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Introduction

Certain crimes lie beyond the reach of repair. From torture and systematic rape to enslavement and ethnic cleansing, many of the violations that force refugees from their homes count among those injustices for which it is impossible to truly make amends. During the Cold War, many if not most refugees were resettled in western countries, defusing the explosive question of how refugees may be reconciled with their states of origin. Today, however, permanent resettlement is a rare solution to refugee crises. For millions of refugees, repatriation to their countries of origin is no longer an option but an imperative, the only alternative to the limbo of protracted displacement. This raises some critical questions: What can refugees legitimately expect from return? Are they entitled to anything more than a haphazard journey back to ruined or reoccupied homes in communities where their livelihoods are uncertain and their welcome lukewarm at best? If so, what are the conditions of a *just return* process? Who is obliged to ensure these conditions are met? While sometimes fierce public and academic debates probe the obligations states of asylum owe to those harboured within their borders, the issue of what states of origin owe to returning refugees has often been overshadowed. Yet experiences from Guatemala and Cambodia to the Balkans and Afghanistan indicate that identifying the state of origin's responsibilities to returnees and ensuring these duties are met is integral to safe and sustainable repatriation and peacebuilding processes and, in turn, a stable political future.

Historically, questions of justice and the ability of impoverished refugees to straggle back to their homes have rarely found space on political or scholarly agendas. However, over the past 25 years, the repatriation of refugees and the rectification of past injustices have emerged as multifaceted, pressing challenges for state policymakers and humanitarian practitioners alike. As former United Nations Secretary-General Kofi Annan argued in 2005, 'The return of refugees and internally displaced persons is a major part of any post-conflict scenario. And it is far more than just a logistical operation. Indeed, it is often a critical factor in

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sustaining a peace process and in revitalising economic activity' (Annan 2005). The success of return operations depends on the ability of governments and non-state actors to confront and respond to the questions of justice the repatriation process puts front and centre, from the resolution of land disputes to accountability for the atrocities and inequalities that fuel forced migration.

Drawing on the tools of international law, moral theory, and political and historical analysis, this book focuses attention on the responsibilities states of origin bear towards their repatriating citizens and articulates a minimum account of a just return process. I contend that the goal of a just return must be to put returnees back on equal footing with their non-displaced co-nationals by recasting a new relationship of rights and duties between the state and its returning citizens. The conditions of just return match the core duties a legitimate state must provide for all its citizens: equal, effective protection for their security and basic human rights, including accountability for violations of these rights. Indeed, in the following chapters I will argue that remedies such as property restitution, compensation, apologies and truth commissions play a critical role in creating the conditions for a just return, as it is through such forms of redress that the state of origin may re-establish its legitimacy by acknowledging and attempting to make good on the duties it abrogated by forcing its citizens into exile. However, redress and return are invariably imperfect processes. While this book maintains that reparations are a critical expression of accountability for forced migration, and an essential component of a just return, it also engages in a detailed examination of the legal, moral and pragmatic political problems associated with efforts to uphold at least a degree of state responsibility for displacement and provide redress to returnees.

The rise of return: political origins and practical implications of the focus on repatriation

Although the right to return is acknowledged in numerous United Nations resolutions and Article 13(2) of the Universal Declaration of Human Rights, 'the right of return has not figured prominently in general discussions of refugee rights. The major thrust of these discussions has been on the right *not* to be returned' (Dowty 1994: 26). Indeed, the 1951 Convention Relating to the Status of Refugees refers to repatriation principally in the negative terms of *refoulement*.[1] In contrast, the UNHCR Statute identifies the facilitation of repatriation as one of the organisation's principal functions and calls on the High Commissioner to 'provide

[1] I use repatriation and return as synonyms throughout.

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for the protection of refugees . . . [by] . . . assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities' (UNGA 1950). However, throughout much of the Cold War, return was often sidelined in favour of other solutions that better served western political interests. It was only in the aftermath of the Cold War that return emerged as the predominant solution to displacement, and with it a wide range of policy challenges, from the provision of protection and development support in return communities to the resolution of returnees' land claims. Although UNHCR (2011: 5, 17) statistics show a consistent decline in refugee repatriation rates since the end of 2004, the refugee agency insists that 'voluntary repatriation remains the preferred solution among most of the world's refugees', not to mention its governments. Even with declining repatriation rates, the overall number of returnees remains considerable: between 1998 and 2007, 11.4 million refugees returned to their countries of origin through more than 25 large-scale repatriation programmes; for every refugee resettled between 1998 and 2008, 14 returned to their home countries (UNHCR 2008: 10).[2]

