « la Convention »). L'hypothèse de départ est qu'une approche de la restitution du logement fondée sur les droits de l'homme contribue doublement à la paix après un conflit armé. D'une part parce que la résolution des problèmes juridiques de restitution du logement élimine un des obstacles au retour et, de l'autre, parce que l'application de normes internationales en matière de droits de l'homme dans des processus juridiques de restitution à grande échelle est de nature à favoriser largement la restauration de la primauté du droit dans des États en situation d'après-conflit, qui sont souvent affaiblis sur les plans politique et juridique. Pareille approche ouvre davantage de perspectives de reconstruction durable et présente moins de risques de

reprise du conflit armé que des compromis purement politiques prévoyant, par exemple, l'échange de groupes de réfugiés.

La thèse se fonde sur une théorie de Paul Diehl, Charlotte Ku et Daniel Zamora élaborée dans le cadre de la doctrine des organisations internationales. Selon cette théorie, une norme de droit international ne peut fonctionner effectivement que si trois éléments indispensables sont réunis : un concept juridique suffisamment évolué, une structure de soutien et la volonté politique d'appliquer la norme, qui implique un consensus entre les différents acteurs du système. C'est autour de ces trois préalables que s'articule la thèse. Bien que cette théorie ait été développée à l'origine pour être appliquée dans un contexte international, elle a été appliquée dans la thèse comme instrument d'analyse de la mise en œuvre de normes internationales au sein d'un État en situation d'après-conflit. L'absence d'autorités centrales fortes et l'anarchie relative qui en découle sont en effet des caractéristiques que l'ordre juridique international partage avec un tel État.

Le droit à la restitution du logement est-il un droit de l'homme ? Tel est l'objet de la première partie de la thèse, qui commence par passer en revue la jurisprudence de la Cour européenne des Droits de l'Homme (ci-après « la CEDH »), en particulier à la lumière des trois dispositions de la Convention les plus pertinentes en la matière : le droit au respect du domicile (article 8 de la Convention), la protection de la propriété (article 1er du protocole n° 1 de la Convention) et l'interdiction de discrimination (article 14 de la Convention). Première constatation : il n'existe pas, dans la Convention, de droit à la restitution du logement, ni explicitement, ni implicitement. Pareil droit peut néanmoins exister dans certains cas, lorsque la perte du logement est imputable à l'État. L'obligation existe aussi pour l'État, dans le cas où il a été juridiquement établi qu'un individu est le propriétaire ou le locataire légitime d'un logement, d'aider l'intéressé à récupérer son logement sur des tiers. Selon la jurisprudence de la CEDH, l'État est ainsi tenu d'agir contre l'occupant illégal d'un logement, à la demande du propriétaire ou du locataire légitime. Le droit à la protection de la propriété n'offre guère plus de protection juridique que le droit au respect du domicile, notamment parce que l'article 1er du protocole n° 1 confère une plus grande liberté d'action à l'État. Mais le fait qu'un logement soit la propriété d'un individu peut donner plus de poids à une requête fondée sur l'article 8 de la Convention.

L'expulsion d'individus de leur logement pendant des conflits armés peut procéder de considérations ethniques, nationalistes ou religieuses. Ces mêmes motifs peuvent faire obstacle à la restitution du logement à l'issue du conflit, témoin notamment l'application discriminatoire de la législation en matière de restitution. Aussi l'interdiction de discrimination consignée dans la Convention a-t-elle également été prise en compte dans la thèse. Dans le contexte de conflits armés, avec tout leur cortège de misères, un contrôle judiciaire très strict s'impose dans bien des cas. Divers éléments abondent dans ce sens. Tout d'abord, il peut y avoir discrimination en fonction de la race ou de l'appartenance ethnique. Ensuite, l'inviolabilité du domicile est un des droits de l'homme fondamentaux. Enfin, l'enjeu est considérable pour celui qui a perdu son logement. Même si la CEDH a autorisé l'utilisation de données statistiques

comme moyens de preuve, la discrimination restera souvent difficile à prouver dans des cas d'espèce, surtout au niveau des effets discriminatoires d'une politique apparemment neutre des autorités publiques. Pour ne pas négliger les intérêts spécifiques des minorités dans les affaires de restitution de logements, la CEDH devrait tirer davantage parti de l'expertise qui existe au sein du Conseil de l'Europe, notamment des rapports du Comité consultatif de la Convention-cadre pour la protection des minorités nationales.

Après avoir dressé l'inventaire des droits susceptibles d'être violés par la perte du logement, la thèse s'attache à analyser les effets d'une violation du point de vue du droit international. Tout État est en principe tenu de garantir le redressement des droits en cas de violation d'une disposition de droit international. Au niveau de la doctrine, c'est à la restitution que va la préférence pour la réparation. Dans la pratique, le redressement des droits, dans la mesure où redressement il y a, prend souvent la forme d'une compensation ou d'un autre type de réparation. Les règles en matière de redressement des droits ont été conçues à l'origine pour régir les relations entre États. Mais elles peuvent aussi être appliquées dans les relations entre États et individus, comme l'illustrent les arrêts et décisions des organes internationaux des droits de l'homme. On constate que le principe de la restitution est rarement appliqué, pour la simple raison qu'il est impossible à appliquer dans la pratique dans un grand nombre de cas de violation des droits de l'homme, la torture notamment. Mais, dans le cas de la perte du logement, la restitution est généralement possible et devrait dès lors toujours être privilégiée.

L'obligation faite aux États de garantir le rétablissement des droits ne s'est pas encore traduite par la création d'un droit individuel à réparation qui soit opposable et incontesté. Certes ont été mis en place dans le cadre des Nations unies des *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*. Si ces directives placent incontestablement la victime au centre des préoccupations, elles ne privilégient toutefois pas la restitution. Par ailleurs, elles ne sont pas juridiquement contraignantes. Il n'en reste pas moins que l'autorité que leur confère leur statut de texte politique adopté par l'Assemblée générale des Nations unies est susceptible d'influer positivement sur l'émergence du droit à réparation.

Dans le contexte européen, la CEDH a toujours été réticente à accorder un droit à réparation. Selon le système mis en place par la Convention, l'octroi d'un droit à réparation relève de l'ordre juridique national. Les États sont donc libres de choisir la forme de réparation qu'ils souhaitent. La Convention donne à la CEDH la possibilité – mais sans lui en faire obligation – d'accorder une juste réparation dans le cas où la législation nationale ne le prévoit pas ou ne le prévoit que partiellement. Ces dernières décennies, la CEDH a accordé de plus en plus souvent une réparation financière et elle en est même arrivée ces dernières années à recommander dans certains cas la restitution, surtout – et la chose est assez frappante pour être relevée – dans des affaires où il s'agit de restitution de propriété, notamment de loge-

ments. La liberté d'appréciation des États s'en trouve donc grignotée un peu plus, sinon formellement, du moins *de facto*. Cette évolution n'en a pas pour autant conduit à la création, à la CEDH, d'un droit individuel à réparation.

