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The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?

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THE RIGHT TO RETURN UNDER INTERNATIONAL LAW FOLLOWING MASS DISLOCATION: THE BOSNIA PRECEDENT?

*Eric Rosand**

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* Eric Rosand is an Attorney-Adviser in the U.S. Department of State's Office of the Legal Adviser. The views and opinions expressed are those of the author and do not necessarily represent those of the Department of State. The author wishes to acknowledge the helpful editorial and substantive comments provided by Susan Woodward of the Brookings Institution; Brunson McKinley, Doug Hunter, and David Stewart of the Department of State; E.J. Flynn and Erin Mooney of the U.N. Office of the High Commissioner for Human Rights (Geneva); Gregory Racz; and Professors David and Ellen Rosand.

*The end of the Cold War led many of us to believe that the world's refugees and displaced persons would soon be able to return home and begin to rebuild their lives. Regrettably, for many this has not been the case.*¹

On the night of May 2, 1997, some twenty-five abandoned Serb houses were set on fire in the Croat-controlled municipality of Drvar, part of the Muslim-Croat Federation of Bosnia and Herzegovina.² It was clear from all the circumstances that Croats organized the arson of houses in Drvar to obstruct the return of the original Serb residents to the area. Croat authorities then made a concerted effort to resettle displaced Croats in Drvar in order to solidify a stretch of "ethnically-pure" territory adjacent to the Republic of Croatia.³ These displaced Bosnian Serbs are just a few of the estimated 2.3 million Serbs, Croats, and Bosniaks (Bosnian Muslims)⁴ who left or were driven from their homes during and in the immediate aftermath of the Bosnian war.⁵ This dislo-

1. *Prepared Testimony of Assistant Secretary Phyllis E. Oakley, Bureau of Population, Refugees and Migration, Dep't of State, Before the House Committee on International Relations Subcommittee on International Operations and Human Rights*, Federal News Service, Mar. 11, 1997, available in LEXIS, News Library, Curnws File.

2. *See Periodic Report, May 29, 1997*, United Nations Human Rights Field Operation in the former Yugoslavia, at 11 (last modified Feb. 10, 1998) <http://www.unhcr.ch/html/menu2/5/ex_yug/yug_pr3.htm> [hereinafter *UNHR Periodic Report*]. Before the war, some 9,000 people lived in Drvar, which was then known as Titov Drvar, of whom 97.3% were Serbs and 2.7% "others." In 1995, however, the Serb population fled after the town fell to Croat forces. The new Croat authorities have since repopulated the municipality with displaced Croats from municipalities in the Bosniak and Serb-held areas of Bosnia. The population of Drvar now consists of between 5,000 to 6,000 civilians, of which, seventy-nine are Serbs. *See id.*

For purposes of this article, Serbs refers to Bosnian-Serbs, and Croats refers to Bosnian-Croats—*i.e.*, those Serbs and Croats who live in Bosnia.

3. *International Crisis Group Bosnia, Obstruction of the Right to Return to Drvar*, June 9, 1997, at 1 [hereinafter *ICG, Drvar Report*]. Although the perpetrators of these acts were Croats and the victims Serbs, all three sides—*i.e.*, Croats, Serbs and Bosniaks—have committed and been victimized by these sorts of acts designed to prevent people from returning to their pre-war homes.

4. *See SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* 315 (1995) (relating decision of Bosnian Prime Minister Haris Silajdzic to urge the adoption of the term Bosniak instead of Muslim). This was done so as to reflect Bosnian-Muslims' nationality, as opposed to their religion.

5. The Bosnian war was merely one of the conflicts that erupted in the former Socialist Federal Republic of Yugoslavia ("SFRY"). Following a period of unsuccessful negotiations among the six republics of the SFRY and the subsequent withdrawal by Croatia and Slovenia from the federal government, Federal Prime Minister Markovic and the Federal Parliament ordered the Yugoslav National Army in June 1991 to maintain the territorial integrity of Yugoslavia. These efforts proved unsuccessful in Slovenia. In Croatia, however, the JNA forces, together with the Krajina Serbs (Serbs living in the Krajina region of the Republic of Croatia), managed to assume control over approximately thirty percent of Croatian territory. The fighting spread into Bosnia shortly after Bosnia declared full independence from the SFRY on March 3, 1992. For a detailed discussion of the war, see, for example, LAURA

cation resulted from the use of "ethnic cleansing"⁶ campaigns in which local, regional, and higher authorities acted according to a premeditated plan and seized or consolidated control over territory by forcibly displacing or killing members of opposing ethnic groups.⁷ Many of those who were driven from their homes through different techniques that often involved violence and intimidation are now being prevented from returning home through various forms of legal and bureaucratic obstruction by the parties to the conflict.⁸

SILBER & ALAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1996); MISHA GLENNY, *THE FALL OF YUGOSLAVIA* (3d ed. 1996).

6. Although the term was coined in the early 1980s by Vojislav Seselj, the Serbian ultranationalist leader from Bosnia, it was only after hostilities erupted in the former Yugoslavia in 1991 that "the term attained its sad notoriety." Alfred de Zayas, *The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*, 6 CRIM. L.F. 257, 260 n.12 (1995) [hereinafter de Zayas, *The Right to One's Homeland*]. According to the Commission of Experts, established pursuant to Security Council Resolution 780 to investigate serious violations of international humanitarian law committed in the territory of the former Yugoslavia, the expression "ethnic cleansing," in the context of the conflict in the former Yugoslavia, means "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area." Letter from the Secretary General to the President of the Security Council, Feb. 9, 1993, U.N. Doc. S/25274 (1993), transmitting *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), ¶¶ 55-56. The Special Rapporteur of the U.N. Commission on Human Rights concluded that the term "ethnic cleansing" refers to "the elimination by the ethnic group [exerting] control over a given territory of members of other ethnic groups." *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, prepared by Tadeusz Mazowiecki, Special Rapporteur, U.N. ESCOR Comm'n Hum. Rts., ¶ 9, U.N. Doc. A/47/666 (1992) [hereinafter *Periodic Report*]. For a complete analysis of the expression and its origin see also Drazen Petrovic, *Ethnic Cleansing—An Attempt at Methodology*, 5 EUR. J. INT'L L. 342 (1994). See *infra* part I.1 for a fuller discussion of "ethnic cleansing" in the Bosnian war.

7. See Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina, *Special Report: Musical Chairs—Property Problems in Bosnia and Herzegovina*, July 1996, at 9 [hereinafter *OSCE Report*]. See also Human Rights Watch/Helsinki, *Northwestern Bosnia: Human Rights Abuses During a Cease-Fire and Peace Negotiations*, Feb. 1996, at 6.

8. Many observers have reported the systematic opposition to the return of minorities, taking the form of legal and bureaucratic obstruction and open hostility by local authorities. See, e.g., Marcus Cox, *Return, Relocation and Property Rights: A Discussion Paper 2*, prepared on behalf of the United Nations High Commissioner for Refugees (UNHCR) and Commission on Real Property Claims (CRPC) in Sarajevo, Dec. 1997 [hereinafter *Cox Report*]; *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, prepared by Elisabeth Rehn, Special Rapporteur, U.N. ESCOR Comm'n Hum. Rts., ¶¶ 14-20, U.N. Doc. E/CN.4/1997/56 (1997); *Report on the Human Rights Situation in Bosnia and Herzegovina*, prepared by Elisabeth Rehn, Special Rapporteur, U.N. ESCOR Comm'n Hum. Rts., ¶¶ 54-63, U.N. Doc. E/CN.4/1998/13; Amnesty International, 'Who's Living in My House?' *Obstacles to the Safe Return of Refugees and Internally Displaced Persons*, March 19, 1997, at 7, AI Index: EUR 63/01/97 [hereinafter *Amnesty Report*]; International Crisis Group Bosnia, *Going Nowhere Fast: Refugees and Internally Displaced Persons in Bosnia*, April 30, 1997, at 1-5 [hereinafter *ICG Report, Going Nowhere Fast Report*].

The importance of the return of these people has generally been seen as a crucial element in maintaining a unified Bosnia and in producing a lasting peace in the region. The issue, however, has not yet been considered in the broader context of the right to return under international law following mass dislocation.

INTRODUCTION

On December 14, 1995, in Paris, representatives of the Bosnian-Serbs, Bosniaks, and Bosnian-Croats signed the General Framework Agreement for Peace ("Dayton Accord" or "Peace Agreement").⁹ This cease-fire agreement put a stop to the fighting that had been raging in Bosnia for nearly four years, in what was the most violent and disruptive war that Europe had seen in half a century.¹⁰ One of the aims of the Dayton Accord was to enable all refugees and displaced persons to return to their pre-war homes.¹¹ Annex Seven of the Dayton Accord explicitly refers to the rights of refugees and displaced persons to return to their homes and makes their early return a key objective of the agreement.¹² More than two-and-one-half years into implementation of

9. The terms of this agreement were negotiated and agreed to in Dayton, Ohio. The text is available at <http://www.ohr.int/gfa/gfa-frm.htm> (visited Sept. 30, 1998). The principal instrument concluded in Dayton and signed in Paris was the General Framework Agreement for Peace in Bosnia and Herzegovina, to which eleven annexes were attached. At Dayton, the parties agreed to accept a single state comprised of two Entities: the Federation of Bosnia and Herzegovina ("Federation"), comprising fifty-one percent of the territory of Bosnia in a number of cantons, most of which are divided ethnically between Croats and Bosniaks; and the predominantly Serb Republika Srpska ("RS"), comprising forty-nine percent of the territory. Under Annex Four, each Entity has its own parliament, government, police force and army, and carries out most of the functions of a state, whereas the Bosnian State was to be a loose form of central government. See Annex Four of the "Peace Agreement" (visited Sept. 30, 1998) <<http://www.ohr.int/gfa/gfa-an4.htm>>. The central government of Bosnia, consisting of a parliament, council of ministers and a three-person presidency, is given control over only a small number of matters—e.g., monetary policy, foreign policy, trade policy, customs and immigration.

The parties to this Agreement were the Republic of Bosnia and Herzegovina (represented by its President, Alija Izetbegovic), the Republic of Croatia (represented by its President, Franjo Tudjman) and the Federal Republic of Yugoslavia (represented by the then President of Serbia, Slobodan Milosevic). See *id.*

10. Susan L. Woodward, *Bosnia after Dayton: Year Two*, 96 CURRENT HIST. 97 (1997).

11. This text will define "refugees" as those who have left their homes and fled to a country outside of Bosnia, whereas "displaced persons" refers to those who fled their home but remain in Bosnia.

12. Annex Seven, Article I states that "[a]ll refugees and displaced persons have the right freely to return to their home of origin. . . . The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina." The General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Annex Seven, Art. I, available at <<http://www.ohr.int/gfa/gfa-homehtm>>. See also

this cease-fire agreement, however, this guarantee has remained unfulfilled for the majority of those dislocated during the war, and more than 1.8 million people remain unable to return.¹³

Since the right to return was first enunciated in the Universal Declaration of Human Rights in 1948,¹⁴ scholars generally have viewed it to apply only to an individual but not to individuals belonging to a mass group.¹⁵ During the same period, there has been a dramatic increase in the number of displaced persons and refugees, often the result of practices specifically intended to promote the creation of ethnically homogeneous states by driving entire ethnic groups from their homes. If the international community is to confront this problem adequately and effectively, the right to return must be more broadly defined to apply to all individuals, including members of an entire dislocated "population."¹⁶ The aim of this article is to show that part of the importance of implementing the Dayton Accord's provisions, regarding the return of refugees and displaced persons to their former homes in Bosnia, is to establish a strong precedent for this broadened right to return under international law.¹⁷ Although a number of large groups

Annex Six, Art. II.5. The inclusion of Annex Seven in the Peace Agreement allowed U.S. policymakers to claim that "America had negotiated not the division of Bosnia but instead its eventual reunification." David L. Bosco, *Reintegrating Bosnia: A Progress Report*, 21 WASH. Q. 65 (Spr. 1998).

