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Applying the Lessons of Bosnia in Iraq: Whatever the Solution, Property Rights Should be Secured

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[Rhodri C. Williams](#), Consultant, Foreign Policy, Brookings-Bern Project on Internal Displacement

Brookings-Bern Project on Internal Displacement

JANUARY 08, 2008 — In the rancorous domestic debate over how to achieve a political solution in Iraq, calls to divide the country among its primary ethnic and religious groups have recently come to the fore. Such proposals generally advocate some form of “soft-partition” through decentralization - rather than outright fragmentation - of the Iraqi state. The culmination of this trend to date came in the form of a non-binding Senate resolution in September 2007 calling for the division of Iraq into three semi-autonomous regions. Soft-partition proposals are often justified with reference to the successful resolution of the 1992-95 conflict in Bosnia, but have largely failed to take into account the importance of parallel measures guaranteeing displaced Bosnians the right to reclaim their homes in securing the country’s continued stability.

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Partition proposals have met significant criticism, ranging from concerns that any accompanying mass population movements would end in a bloody rout to the rather elementary observation that Iraqis themselves do not favor such a solution. A further risk – and one that has gone largely unnoted so far – is that the noisy debate over political outcomes in Iraq may overshadow the humanitarian plight of individuals and families displaced by violence in Iraq, distracting both domestic and international actors from basic steps necessary to protect their rights pending an end to the crisis. This concern has become particularly acute with the recent return of tens of thousands Iraqi refugees from Syria, and the accompanying realization that neither domestic nor international actors in Iraq have a plan for dealing with the widespread problem of persons who squatted in their homes during their absence.[1]

The Lessons of Bosnia

Proponents of partition note that the population of Iraq is already being separated in an uncontrolled process of ethnic cleansing and displacement. As of October 2007, as many as 2.5 million Iraqis had fled the country and a further 2 million were internally displaced, with many more families forced out of their homes every month. Partition advocates further argue that the political preconditions for “soft

partition” already exist, with the current Iraqi Constitution allowing for the formation of sectarian regions with broad powers under the umbrella of a relatively weak state-level government. In presenting these factors, partition advocates frequently invoke the “lessons of Bosnia” in arguing that some degree of political separation and autonomy for Iraq’s predominant sects is a precondition for peace and stability.

It is true that international negotiators ended a vicious internecine conflict in Bosnia by according each of the warring parties control of an enclave within a loose federal state under the terms of the 1995 Dayton Peace Accords. However, an equally important legacy of Bosnia is the rule that all those wrongfully displaced during the war had the right to return and reclaim their former homes and property, regardless of what sectarian group happened to exercise control of the area where they were located. In balancing individual rights to return to ancestral homes against the territorial demands of Bosnia’s ethno-political elites, the drafters of the Dayton Accords sought to navigate among a number of risks. On one hand, as in Iraq, outside forces could not impose a solution, and so had to arrive at a political formula that would devolve sufficient control to satisfy all the parties to the conflict. On the other hand, allowing the warlords to keep their spoils – in the form of thousands of abandoned homes in the areas they controlled – would have passed the cost of the war entirely to its displaced victims, setting in motion a destabilizing cycle of grievances.

The failure of the current Iraq debate to fully grasp this dynamic is reflected in the fact that some partition advocates actively endorse population exchange as a component of soft-partition. Proponents of full-blown ethnic separation, such as Michael O’Hanlon and Edward Joseph, are driven by the conviction that any minorities remaining on the “wrong” side of future political lines between Iraq’s sects would present too ready a target for destabilizing attacks and should be moved for their own safety. Joseph, who worked as a UN peacekeeper during the war in Bosnia, speaks of how his qualms about evacuating minorities from the embattled Zepa enclave were erased by “the shrieks of terror from the huddled Muslim women as Serb jeeps rolled by....”[2] Such arguments for population exchange are misleading. No one questions that civilians should be removed to safety where necessary in conflict situations. However, according to international law such evacuations should be temporary and civilians should be allowed to return once the threat to their safety has ceased. In repeated resolutions on Bosnia, for instance, the UN Security Council insisted that “all displaced persons have the right to return in peace to their former homes....”[3]