Le droit international ne connaît pas encore, lui non plus, de droit spécifique à la restitution du logement. En l'absence de convention universelle régissant un tel droit, on a examiné dans cette thèse s'il existe une norme de droit international coutumier en la matière. On constate que, depuis la Seconde Guerre mondiale, le droit des réfugiés à rentrer dans leur pays d'origine est de plus en plus largement reconnu. L'idée s'impose aussi de plus en plus que ce droit implique le droit de récupérer son logement. Et on assiste, depuis les années quatre-vingt-dix, à l'adoption de déclarations et de résolutions d'organisations internationales et même à la conclusion de certains traités de paix qui font explicitement état d'un droit à la restitution du logement. Par ailleurs, ce droit est reconnu non seulement aux réfugiés, mais aussi de plus en plus souvent aux personnes déplacées. Tout comme c'est le cas pour le droit à réparation, le droit spécifique à la restitution du logement a également fait l'objet, récemment, d'un document des Nations unies) les *Principes concernant la restitution des logements et des biens dans le cas des réfugiés et des personnes déplacées*, couramment appelés les Principes Pinheiro, du nom de leur auteur. Ici encore, il s'agit d'un texte non contraignant, adopté par la sous-commission de la promotion et de la protection des droits de l'homme. Rédigé dans des termes relativement très précis, ce document est assez facile à appliquer dans la pratique. Cependant, ces différentes tendances ne sont pas encore assez générales ni uniformes pour qu'on puisse véritablement parler d'une norme de droit international coutumier. Il n'existe donc pas encore de droit international à la restitution du logement, même si les germes en sont de plus en plus manifestes.

Le traité de paix de Dayton, qui a mis fin au conflit armé en Bosnie-Herzégovine en 1995, prévoit un droit explicite à la restitution du logement. En outre, les normes de la Convention et d'un certain nombre d'autres conventions de droits de l'homme sont directement applicables, aux termes mêmes du traité, à la totalité du territoire bosnien. La Chambre bosnienne des Droits de l'homme a concrétisé le droit à la restitution du logement dans sa jurisprudence. Elle a, pour ce faire, tiré utilement profit du cadre de la Convention, tant pour préciser les obligations des pouvoirs publics que pour apprécier les intérêts respectifs des anciens et des nouveaux occupants des logements à restituer. La marge de manœuvre des autorités rétives à la restitution du logement se rétrécit ainsi de plus en plus. Et le droit formulé en termes généraux dans le traité de paix se trouve concrétisé dans l'appréciation de cas spécifiques de violation des droits de l'homme. Dans le même temps, il est apparu que les normes existantes en matière de droits de l'homme consignées dans la Convention s'appliquent aisément dans une situation d'après-conflit.

Ces travaux sur la question de savoir si le droit à la restitution du logement existe effectivement en tant que droit de l'homme internationalement reconnu ont conduit à faire trois recommandations. Premièrement, il faut éviter que la restitution du logement en soit réduite à n'être qu'une monnaie d'échange dans le jeu des négociations

politiques. Elle doit donc se voir conférer un statut juridique fondé sur des normes internationales de droits de l'homme. Deuxièmement, il importe, aussi longtemps que le droit des réfugiés et des personnes déplacées à la restitution de leur logement ne sera pas internationalement reconnu, d'intégrer ce droit dans les traités de paix, de manière à pouvoir garantir que les personnes qui ont perdu leur logement pendant un conflit armé puissent le récupérer par la voie juridique. Troisièmement, il faut garantir que le droit à la restitution du logement soit interprété à la lumière de normes existantes en matière de droits de l'homme, notamment de la Convention. Cela doit permettre d'évaluer de façon honnête tous les intérêts en présence dans l'appréciation de cas concrets.

La deuxième partie de la thèse porte sur les structures de soutien indispensables pour garantir une application effective de la norme ; elle examine les structures européennes (au niveau de la Convention) et les structures nationales (au niveau de la Bosnie-Herzégovine) sous l'angle des obstacles juridiques auxquels se heurtent les personnes qui essaient de récupérer leur logement. On est frappé de constater le décalage qui existe entre les normes et les structures de soutien. Ainsi, les Principes Pinheiro, qui constituent les normes universelles les plus spécifiques en matière de restitution du logement, ne bénéficient-elles pas de structures générales de soutien. La Convention, en revanche, est assurée d'un puissant système de soutien, mais elle ne connaît pas de droit spécifique à la restitution du logement. Enfin, s'il arrive que les États en situation d'après-conflit intégrent le droit à la restitution du logement dans les traités de paix, leurs structures de soutien sont souvent affaiblies ou détruites par le conflit armé et, qui plus est, souvent partiales ou tout simplement rétives à la mise en œuvre du principe de la restitution du logement. Il s'agit donc de conjuguer les éléments les plus efficaces des différents niveaux – le niveau mondial, le niveau européen et le niveau national – ou, à tout le moins, de les faire se renforcer mutuellement. La priorité doit aller au niveau national, car c'est avant tout à ce niveau-là que les droits de l'homme doivent être garantis. Si, à l'issue d'un conflit armé, les structures nationales de soutien se révèlent insuffisantes, fût-ce temporairement, il y a lieu de prévoir des garanties complémentaires, par exemple en établissant un contrôle international intensif ou en installant des organes intérimaires chargés de veiller au respect des droits de l'homme, composés éventuellement de personnalités internationales indépendantes de manière à en garantir l'impartialité. De tels organes peuvent également pourvoir à un autre besoin particulier des États en situation d'après-conflit, à savoir la nécessité de traiter un très grand nombre de cas de requêtes en restitution.

L'Europe connaît, parallèlement, le système mis en place par la Convention. Ce système, qui est relativement très fort à l'échelle mondiale, peut faire office de filet de sécurité dans les cas où les autorités nationales ne se révèlent pas en mesure de garantir une réparation adéquate. Le caractère subsidiaire du système est mis en évidence à l'article 13 de la Convention, qui garantit le droit à l'octroi d'un recours effectif devant une instance nationale. La Convention donne aux individus la possibilité de porter une plainte pour violation présumée des droits de l'homme devant une cour internationale. C'est la CEDH, dont les arrêts et décisions ont force obligatoire. Aussi fort que soit ce

système, il n'en dresse pas moins des obstacles aux personnes qui cherchent à obtenir réparation à la suite de la perte de leur logement. La thèse se penche sur un certain nombre des obstacles qui surgissent dans des situations d'après-conflit, notamment du fait de la portée temporelle et de la portée géographique de la Convention.