This type of provision is not unique in the context of recent conflict resolution. It has appeared in other peace agreements. See, e.g., Final Act of the Paris Conference on Cambodia, art. 20.1, pt. V, U.N. Doc. A/46/608 (1991) (stating that "Cambodian refugees and displaced persons located outside Cambodia, shall have the right to return to Cambodia"); Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons [part of political settlement of Georgia/Abkhazia conflict], Annex II, U.N. Doc. S/1994/397 (1994) (recognizing the right to return of those dislocated during the civil war).

13. See *Cox Report*, supra note 8, at 2.

14. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, at 71, art. 13(2) (1948) [hereinafter UDHR or *Universal Declaration*]. This right was subsequently codified in both the International Covenant on Civil and Political Rights, entered into force Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR] and the International Covenant on the Elimination of All Forms of Racial Discrimination, entered into force Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter ICERD].

15. See, e.g., Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 294 (1995); HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 7-16 (1987); Ruth Lapidoth, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISR. Y.B. HUM. RTS. 103 (1987); Kurt Rene Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586 (1978).

16. For purposes of this article, "population" refers to ethnic or religious groups of a least several thousand individuals, established over a long period of time in a particular area. See, e.g., Alfred de Zayas, *Population, Expulsion and Transfer*, in 8 ENCYCLOPEDIA OF PUB. INT'L L., at 438 (1985) [hereinafter de Zayas, *Population*].

17. Although the right to return under international law generally refers to the right to return to one's country, the Dayton Accord provides refugees and displaced persons the right

have returned in recent years, they have generally done so without any declaration by the international community that they have a *right* to do so. In the case of the former Yugoslavia, however, once the conflict spread into Bosnia in the spring of 1992, causing thousands to flee their homes each week, the world has indeed repeatedly asserted that all of the refugees and displaced persons have a right to return.

Part I of this article examines both the "ethnic cleansing" of the Bosnian war that led to the mass flight of people from their homes, and the efforts by the parties to the conflict to solidify the resulting ethnically cleansed territories following the cessation of hostilities. It then looks at the international response to these mass dislocations and focuses on the repeated enunciation of the right of all refugees and displaced persons to return, even though they are members of dislocated ethnic groups numbering well over 250,000.¹⁸

Part II begins by providing an historical outline of some of the significant, forced population movements in the twentieth century. For much of the century the international community has explicitly or tacitly condoned population transfers, which were effected to create ethnically homogeneous communities so as to ease existing or potential ethnic tensions. Now, however, the international community uniformly condemns "ethnic cleansing" or any other activity that has as its goal the creation of ethnically pure societies.¹⁹ Despite this reversal, however, in

to return to their home of origin and repossess property wrongfully taken during the war. Even though the right to return developed in the context of nationals seeking to return to their country, the right is also of relevance where there has been a mass internal displacement of the population, such as in Bosnia. See, e.g., Christa Meindersma, *Population Exchanges: International Law and State Practice—Part 1*, 9 INT'L J. REFUGEE L. 335, 362 (1997) (arguing that the right to return is of relevance to the situation in Cyprus, where the major displacement has taken place within the territory of Cyprus).

International human rights instruments refer either to "the right to return" or "the right to enter one's country." International refugee law uses the term "repatriation." This article will use the term "right to return," except when discussing the work of international refugee organizations.

18. See *Cox Report*, *supra* note 8, at 4. This report notes that the original refugee population according to ethnicity was: 670,500 Bosniaks, 273,300 Bosnian-Croats, and 301,200 Bosnian-Serbs; whereas the original displaced persons population according to ethnicity was: 365,330 Bosniaks, 81,580 Bosnian-Croats, and 417,940 Bosnian-Serbs.

19. Secretary of State Madeleine Albright, speaking to Croatian President Franjo Tudjman, recently stated that "it was morally unacceptable to have an ethnically pure state in modern Europe." Zoran Radosavljevic, *Albright Meets Serb Victims, Gets Tough on Croatia*, REUTERS, May 31, 1997, available in LEXIS, Nexis Library, Curnws File. Professor Hurst Hannum believes one must

reject the [idea] that every ethnically or culturally distinct people, nation, or group has an automatic right to its own state or that ethnically homogeneous states are inherently desirable. Even in an environment where human rights are respected, a global system of states based primarily on ethnicity or historical claims is clearly unachievable Ethnically based states almost inevitably lead to claims of eth-

the final decade of this century the world has seen an increase in the number of political, religious, and ethnic conflicts that have forced masses of people to flee their homes.²⁰

Part II continues by considering, in response to both the end of the Cold War and the dramatic increase in the numbers of refugees and displaced persons, how the emphasis of the U.N. High Commissioner for Refugees' ("UNHCR") refugee policy has shifted towards repatriation. As a result of this policy, each year millions of dislocated people are returning to the area from which they were driven. Given this mushrooming in the number of returnees and the condemnation of population movements, Part II concludes by affirming the need to reassess the right to return under international law following mass dislocations of a population.²¹

Part III examines this right. It analyzes the international human rights instruments and the relevant resolutions and statements issued by the different United Nations (U.N.) organs and other international bodies, focusing on commentators' interpretations of these sources of the right. Part III concludes that the restrictive interpretations of this right under international human rights treaties, which limit its extension to individuals who are not part of a large group, are not justified. Commentators point out, however, that international practice does not support the claim that international law recognizes the right to return following mass movements of population. They have based this argument, in large part, on the lack of returns in both Cyprus and Israel, despite the international community's repeated statements that those dislocated during these conflicts have the right to return. The return of hundreds of thousands of Bosnians, following the international community's assertion of their right to return, therefore, will provide an

nic superiority on the part of the new majority and to a cultural rigidity that creates problems for new minorities. At their worst, newly created ethnic states may tolerate or encourage the killings and ethnic cleansing that scarred the dissolution of the former Yugoslavia.

Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, 77 FOREIGN AFF. 13, 16 (1998).

20. One commentator writes that "conflicts within states—often triggered by ethnic and cultural differences—will continue to proliferate." Hannum, *supra* note 19, at 13.

21. Throughout the international efforts to resolve the Bosnian conflict, the right to return to one's country has been specifically interpreted as a right to return to one's home of origin and repossess property wrongfully taken during the conflict. The complex issue concerning the provision of compensation to those who choose not to return to their home is beyond the scope of this article. For an in-depth review of compensation for private claims to property abandoned as a result of mass relocations, see, for example, Benvenisti & Zamir, *supra* note 15.

important example of international practice where the right to return of mass dislocated groups is not only articulated but enforced as well.

I. "ETHNIC CLEANSING" AND THE INTERNATIONAL RESPONSE

A. "Ethnic Cleansing"

In May 1992, after thousands of Bosnians, having been driven from their homes, began arriving in Croatia and telling of the horror that they left behind, a new term entered into the international political vocabulary that has proved the "enduring lexicographical legacy of the Yugoslav war:"²² "ethnic cleansing"—the elimination by the dominant ethnic group of a given territory of members of other ethnic groups within that territory. The practice of "ethnic cleansing" involves "a variety of methods with the aim to expel, including harassment, discrimination, beatings, torture, rape, summary executions, relocation of populations by force, confiscation of property and destruction of homes and places of worship and cultural institutions."²³

Nearly four years of "ethnic cleansing" in Bosnia led to massive relocations of population and a concentration of each of the three ethnic groups in the respective centers of habitation. In light of Bosnia's pre-war heterogeneity and tolerance, "ethnic cleansing" was necessary if the nationalist leaders of each ethnic group were to solidify their power.²⁴ The pre-war population structure provides a clear picture of the multi-ethnic society that was torn apart as a result of the "ethnic cleansing." According to the 1991 census, Bosnia had a total population of just under 4.4 million, broken down by ethnicity as follows: forty-three percent Bosniak, thirty-one percent Serb, seventeen percent Croat, and nine percent other.²⁵ The ethnic groups were broadly distributed in each region.

22. SILBER & LITTLE, *supra* note 5, at 244.

23. U.N. DEP'T OF PUB. INF., THE UNITED NATIONS AND THE SITUATION IN THE FORMER YUGOSLAVIA, at 65-66 (1995) [hereinafter U.N. Dep't of Pub. Information]; *see also* Petrovic, *supra* note 6.

24. *Cf.* Susan Woodward, however, argues that if these leaders had simply wanted to solidify their power, they would not have had to resort to "ethnic cleansing." They were more ambitious, however. Woodward believes that their ultimate goal was not simply power; rather, they sought statehood (*i.e.*, independent Bosnian-Muslim, Bosnian-Croat, and Bosnian-Serb states), sovereignty, and the assets of statehood, plus legitimacy on the basis of the right to self-determination. "Ethnic cleansing," she believes, was necessary to achieve these goals. Discussion with Susan Woodward, Senior Policy Fellow, Brookings Institution (June 1, 1998).

See generally Ivana Filice & Christine Vincent, *Bosnia-Herzegovina: Cultural Profile*, 6 INT'L J. REFUGEE L. 425 (1994) (presenting a cultural overview of the situation and peoples in pre-war Bosnia).

25. *See Cox Report, supra*, note 8, at 3.

Urban areas were generally ethnically-mixed, whereas the rural villages and hamlets were often dominated by one ethnic group.²⁶ Together, these hamlets made up larger ethnically-mixed administrative districts (*opstinias*).²⁷

Nearly four years of "ethnic cleansing", however, proved extremely successful in driving people from their homes and separating the population along ethnic lines.²⁸ Hundreds of thousands of Bosnian citizens of all three ethnicities were deprived of their housing through different techniques of violence and intimidation that generally had the actual or

26. See *OSCE Report*, *supra* note 7, at 9. In fact, thirty to forty percent of all marriages in urban areas in Bosnia were mixed marriages. See ROBERT J. DONIA & JOHN V. A. FINE, *BOSNIA AND HERZEGOVINA: A TRADITION BETRAYED* 9 (1994).

27. See *OSCE Report*, *supra* note 7, at 9. Research conducted before the war revealed that this diversity of peoples in Bosnia was one important factor that made Bosnian citizens the most ethnically-tolerant of all of the SFRY's population. See Randy Hodson et al., *National Tolerance in the Former Yugoslavia*, 99 AM. J. SOC. 1534-58 (1994).