Return in the early post-WWII years and during the Cold War

Noting that the three durable solutions to displacement, voluntary repatriation, local integration and resettlement, are often listed in order of preference, Goodwin-Gill (1995: 32) suggests that, much like many contemporary governments, the drafters of the UNHCR Statute regarded voluntary repatriation as the ideal resolution to displacement. This early preference for repatriation is reflected in the fact that between 1945 and 1947, the United Nations Relief and Rehabilitation Agency (UNRRA) spent more than $3.6 billion on relief and repatriation for those displaced by World War II (Martin et al. 2005: 82).[3] However, only a few years later, the United States and France attempted to 'torpedo' the inclusion of repatriation in the mandate of the High Commissioner for Refugees (Holborn 1975, Harrell-Bond 1989: 46). For the western powers confronting the rise of the eastern bloc, 'it was virtually inconceivable that refugees from . . . the USSR would be willing to return home, or should be forced to repatriate. Nor was the West able or willing to conceive of refugee problems outside Europe' (Harrell-Bond 1989: 46, Holborn 1975).

[2] Interestingly, while refugee repatriation rates have declined in recent years, increasing numbers of internally displaced persons (IDPs) have returned, with some 2.9 million IDPs returns recorded by UNHCR in 2010, the largest amount in some 15 years.

[3] This text focuses on repatriation movements post-World War II. For analyses of earlier return processes, see, for example, Long (2009).

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By the time the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was signed in 1969, the proliferation of refugee problems outside Europe was all too clear. The OAU Convention (Article 5.5) emphasises the importance of the voluntary repatriation of refugees, calling for 'every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organisations, to facilitate their return'. In practice, however, in the first decades of the modern refugee regime, many influential countries and international organisations were hesitant to promote voluntary repatriation as a solution to refugee crises. After World War II, UNHCR's precursor, the International Refugee Organisation (IRO), did not encourage the repatriation of displaced persons to Communist countries where they could be persecuted as traitors. In the early years of UNHCR's work, the use of repatriation as a durable solution was limited as millions of refugees who 'voted with their feet' against repression and conflict in Communist-aligned countries were offered permanent resettlement in the west. In essence, resettlement was used by the west as a sharp political slight against the eastern bloc (Loescher 2001a, Martin et al. 2005: 81–86).

Certainly, the Cold War period saw several significant if troubled repatriations processes. For example, UNHCR facilitated the repatriation of almost 10 per cent of those who fled during the 1956 Hungarian refugee crisis. In spite of the initial opposition of western governments to the operation, UNHCR viewed the facilitation of repatriation to Hungary as an opportunity to overcome its almost total isolation from the eastern bloc (Loescher 2001b: 36). A few years later, the largest repatriation movement on record began with the return of some 10 million displaced persons to the newly independent state of Bangladesh between 1971 and 1972 (UNHCR 2000: 59–60). Despite the complexity and importance of some of these cases, the ethos of the refugee regime nonetheless remained focused on the resolution of displacement through resettlement and local integration. With the decline of Cold War rivalries, however, the political logic underpinning the large-scale resettlement of refugees evaporated, and permanent resettlement opportunities 'largely withered away' (Hathaway 1997: 533).

Increasing returns in the aftermath of the Cold War: rewards, risks and a changed regime

A few years before the end of the Cold War, the refugee regime began to address the question of repatriation in a more explicit manner. In Conclusion No. 40 of 1985, the UNHCR Executive Committee articulated an institutional doctrine to guide voluntary repatriation activities, and

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by the late 1980s, UNHCR, donors and many host states were broadly united in the effort to transform repatriation from a rhetorical concession into the principal durable solution for refugees. UNHCR declared the 1990s the 'Decade of Repatriation', and during this period return programmes expanded considerably, framed as a contribution to regional stability and international security (Hammerstad 2000: 392–396). At the same time, local integration opportunities waned as the developing countries hosting the vast majority of the world's refugees adopted increasingly restrictive asylum policies, in part as a protest against inadequate progress in establishing 'burden sharing' mechanisms between the global North and South (Kibreab 2003: 26, Loescher et al. 2008: 48–50, Ogata 2005).