Les limites temporelles de la Convention et, par voie de conséquence, de la juridiction de la CEDH reposent sur le principe fondamental de non-rétroactivité des lois, qui fait que la Convention n'a en principe pas d'effet rétroactif. De nombreux États européens n'ayant adhéré à la Convention qu'après la fin de conflits armés, les plaintes relatives à des violations des droits de l'homme survenues pendant ces conflits ne sont en principe pas recevables. Le principe de non-rétroactivité de la Convention souffre toutefois une importante exception : si la violation peut être qualifiée de durable, l'affaire peut quand même être portée devant la CEDH. Il importe donc pour le requérant de présenter la perte de son logement comme une violation durable. La Cour se détermine dans les arrêts qu'elle rend dans de telles affaires en fonction de la nature et de la teneur de la règle de droit présumée violée et des faits qui sont à l'origine de la violation prétendue.

Il y a deux cas où la portée géographique de la Convention peut intervenir dans des situations d'après-conflit. Premièrement, lorsqu'un État contractant occupe tout ou partie d'un autre État contractant. Et, deuxièmement, lorsqu'un État contractant perd son autorité sur une partie de son propre territoire. Aux termes de l'article premier de la Convention, les États contractants sont tenus de garantir le respect des droits définis dans la Convention « *à toute personne relevant de leur juridiction* ». Or, le droit international limite traditionnellement la compétence ou la juridiction d'un État au territoire sur lequel celui-ci peut exercer son autorité légitime. Et ce territoire correspond généralement au territoire national. En matière de droits de l'homme, on assiste toutefois à l'émergence progressive d'une autre conception de la juridiction, l'élément déterminant devenant le contrôle ou le pouvoir effectif exercé par l'État sur les personnes, et ce indépendamment de la légitimité de ce pouvoir. Cette interprétation plus large de la notion de juridiction n'est pas reprise de façon systématique dans la jurisprudence de la CEDH. Pour la Cour, la juridiction reste avant tout une notion territoriale, qui ne doit s'appliquer qu'exceptionnellement à des situations extraterritoriales. La Cour se montre ainsi plus frileuse que d'autres organes régionaux et mondiaux des droits de l'homme. Si un État exerce le contrôle effectif sur un territoire situé en dehors des frontières nationales, il est tenu d'y garantir le respect des droits définis dans la Convention. Inversement, s'il a perdu le contrôle sur une partie du territoire national, il est censé continuer à y exercer sa juridiction. Même si la réalité des faits s'avère différente, l'État reste soumis à des obligations positives, en l'occurrence une obligation de moyens pour garantir autant que faire se peut le respect des droits de l'homme.

En Bosnie-Herzégovine, la structure de soutien destinée à garantir le droit à la restitution du logement a été mise en place dans le prolongement du traité de Dayton. La CRPC, une commission spécialement créée pour traiter les réclamations des réfugiés et personnes déplacées en matière de propriété immobilière, était chargée de

déterminer à qui revenait tel ou tel logement. Un Médiateur et une Chambre des droits de l'homme avaient pour mandat de se prononcer sur les plaintes pour violation des droits de l'homme. Toutes ces instances semi-internationales étaient confrontées aux mêmes problèmes : mauvaise volonté des autorités locales et, partant, absence quasi totale de mise en œuvre des décisions prises, surtout pendant les premières années qui ont suivi la guerre ; application par ces mêmes autorités de tactiques d'obstruction toujours renouvelées visant à renforcer la position de leur propre groupe ethnique ; abondance de dossiers à traiter ; manque de ressources financières et humaines ; et, enfin, nécessité d'opérer dans le cadre d'un système national complexe, caractérisé par une forte décentralisation des compétences. Au terme du mandat de ces diverses institutions, le transfert des compétences aux autorités nationales ne s'est pas fait sans anicroche, loin s'en faut, notamment parce que le robinet de l'aide internationale s'est fortement tari avant que toutes les requêtes n'aient pu être traitées.

L'expérience bosnienne amène à faire quatre recommandations sur le chapitre de la structure de soutien. Premièrement, il importe d'assurer l'impartialité de la structure de soutien en veillant à garantir une présence internationale dans les mécanismes de restitution et de droits de l'homme au plus haut niveau national. Deuxièmement, il faut que l'efficacité soit privilégiée, en accordant une attention toute particulière à la mise en œuvre par les autorités nationales des décisions en matière de restitution du logement. Troisièmement, il faut veiller à ce que le processus de restitution du logement soit flexible, de manière à pouvoir gérer au mieux les obstacles pratiques, politiques et juridiques qui surgissent en cours de processus. Quatrièmement, enfin, il faut réaliser une transition optimale entre des institutions mises en place à titre temporaire après un conflit et des organes nationaux à caractère permanent. Il s'agit en effet, sur le long terme, d'inscrire de façon pérenne le respect des droits de l'homme dans l'ordre juridique national pour qu'il ne soit plus seulement une espèce de système autonome, imposé de l'extérieur.

La troisième et dernière partie de la thèse s'attache à analyser le déroulement dans la pratique du processus de restitution du logement en Bosnie-Herzégovine et les enseignements à en tirer. Le point de départ de l'analyse est le troisième des préalables à l'efficacité du fonctionnement d'une norme de droit tels que définis par Diehl, Ku et Zamora, à savoir l'existence d'une volonté politique d'appliquer la norme et d'un consensus en la matière entre les différents acteurs du système. L'étude de ce préalable dans le cas spécifique de la Bosnie se fonde sur l'examen des intérêts des différents acteurs du processus de restitution, qui peuvent expliquer leur attitude respective.

Au cours des années qui suivirent immédiatement la signature de l'accord de paix de Dayton (1995), le processus de restitution a été très laborieux. Les autorités locales, dominées respectivement par les Serbes, les Croates et les Bosniaques – les Bosniens musulmans – coopéraient certes au retour des réfugiés et personnes déplacées appartenant à leur propre groupe ethnique, mais elles s'opposaient de toutes les manières au retour des réfugiés et déplacés appartenant aux autres groupes ethniques. Dans le même temps, les acteurs internationaux – pays européens concernés et Haut Commissariat des Nations unies pour les Réfugiés (HCR) – s'efforçaient au contraire d'encou-

rager le retour des réfugiés, notamment pour neutraliser les épurations ethniques. Or, c'était précisément pour cette raison que les autorités locales s'opposaient au retour des minorités. Elles faisaient tout pour empêcher le dépôt de requêtes en restitution de biens immobiliers, et les membres des minorités faisaient l'objet de discriminations, voire de menaces. Les premières années se sont donc caractérisées par la priorité donnée par les instances politiques internationales au retour, plutôt qu'à la restitution du logement, mais aussi par une approche résolument pragmatique. Ainsi, chaque fois que cela était possible, des accords politiques étaient passés avec les dirigeants bosniens en vue de faciliter le retour des réfugiés et des personnes déplacées. C'est ce qui explique que des progrès aient pu être enregistrés dans certaines régions alors que rien ne se passait dans d'autres. Par ailleurs, le processus de retour servait ainsi en quelque sorte de monnaie d'échange dans le jeu des négociations politiques. La restitution du logement n'était du reste pas une priorité dans une Bosnie dévastée, où sécurité et reconstruction économique se disputaient l'attention des responsables politiques. L'approche adoptée face à la question de la restitution a eu pour effet que, quatre ans après la signature du traité de Dayton, le retour des réfugiés était pour ainsi dire totalement arrêté.