More moderate partition advocates such as the former Democratic presidential candidate Joseph Biden tend to advocate political rather than demographic separation of Iraq’s sects. Biden asserts that his calls for a loose federation of three sectarian regions in Iraq “may be the only way to prevent violent partition and preserve a unified Iraq.”[4] However, while the Biden plan aspires to arrest sectarian cleansing and ensure prospective respect for minority rights, it still misses the key lesson of Bosnia that some form of redress must be provided for those millions already victimized. In Bosnia, this redress began with a provision in the Dayton Accords guaranteeing all those displaced the rights “freely to return to their homes of origin” and “to have restored to them property of which they were deprived....”[5] Although there was considerable skepticism about the practicability of these provisions in the immediate wake of the war, ten years of painstaking efforts – by individual displaced persons, harassed local administrators and dedicated international monitors – yielded impressive results, creating the first real precedent for post-conflict restitution of property rights.

The Right to Return

By 2004, less than ten years after the end of the war in Bosnia, approximately 200,000 abandoned homes had been returned to the families that had fled them, a stunning achievement in light of the tense and lawless conditions that prevailed when the process began. By putting displaced families back in control of what were often their only remaining pre-war assets, property restitution also restored a degree of economic autonomy, allowing the displaced, simply put, to get on with their post-war lives. As many as one million – half of those displaced during the conflict – may have permanently returned to their former homes.[6] Many others chose to sell or exchange reclaimed properties in order to finance a new beginning in other parts of the country. While questions remain about whether enough was done to promote return in the face of local obstruction, restitution clearly allowed many of those who instead chose to resettle to do so on their own terms, alleviating patterns of dependency easily exploited by nationalist politicians.

The aforementioned village of Zepa provides an example of this dynamic. According to the political terms of the Dayton Accords, the entire region, once predominantly Muslim, was placed under the control of Serbs. In light of the wartime atrocities perpetrated by Serbs around Zepa and in nearby Srebrenica, it was hard to imagine that Muslims would ever reclaim their homes or return to the region. Nevertheless, by 2005, ten years after Edward Joseph and his UN colleagues were faced with the awful dilemma of uprooting local inhabitants to save their lives, some 500 Muslims – one-sixth of the pre-war population – had returned to live in Zepa.[7] Of the nearly 1,700 claims for property in the area, all but eight had been approved and enforced, with the keys to vacated homes returned to the claimants.[8]

Many of those displaced during the Bosnian conflict still struggle to make ends meet and remain far from reconciled with their former enemies. However, these circumstances should come as little surprise in a region recovering from decades of authoritarian socialism and years of fratricidal war. What is surprising is that anyone had the possibility to return to their homes at all – or even just reclaim and sell them – in conditions of choice and basic safety. Bosnia's recovery from war has been slow but steady, with no relapses into widespread violence and little reason to fear such in the future. By giving effect to claims for hundreds of thousands of lost homes, the restitution program absorbed a significant part of the grievances resulting from the war and should be given no small measure of the credit for Bosnia's relative stability. In addition (take heed, Jordan, Syria and Sweden), the restitution process eased the repatriation to Bosnia of hundreds of thousands of refugees who received temporary shelter during the war in Western Europe.

Applying Bosnia's Lessons in Iraq

The real lessons of Bosnia are both more challenging and more hopeful than those put forward by advocates of partition in Iraq. It may be that some degree of political decentralization and autonomy along sectarian lines will come to be seen by Iraqis as a necessary measure to rebuild confidence in the wake of what has been termed a nascent civil war in Iraq. It is clear that any such autonomous regions must guarantee respect for the rights of resident minorities. However, the missing lesson of Bosnia is that any political settlement in Iraq should be legitimized not only through prospective commitments to respect minority and human rights but also via retrospective undertakings to address the wrongs done to all those who were forced to flee, ending their displacement and restoring them some ability to provide for themselves. Growing international consensus around this approach is

reflected in guidelines such as the 1998 UN Guiding Principles on Internal Displacement, which point out the duty of states to assist displaced persons “to recover, to the extent possible, their property and possessions which they left behind....”[9]