This shift towards return in the late 1980s and early 1990s elicited a volley of critiques from scholars and refugee advocates alike. While UNHCR, reluctant host states and governments that scaled down their resettlement quotas were – and are – quick to aver that most refugees prefer return as the durable solution to their displacement, critics rightfully underline that the evidence substantiating such claims is often thin (Harrell-Bond 1998, Takahashi 1997). Many scholars, practitioners and policymakers contend that the upshot of the focus on return is the erosion of asylum rights, the legitimisation of restrictive policies intended to prevent refugees from accessing shelter in wealthy western democracies and the creation of unrealistic expectations among the displaced (Adelman and Barkan 2011, Chimni 1993, Hathaway 2007). Many of the same critics see self-interested motivations behind the promotion of return and question the voluntary nature of many repatriation movements. Indeed, temporary protection and 'mandated return' programmes often make little or no pretence towards voluntariness, in spite of the risks associated with privileging the judgement of states over that of refugees, who may better understand the specific dangers posed by repatriation (Chimni 1993: 454).

Many of these critiques remain highly relevant. But despite the risks associated with return as a durable solution to displacement, a strong conviction has emerged that voluntary repatriation movements should be supported because they have the potential to help to consolidate peace processes. This conviction is reflected in UN Secretary-General Boutros Boutros-Ghali's influential 1992 report *An Agenda for Peace*, which argued that 'Peacemaking and peace-keeping operations, to be truly successful, must come to include comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people. Through agreements ending civil strife, these may include disarming the previously warring parties and the restoration of order . . . [and] repatriating

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refugees' (UNSG 1992, para. 55). In keeping with the view that peace processes and return movements are closely connected, virtually all of the dozens of peace agreements concluded since 1995 recognise the right of the displaced to return not only to their country of origin, but to their original homes (Phuong 2005).

Undoubtedly, repatriation movements unfolding in the context of volatile peace processes have in some instances been more limited in scope than is often implied by UNHCR, particularly in cases of ethnic conflicts when refugees would be minorities in return communities (Adelman 2002, Adelman and Barkan 2011, Dumper 2006: 13). However, it has nonetheless become clear that the success of repatriation movements and peace operations are indeed often closely intertwined (Black et al. 2006, Dumper 2006b, 2007, Weiss Fagen 2003, 2005, 2006). In some circumstances, return movements can help to stabilise insecure border regions and may serve as an important expression of confidence in fledgling peace processes. As the 2009 *Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict* argues, 'visible peace dividends that are attributable to the national authorities, including early employment generation and supporting returnees, are . . . critical to build the confidence in the government and the peace process' (UNSC 2009, para. 18). In addition, refugees may return with important training and skill sets developed while in exile, which may enable them to make valuable contributions to peacebuilding and development (Milner 2009: 27–28).

Yet in many instances, repatriation has not been a boon for peace processes. Almost inevitably, repatriation movements generate tensions at the local level as returnees attempt to reclaim lost properties and have to confront former neighbours who may have been complicit in the violations that forced them from their homes. Influxes of returnees may further stretch already limited services such as schools and clinics, may be met with hostility on the part of those who were unable to seek shelter abroad and perceive returnees as having been 'spoiled' with international support. In worst-case scenarios – which are all too common – premature and forced return movements can overwhelm and undercut 'fragile institutions' in countries struggling to emerge from conflict, exposing returnees to unnecessary and unacceptable risks, and ultimately setting back peace processes by potentially reigniting conflict and forced migration flows (Milner 2009: 26–27, Rodicio 2001, 2006, Utting 1994). These risks are particularly pronounced in cases of massive return movements. For example, Afghanistan has seen the repatriation of some 5 million refugees since 2002, representing approximately one-quarter of the country's population. Reflecting on the failure to provide returnees

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with the support essential to make repatriation a sustainable contribution to peace, the head of the UNHCR mission in Afghanistan recently characterised the agency's approach to return as 'a big mistake, the biggest mistake UNHCR ever made' (AFP 2011, IRIN 2012).