C'est vers la fin des années quatre-vingt-dix que les acteurs internationaux commencèrent à prendre conscience de l'insuffisance des efforts déployés jusque là. Ils comprirent aussi petit à petit toute l'importance de la restitution du logement dans le cadre plus large d'une résolution pacifique durable des problèmes de la Bosnie. Cette prise de conscience se traduisit progressivement, l'expérience aidant, par un double changement de cap. Premièrement, on abandonna l'idée d'associer de façon explicite la restitution juridique du logement et le retour effectif des réfugiés. Et, deuxièmement, on remplaça en grande partie l'approche pragmatique par une approche fondée sur les principes de l'État de droit. Le premier changement de cap a eu deux conséquences : d'une part, les autorités locales modérèrent leur opposition violente à la restitution et, de l'autre, les réfugiés eurent davantage la possibilité de choisir de se réinstaller dans le logement qu'ils avaient récupéré ou, au contraire, de le louer ou de le vendre. Le deuxième changement de cap, étroitement lié au premier, impliquait l'abandon du principe de négociations politiques avec les dirigeants locaux, au profit d'une nouvelle conception du processus de restitution du logement, qui était désormais considéré comme un processus juridique, et la restitution comme un droit. On s'inscrivait donc à nouveau dans le droit fil des prescriptions de l'accord de paix.

Pour mettre ce changement de cap en pratique, les lois discriminatoires adoptées par les autorités locales en matière de restitution du logement furent modifiées, ou remplacées, par le Haut Représentant institué par l'accord de Dayton comme la plus haute autorité civile en Bosnie-Herzégovine. Celui-ci révoqua en outre les fonctionnaires qui faisaient obstacle à la restitution et accorda une aide matérielle supplémentaire à des bureaux locaux du logement pour leur permettre de traiter un plus grand nombre de requêtes en restitution. Enfin, dès 1999, différents acteurs internationaux – le Haut Représentant, la CRPC, le HCR, la Mission des Nations unies en Bosnie-Herzégovine et l'Organisation pour la Sécurité et la Coopération en Europe (OSCE) – engagèrent

une coopération structurelle dans le cadre du Plan d'application de la loi sur la propriété (PLIP), prévoyant la désignation dans chaque commune d'une seule et unique personne désormais responsable du contrôle du processus de restitution au nom de la communauté internationale. Plus question ainsi pour les autorités locales de monter différentes instances les unes contre les autres. Les responsables locaux du PLIP transmettaient les problèmes qu'ils rencontraient à un organe central de concertation établi à Sarajevo, lequel pouvait alors formuler une politique générale. Dans l'approche du PLIP, l'accent portait fortement sur la publicité et la transparence : des campagnes d'information dans les médias attiraient l'attention des Bosniens sur leurs droits à la restitution et chaque mois étaient publiées, par commune, des statistiques tenues à jour par le PLIP sur les progrès réalisés. Le PLIP était l'expression visible d'un consensus politique entre les différents acteurs sur la mise en œuvre du droit à la restitution du logement.

Après quelques années, la coopération se relâcha au sein du PLIP, en raison notamment de la baisse des crédits alloués au Plan et de divergences de vues sur l'objectif final du processus de restitution. Il n'empêche que des résultats importants ont pu être enregistrés. Le PLIP a en effet permis d'accroître la pression sur les autorités locales, parallèlement à la pression exercée par la base, un grand nombre de personnes déplacées commençant à déposer des requêtes en restitution de leur logement. En définitive, plus de 90 % des centaines de milliers de requêtes en restitution ont été traitées et les décisions prises appliquées. Mais il y a lieu de noter que tous les réfugiés ou personnes déplacées n'ont pas effectivement réintégré leur logement, préférant souvent le vendre ou le louer.

La réussite relative du processus de restitution du logement en Bosnie-Herzégovine peut s'expliquer par le contexte absolument unique où il s'est déroulé : une très grande ingérence de la communauté internationale, un soutien financier considérable, et le fait qu'aucun des trois principaux groupes en présence – Serbes, Croates et Bosniaques – n'est sorti clairement vainqueur du conflit, chacun d'entre eux se trouvant dans une position minoritaire. S'il n'y a pas de complications supplémentaires, ce point de départ positif permet d'identifier les problèmes essentiels, et les solutions à y apporter, qui se posent dans la question de la restitution du logement. L'expérience bosnienne amène à faire deux recommandations pratiques. Premièrement, il est souhaitable que les acteurs internationaux constituent des coalitions, formelles et informelles, entre tous les tenants de la restitution du logement. Deuxièmement, il importe d'intensifier, auprès de tous les acteurs, la prise de conscience de l'importance que revêt la restitution du logement pour la restauration de l'État de droit et la réalisation d'une paix durable.

Il est important, enfin, de ne pas perdre de vue que la mise en œuvre du droit à la restitution du logement est une condition certes nécessaire, mais non pas suffisante, à un retour durable des réfugiés et des personnes déplacées. Encore faut-il – et c'est tout aussi indispensable – garantir un environnement physique sûr et veiller à ce que soient réunis un certain nombre de facteurs socioéconomiques tels qu'un accès non discriminatoire à l'éducation, au marché du travail et aux prestations sociales. Une

étude plus approfondie s'impose donc sur la cohérence entre les aspects juridiques et les autres facettes du processus de retour au pays.

(traduction : Jean Buyse)

SAŽETAK

Gubitak doma za pojedinca je jedna od najdalekosežnijih posljedica oružanog sukoba. Kad oružje utihne, povrat vlastitog doma je važan cilj, simbolično i materijalno. Pravo na povrat stanova i kuća (restitucija) je pak rijetko formalno regulirano zakonom. Osim toga, dotični stan je često uništen ili zauzet drugima. Ova studija bavi se pravnim preprekama koje otežavaju povrat stanova. Uz to donosi i preporuke kako povrat stanova i kuća učiniti efikasnijim u budućnosti.