Another concrete lesson learned in Bosnia is that restitution of property and homes is not to be undertaken lightly. Important preconditions include a minimal degree of security and significant formal, financial and resource commitments from the parties to the conflict. The failure to meet these conditions so far in Iraq argue for a current focus on steps that can be taken to preserve the claims of the displaced to their former homes, rather than attempt to give them immediate effect. For instance, although an Iraqi Commission is currently at work restoring property to those dispossessed under the Saddam Hussein regime, calls to extend its mandate to cover property lost since the 2003 US invasion may be misplaced. The Commission is struggling to fulfill its own mandate under difficult and dangerous circumstances and burdening it with further tasks would serve nobody if it collapsed as a result.[10]

Meanwhile, the Iraqi government's ad hoc efforts to address current property confiscations have been inconsistent and ineffective in the face of overwhelming insecurity and violence. On one hand, an attempt that began early in the “surge” campaign to simply decree the return of all property by an arbitrary deadline was not backed by sufficient resources to work. In fact, it may have exposed displaced families to danger by encouraging them to return to homes where their safety could not be guaranteed. On the other hand, proposals to encourage families to permanently exchange their homes for others in safer areas unfairly shift the burden to the victims of the conflict. In effect, families are asked to permanently trade away their life-savings in order to find shelter from what many still hope will only be a temporary spasm of violence.

With violent displacement ongoing, the rights of the uprooted to their homes and lands cannot currently be enforced but should not be traded away. For the time being, the Iraqi authorities and their international partners must step up to the challenge of simply providing shelter and humanitarian assistance to displaced families. However, important steps can also be taken now to safeguard rights to homes, lands and property to be exercised voluntarily at a future time. These include the following:

- The authorities throughout Iraq as well as the international community should condemn forced displacement and the appropriation and destruction of property clearly, consistently, and at the highest political levels. Such statements should refer to the fact that these acts are violations of international law and include commitments to undo them through the provision of legal remedies to the victims, including restitution of homes and compensation where they have been destroyed. The Iraqi authorities should also open criminal investigations in any cases in which public officials are alleged to have participated in evictions or confiscated the properties of the displaced.
- The Iraqi authorities should clearly state that the longstanding provisions of the Iraqi Civil Code on property title remain in force. These rules specify that true title does not pass with property acquired unlawfully; that transfers of property made under duress are invalid; and that those wrongfully dispossessed are entitled to the return of their property as well as compensation for lost income streams such as rental agreements or crops.[11] Whether redress is ultimately provided via the regular Iraqi courts or a special commission, these protective rules of the Civil Code should be given effect.

- The Iraqi authorities should also clarify the specific significance of the above provisions of the Iraqi Civil Code in the current situation of generalized violence. For instance, they should clearly state that the current violence makes it presumptively impossible for displaced persons to invoke remedies under the Code, in order to ensure that their claims are preserved against the workings of statutes of limitations. Likewise, the authorities should declare that transfers of property taking place in areas with high sectarian tensions will be subject to future review to determine whether they took place under duress.

- The Iraqi authorities should secure, back up and protect all registered data on property title and transactions. It may be worth considering temporarily suspending legal transfers of property rights in areas experiencing severe sectarian conflict.

- All possible measures should be taken to preserve evidence in support of the property claims of displaced persons. The Iraqi authorities have developed an innovative one-page form to be filled in and signed by displaced persons detailing real property and lands they left behind.[12] Advocates for the displaced have called for full, sworn affidavits to be taken, including details on all abandoned personal property (such as furniture or farm equipment) as well as real property, the value of such property and any income streams derived from it, and the precise circumstances under which they left. In addition, all available documentation of property rights, ranging from title deeds to utilities bills establishing prior addresses, should be copied and safeguarded. Such procedures should be undertaken wherever displaced populations are to be found, both inside Iraq and in other countries where refugees have found shelter.

- No distinction should be made between those displaced within Iraq and refugees outside its borders for the purposes of safeguarding property rights. Full information should be provided to all Iraqi refugees and displaced persons on the steps they can take now to secure their future rights to assets left behind. It should be clear that they will be provided with legal remedies regardless of whether they ultimately choose to return to their homes or make a new beginning elsewhere.