28. See *Cox Report*, *supra* note 8, at 5. UNHCR published rough figures which illustrate how dramatic the population shifts were. Before the war there were 301,641 Muslims and Croats in the eastern Bosnian and southern Herzegovina region, excluding Gorazde. By the end of 1995 this number had shrunk to an estimated 4,000. Similarly, the pre-war Muslim population of Tuzla of 316,000 more than doubled to 659,000. In contrast, the pre-war Serbian population of Zenica, which was 79,355, fell to 16,000 and Tuzla's Serb population plummeted from 82,235 to an estimated 15,000. UNHCR, *Information Notes on Former Yugoslavia*, No. 12/95, at 8 (Dec. 1995) [hereinafter *UNHCR Information Notes*]; see also, TIM JUDAH, *THE SERBS: HISTORY, MYTH & THE DESTRUCTION OF YUGOSLAVIA* 291 (1997).

At the end of 1997, there were overwhelming ethnic majorities in all parts of Bosnia, with the highest minority ratios at about thirteen percent in the Tuzla-Podrinje and Sarajevo Cantons. See *Refugees and Others of Concern to UNHCR: 1997 Statistical Overview*, Dec. 1, 1997, Statistical Unit, U.N. High Commissioner for Refugees.

For detailed accounts of the violence and terror that were perpetrated against one another by the three ethnic groups, see generally, *The Situation of Human Rights in the Territory of the Former Yugoslavia (1992-1994)*, Periodic Reports by Tadeusz Mazowiecki, Special Rapporteur, U.N. Comm'n Hum. Rts. In his 1994 report, the Special Rapporteur focused on the Bosnian-Croat terrorization of Bosniaks and Bosnian-Serbs in the Bosnian-Croat held territory, concentrating on Mostar, stating that "[a] result of the 'ethnic cleansing' of Serbs is that their population in Mostar has been reduced from a pre-war figure of 30,000 to just 400." U.N. ESCOR, 50th Sess., Agenda Item 12, ¶¶ 15-19, U.N. Doc. E/CN.4/1994/110 (1994).

For a thorough account of the "ethnic cleansing" of the summer of 1992, largely committed by Serbs against Muslims, see generally SILBER & LITTLE, *supra* note 5, at 244-57. During this summer, as one Muslim leader in the soon to be ethnically pure Banja Luka recounted, "[t]here [was] a lot of killing. [The Serbs were] shipping Muslim people through Banja Luka in cattle cars. Last night there were twenty-five train wagons for cattle crowded with women, the elderly and children." *Id.* at 248. They were being shipped to Travnik, a city that had been home to all three nationalities, but which the summer of 1992 turned into a "vast refugee encampment, its delicate ethnic and social mix torn apart by the influx of the dispossessed [Muslims] and the gradual exodus of local Serbs and Croats." *Id.* For a graphic description of the horror and despair that accompanied these long journeys into exile, see generally ED VULLIAMY, *SEASONS IN HELL: UNDERSTANDING BOSNIA'S WAR* (1994).

tacit approval of authorities.²⁹ As a result, ninety percent of the pre-war Bosnian-Serb population left the area now called the Federation and over ninety-five percent of the pre-war Bosnian-Croat and Muslim inhabitants fled what would become the Republika Srpska ("RS") during this period. According to one estimate, only 2.8 million people, or sixty-four percent of the pre-war total remained in Bosnia following the exodus of refugees.³⁰ If one includes those internally displaced during the conflict, then only forty-two percent of the people remained in their home of origin following the end of the war.³¹

The destruction of property and the massive population movements that resulted from ethnically motivated atrocities led to severe housing problems. Not only were many homes abandoned, emptied, or destroyed,³² but, simultaneously, large numbers of displaced people

29. *OSCE Report*, *supra* note 7, at 9. Most human rights organizations concluded that although the Bosniak extremists did commit ethnic-based atrocities and evictions, the Bosniak-dominated Bosnian Government did not engage in systematic "ethnic cleansing." *Id.*

30. This total includes the thousands, estimates range from 20,000 to 80,000, of Bosnian Serbs who fled or were forced to leave the suburbs of Sarajevo when these were transferred from the Republika Srpska to the Federation in the early spring of 1996. The Dayton Accord provided that authority over five Sarajevo suburbs would pass from the Republika Srpska to the Federation by March 19, 1996. Annex 1A (establishing that 45 days after the transfer of authority from the U.N. Protection Force (UNPROFOR) to the NATO-led Implementation Force (IFOR), the two Entities were to have established legal authority over the territory designated to them in Annex 1A; for the Federation, this included gaining control over Sarajevo). During the months preceding the transfer, however, both sides fell well short of implementing the confidence building measures that would have allowed the transition to have occurred smoothly.

Despite painstaking preparations, the orderly transfer of authority broke down when local police abandoned their neighborhoods, first to Serb thugs who forced evictions, carted off industrial equipment, and torched buildings, then to Bosniak gangs who ransacked properties in advance of the arrival of the new police. When the dust settled, most of the Serbs had fled.

James A. Schear, *Bosnia's Post-Dayton Traumas*, 104 FOREIGN POL'Y 87, 93 (1996); *see also Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, prepared by Elisabeth Rehn, Special Rapporteur, U.N. Comm'n Hum. Rts., ¶ 36, U.N. Doc. E/CN.4/1996 (1996). Such actions went largely unopposed by either the U.N.'s civil police monitors or IFOR. *See Schear, supra*, at 93. By some estimates, as many as 80,000 Bosnians have left their homes after Dayton, either voluntarily or by coercion. Nearly all have resettled in areas where their ethnic group is in the majority. *See Bosco, supra* note 12, at 67.

31. *See generally Bosco, supra* note 12. According to estimates, 540,000 or thirty-nine percent of all Bosnian Serbs; 490,000 or sixty-seven percent Bosnian Croats; and 1,270,000 or sixty-three percent of Bosniaks were dislocated due to the war. *Framework Report to Facilitate the Launching of the Commission Stipulated in Annex Seven Chapter Two of the Dayton Agreements* ¶ 81, International Centre for Migration Policy Development, March 1996 [hereinafter *ICMPD Report*].

32. Although the current housing situation differs from region to region, a government survey of July 1995 estimated that sixty-three percent of all housing units were partly damaged and that eighteen percent of all units have been destroyed (defined as more than sixty percent damage). *See ICMPD Report* at ¶ 82.

flooded into urban areas.³³ In order for the local authorities to accommodate the influx of internally displaced persons, and to increase their power by controlling access to housing and by distributing it for political gain to supporters, they immediately seized these empty dwellings. In response to this housing crisis, the Bosniak, Croat, and Serb authorities also passed special legislation.

B. Barriers to Return—Abandoned Property Laws³⁴

The property laws enacted during the war cemented the ethnic consolidation initiated during the conflict. The two entities—the Federation and the RS (“Entities”)—adopted legislation allowing for use of both private and socially-owned homes left behind by those who fled the region.³⁵ Under these laws, people were given “temporary occupancy”

33. Before the war, only twenty percent of Bosnians lived in urban areas. In addition to seeking to accommodate the thousands of Bosnian Serb displaced people that flooded into the RS during the war, the RS authorities needed to find homes for some 150,000 ethnic Serbs from the Croatian Krajina and Western Slavonia. These Serbs were driven out of Croatia during the Croatian military action at the beginning of August 1995 that retook these regions from the Serbs. See, e.g., *ICG Report, Going Nowhere Fast*, *supra* note 8; see also Elizabeth M. Cousens, *Making Peace in Bosnia Work*, 30 CORNELL INT’L L.J. 789, 795 (1997).

Almost everywhere throughout Bosnia, houses of people who left during the war (in particular ethnic minorities) are used to host displaced persons. According to the 1996 *Census of Refugees and Displaced Persons in the RS*, about half of the displaced persons in the RS were living in abandoned housing. Refugees and displaced persons, therefore, cannot return to their homes without evicting others. Eviction, however, is almost impossible in the absence of an alternative solution for the occupants. See generally *An Action Plan in Support of Refugees and Displaced Persons in Bosnia and Herzegovina*, Reconstruction and Return Task Force, March 1998 (on file with author).

34. In addition to the property laws described *infra*, numerous other obstacles and risks face refugees and internally displaced persons who seek to return—which fall outside the scope of this article. They may be at risk of violence or intimidation, either from the security forces or from civilians in situations where the police are unwilling or unable to provide adequate protection. Extensive minefields and the deliberate placement of mines in houses present another physical threat. In many areas there is a lack of adequate shelter to accommodate returnees and protect them from the harsh Bosnian winters. In addition, a lack of employment opportunity generally awaits returnees, owing to either the depressed economy or discrimination. Finally, the continued presence of war criminals indicted by the International Criminal Tribunal for the Former Yugoslavia—*i.e.*, those responsible for directing and/or carrying out much of the “ethnic cleansing”—makes many potential returnees apprehensive about returning. See, e.g., *ICG Report, Going Nowhere Fast*, *supra* note 8, at 35–46; *Amnesty Report*, *supra* note 8, at 7–12.

35. Under practices of the SFRY, construction of socially-owned dwellings came from the contributions of each working person to the Housing Contribution Fund. These obligatory contributions could have amounted to a much as ten percent of total income. Although every worker contributed to the fund, not every family received occupancy rights to a socially-owned apartment. Those holding occupancy rights in these socially-owned apartments were more than just tenants, but they did not own their homes (and were not allowed to purchase them). See *OSCE Report*, *supra* note 7, at 17; see also Jessica Simor, *Tackling Human*

rights to so-called “abandoned property.”³⁶ The underlying problem with these laws, which the international actors seeking to promote returns continue to face in their efforts to have the Entities amend them, is the tension between respecting the right of pre-war owners/occupants to return to their homes and the rights of the current or “temporary occupants.”³⁷ At the end of 1997, two years after the parties signed the Dayton Accord pledging to support the right to return, but also “the right to have restored to [refugees and displaced persons] 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,”³⁸ the Entities’ property laws continued to favor the rights of the temporary occupant—usually a member of the current ethnic majority—over those

Rights Abuses in Bosnia and Herzegovina: The Convention Is up to It, Are Its Institutions?, 1997 EUR. HUM. RTS. L. REV. 644, 653–54 (1997). An occupancy right has been referred to as “quasi-ownership.” OPEN SOCIETY INSTITUTE FORCED MIGRATION PROJECT, PROPERTY LAW IN BOSNIA AND HERZEGOVINA 13 (1996).

36. Both Croatia and Israel have used similar “abandoned property” laws to resettle displaced Croats and Jews in homes from which Serbs and Palestinians fled during ethnic conflict, so as to reinforce efforts to create ethnically homogeneous communities. For a discussion of the Croatian laws, see, for example, *Draft Report—Protection of Property Rights in the Republic of Croatia: The Law on Temporary Taking over and Administration of Specified Property*, OSCE Mission to the Republic of Croatia, April 1997. For a discussion of the Israeli laws, see, for example, Benvenisti & Zamir, *supra* note 15, at 307–08; Sabri Jiryis, *Settlers’ Law: Seizure of Palestinian Lands*, 2 PALESTINE Y.B. INT’L L. 17 (1985).

37. Office of the High Representative, Banja Luka, *Right to Return Blocked by Property Laws*, (Nov. 18, 1997) (briefing paper on file with author) [hereinafter *OHR Briefing Paper*]. The defenders of ethnic homogeneity have continued to block minority returns by citing the need to provide shelter for the displaced persons belonging to the ethnic majority.