Pozadina ovog istraživanja je promjenjivi karakter oružanih sukoba od kraja hladnog rata. Ova promjena ne leži toliko u nastajanju unutarnjih sukoba, nego u povećanom uplitanju međunarodnih organizacija u sukobe i u promjeni opravdanja za sukobe – kratko rečeno od sukoba potaknutih ideologijom k sukobima potaknutim (nacionalnim) identitetom. Ovo zadnje znači da opravdanje oružanih sukoba – ne izjednačavati s uzrokom sukoba – sve više treba tražiti u percepcijama skupnog identiteta. To znači da strane u sukobu ne vjeruju da se protivnika može 'obratiti', nego da ga se treba prognati ili eliminirati. Progon ljudi iz njihovih kuća tako postaje sredstvo u bitci za 'čišćenje' određenih područja. Ovakav razvoj događaja čini povrat stanova nakon sukoba problematičnijim nego prije. Istovremeno, povećano međunarodno uplitanje pruža prilike koje proces povrata stanova većih razmjera, kao sastavni dio obnove zaštite ljudskih prava i pravne države, ipak mogu napraviti uspješnim.

Centralno pitanje ovog istraživanja je kako učiniti efikasnijim pravo na povrat stanova izbjeglicama i raseljenim osobama u europskim postkonfliktnim okolnostima. Izabrana perspektiva je temeljena na ljudskim pravima, konkretno Europska konvencija o ljudskim pravima (engl. skraćenica: ECHR). Istraživanje polazi od pretpostavke da pristup povratu stanova temeljen na ljudskim pravima na dva načina pridonosi miru nakon oružanog sukoba. Kao prvo, zato što rješavanje pravnih zahtjeva za povrat imovine uklanja jednu od prepreka za povratak. Kao drugo, zato što pravni procesi restitucije većih razmjera, ako se odvijaju prema normama međunarodnih ljudskih prava, mogu pozitivno djelovati na obnovu pravne države u često politički i pravno oslabljenim postkonfliktnim državama. Ovaj pristup pruža više perspektiva za trajnu obnovu i manje šansi za nove oružane sukobe od čisto političkih kompromisa, gdje se, na primjer, izmjenjuju grupe izbjeglica.

Na ključno pitanje ovog istraživanja odgovorit će se uz pomoć teorije iz učenja o međunarodnim organizacijama Paula Diehla, Charlotte Ku i Daniela Zamore. Oni tvrde da postoje tri obvezna preduvjeta za efikasno funkcioniranje jedne norme međunarodnog prava: (1) dovoljno razvijen pravni koncept, (2) potporna struktura i (3) politička volja i konsenzus različitih sudionika u jednom sistemu da se normu primijeni. Istraživanje je strukturirano po ovim preduvjetima. Iako je ova teorija

razvijena za upotrebu na *međunarodnoj* razini, u ovoj studiji ona je upotrebljena da bi se analiziralo provedbu međunarodnih normi *unutar* jedne postkonfliktne države. Nedostatak snažne centralne vlasti i relativna anarhija koja dolazi s tim, značajke su koje međunarodni pravni sustav dijeli s ovakvim državama.

U prvom dijelu ovog istraživanja traži se odgovor na pitanje postoji li ljudsko pravo na povrat stanova. Tu će se prvo analizirati pravorijek Europskog suda za ljudska prava (engl. skraćenica ECourtHR) na bazi tri, za ovo istraživanje najrelevantnije odredbe: pravo na poštovanje doma (članak 8 ECHR), zaštita imovine (članak 1 Protokol 1) i zabrana diskriminacije (članak 14). Ova analiza je pokazala da ECHR ne podrazumijeva, ni implicitno ni eksplicitno, pravo na povrat stanova. Ovo pravo pak može nastati u određenim slučajevima kada se gubitak stana može svesti na državu. Kada je pravno utvrđeno da je netko zakoniti vlasnik ili najamnik nekog stana, država je također obvezna pomoći pri izvršavanju ovog zahtjeva prema trećim licima Država je znači dužna postupiti prema ilegalnim korisnicima na zahtjev zakonitih vlasnika ili najamnika, pokazalo je pravorijek Europskog suda za ljudska prava. Dodatno značenje prava na zaštitu imovine poviše prava na poštovanje doma je ograničeno, među ostalim zbog toga što članak 1 Prvog protokola državi omogućuje širu upravnu slobodu. Činjenica da je stan nečija imovina može pak ojačati nečiji zahtjev i skladu s člankom 8 ECHR.

Proganjanje ljudi iz njihovih kuća tokom oružanog sukoba može, među ostalim, biti uzrokovano etničkim, nacionalnim ili religijskim motivima. Isti ralozi mogu otežati povrat imovine nakon sukoba. Jedan primjer je diskriminirajuća primjena restitucijskih zakona. Zato se u ovom istraživanju gledalo i na zabranu diskriminacije u ECHR. U kontekstu oružanih sukoba i njihovih posljedica, u većini slučajeva je potreban strogi sudski test. Različiti faktori ukazuju na to. Kao prvo, može se raditi o razlici na temelju rase ili etničkog podrijetla. Kao drugo, imunitet doma je jedno od najvažnijih ljudskih prava. Kao treće, ljudima koji su izgubili dom puno ovisi o mogućem povratu. Ipak, diskriminaciju će biti teško dokazati u konkretnom slučaju, pogotovo u slučaju diskriminacijskog djelovanja državne uprave koje na prvi pogled izgleda neutralno, iako je ECHR dopustio upotrebu statističkog dokaznog materijala. Da se ne bi izgubilo iz vida specifične interese manjina u slučajevima restitucije, savjetuje se da Sud više upotrebljava ekspertizu unutar Vijeća Europe, između ostalog izvještaje Savjetodavnog odbora za zakonski okvir za zaštitu nacionalnih manjina.

Nakon uspostavljanja prava, koja se potencijalno krše gubitkom doma, u ovoj se studiji istražuju međunarodno-pravne posljedice povrede prava. Za svaku povredu međunarodnog prava, država je u principu dužna pružiti pravnu reparaciju. U doktrini, restitucija važi kao način pravne reparacije koji zaslužuje prednost. U praksi se, ukoliko se uopće prizna pravna reparacija, često pruža odšteta ili drugi način kompenzacije. Pravila pravne reparacije su razvijena u kontekstu međunarodnih odnosa. Ona se također mogu primijeniti između država i pojedinaca. Presude međunarodnih organa za ljudska prava ovo pokazuju. U njima se rijetko presudila restitucija, jer kod mnogih prekršaja ljudskih prava, kao na primjer kod mučenja, to praktično jednostav-

no nije moguće. Ipak, kod gubitka vlastitog doma to je uglavnom moguće. U ovom slučaju restituciji bi valjalo dati prednost.