High-level initiatives such as the development by the UN Secretary-General's Policy Committee of a 'Preliminary Framework for supporting a more coherent, predictable and effective response to the durable solutions needs of refugee returnees and IDPs' attempt to minimise these risks, and maximise the contributions returns may make to peacebuilding processes.[4] However, this initiative focuses on prompt access to durable solutions for those recently displaced by conflict and does not address the millions of refugees now in conditions of protracted displacement. Perhaps the greatest difficulty associated with the increased focus on return as the 'preferred' solution to displacement is that many refugees now remain in an indefinite limbo, forced to wait for beleaguered peace processes to gain traction, or for stagnant conflicts to move towards resolution, rather than having the opportunity to access local integration or resettlement opportunities.[5] By the end of 2010, approximately 7.2 million refugees were in situations of protracted displacement, as viable conditions for return had not yet taken hold, but other solutions were foreclosed to them (UNHCR 2011: 2). In a 2010 speech to the United Nations General Assembly, UN High Commissioner for Refugees, António Guterres lamented that 2009 was the 'worst [year] in two decades for the voluntary repatriation of refugees', due to the impossibility of return to countries locked in conflict. Nonetheless, his speech underlined the regime's persistent focus on return as the preferred and predominant solution to displacement. 'Despite the lower number of refugees able to return to their countries in conditions of safety and dignity', Guterres (2010) argued, 'voluntary repatriation remains a vital solution. Indeed, with major conflicts failing to resolve, it becomes all the more important to act on the opportunities which do exist for voluntary repatriation.'

In short, since the end of the Cold War, the refugee regime has changed dramatically and perhaps irrevocably. The problems associated with

[4] Framed as a follow-up to the Secretary-General's 2009 Report on Peacebuilding, the framework emphasises a rights-based approach premised on the state of origin's responsibility for its displaced citizens. It will be piloted in three countries in 2012 and 2013. See Secretary-General's Policy Committee Decision 2011/20 (UNSG 2011a).

[5] Adelman and Barkan (2011) suggest that this problem is particularly acute for refugees who would be ethnic minorities if they were to return to their countries of origin and suggest that the insistence that refugees have the right to return is in large part to blame for this conundrum.

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return are troubling for anyone concerned with the rights and wellbeing of refugees, but this does not alter the political realities now underlying the international refugee regime: affluent countries lack the incentive and domestic support necessary to resuscitate large-scale resettlement programmes. The lauded tradition of hospitality towards refugees in the developing world, and particularly in Africa, is flagging and unlikely to be revived without a substantial breakthrough in donor support and burden sharing. The prospects of such a breakthrough are bleak, as evidenced by the confounding of UNHCR's recent attempts to enable the permanent local integration of Burundian refugees who have been living in Tanzania for decades. While efforts to improve the protection of refugees and ensure their access to a sufficiently wide range of durable solutions remain of the utmost importance, increased focus on repatriation is not a passing trend but a definitive change in the structure of the international refugee system. Scholars and advocates should be concerned that, despite this change, repatriation has attracted only modest attention from researchers to date, and the theoretical framework underpinning return remains comparatively undeveloped (Takahashi 1997: 593, Zetter 2004: 299). For example, in spite of UNHCR's mantra that repatriation must take place 'in conditions of safety and dignity', the UNHCR *Handbook on Voluntary Repatriation* offers little discussion of the meaning of dignified return beyond setting out a dictionary definition of dignity (UNHCR 1996: 11). As the onus has shifted from states of asylum and resettlement countries to states of origin to provide a durable solution to displacement in the form of repatriation, there is a pressing need for more rigorous examination of the conditions of just return and how states may realise these conditions.

Theoretical implications of the focus on repatriation

The rise of return as the dominant durable solution to displacement also has significant implications for the prevailing theoretical conceptions of the refugee predicament. Historically, few political theorists and philosophers have systematically engaged with the problem of refugees, with the notable exception of Hannah Arendt. As a refugee from Nazi Germany, Arendt discusses refugees and statelessness in *The Origins of Totalitarianism*, a text that has become a touchstone for scholars grappling with the nature and consequences of forced migration. Theorists such as Giorgio Agamben (1994) have drawn on Arendt to position the refugee as the 'central figure of our political history', and her contribution continues to illuminate certain aspects of the refugee problem. However, structural changes in the international system, including the increased focus on

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repatriation, mean that Arendt's depiction of refugees as stateless, rightless 'scum of the earth' no longer so clearly reflects or suggests avenues for resolving the challenges faced by the majority of the world's refugees (Arendt 2004: 343).