38. BOSN. & HERZ. CONST. art. II.5. The Constitution is part of the Dayton Accords, Annex Four. See Dayton Peace Accords, Dec. 14, 1995, Annex 4, *microformed on UNGA A/50/790*. Under Annex Seven, the Commission for Displaced Persons and Refugees was established to “receive and decide any claims for real property in Bosnia . . . , where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property.” Dayton Peace Accords, Dec. 14, 1995, Annex 7, ch.2, arts. VII, XI, *microformed on UNGA A/50/790*. Annex Seven also provides that a property fund shall be established to provide compensation to those refugees for their property should they choose not to return. See *id.* at art. XII, para.2, art. XIV, para.1. For a discussion of the CRPC, see, for example, Hans van Houtte, *The Property Claims Commission in Bosnia-Herzegovina—A New Path to Restore Real Estate Rights in Post-War Societies?*, in INTERNATIONAL LAW: THEORY AND PRACTICE 549 (K. Wellens ed., 1998); John M. Scheib, *Comment: Threshold of Lasting Peace: The Bosnian Property Commission, Multi-Ethnic Bosnia and Foreign Policy*, SYRACUSE J. INT’L L. & COM., Fall 1997, at 119. In addition to guaranteeing refugees and displaced persons the right to return freely and in safety to their homes of origin, Annex Seven provides that, in their respective territories, the parties will seek to create “the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of . . . dislocated persons, without preference for any . . . group.” Dayton Peace Accords, *supra*, at arts. 1.3(a), 2.1. To promote the return of persons to areas controlled by the authorities of different nationalities, the parties agreed, *inter alia*, to repeal legislation with discriminatory effect. See *id.*

of the pre-war occupancy right holders.³⁹ The property laws and their arbitrary and discriminatory implementation⁴⁰ make it extremely difficult for owners of private property, and virtually impossible for occupancy-right holders of socially-owned flats, to return to their former homes.⁴¹ This legislation, therefore, remains one of the most significant obstacles to the return of displaced persons and refugees to their pre-war homes.⁴²

Although each Entity's legislation is somewhat different, they share the same goal: to deprive the original residents of their property rights while strengthening the legal position of the current occupants. In the Federation, most occupancy rights of those who left their apartments during the war have been lost under the terms of the Law on Abandoned Apartments.⁴³ Under this law, those who left socially-owned apartments during the war were required to reclaim their property within seven to fifteen days of the cessation of hostilities.⁴⁴ In the RS, although the rights have not been lost, impossible conditions are imposed on their exercise. For example, the Law on Abandoned Apartments imposes a reciprocity requirement on return to both socially-owned and private property under which the temporary occupant must *willingly* vacate the dwelling before the pre-war and the rightful owner/occupant can return.⁴⁵

39. The majority of those who are deemed to have "abandoned" their property in the Republika Srpska are Bosniaks or Croats, whereas the temporary occupant invariably is a Serb. In the Federation, the opposite is true, thus, the majority of temporary occupants are Bosniaks or Croats. See OSCE Report, *supra* note 7, at 20. The situation is even more complicated in the Federation because of the internal Bosniak-Croat tensions. *Id.*, at n.48.

40. Even when all of the lawful conditions for an eviction of the temporary occupant in favor of the pre-war occupant have been satisfied, the local police often refused to proceed with the eviction. See ICG Report, *Going Nowhere Fast*, *supra* note 8.

41. See Humanitarian Issues Working Group, *Bosnia and Herzegovina Repatriation and Return Operation 1998*, ¶¶ 123-24 (Dec. 1997) [hereinafter HIWG Report]; see also OSCE Report, *supra* note 7, at 8; OHR Briefing Paper, *supra*, note 37. This is particularly the case when a housing unit has been allocated to a displaced person or those in the military. Local authorities in Sarajevo consider those who left the city—*i.e.*, Serbs—to have forfeited their rights to their socially-owned apartments and regard the stock of these apartments to be a resource at their disposal to reward those who remained to defend the city. See Cox Report, *supra* note 8, at 7.

42. According to UNHCR, "one of the most important legal obstacles to the return of refugees and displaced persons remains the current property legislation in both Entities." HIWG, *supra* note 41, at ¶ 124.

43. Originally published as a decree with the force of law in the *Official Gazette of the Republic of Bosnia-Herzegovina* no: 6/92 (amended version on file with author).

44. The Bosnian legislature proclaimed December 22, 1995 the end of the state of war. See OSCE Report, *supra* note 7, at 18 n.31.

45. Originally published in the *Official Messenger of the Republika Srpska* no. 3/96 (on file with author).

OHR,⁴⁶ OSCE,⁴⁷ UNHCR,⁴⁸ and the Human Rights Ombudsperson for Bosnia have all concluded that the abandoned property laws that were in effect through the end of 1997 violated the rights to return and property as set forth in Annex Seven of the Dayton Accord.⁴⁹ In March 1998, largely in response to the international community's threats to cut off reconstruction aid if the discriminatory and arbitrary laws were not amended, the Federation did amend its laws so as to conform to Annex Seven.⁵⁰ The international community's persistent efforts to remove this

46. According to Annex Ten, the OHR is responsible for coordinating and facilitating civilian aspects of the Peace Agreement, such as humanitarian aid, economic reconstruction, protection of human rights, and the holding of free elections. *See* Dayton Accord (visited Sept. 30, 1998) <<http://he:www.unige.ch/humanrts/icty/dayton/daytonannex10.html>>.

47. Annex Three gives OSCE responsibility for supervising the preparation and conduct of local elections in Bosnia. *See* Dayton Accord (visited Sept. 30, 1998) <<http://he:www.unige.ch/humanrts/icty/dayton/daytonannex3.html>>.

48. Annex Seven entrusts UNHCR with two major tasks: to continue to lead the humanitarian assistance operation that it had spearheaded since the conflict began, and to design and implement a plan for the return of refugees and displaced persons to their pre-war homes. *See* Dayton Accord (visited Sept. 30, 1998) <<http://he:www.unige.ch/humanrts/icty/dayton/daytonannex7.html>>.

49. *See OHR Briefing Paper, supra* note 37. To promote the return of persons to areas controlled by authorities of different ethnicities, the Dayton Accord obliges the parties to undertake several specific confidence-building measures, including the repeal of legislation with discriminatory intent or effect, the suspension of nationality-based propaganda in the media and the provision of specific protection for minority populations. *See* Dayton Peace Accords, *supra* note 38, at arts. I, II.

See also OSCE Report, supra note 7, at 20–21 n.49 (concluding that laws violate right to property guaranteed by Annex 6, Article 1 (11) of the Dayton Accord, as well as Article 1, Protocol 1 of the European Convention for the Protection of Fundamental Freedoms and Human Rights). As these property laws are in direct contravention with the Peace Agreement in many respects, members of the international community have placed constant pressure on the Entities to amend them to make them more conducive to return. In late 1997, the OHR, with input from the UNHCR and the United States Government, prepared and submitted draft legislation to the Entities, which conformed with the Peace Agreement.

In 1997, the Human Rights Ombudsperson for Bosnia concluded that the Law on Abandoned Apartments of both Entities violated the right to respect for one's home enunciated in Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("European Convention") and that the RS's legislation contravened the right to peaceful enjoyment of possession set forth in Article 1 of Protocol No. 1 to the European Convention. *See* Simor, *supra* note 35, at 656.

50. Whereas the amended Federation law went into force in early April 1998, the RS Parliament has yet to agree to the OHR-proposed amendments.

In March 1998, the Federation Parliament passed an amended version of this law, which entered into force in early April 1998 (on file with author). The non-discriminatory implementation of the new law has proven to be problematic. On May 21, 1998, Carlos Westendorp, the High Representative, wrote to the Prime Minister of the Federation, expressing his concerns, stating that "[w]hile the adoption of the law constituted a substantial step to ensuring that the right to return is respected, numerous obstacles have already arisen in the course of implementing this legislation." Letter from Carlos Westendorp, High Representative, to Prime Minister Bicakcic, Federation of Bosnia and Herzegovina, at 1 (May 21, 1998) (on file with author). Mr. Westendorp detailed a number of ways in which the municipi-

obstacle to return is just one example of the world's commitment in Bosnia to enforcing the right to return of hundreds of thousands of people on the ground. Ever since hostilities commenced in 1992, the international community has remained steadfast in its belief that all dislocated persons—in the end numbering more than two million—not only have the right to return to their pre-war homes, but that they should be able to exercise this right.⁵¹

C. The Formulation of the Right to Return

1. Peace Agreements

In the summer of 1992, as the war in Bosnia intensified, the humanitarian problems grew significantly. The world saw a dramatic increase in the numbers of refugees and displaced persons and violations of basic human rights and international humanitarian law.⁵² By this time, some 200,000 refugees from the former Yugoslavia, mostly from Bosnia, had arrived in Germany.⁵³ Seeking assistance in shouldering the refugee burden, Germany demanded that European countries establish quotas for the number of Yugoslav refugees they were willing to admit

palities were obstructing implementation. For example, some local housing offices have refused to accept claims unless the claimant—*e.g.*, pre-war occupant—provides certain “required” documents. Such a practice, Mr. Westendorp notes, clearly violates the Federation's Ministry of Urban Planning's Instructions, which specifically require that the

competent authority . . . accept claims regardless of whether or not the necessary documentation is supplied. In the event the Claimant cannot provide the necessary documentation, the municipal administrative authority shall check the records of the Allocation Right Holder, the relevant court or administrative body or any other available documentation to confirm the occupancy right of the Claimant.

Id.

Mr. Westendorp concluded his letter by stating that “ultimately, the Federation's compliance on this issue will not be judged by the rights afforded in law, but those available in practice. Until the gap between law and practice is closed, financial and military assistance for the Federation remains in jeopardy.” *Id.*, at 2.

51. Despite these efforts, however, the return numbers remain low. As of February 28, 1998, only 208,000 of the more than 1.2 million Bosnians who sought refuge outside of Bosnia during the war have returned to Bosnia. Many have sought and received permanent status abroad: the U.S. has admitted 60,100 of them since 1993. Of the more than one million people who were displaced internally during the war, only 222,000 of them have returned to their places of origin, mostly to majority areas. *Bosnia and Herzegovina, Update*, UNHCR-Washington (Feb. 28, 1998) [hereinafter UNHCR-Washington Update].

52. For further discussion of the violations of basic human rights and international humanitarian law that took place during the war in the former Yugoslavia, see, for example, *Periodic Report*, *supra* note 6.