Obveza za države da ponude pravnu reparaciju još nije dovela do neosporivog i općenito opozivog *pravila* na pravnu reparaciju za pojedince. U okviru Ujedinjenih naroda ostvarena su pak Osnovna načela i smjernice za ostvarivanje prava na pravni lijek i reparaciju žrtava kršenja ljudskih prava i ozbiljnih povreda Međunarodnog humanitarnog prava. Smjernice stavljaju žrtvu na centralno mjesto, ali ne daju jasnu prednost restituciji. Uostalom, smjernice nisu formalno pravno obvezujuće. Ipak, one, kao izvršni politički dokument prihvaćen u Općoj skupštini UN-a, mogu to biti i imati pozitivan utjecaj na nastajuće pravo na pravnu reparaciju.

U europskom kontekstu ECourtHR je oduvijek bio suzdržljiv u pružanju pravne reparacije. Kod ECHR primarna odgovornost za to leži unutar nacionalnog pravnog sustava. Pri tome države imaju slobodu da izaberu oblik pravne reparacije koji žele. ECHR pruža Sudu mogućnost – ali ne i obvezu – da pruži pravedno zadovoljenje ukoliko ovo nije ili je tek djelomice moguće na nacionalnoj razini. U zadnjim desetljećima Sud je sve češće pružao novčanu odštetu, a u novije vrijeme je u nekim slučajevima čak preporučio restituciju, naročito kada se radilo o povratu imovine, uključujući stanove. Tako je *de facto*, ali ne i formalno dodatno ograničena sloboda država da same ocjenjuju takve slučajeve. Ovakav razvoj ipak nije doveo do prava na reparaciju za pojedince pred Europskim sudom za ljudska prava.

Ni pod međunarodnim pravom još ne postoji specifično pravo na povrat kuća. Pošto ne postoji svjetski ugovor koji obuhvaće ovo pravo, u ovoj studiji se istražilo postoji li kakva norma međunarodnog običajnog prava na ovom području. Nakon Drugog svjetskog rata pravo izbjeglica na povratak u zemlju podrijetla sve šire je priznato. U sve većoj mjeri se prihvaća da ovo obuhvaća i pravo na povrat stanova. U izjavama i rezolucijama međunarodnih organizacija, a i nekim mirovnim ugovorima iz 90-ih godina, govori se o konkretnom pravu na povrat stanova i kuća. Sve više se prihvaća da se ovo pravo ne odnosi samo na izbjeglice nego i na interno raseljene osobe. Slično općenitijem pravu na pravnu reparaciju, Ujedinjeni narodi su nedavno izdali i dokument o pravu na povrat stanova 'Principi o povratu stambene i druge imovine za izbjeglice i raseljene osobe' (Pinheiro Principes, nazvane po autoru). Ponovo se radi o neobvezujućem tekstu, donesenom od strane podkomisije za zaštitu ljudskih prava. Zahvaljujući relativno preciznom formuliranju, ovaj dokument se čini dobrim za primjenu u praksi. Ipak, ovdje navedeni trendovi još uvijek nisu dovoljno općeniti i uniformni da bi se moglo govoriti o zajedničkim normama međunarodnog prava. Međunarodno pravo na povrat stanova zato još ne postoji, ali je u nastajanju.

U Bosni i Hercegovini je nakon završetka oružanog sukoba u 1995. u Dayton-skom mirovnom ugovoru eksplicitno obuhvaćeno i pravo na povrat stanova. Uz to su norme iz ECHR-a i određeni međunarodni ugovori izravno primjenjivi kroz Daytonski ugovor u cijeloj Bosni. Vijeće za ljudska prava BiH je u svom pravorijek razradilo pravo na povrat stanova. Za to se ECHR okvir pokazao vrlo praktičnim, za preciziranje dužnosti vlade i za odmjeravanje interesa starih i novih stanara. Time se još više smanjio prostor za djelovanje vlasti koje su bili nevoljne prema povratu stanova. Opće

formuliranom pravu iz mirovnog ugovora je tako dan konkretan oblik pri ocjeni specifičnih slučajeva mogućih prekršaja ljudskih prava. Istovremeno su se postojaće norme ljudskih prava iz Europske konvencije o ljudskim pravima pokazale uspješno primjenjivim u postkonfliktnim okolnostima.

Gore navedeno istraživanje o postojanju međunarodnog ljudskog prava na povrat stanova vodi do tri preporuke. Kao prvo, treba se spriječiti da povrat stanova postane pijun u političkim pregovorima. Zato je važno oblikovati restituciju stanova na pravni način po normama međunarodnog prava. Kao drugo, važno je u mirovni ugovor uključiti pravo na povrat stanova za izbjeglice i druge raseljene osobe, pošto opće priznato međunarodno pravo na povrat stanova još ne postoji. Ovako se može osigurati da osobe koje su izgubile svoj dom u oružanom sukobu njegov povrat mogu tražiti pravnim putem. Kao treće, važno je osigurati da se ovakvo pravo tumači u svjetlu postojećih međunarodnih normi, kao što je ECHR. Ovo može osigurati da se svi relevantni interesi pošteno odvagnu pri donošenju odluka u konkretnim slučajevima.

Drugi dio ovog istraživanja bavi se potpornom strukturom nužnom za efikasnu primjenu norme. Ovdje se treba gledati na europsku (ECHR) i nacionalnu razinu (Bosna i Hercegovina) iz perspektive pravnih prepreka za osobe koje pokušavaju vratiti svoj stan. Pri tome je uočljivo da postoje razlike između normi i potpornih struktura. Najspecifičnije norme širom svijeta na području povrata stanova, Pinheiro Principes, nemaju potporu jednog općeg provedbenog sistema. ECHR, nasuprot, poznaje jak potporni sistem, ali ne sadrži specifično pravo na povrat stanova. Postkonfliktne države, na koncu, nekad uključe pravo na povrat stanova u mirovne ugovore, ali potporna struktura je često oslabljena ili uništena zbog oružanog sukoba, a često su i pristrane ili jednostavno nevoljne da provedu pravo na povrat stanova. Stoga je važno spojiti najefikasnjie elemente s različitih razina – svjetske, europske, nacionalne – ili im u svakom slučaju dopustiti da ojačaju jedna drugu. Ovo se prvo treba ostvariti na nacionalnoj razini, jer se ljudska prava prvenstveno tamo trebaju osigurati. Ukoliko nakon oružanog sukoba nacionalne potporne strukture (privremeno) ne djeluju, potrebna su dodatna jamstva. Ovo je moguće ostvariti kroz intenzivni međunarodni nadzor ili kroz uspostavljanje privremenih organa koji će osigurati provedbu ljudskih prava, eventualno uz sudjelovanje stranih članova da bi se osigurala nepristranost. Pored toga, ovakvi organi mogu također pridonijeti u jednoj drugoj specifičnoj potrebi postkonfliktnih država: rješavanju vrlo velikog broja zahtjeva.