Arendt was principally concerned with European Jewish refugees who fled the Holocaust. Many of these refugees were indeed literally stateless as the denaturalisation laws of the Third Reich stripped millions of unwanted minorities of their citizenship. This practice has since been explicitly forbidden under international law, with the development of treaties such as the 1961 Convention of the Reduction of Statelessness.[6] At the time, however, the minorities' legal predicament was more ambiguous, as international law did not yet fully conceive of individuals as the subjects of international rights and obligations (Benhabib 2004: 54, 68).[7] Certainly, Arendt's concerns with statelessness ran much deeper than questions of legal status. For Arendt, the displacement of refugees across Europe exposed the poverty of human rights rhetoric and the 'fiction' of justifying the state system in terms of the protection and promotion of human rights (Agamben 1994). Although Arendt (2004: 344) writes that 'the very phrase "human rights" became for all concerned – victims, persecutors, onlookers alike – the evidence of hopeless idealism or fumbling feeble-minded hypocrisy', she is nonetheless adamant about the political and ethical value of this very discourse (Isaac 2002: 507). Her principal observation and concern was that refugees were powerless to stop their state from robbing them of their rights as citizens. Left without the protection of a state, refugees were unable to find 'a community willing and able to guarantee any rights whatsoever' (Gibney 2004: 2). The 'right to have rights', Arendt concluded, depended on membership of a political community; as membership was distributed according to the

[6] Article 9 of the 1961 Convention on the Reduction of Statelessness provides that 'a contracting state may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds', while Article 7 indicates that 'if the law of a contracting State permits renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality'. The 1961 Convention entered into force in 1975, and was preceded by the 1954 Convention Relating to the Status of Stateless Persons. It is important to note that international support for both treaties has been lacklustre: the 1954 Convention has 59 signatories, while the 1961 Convention has only 31. However, instruments such as the 1948 Universal Declaration of Human Rights also provide some general protection against statelessness. For instance, Article 15(2) of the Universal Declaration of Human Rights underlines that 'No one shall be arbitrarily deprived of his nationality.'

[7] The minorities treaties overseen by the League of Nations purported to provide some protection to minorities against acts such as forced denationalisation. However, the protection provided by these treaties was meagre and not universal, and members of the affected minority groups had no standing in the legal bodies responsible for the implementation of the treaties (Roucek 1929).

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prerogative of states, citizens risked being rendered 'stateless' refugees or, as Arendt put it even more bluntly, 'superfluous' (Benhabib 2004: 50). In other words, 'the loss of citizenship rights . . . contrary to all human rights declarations, was politically tantamount to the loss of human rights altogether' (Benhabib 2004: 50).

While aspects of Arendt's argument continue to resonate, this book suggests that Arendt's focus on refugees as powerless and fundamentally stateless is now rather anachronistic (Bradley in press). This is attributable to factors such as changes in the geographic scope and political impetus of refugee flows; the codification of human rights in international law; and, perhaps above all, the increasing importance of repatriation and the reconstitution of the relationship between refugees and their states of origin, a possibility largely unforeseen by Arendt. As Gibney (2004: 4) observes, 'the circumstances that confronted Europe with refugees between 1930 and 1950 had their source in what have turned out to be relatively transient forces . . . that emanated from *within* Europe'; most refugee crises now originate *outside* Europe, due to civil wars, ethnic strife, and the persistent difficulties associated with building solid state structures in conditions of impoverishment. Unlike in Arendt's time, most contemporary refugees are not technically stateless but remain citizens of their states of origin.[8] Refugees certainly lack effective state protection, but this is unfortunately true for almost every citizen of deeply dysfunctional states such as Afghanistan and Haiti, displaced or not. If it is to maintain its analytic incisiveness, 'statelessness' cannot simply mean a lack of robust state protection. Very different courses of action are required to resolve the predicament of people who are literally stateless, and to ensure that the citizens of abusive or failing states, including refugees, can avail themselves of stronger state protection systems. While a stateless person must carve out a fresh space for herself as a recognised member of a state's political community, a refugee can already lay claim to a place in a state's political community, albeit one in marked need of improvement.

[8] In this connection, it is helpful to note the distinction between *de jure* and *de facto* statelessness. According to Batchelor (1998: 170–174), a *de jure* stateless person is one who 'is not considered as a national by any State under the operation of its law'. This reflects the formal definition of statelessness set out in the 1954 Convention relating to the Status of Stateless Persons. While the drafters of the 1954 Convention and the 1951 Convention relating to the Status of Refugees assumed an overlap between refugees and *de facto* stateless persons, in light of refugees' inability to benefit from effective national protections, 'neither *de jure* nor *de facto* statelessness necessarily signifies the existence of a well-founded fear of persecution under the terms of the 1951 Convention . . . if stateless persons are really to benefit from the provisions of international or regional instruments developed to resolve cases of statelessness, they must be able to show *de jure* statelessness' (Batchelor 1998: 172). Statelessness and refugeehood are, therefore, not legally synonymous.

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