53. See SILBER & LITTLE, *supra* note 5, at 247. In the early weeks of the war in Bosnia, UNHCR announced that some 10,000 people a week were being ethnically cleansed or were in flight. “By the end of 1992 more than two million people had left their homes, or roughly half the pre-war population of Bosnia.” JUDAH, *supra* note 28, at 293.

based on the country's size and ability to accommodate them.⁵⁴ The European Community ("EC") rejected this proposal and, instead, decided to focus its efforts on limiting the number of Yugoslav refugees by increasing its funding for the work of UNHCR and humanitarian relief in the former Yugoslavia in order to keep those displaced by the war from becoming refugees. On July 29, 1992, the International Meeting on Humanitarian Aid to the Victims of Conflict in the Former Yugoslavia, convening to obtain pledges to finance aid and refugee work, endorsed a seven-point humanitarian response plan proposed by the U.N. High Commissioner for Refugees, Mrs. Sadako Ogata.⁵⁵ One element of this plan sought to reduce further the burden on nearby countries by focusing on the return and rehabilitation of refugees to Bosnia.⁵⁶ Beginning

54. See, SILBER & LITTLE, *supra* note 5, at 247; WOODWARD, *supra* note 4, at 295-96.

55. Although at this one-day conference in Geneva, the twelve EC countries argued for a quota system, Britain's Baroness Chalker, Minister of Overseas Development, spearheaded the charge against this idea and won support from the other ten (not Germany). The refugees, she argued, should be accommodated as near to their homes as possible, so that their return could be facilitated all the more easily once the fighting had dissipated. She was, she said, "speaking not in the interest of the British or EC taxpayer, but in the interests of the refugees themselves." SILBER & LITTLE, *supra* note 5, at 247. These authors argue that to assume that the refugees would be able to return once the fighting concluded was to miss the whole purpose of the war—the creation of ethnically pure regions and thus ensure that the refugees and displaced persons would never return. At the Geneva meeting, however, Baroness Chalker refused to address that question. She said that that was a political matter, which would be dealt with at the upcoming London conference scheduled by British Foreign Secretary Douglas Hurd. In the meantime, the world faced a humanitarian and not a political crisis, which thus demanded a humanitarian rather than political response. *Id.*

56. See generally U.N. Dep't of Pub. Information, *supra* note 23. Other elements of the plan included the respect for human rights and humanitarian law, preventive protection, humanitarian access to those in need, measures to meet special humanitarian needs, material assistance, and temporary protection measures for refugees. *Id.*

Rather than determining refugee status in accordance with the provisions of the 1951 Convention Relating to the Status of Refugees and on the basis of [each individual's application for asylum in light of a] well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion, refugees from Bosnia were, [at the request of Mrs. Ogata,] generally accorded temporary protection . . . The basic elements of temporary protection are admission to safety in the country of refuge; respect for basic human rights, with treatment in accordance with internationally recognized humanitarian standards and protection against *refoulement*, and finally repatriation when conditions in the country of origin allow.

Simon Bagshaw, *Benchmarks or Deutschmarks? Determining the Criteria for the Repatriation of Refugees to Bosnia and Herzegovina*, 99 INT'L J. REFUGEE L. 566, 568 (1997); see also *Note on International Protection*, 45th Sess. of Exec. Comm. of High Commissioner for Refugee's Programme, U.N. Doc. A/AC.96/830 (1994).

States and the UNHCR have emphasized "that among the various aspects of temporary protection *there is clearly a focus on return as the most appropriate solution.*" Humanitarian Issues Working Group, *Post Conflict Solutions: UNHCR Programme in Bosnia and Herzegovina and other Countries in the Region Annex 2*, sec. 3, ¶ 7 (Jan. 1996) (emphasis added).

with this meeting, Mrs. Ogata became increasingly vocal in her demands that the international community guarantee refugees "the right to return" and "the right to stay."⁵⁷

Although the enunciation of the right of refugees and displaced persons to return to their pre-war homes originated as part of a humanitarian effort to contain the conflict, as the war progressed, the international community's demands for these returns became a crucial part of the political solution as well—*i.e.*, the recreation of a multi-ethnic Bosnia. At the London Conference, which convened during the summer of 1992 and was, at that time, the most ambitious international summit on Bosnia, the attendees called for the reversal of "ethnic cleansing."⁵⁸ The Conference established the requirements for acknowledging the right of all refugees and displaced persons to return or to receive compensation for their property should they choose not to do so.⁵⁹

As the problems caused by the massive forcible displacement expanded during the war, the cease-fire and peace proposals incorporated more extensive provisions regarding the right to return. For example, constitutional proposals submitted by the International Conference on the Former Yugoslavia ("ICFY") in October 1992 briefly mentioned the reversal of "ethnic cleansing."⁶⁰ Likewise, the Interim Arrangements of the Vance-Owen Peace Plan ("VOP")⁶¹ made the U.N. Civilian Police

57. WOODWARD, *supra* note 4, at 296 n.35.

58. SILBER & LITTLE, *supra* note 5, at 258. The London Conference, which was hosted by the British government and the U.N., had more than thirty countries and organizations in attendance. It also established the International Conference on the Former Yugoslavia (ICFY) (initially known as the "Vance-Owen Negotiations" after the then Co-Chairmen of ICFY's Steering Committee: Cyrus Vance and David Owen), with a Working Group on Bosnia and Herzegovina. For the complete set of documents adopted at the London Conference, see 31 I.L.M. 1531 (1992).

59. See Paul C. Szasz, *Current Developments: The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia*, 90 AM. J. INT'L L. 301, 312 (1996) [hereinafter Szasz, *Current Developments*]. The President of the Security Council issued a statement in support of a cease-fire agreement reached at the London Conference amongst the parties, "welcoming the provisions in the agreement concerning the return of all refugees." Statement by the President of the Security Council, July 17, 1992. This agreement would allow the U.N. to monitor all heavy weapons around the towns of Sarajevo, Bihac, Gorazde, and Jajce. In addition, the Bosnian Serbs agreed to withdraw from an undefined part of the land they controlled.

Given the international community's goal of reversing "ethnic cleansing," the guarantee of a right to return simply to one's country—*i.e.*, Bosnia—would not have accomplished this objective, as those returning could be prevented from returning to their former homes, where they were an ethnic minority and forced to resettle in another part of the country where their ethnic group constituted the majority.

60. See, *supra* note 58.

61. During the first four months of 1993, the ICFY Co-Chairmen presented, negotiated, and tried to achieve the Bosnian parties' acceptance of a set of four instruments known as the

("UNCIVPOL")⁶² responsible for monitoring the contribution of the local police in the reversal of "ethnic cleansing"—*i.e.*, the returning of refugees and displaced persons.⁶³

In July 1993, shortly after the VOP was rejected by the Bosnian-Serbs, the ICFY formulated another peace plan, culminating on September 20, 1993, in a final negotiating session on the British carrier HMS *Invincible*. The "*Invincible Plan's*"⁶⁴ Constitutional Agreement provided for a general right of resettlement, "which, of course, would in principle also have assured refugees and other displaced persons of a right to return home."⁶⁵ Although the parties were unable to agree on any of the above cease-fire plans, none of them considered the human rights provisions of these proposals, including the right to return, to be controversial.⁶⁶ In the Dayton Accord, the parties signed an agreement that

Vance-Owen Peace Plan ("VOP"). See UN Doc. S/25479, Annexes. I-IV (1993) for the final version of the VOP. For a detailed discussion of the negotiations that preceded the VOP, see DAVID OWEN, *BALKAN ODYSSEY* 89-149 (1995).

62. UNCIVPOL was the civilian police force associated with the U.N. Protection Force (UNPROFOR), which the Security Council established, initially for Croatia, later extending its mandate to Bosnia and Macedonia. See Szasz, *Current Developments, supra* note 59, at 312-13.

63. Many praised the VOP because of the importance it placed on the right of all refugees and displaced persons to return to their pre-war home. See NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* 247 (1994).

64. Szasz, *Current Developments, supra*, note 59, at 302-03. The Plan laid out a fully articulated Constitutional Agreement of the Union of Bosnia and Herzegovina and a set of Agreed Arrangements, both of which contained extensive procedural and substantive human rights provisions. The parties quickly rejected the Plan, however, primarily because of disputes over territory rather than the legal provisions. The final "*Invincible Plan*" appears in B.G. RAMCHARAN, *THE INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA, OFFICIAL PAPERS* vol. 1, 275-329 (1997).

65. RAMCHARAN, *supra* note 64, at 313. The Plan supplemented this with a right to the return of, or compensation, for lost property. Moreover, the Agreed Arrangements concerning the Constitutional Agreement included a section entitled "Protection of human rights and the reversal of ethnic cleansing" and repeated the VOP's provision regarding UNCIVPOL's role. *Id.* The "*Invincible Plan*" failed because the government of Bosnia did not consider sufficient the thirty percent of the entire Bosnian territory to be allocated to the Muslim Republic, demanding, instead, a minimum of 33.3%. See *id.* at 244; see also *Report of the Co-Chairman of the Steering Committee on the Activities of the [ICTY]*, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/26486 (1993). The Constitution of the Muslim-Croat Federation which contains many of the same human rights provisions from the "*Invincible Plan*," explicitly provides for the right of refugees and displaced persons to return to their homes of origin and charged the human right ombudsmen with assisting in the reversal of "ethnic cleansing." *BOSNIA AND HERZEGOVINA: CONSTITUTION OF THE FEDERATION*, Mar. 18, 1994, 33 I.L.M. 740 (1994); see also, Szasz, *Current Developments, supra* note 59, at 313.

66. See Paul C. Szasz, *Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals*, 25 CAL. W. INT'L L.J. 237, 237 (1995) [hereinafter Szasz, *Protecting Human and Minority Rights*].

incorporates many of these same human rights provisions.⁶⁷ The right of all refugees and displaced persons to return to their former homes is first enunciated in Annex Four (the new Bosnian Constitution)⁶⁸ and then essentially repeated in Annex Seven (the Refugee Agreement).⁶⁹ Thus, after more than three years of failed attempts to stop the fighting, a peace agreement was reached in which the right of the more than two million dislocated people to return home assumed a central role.

2. United Nations' Articulation of the Right to Return

Throughout the war, in its efforts to bring peace to the region, the U.N. echoed the international peace negotiators' endorsement of the right of the growing numbers of dislocated people to return to their pre-war homes. On May 15, 1992, the Security Council, in response to the rapidly escalating humanitarian crisis in Bosnia, unanimously passed a

67. The Bosnian-Serbs were not allowed to sign the Peace Agreement. They were represented at Dayton by then Serbian President Slobodan Milosevic, who signed on their behalf.

Under the Accord, Bosnia is bound by twenty-one international human rights instruments. This is stipulated in the Constitution (Annex Four), as well as in Annex Six, which is devoted to human rights. The Peace Agreement also established three national institutions to deal with human rights issues. Annex Six established The Human Rights Ombudsperson and the Human Rights Chamber (which together form the Commission on Human Rights). See Dayton Peace Accords, *supra* note 9, Annex IV, ann. I, secs. 1-15 and Annex VI, App. These institutions can consider alleged or apparent violations of human rights by the authorities which occurred after the date of entry into force of the Dayton Accord—*i.e.*, December 14, 1995. As noted in *supra* note 39 and accompanying text, Annex Seven established the CRPC, to which claims can be made for the return for real property or for compensation in lieu of return. For a detailed discussion of the human rights protections enshrined in the Dayton Accord, see, for example, James Sloan, *The Dayton Peace Agreement: Human Rights Guarantees and their Implementation*, 7 EUR. J. INT'L L. 207 (1996); Szasz, *Current Developments*, *supra* note 59; and *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, prepared by Elisabeth Rehn, Special Rapporteur, U.N. ESCOR Comm'n on Hum. Rts., ¶¶ 21-41, U.N. Doc. E/CN.4/1998/9 (1997).

It is reasonable to assume that the Contact Group's (informally established in May 1994 in association with the ICFY, consisting of the UK, the U.S., Germany, France, and the Russian Federation) act of witnessing the conclusion and entry into force of the Dayton Accord was an endorsement of the goals of the agreement, including the right of refugees and displaced persons to return to their home of origin. See Bagshaw, *supra* note 56, at 587. This endorsement is further supported by the fact that the Contact Group, which acts only by consensus, produced a draft constitution which became the Bosnian Constitution as contained in Annex Four. See Paul Szasz, *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia?*, 19 FORDHAM INT'L L.J. 363, 373 (1995). This draft provided, *inter alia*, for the right of refugees and displaced persons to return to their former homes, now articulated in Article 2(5) of Annex Four.