Uz to, u Europi postoji - iz svjetske perspektive - relativno jak ECHR sistem. On može služiti kao dodatna sigurnosna mreža, ukoliko nacionalna razina ne pruža odgovarajuću pravnu reparaciju. Ovaj dopunski karakter podržan je člankom 13 ECHR koji, na nacionalnoj razini, jamči pravo na djelotvoran pravni lijek. ECHR pruža pojedincima mogućnost da svoje žalbe o navodnom kršenju ljudskih prava daju prosuditi pred međunarodnim sudovima. Ovaj Europski sud za ljudska prava donosi pravno obvezujuće odluke. Koliko god snažan bio ovaj sistem, on ipak sadrži prepreke osobama koje traže pravnu reparaciju nakon što su izgubile svoj dom. U ovom istraživanju naglasak je na nekim od ovih prepreka koje su relevantne za postkonfliktne situacije, tj. na vremenskoj i geografskoj dalekosežnosti ECHR-a.

Vremenske granice ECHR-a i vremenska nadležnost ECourtHR-a, koje su blisko vezane, temeljene su na osnovnom načelu nepovratnosti: ECHR u principu nema povratnu snagu. Pošto je većina europskih država tek nakon završetka oružanih sukoba postala član ECHR-a, u principu se ne može žaliti na kršenje ljudskih prava koja su se dogodila tokom oružanog sukoba. Princip nepovratnosti pak poznaje važnu iznimku: ukoliko se kršenje može kvalificirati kao kontinuiran a ne jedinstven događaj, onda ECourtHR ipak može presuditi slučaj. Zato može biti bitno da se gubitak stana konstruira kao kontinuiran prekršaj. U ovakvim slučajevima za odluku Suda presudne su bit i sadržaj pravne odredbe koja je moguće prekršena, kao i činjenice na kojima se temelji mogući prekršaj.

Geografska dalekosežnost ECHR-a je na dva načina bitna za postkonfliktne okolnosti. Prvo, kada jedna Ugovorna stranka ECHR-a zauzme drugu, ili dio druge Ugovorne stranke ECHR-a. Drugo, kada jedna Ugovorna stranka ECHR-a izgubi vlast nad dijelom svog područja. Članak 1 ECHR-a određuje da priključene Ugovorne stranke ECHR-a trebaju osigurati prava iz Konvencije svakoj osobi 'pod svojom jurisdikcijom'. U skladu s tradicionalnim međunarodnim pravom, pravomoćnost ili nadležnost je ograničavala područje nad kojim je država mogla legalno izvršavati vlast. Ovo se obično poklapalo s vlastitim područjem. Unutar ljudskih prava s vremenom se razvila nova vizija o nadležnosti (jurisdikciji), kod koje je stvarna kontrola ili moć države nad osobama presudna. Legalnost te moći tu ne igra nikakvu ulogu. U pravoslovlju ECourtHR ovo široko poimanje nadležnosti nije sistematski preuzeto. Sud još uvijek smatra ovu nadležnost prvenstveno kao teritorijalnu, koju se samo iznimno može primijeniti u ekstra-teritorijalnim okolnostima. Time je Europski sud suzdržaniji nego ostale regionalne i svjetske organizacije za ljudska prava. Ako jedna država ima efikasnu kontrolu nad određenim područjem izvan svojih granica, onda je ona obvezna osigurati prava ECHR-a. Obrnuto, kad država izgubi efikasnu kontrolu nad jednim dijelom svog područja, pretpostavka ostaje da država izvršava pravomoć. Ako se utvrdi da to zapravo nije tako, ipak ostaju postojati pozitivne obveze za državu – u ovom slučaju dužnost da osigura ljudska prava koliko je to stvarno moguće.

U Bosni i Hercegovini potporna struktura za pravo na povrat stanova je ugrađena u Daytonskom ugovoru. Komisija za imovinske zahtjeve raseljenih osoba i izbjeglica (eng. CRPC) imala je zadatak odlučiti kome pripada određeni stan. Ombudsman i Komora za ljudska prava imali su mandat donositi presude o žalbama o prekršajima ljudskih prava. Sve ove polumeđunarodne ustanove suočavale su se sa sličnim problemima: lokalnim vlastima koje su, pogotovo u prvim godinama nakon rata, onemogućavale provedbu odluka; stalnim promjenama opstrukcijskih taktika tih istih vlasti koje su pokušavale ojačati poziciju svoje vlastite etničke skupine; veliki brojevi podnijetih zahtjeva; nedostatak fondova i osoblja; i na kraju djelovanje u složenom nacionalnom sistemu gdje su nadležnosti u velikom broju decentralizirane. Kod završetka mandata ovih daytonskih ustanova, prijenos nadležnosti nacionalnim vlastima nije prošao bez problema, između ostalog i zbog toga što je međunarodna pomoć bila smanjena prije nego što su se zahtjevi riješili.

Ova bosanska iskustva dovode, što se tiče potpornih struktura, do četiri preporuke. Kao prvo, bitno je osigurati nepristranost potpornih struktura kroz ugradnju međunarodne prisutnosti u mehanizmima restitucije i ljudskih prava na najvišoj nacionalnoj razini. Ovo se, na primjer, može izvesti kroz uključivanje stranih članova u ovakve ustanove. Kao drugo, treba se staviti naglasak na efikasnost kroz davanje posebne pažnje provedbi odluka o restituciji od strane vlasti same države. Kao treće, vrlo je korisno proces povrata stanova napraviti fleksibilnim, vodeći računa o praktičnim, političkim i pravnim preprekama koje se usput mogu pojaviti. Na kraju, važno je ostvariti dobar prijelaz od privremenih postkonfliktnih ustanova k stalnim, nacionalnim organima vlasti. Na duži rok, poštovanje ljudskih prava treba postati dio postojećeg nacionalnog pravnog sustava, a ne da stoji izvan njega kao izvana nametnut, izolirano djelujući sustav.