- All the above measures should be distinguished from the current process of resolving claims for property confiscated under the Saddam Hussein regime. For instance, one of the most important jobs for the Iraqi property commission is the restoration of homes in northern Iraq to Kurds who were evicted under pre-2003 “Arabization” policies. This restitution process is likely to result in the legal eviction of many Arabs from claimed homes. However, allegations persist that Arabs are also currently subject to extra-legal evictions from homes in the north.[13] Thus, the preservation of claims by Arabs displaced from the north is crucial, not as a means of challenging post-Saddam Hussein restitution, but as a means of eventually identifying and rectifying abuses that took place outside this process.

- Finally, future efforts to uphold the land and property rights of displaced persons should be integrated into broader efforts to provide reparations to all victims of severe human rights violations in the context of the current sectarian violence. The failure to date to take this approach in addressing Ba’athist era violations is instructive. Most notably, entirely separate laws have been passed authorizing the pre-2003 restitution program discussed above, as well as reparations for those imprisoned and the families of those killed by the Saddam Hussein regime. The ad hoc nature of these laws has raised concerns regarding the possibility of uncoordinated multiple adjudications of victims’ claims, delaying the delivery of remedies to victims and imposing unnecessary costs on the Iraqi state.

The possibility of further sectarian decentralization in Iraq undoubtedly poses risks for the Iraqi state and therefore for the stability of the region. However, these risks were foreseen in the drafting of the current Constitution, which provides a framework for discussing and containing them. From this perspective, federalism and ‘soft-partition’ are, in the first instance, domestic political questions. However, the humanitarian side of the equation remains far from resolved. The absence of sustained, meaningful discussion of restitution and legal remedies in the federalism debate signals a significant risk that hundreds of thousands of dispossessed Iraqi families – and overstretched local authorities tending to them in both Iraq and neighboring countries – will be left to bear the ultimate cost of any feasible political solution. The resulting legacy of grievance and impoverishment may pose a far greater threat to long-term national and regional stability than the constitutional wrangling of Iraq’s political class. The central lesson Bosnia can offer is that this need not be so.

Rhodri C. Williams oversaw international monitoring of the restitution process in Bosnia with the Organization for Security and Cooperation in Europe from 2000-2004. He currently works as a consultant to the Brookings Institution-University of Bern Project on Internal Displacement and can be contacted at rcw200@yahoo.com.

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- [1] Cara Buckley, “Refugees Risk Coming Home to an Unready Iraq,” New York Times (December 20, 2007).
- [2] Michael E. O’Hanlon and Edward P. Joseph, “A Bosnia Option for Iraq,” The American Interest Online (January 1, 2007).
- [3] United Nations Security Council, Resolution 820 – Yugoslavia (1993), para. 7.
- [4] Senator Joseph R. Biden, Jr., “Iraq: A Way Forward” (undated), accessed at <http://www.planforiraq.com>.
- [5] General Framework Agreement for Peace in Bosnia and Herzegovina – Annex 7: Agreement on Refugees and Displaced Persons, Chapter One, Article 1 (1995).
- [6] See United Nations High Commissioner for Refugees, “BiH Fact Sheet” (December 2007), available at <http://www.unhcr.ba/>.
- [7] Aida Alic, Ilda Zornic and Nerma Jelacic, “Zepa Marks Anniversary Alone,” Balkan Crisis Report (July 27, 2005).
- [8] Office of the High Representative, “Statistics: Implementation of the Property Laws in Bosnia and Herzegovina” (September 2004), available at <http://www.ohr.int/plip>. Zepa is located in the Republika Srpska municipality of Rogatica.
- [9] Guiding Principles on Internal Displacement (1998), Principle 29(2). The Guiding Principles can be accessed at http://www.brookings.edu/projects/idp/gp_page.aspx.
- [10] More information on this body, the Commission for the Resolution of Real Property Disputes, can be accessed at <http://www.ipcciraq.org/en/index.php>.

[11] See Dan Stigall, “Courts, Confidence and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission,” *The Army Lawyer* (March 2005).

[12] A translation of this form can be accessed at http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx#MidEast.

[13] “Iraq: Ethnic violence forces more Arabs to flee Kirkuk,” IRIN (September 16, 2007).