68. Annex Four, *supra* note 9, at art. II, sec. 5.

69. Under Annex Seven, the refugees and displaced persons are also entitled to reclaim their former property or be compensated for it should they choose not to return. Annex Seven, Article XIV provides that payment should be made out of a Property Fund, which the CRPC is called on to administer. As of December 1998, such a fund has not been created. See Annex Seven, *supra* note 9, at Art. I(1) and XIV.

resolution fully supporting efforts “to deliver humanitarian aid to all the victims of the conflict and to assist in the voluntary return of displaced persons to their homes.”⁷⁰ Shortly thereafter, the Security Council voiced its support for the VOP when it stated that the “primary objective [of international activity in Bosnia] remains to reverse the consequences of the use of force and to allow all persons displaced from their homes in [Bosnia] to return . . . in peace, beginning, *inter alia*, with the prompt implementation of the provisions of the [VOP]”⁷¹ In nearly every resolution that addressed the conflict in Bosnia, the Security Council stressed that the reversal of the “ethnic cleansing” and the voluntary return of all refugees and displaced persons to their pre-war homes were to be part of the lasting solution to the conflict.⁷² In many of these, it stated that the more than two million refugees and displaced persons had the “right” to return.⁷³

The human rights organs of the U.N. joined the Security Council in its condemnation of the human rights abuses that had taken place in Bosnia during the war and in its conviction that all gains from “ethnic cleansing” must be reversed. For example, the Commission on Human Rights affirmed the right of all persons to return to their homes.⁷⁴ In addition, the Committee on the Elimination of All Forms of Racial

70. S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg. at ¶ 7, U.N. Doc. S/RES/752 (1992).

71. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg. at ¶ 6, U.N. Doc. S/RES/836 (1993).

72. See, e.g., S.C. Res. 1088, U.N. SCOR, 51st Sess., 3723d mtg. at ¶ 11, U.N. Doc. S/RES/1088 (1996) (“*welcom[ing]* the commitment of the parties to the right of all refugees and displaced persons to return to their homes of origin in safety”); S.C. Res. 1034, U.N. SCOR, 50th Sess., 3612th mtg., at ¶ 18, U.N. Doc. S/RES/1034 (1995) (urging all parties to the conflicts in the former Yugoslavia to assist the international community in creating “conditions, conducive to the repatriation and return of refugees and displaced persons in safety and dignity”); S.C. Res. 941, U.N. SCOR, 49th Sess., 3428th mtg. at ¶ 3, U.N. Doc. S/RES/941 (1994) (“*reaffirms* . . . that all displaced persons should be enabled to return in peace to their former homes”); S.C. Res. 820, U.N. SCOR, 48th Sess., 3200 mtg., preamb. & ¶ 7, U.N. Doc. S/RES/820 (1993) (“*reaffirms once again* that any taking of territory by force or any practice of ‘ethnic cleansing’ is unlawful and totally unacceptable . . . *insisting* that all displaced persons have the right to return in peace to their former homes”); S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., ¶ 2, U.N. Doc. S/RES/787 (1992) (“*insist[ing]* that all displaced persons be enabled to return in peace to their former homes”).

73. See, e.g., S.C. Res. 947, U.N. SCOR, 49th Sess., 3434th mtg., ¶ 7, U.N. Doc. S/RES/947 (1994) (“*affirm[ing]* the right of all displaced persons to return voluntarily to their homes of origin in safety and dignity with the assistance of the international community”); S.C. Res. 859, U.N. SCOR, 48th Sess., 3269th mtg., ¶ 6(d), U.N. Doc. S/RES/859 (1993) (“*further affirm[ing]* [the] . . . [r]ecognition and respect for all displaced persons to return to their homes in safety and honor”).

74. See Comm’n on Hum. Rts. Res. 1996/71, U. N. GAOR, Hum. Rts. Comm., 52d Sess., preamb. (1996).

Discrimination (CERD),⁷⁵ in its “concluding observations” on the report submitted to it by the government of Bosnia, condemned “ethnic cleansing” and urged the immediate reversal of any gains that had resulted from the systematic policy of “ethnic cleansing” carried out in the areas under Bosnian-Serb control. Such reversal, it emphasized, must begin with the voluntary return of people.⁷⁶ In a decision adopted on August 17, 1995, CERD demanded that “persons be given opportunity to safely return to the places they inhabited before the beginning of the conflict and their safety be guaranteed”⁷⁷

D. Implementation of the Right to Return

As indicated above, since the beginning of the conflict, the right of refugees and displaced persons to return to their pre-war homes was a cornerstone of the international community’s efforts to bring peace to the region and recreate a unified, multi-ethnic Bosnia. Apart from stopping the fighting, silencing guns, and separating forces, the single clearest promise of the Dayton Accord was that 2.2 million Bosnian refugees and internally displaced persons would be able to return home.⁷⁸ In the two-and-one-half years since the agreement was reached, however, only some 400,000 have been able to exercise this right, with only 35,000 returning to their former homes in areas controlled by other ethnic groups—*i.e.*, “minority return.”⁷⁹ Since the

75. CERD, which reports to the U.N. General Assembly, was established to monitor compliance by states parties to the International Covenant on the Elimination of All Forms of Racial Discrimination (“ICERD”). CERD is composed of eighteen independent experts who meet twice a year in Geneva.

76. See *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 50th Sess., Supp. No. 18, ¶ 219, U.N. Doc. A/50/18 (1995) [hereinafter CERD Report]. See also de Zayas, *The Right to One’s Homeland*, *supra* note 6, at 282.

77. CERD Report, *supra* note 76, at ¶ 26.

78. According to Ambassador Richard Holbrooke, the chief U.S. negotiator at Dayton,

Dayton was not the creation of two different countries inside Bosnia. It’s one country with rights of refugees to return, a single central government and a merger of two hostile forces, the Serbs and the Croats and Muslims. . . . This is going to be one country. If it isn’t then we will have failed.

Stephen S. Rosenfeld, *Residue of Ethnic Cleansing*, WASH. POST, Dec. 1, 1995, at A27.

79. See, e.g., Chris Hedges, *UN Stymied by Resistance to Easing of Bosnian Partition*, N.Y. TIMES, Feb. 16, 1998, at A4; *HIWG Report*, *supra* note 41, at ¶ 2. According to the U.N., of the 560,000 Muslims and Croats expelled by the Bosnian Serbs during the war, only about 3,10000 have been allowed to return as of mid-February 1998. Mike O’Connor, *West Fears Bosnia Funds Aid Hard-Line Serbs*, N.Y. TIMES, Feb. 16, 1998, at A4.

Whereas “majority returnees,” those returning to areas where their ethnic group makes up a majority of the population, face only the usual run of problems in a post-war situation, such as: damage to housing and infrastructure, scarcity of jobs and war-related psychological trauma, “minority returnees,” in addition to these difficulties, generally also have to contend with hostility, harassment, and all of the different forms of discrimination that result from

Peace Agreement was signed, despite numerous obstacles⁸⁰ that the parties have erected to maintain their ethnically homogeneous communities, the international community has not wavered in its belief that the right of all to return remains one of the keys to lasting peace in the region,⁸¹ and the insistence that any gains resulting from “ethnic cleansing” and “ethnic engineering” must be reversed.⁸² In 1997, despite resistance from some Bosnians on the ground, the U.S. objective in implementing the Dayton Accord remained the destruction of “the myth that Bosnians from different ethnic groups cannot live together,” and the United States believed that “[t]he safe return and reintegration of . . . ethnic minorities to areas controlled by each ethnic group [would] contribute significantly to the achievement of this

being seen as the “other” in a political environment still being fueled by virulent nationalism. *ICG Report, Going Nowhere Fast*, *supra* note 8, at 35.

80. *See, supra* part I.2.

81. The notion that long-term peace in the region will be enhanced by ethnic reintegration has been explicitly endorsed by the Parties to Dayton and other international actors responsible for implementing the Peace Agreement. *See, e.g.*, Rome Statement on Sarajevo, Feb. 18, 1996 (Supported by President Izetbegovic, President Milosevic, Prime Minister Muratovic, President Zubak, Prime Minister Kasagic).

Sarajevo will be a united city in accordance with the Peace Agreement. It is our common conviction that this will give better possibilities for all—Bosnia[k]s, Serbs, Croats and Others—and will be an important contribution to peace in all of Bosnia and Herzegovina. We are determined to work for the reconciliation and peaceful living together in Sarajevo. We appeal to all to stay in the city, and rest assured that their legitimate rights will be taken into account.

Elizabeth Andersen, *The Role of Asylum States in Promoting Safe and Peaceful Repatriation under the Dayton Accord*, 7 EUR. J. INT'L L. 193, 196–97 n.16 (1996); Reuters News Service, *Top Envoy Visits Serb Corridor Whose Fate Unclear*, Feb. 29, 1996, in Andersen, *supra*, at 197 n.16 (quoting High Representative Carl Bildt as saying “[t]he Bosnian government obviously has to do more, everything it can and somewhat more, to convince Serbs they have a future in Sarajevo. That’s very important for the multi-ethnic future of Sarajevo and of course it has implications for the rest of the country”). *Cf.* Benvenisti & Zamir, *supra* note 15, at 328 (asserting that “policy considerations militate against the unrestricted right of return of refugees after mass relocations in situations similar to the Israeli-Palestinian conflict,” as, “[h]istorically, interethnic friction within heterogeneous communities has been a recipe for violence” and citing the conflict in the former Yugoslavia as an example).

82. The International Crisis Group has used the phrase “ethnic engineering” to describe the post-Dayton, politically-motivated resettlement that the local authorities have continued to carry out in order to affect the ethnic composition of the resettled areas and to prevent returns. As examples of this behavior, it cites the intimidation, violence and burning of homes by Bosnian-Serbs directed by the authorities in Pale (the capital of the RS), combined with propaganda broadcast on Pale television and radio aimed at fomenting fear, which led to the flight of some 50,000 Bosnian-Serbs from their homes in the Sarajevo suburbs, immediately prior to the transfer from Bosnian-Serb to Bosniak control in early 1996; and the Bosnian Croats resettlement of Bosnian Croats, particularly from Central Bosnia, in Drvar and Glamoc. *See ICG Report, Going Nowhere Fast*, *supra* note 8, at 43; *see also* Bosco, *supra* note 12, at 67.

objective.”⁸³ This view echoed that of the International Commission on the Balkans, which was established to report on the situation there and on long-term measures that might contribute to the establishment of a durable peace in the region. Its 1996 report stated that “the refugees are the prime living victims of this war. If they cannot go home, can we really speak of a peace settlement at all, rather than a deal fixed between the warring sides?”⁸⁴ Although the Commission acknowledged the “confusing scene” on the ground, it nevertheless concluded that several things remain clear regarding the plight of hundreds of thousands of refugees, including that their “right to return must be secured.”⁸⁵ On February 6, 1998, in Sarajevo, the International Conference on Returns adopted a declaration with strong and specific requests that authorities at all levels abolish obstacles to return.⁸⁶ The main goal of this initiative was the reestablishment of Sarajevo as a multi-ethnic, open, and tolerant city, with a concrete target of the return of 20,000 of the non-Bosniaks who inhabited the capital before the war.⁸⁷

Since early 1997, the international community has focused much of its attention in Bosnia on increasing the number of “minority returns.”