U trećem i zadnjem dijelu ove studije istražuje se kako je prošao proces povrata stanova u Bosni u praksi i koje se lekcije iz toga mogu naučiti. To se istražuje po trećem preduvjetu koji Diehl, Ku i Zamora uzimaju kao osnovu za efikasno djelovanje jedne pravne norme: politička volja ili konsenzus različitih sudionika u pravnom sustavu da bi se primijenila norma. Da bi se protumačilo postupke različitih sudionika u procesu povrata stanova u BiH, gledalo se kakav je bio njihov interes u svemu tome. U prvim godinama nakon Daytonskog mirovnog ugovora (1995.) proces povrata stanova se odvijao vrlo teško. Lokalne vlasti, nad kojima su Srbi, Hrvati ili Bošnjaci imali nadmoć, surađivale su pri povratku izbjeglica i raseljenih osoba vlastite 'etničke' skupine, ali su blokirale druge na sve moguće načine. Istovremeno su međunarodni sudionici, kao sudjelujuće europske zemlje i UN-ova organizacija za izbjeglice UNHCR, pokušavali unaprijediti povratak prognanika. To se djelomice radilo da bi se poništile posljedice etničkih čišćenja. To je bio pravi razlog zašto su lokalne vlasti BiH radile protiv povratka nacionalnih manjina. Podnošenje zahtjeva restitucije zamalo je postalo nemoguće, a povratnici su bili diskriminirani ili im se čak prijetilo. Pored ovog međunarodno-političkog naglaska na povratku – umjesto same restitucije – prve su godine bile obilježene i pragmatičnim pristupom. Gdje je to bilo moguće, s bosanskim vlastodršcima politički su se sporazumi pravili da bi se omogućio povratak. Posljedica ovoga je da se u nekim područjima dobro napredovalo u tome, a u drugim uopće ne. Povrh toga, proces povratka je postao politička lopta u većim pregovaračkim igrama. Uz to, povrat stanova nije bio prioritet u razorenoj Bosni, gdje su se sigurnost i ekonomska obnova borile za politički pozor. Postojeći pristup restitucijskim problemima doveo je do toga da je četiri godine nakon Daytona jedva bilo izbjeglica koje su se vratile.

Kod međunarodnih sudionika na kraju devedesetih godina počelo je prodirati shvaćanje da postojeći napori nisu dali dovoljno plodova. Istovremeno je važnost povrata stanova kao dio strukturalnog miroljubivog rješenja problema BiH postajala sve jasnija. Ovo je u nekoliko (ne unaprijed planiranih) faza dovelo do dvostrukih promjena. Kao prvo, ukinuta je izričita veza između pravnog povrata stanova i stvarnog povratka izbjeglica. Kao drugo, pragmatični pristup uglavnom je zamijenjen pristupom temeljenim na načelima pravne države. Prva promjena značila je, s jedne

strane da je lokalni otpor prema povratu oslabio, dok je s druge strane više nego ikada ranije izbjeglicama prepustio izbor da odluče da li da se ponovo usele u svoju vraćenu kuću, ili da je iznajme ili prodaju. Druga promjena, blisko vezana s prvom, značila je da se više nije polazilo od političkih pregovaranja s lokalnim vlastima, nego da se povrat stanova predstavljao kao pravni proces, a restitucija kao pravo – posve u skladu s propisima mirovnog ugovora.

Da bi se ova promjena smjera provela u praksi, prilagođena su ili zamijenjena diskriminacijska lokalna pravila restitucije, od strane Visokog povjerenika koji je Daytonskim ugovorom postavljen kao najviša razina civilne vlasti u Bosni. Povrh toga, on je otpustio vladine službenike koji su radili protiv restitucije. Usto, općinski stambeni uredi dobili su dodatnu materijalnu pomoć, tako da se moglo riješiti više zahtjeva za restituciju. Na kraju su, od 1999. godine različiti međunarodni čimbenici – Visoki povjerenik, CRPC, UNHCR, UN-misija u Bosni i Organizacija za europsku sigurnost i suradnju (OESS) – počeli strukturalno surađivati u Planu provedbe imovinskog prava (eng. Property Law Implementation Plan, PLIP). Po tom planu je u svakoj općini jedna osoba iz međunarodne zajednice obvezna nadzirati procese restitucije. Time se spriječilo da lokalne vlasti izigraju različite ustanove jednu protiv druge. Lokalni PLIP predstavnici su obavještavali o uočenim uskim grlima centralnu PLIP skupštinu u Sarajevu, koja je na bazi toga formulirala opću politiku. Takav pristup PLIP-a bio je karakteriziran jakim naglaskom na publicitet i transparentnost: kroz medijske se kampanje stanovništvu BiH ukazivalo na njihova prava na restituciju, a svakog mjeseca su se objavljivale PLIP-statistike napretka po općinama. PLIP je odražavao politički konsenzus među najvažnijim političkim čimbenicima da bi se provelo pravo na povrat stanova.

Suradnja unutar PLIP-a oslabila je nakon nekoliko godina, među ostalim i zbog smanjenja fondova i razlika u mišljenju o konačnom cilju procesa restitucije. Ipak su postignuti važni rezultati. Kroz PLIP se povećao pritisak na lokalne vlasti. I odozdo se povećao pritisak, jet je veliki broj raseljenih lica počeo podnositi zahtjev za povrat stanova. Na koncu je odrađeno i provedeno više od 90% od nekoliko stotina tisuća zahtjeva za restituciju. Uz to treba naglasiti da se nisu sve izbjeglice i raseljene osobe uistinu vratile svojim domovima. U puno slučajeva radilo se o iznajmljivanju ili prodaji.

Relativni uspjeh procesa povrata stanova u BiH može se objasniti kroz jedinstveni kontekst, tj. vrlo veliku mjeru međunarodnog uplitanja, prisutnost znatne vanjske financijske pomoći, kao i činjenicu da rat nije imao jednog jasnog pobjednika – svaka od tri velike grupe (Srbi, Hrvati i Bošnjaci) bila je u manjini. Ova pozitivna početna pozicija omogućava da se ukaže na bitne probleme i rješenja za povrat stanova, u odsutnosti sporednih komplicirajućih faktora. Iz bosanskog iskustva zato proizlaze i dvije praktične preporuke. Kao prvo, za međunarodne je čimbenike važno uspostaviti formalne i neformalne koalicije između svih koji teže povratu stanova. Kao drugo, važno je kod svih čimbenika povećati svijest o važnosti povrata stanova za obnovu pravne države i ostvarivanje strukturalnog mira.

Na kraju, uvijek treba imati na umu da je provedba prava na povrat stanova nužan, ali ne i samo po sebi dovoljan uvjet za trajni povrat izbjeglica i raseljenih osoba. Jednako važni su i fizički sigurna okolina i socijalno-ekonomski faktori, tj. nediskriminirajući pristup obrazovanju, poslu i socijalnoj skrbi. Zasigurno, povezanost između pravnih i drugih aspekata procesa povratka izbjeglica zaslužuje detaljnije proučavanje.

(translation: Franka Olujić)

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