83. Federal News Service, *Prepared Statement of Robert S. Gelbard, Special Representative of the President and the Secretary of State for Implementation of the Dayton Peace Accord before the Senate Foreign Relations Committee Subcommittee on Europe*, July 17, 1997, available in LEXIS, Nexis Library, Curnws File [hereinafter *Gelbard Speech*].

In May 1997, so as to encourage more active cooperation with the principles in the Dayton Accord, the Steering Board of the Peace Implementation Council (responsible for overseeing implementation of the Peace Agreement) stated that: “[r]efugees and displaced persons have the right to return to their pre-war home in a peaceful, orderly, and phased manner. Unless and until there is a process under way to enable them to do so, there will be continued instability in Bosnia.” *Political Declaration from Ministerial Meeting of the Steering Board of the Peace Implementation Council* at ¶ 45, Sintra, May 30, 1997.

84. ASPEN INSTITUTE BERLIN AND CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, UNFINISHED PEACE: REPORT OF THE INTERNATIONAL COMMISSION ON THE BALKANS 100 (1996).

85. *Id.* (italics in original). The Commission added that

since wartime Bosnia-Herzegovina was afflicted by the brain-drain on a massive scale, persuading significant numbers of the skilled, the educated, and non-nationalistic (or at least less nationalistic) urban elite to return is critically important for reconstruction and reconciliation. . . . [A]lthough not all refugees will want to return home, a good many—scores of thousands—would probably be willing to return with only minimal assurances of future security.

Id.

86. United Nations Office of the High Commissioner for Human Rights, *Periodic Report: February 1998*, ¶ 10 (visited Sept. 30, 1998) <http://www.unhchr.ch/html/menu2/5/ex_yug/yug_pr.htm>.

87. *See id.* The Conference, organized by OHR, enumerated a number of measures the Parties need to implement so as to reverse the obstruction that continued to limit the number of returns. These included the adoption of fair laws on property and occupancy rights, the application of amnesty laws, employment opportunities for returnees, protection from discrimination in areas, including employment, housing, and education. *See id.*

The recurring obstruction to such returns means that relocation to majority areas will increase due to a lack of other alternatives and “the vision of a multi-ethnic Bosnia and Herzegovina will give way to the brutal reality of division.”⁸⁸ In March 1997, with the objective of stimulating “minority returns,” the UNHCR launched the “Open Cities” project.⁸⁹ This initiative was designed to break down political opposition to minority return. It differs from earlier return projects in that instead of directing economic assistance toward the returnees themselves, aid is distributed throughout the target municipality. Reconstruction aid will be distributed only to those municipalities that declare themselves open and show a sincere and sustained commitment to encourage and support the return of all pre-war residents, regardless of their ethnicity, and their complete integration into the community.⁹⁰

Confronting more than two million refugees and displaced persons from the bloodiest European conflict since the Second World War, the international community insisted that their return home lay at the heart of any possible long-lasting peace. Despite much obstruction from the parties to the conflict since the signing of the Dayton Accord, the international community has largely held firm in its belief that the guarantee of the right to return of these refugees and displaced persons remains a fundamental element of long-term regional stability, as well as a means for reversing the largest forced population movement in Europe in nearly fifty years.

88. *HIWG Report*, *supra* note 41, at ¶ 1.

89. Most returns to areas where the returnees constitute the ethnic majority have taken place spontaneously—*i.e.*, not under any internationally organized return program. *See Report of the High Representative for Implementation of the Bosnian Peace Agreement to the Secretary-General of the U.N.*, ¶ 61, Oct. 16, 1997, in *BOSNIA-HERZEGOVINA ESSENTIAL TEXTS*, OFFICE OF THE HIGH REPRESENTATIVE 280 (Jan. 1998). The Report noted that:

more than 80,000 refugees have repatriated to Bosnia-Herzegovina from countries in Europe since the beginning of 1997 and numerous displaced persons more have been able to go home. However, almost all have gone to majority areas—parts of the country administered by their own ethnic group—because of continued political, security and administrative obstacles.

Id.

90. As of January 1998, the UNHCR had officially recognized six Open Cities in the Federation (Bihac, Busovaca, Gorazde, Kakanj, Konjic, and Vogosca) and two in the Republika Srpska (Mirkonjic and Sipovo). *See HIWG Report*, *supra* note 41, at ¶ 48; *see also UNHCR Information Notes*, *supra* note 28, at 5. In support of this initiative, the U.S. Department of State's Bureau for Population, Refugees, and Migration implemented a \$5,000,000 Open Cities Support Program through Catholic Relief Services. *See id.*

II. POPULATION MOVEMENTS: THE CREATION OF ETHNICALLY PURE STATES AND THE INTERNATIONAL RESPONSE

A. *Population Movements or Exchanges by Agreement among States*

Although the world community expressed outrage at the means by which the parties to the Yugoslav conflict forced large groups of ethnic populations from their homes, it should not have been surprised at the several parties' goal: the creation of ethnically homogeneous states. The twentieth century has repeatedly witnessed the massive transfer of populations, whether facilitated by agreement or force, in efforts to resolve ethnic tensions. Whereas for much of the century such transfers received the explicit or tacit approval of the international community, such activity is universally condemned today.

During the first half of the century, many respected politicians viewed the possibility of transferring populations, rather than redrawing state boundaries, as a valid solution to mounting ethnic tensions throughout Europe.⁹¹ These population transfers took place under population-exchange agreements. For example, the Treaty of Neuilly of 1919, signed by Bulgaria and Greece, provided for the relocation of 46,000 Greeks from Bulgaria and 96,000 Bulgarians from Greece.⁹² The 1923 Treaty of Lausanne⁹³ resulted in the compulsory exchange between part of the Muslim population of Greece and part of the Greek population living in Turkey. Under this agreement, which received the blessing of the League of Nations, over two million Greeks and Turks were "exchanged."⁹⁴ Not only were religious affiliation and nationality the determining criteria for the Treaty's applicability, but the compulsory nature of the exchange was absolute, and the Treaty offered no mechanisms to take into account those transferees who did not wish to abandon their current home.⁹⁵

91. See, e.g., Benvenisti & Zamir, *supra* note 15, at 322; de Zayas, *The Right to One's Homeland*, *supra* note 6, at 263.

92. See Benvenisti & Zamir, *supra* note 15, at 321 n.140.

93. Treaty of Peace (Lausanne), July 24, 1923, Greece-Turk., 28 L.N.T.S. 11. This Treaty was a reaction to the large-scale presence of Muslim refugees in Greece in the early 1920s. Turkish forces had attacked Asia Minor, Smyrna, and Eastern Thrace, areas with large Greek populations. Greece and the Allies suffered severe defeats and by the end of the Greco-Turkish war, hundreds of thousands of Greeks had either been massacred or forcibly uprooted from their homelands and compelled to flee to Greece. See, e.g., Meindersma, *supra* note 17, at 338; D. LLOYD GEORGE, *THE TRUTH ABOUT THE PEACE TREATIES*, Vol. II, 1342-51(1938).

94. Under the Treaty, about two million Greeks who had formerly been Turkish citizens and about 500,000 Turks who had formerly been Greek citizens left or were forced to leave for the other side.

95. Article 1 states that

According to one scholar, the Lausanne Treaty set quite a negative precedent in that it approved the first compulsory transplanting of a population from ancestral lands on which they had lived for hundreds of years.⁹⁶ At the time, however, the Treaty was viewed as a bold new system in international affairs—an experiment that the international community entered into with great hope.⁹⁷ This approach was seen as the best solution to stemming ethnic violence, despite the plight of the ordinary citizen whose forced relocation was exacerbated by hunger, homelessness, and unemployment.⁹⁸

During the final months of World War II and the few years following, the Allies followed the precedent established at Lausanne by carrying out compulsory population transfers on a scale of unprecedented magnitude. The Potsdam Declaration, issued by the Allies at the end of the War, provided for the transfer, “to be effected in an orderly and humane manner,” to Germany of the remaining 15 million Germans in Czechoslovakia, Poland, Hungary, and Austria.⁹⁹ The Potsdam Declaration failed to deal with the right to return and any other issues that might result from the mass transfer.¹⁰⁰ Since at the end of World War II

[a]s from May 1, 1923, there shall take place a compulsory exchange of Turkish nationals of the Greek orthodox religion established in Turkish territory, and of Greek nationals of the Moslem religion established in Greek territory; these persons shall not return to live in Turkey or Greece respectively without the authorization of the Turkish Government or the Greek Government respectively.

Treaty of Peace (Lausanne), *supra* note 93.

96. See Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L J.L. 207, 223 (1976).

97. See de Zayas, *The Right to One's Homeland*, *supra* note 6, at 263. In the 1940s, even Sir Winston Churchill spoke favorably of this scheme. See 406 PARL. DEB., H.C. (5th Ser.) 1484 (1944). Lord Curzon, the British Foreign Minister at the time of the Treaty, however, sharply criticized the compulsory nature of the exchange of populations, calling it a “thoroughly bad and vicious solution for which the world will pay a heavy penalty for a hundred years to come.” 130 PARL. DEB., H.L. (5th ser.) 1120 (1944) (speech of Lord Noel-Buxton).

98. See generally STEPHEN LADAS, *THE EXCHANGE OF MINORITIES: BULGARIA, GREECE AND TURKEY* 725–726 (1932).

99. Protocol of Proceedings of the Berlin (Potsdam) Conference, Aug. 2, 1945, art XIII, 3 Bevans 1207 (this provision is redesignated art. XII in the final version of the protocol). These Germans were expelled from areas where their ancestors had been living for 700 years. For a review of these events, see, for example, ALFRED DE ZAYAS, *NEMESIS AT POTSDAM*, chs. 1, 5–6 (4th ed. 1990). It is estimated that two to three million Germans died as a result of this transfer. *Id.* at xxv. Other transfer agreements, involving smaller numbers of people, were implemented in parts of Central and Eastern Europe following the redrawing of borders after the war. See EUGENE KULISHER, *EUROPE ON THE MOVE* 282–88 (1948).

According to one estimate, after the Second World War, West Germany absorbed and rehabilitated some 5,978,000 displaced persons from Poland and 1,891,000 from Czechoslovakia. See JULIUS STONE, *ISRAEL AND PALESTINE* 22 n.27 (1981).

100. The Germans transferred lost title to the property that they had left behind. According to one commentator, the issue of compensating these Germans was raised by the

the notion of an international instrument recognizing the existence of international human rights, let alone the right to return to one's homeland, was only starting to be debated, this lacuna is understandable. In fact, it was only after the end of the communist regimes that the German expellees demanded that the governments in the emerging democratic countries of origin recognize their property rights and their right to their homeland—*i.e.*, to return.¹⁰¹

Much as those involved in orchestrating the post-World War I population-exchange agreements, the Allies failed to appreciate the consequences of the population transfers that they initiated at Potsdam following World War II. At a ceremony in Frankfurt in May 1995 commemorating the Germans expelled at the end of WWII, the U.N. High Commissioner for Human Rights stated that "if in the years following the second world war states had reflected more on the implications of the enforced flight and expulsion of the Germans, today's demographic catastrophes, particularly those referred to as 'ethnic cleansing,' would perhaps not have occurred to the same extent."¹⁰²

B. *The End of the Cold War and the Shift in Refugee Policy*

The majority of the population transfers in the twentieth century up through 1947 resulted from bilateral or multilateral agreements, sanctioned by the international community. As the twentieth century draws to a close, such deliberate mass expulsion of a population and population transfers are now prohibited under international law.¹⁰³

Allies, but no formal commitment was made, apart from the general promise in the Potsdam Declaration for "orderly and humane" transfers. DE ZAYAS, *NEMESIS AT POTSDAM*, *supra* note 99, at 103. *See also* Benvenisti & Zamir, *supra* note 15, at 322 n.152.

101. *See* Benvenisti & Zamir, *supra* note 15, at 322.

102. *As quoted in* de Zayas, *The Right to One's Homeland*, *supra* note 6, at 291-92.

103. The prohibition of population transfers is contained in the Fourth Geneva Convention of 1949, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950), and in Additional Protocol II of 1977, Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, art 17, 1125 U.N.T.S. 609 (entered into force Oct. 21, 1978). Moreover, the International Military Tribunal at Nuremburg prosecuted the deportation of the native population and the implantation of settlers in occupied areas as both a war crime and a crime against humanity. 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBURG 14 NOVEMBER 1945-1 OCTOBER 1946 411 (1948). *See also* de Zayas, *The Right to One's Homeland*, *supra* note 6, at 259.

A 1994 U.N. report stated that any "form of forced population transfer from a chosen place of residence, whether by displacement, settlement, internal banishment, or evacuation, directly affects the enjoyment or exercise of the right to free movement and choice of residence within States and constitutes a restriction upon this right." *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers: Progress Report*

Nevertheless, transfers continue to occur, largely through coercion, with one ethnic group forcibly displacing another group from its homes and the disputed territory. According to the UNHCR, the number of refugees, often victims of these ethnically motivated conflicts, has grown rapidly from 1.2 million in 1951 to a total of 13.2 million in 1996, with an equally large increase in the number of internally displaced persons.¹⁰⁴ For example, 250,000 ethnic Georgians were displaced from Abkhazia as a result of the 1992–93 secessionist war that was fought between Georgia and Abkhazia.¹⁰⁵ In addition, rapid mass exoduses in recent years from countries, such as Afghanistan, eastern

by Awn Shawhat Al-Khasawneh, Special Rapporteur, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 8, ¶ 17, U.N. Doc. E/CN.4/Sub.2/1994/18 (1994). The report concluded that

international law prohibits the transfer of persons, including the implantation of settlers, as a general principle. The governing principle is that the transfer of populations must be done with the consent of the population involved. Because [such transfers] are subject to consent, this principle reinforces the prohibition against such transfer.

Id. ¶ 131.

Mass expulsion is prohibited by customary international law when practiced in a discriminatory or arbitrary fashion, or when aimed at a particular group. *See generally* Kathleen Lawand, *The Right to Return of Palestinians under International Law*, 8 INT'L J. REFUGEE L. 532 (1996); JEAN-MARIE HENCKAERTS, *MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE* (1995); de Zayas, *The Right to One's Homeland*, *supra* note 6 (asserting that the prohibition of collective expulsion and implantation of settlers must be understood as a negative expression of one of the most fundamental rights of human beings—the right to one's homeland); de Zayas, *Population*, *supra* note 16, at 440; V.R. Krishna Iyer, *Mass Expulsion as Violation of Human Rights*, 13 INDIAN J. INT'L L. 169 (1973).

104. Statement by Ms. Sadako Ogata, United Nations High Commissioner for Refugees to the 53rd Session of the United Nations Commission on Human Rights (Geneva, Apr. 1, 1997), *reprinted in* 9 INT'L J. REFUGEE L. 528, 530 (1997) [hereinafter *Ogata Statement*]. Human Rights Watch estimates that close to one million Liberians remained displaced within and outside the country in 1997, the number of internally displaced people in Burma is greater than 300,000, and that between 1985 and 1996, some 920,000 Colombian civilians had been forcibly displaced by political violence. *See HUMAN RIGHTS WATCH WORLD REPORT 1998* (1997).

This increase in the number of refugees led to a significant expansion of the UNHCR. In 1990, the agency had a budget of 544 million dollars and a staff of 2,400. By 1996, however, the budget had grown to around 1.3 billion dollars and the staff to 5,000. *See* Bill Frelick, *Assistance without Protection: Feed the Hungry, Clothe the Naked, and Watch Them Die*, WORLD REFUGEE SURVEY 1997 24, 25 (1997). This tremendous increase in the number of refugees has also led to a dramatic expansion in the type of work UNHCR performs. Twenty years ago, the UNHCR consisted of some lawyers in Geneva revising and amending the international refugee conventions. Today, however, it is a “global rapid-reaction force capable of putting fifty thousand tents into an airfield anywhere within 24 hours, or feeding a million refugees in Zaire.” MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR* 79 (1997).

105. *See* Temo Cheishvili, *Georgia and Abkhazia Keep on Talking without Ever Getting to the Point*, WAR REPORT 57, Dec. 1997–Jan. 1998, at 15.

Zaire, Mozambique, Haiti, Iraq, Liberia, and Rwanda, have assumed large proportions.¹⁰⁶

The end of the Cold War, which has led to a dramatic increase in the number of ethnically legitimated territorial conflicts, and the corresponding increase in the number of dislocated people, has produced a shift in the policy towards resolving the refugee and displaced persons crises.¹⁰⁷ In the political context of the East-West divide, refugee law focused on the right of people to leave their home country and to seek asylum in another state. The right to return was generally not a true option.¹⁰⁸ In a 1991 speech, Mrs. Ogata noted how the mass exodus of migrant workers, evacuees, refugees, and displaced people produced by the Gulf War represents in microcosm the type of population movement with which the world is increasingly confronted at the end of the twentieth century. She added that, in many parts of the world, refugees are victims of civil war and political conflict, rather than persecution, as had traditionally been the case. Moreover, because of both the limited capacity of receiving countries to absorb refugees and the change in east-west relations, the political imperative for local

106. See *Ogata Statement*, *supra* note 104, at 530.

107. See, e.g., James C. Hathaway, *Can International Refugee Law Be Made Relevant Again?*, in 1996 WORLD REFUGEE SURVEY 14, 15 (1996) [hereinafter Hathaway, *Refugee Law*] (arguing that the reception of those refugees opposed to communist regimes reinforced the ideological and strategic objectives of the capitalist world). He further notes that after the Second World War, many developed states believed that granting permanent resident status to refugees would serve their domestic interests. The refugees seeking protection during the early post-war years were of European stock. Therefore, their cultural assimilation was perceived to be relatively simple. These refugees also helped to meet the acute post-war labor shortages. Thus, the generous admission policies that existed in many Western countries during the post-war years resulted from this "pervasive interest-convergence" between the refugees and the governments of industrialized states. *Id.* Thus, of 1,208,586 persons assisted by the International Refugee Organization (the precursor to the UNHCR) as of 1951, 1,038,750 were resettled in new countries and only 72,834 were repatriated to their country of origin or former domicile. In short, eighty-six percent were resettled in new countries and only fourteen percent were repatriated. See LOUISE W. HOLBORN, *THE INTERNATIONAL REFUGEE ORGANIZATION 200-01* (1956).

Hathaway cites a number of reasons for the recent change in attitude of the many of these governments towards refugees. First, most refugees who seek to enter developed states today are from the poorer southern hemisphere states. Second, the receiving countries now see the "different" racial and social profile as a potential challenge to the cultural cohesion in their territory. Third, these countries' economies no longer suffer from the labor shortages of the post-war years. Finally, these refugees no longer have an ideological or strategic value to the receiving states; rather, these "governments generally view refugee protection as an irritant to political and economic relations with the state of origin." *Id.* See also James C. Hathaway, *The Meaning of Repatriation*, 9 INT'L J. REFUGEE L. 551 (1997).

108. PIIRKKO KOURULA, *BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PRACTICE REVISITED 2* (1997) (noting that during this period the focus of the UNHCR was to safeguard the institution of asylum and the treatment of asylum-seekers and refugees in accordance with refugee law).

integration or resettlement abroad is dwindling. Because the vast majority of refugees find asylum in developing countries, which often cannot absorb them, repatriation (*i.e.*, return) has become the most viable option.¹⁰⁹

In fact, the return and reintegration of refugees are increasingly taking place as an integral part of peace settlement implementation within U.N. operations.¹¹⁰ During 1994 and 1995, some three million refugees returned to their countries, the largest numbers to Afghanistan, Mozambique, and Myanmar. Late 1996 and early 1997 saw a massive return of over one million Rwandan refugees who fled during the more than four years of civil war.¹¹¹

Whereas in the first half of the twentieth century population transfers were accepted as a means of resolving and avoiding ethnic conflicts, as the century draws to a close, the international community now seeks to maintain or recreate multi-ethnic communities. Population transfers and mass expulsions are now deemed to violate international law, and voluntary return and repatriation have come to occupy a fundamental part of refugee policy, even when such refugees belong to a mass displaced group. Given the change in the political landscape produced by the end of the Cold War, the rise in internal territorial conflicts, the shift of emphasis in the UNHCR's policy towards refugees, the declining commitment to protection (the rights of refugees to

109. Eduardo Arboleda & Ian Hoy, *The Convention Refugee Definition in the West: Disharmony of Interpretation and Application*, 5 INT'L J. REFUGEE L. 66, 72 (1993) (referring to a lecture Mme. Sadako Ogata delivered at Georgetown University, June 1991).

In subsequent speeches, Ms. Ogata reiterated that the focus of UNHCR's work will be on repatriation. Statement by the United Nations High Commissioner for Refugees to the *Third Committee of the U.N.G.A.*, 31 Oct. 1996, <<http://unhcr.ch>> (visited Sept. 30, 1998) (stating that, "[f]aced with a heavy burden, countries of asylum[,] as well as donors, from their different perspectives, have become increasingly concerned about the costs of providing refugees with indefinite protection and assistance"); Statement by the United Nations High Commissioner for Refugees at the *World Conference on Human Rights*, Vienna, June 16, 1993, <<http://www.unhcr.ch>> (visited Sept. 30, 1998). The UNHCR asserted that:

the ultimate objective of the international protection of refugees is not to institutionalize exile, but to achieve solutions to refugee problems. Voluntary repatriation, whenever possible, is the ideal solution. [This is why], in the three pronged strategy of prevention, preparedness and solutions to which I have committed my office, I have stressed the refugee's right to return home safely and in dignity.

Id.

110. KOURULA, *supra* note 108, at 320 (*e.g.*, El Salvador, Cambodia, Mozambique, Namibia, and Nicaragua); *see also* Hathaway, *Refugee Law*, *supra* note 107, at 14-15.

111. In 1996, the UNHCR's ten largest voluntary repatriation movements by destination were: 1,301,000 people to Rwanda, 477,000 people to Afghanistan, 219,000 people to Myanmar, 115,000 people to Iraq, 106,000 to Vietnam, 88,000 to Bosnia, 73,000 to Mali, 73,000 to Togo, 71,000 to Burundi, and 59,000 to Angola. *See* 1997 UNHCR BY NUMBERS, at 11 (on file with the author).

asylum and non-*refoulement*) among wealthier countries, and the international community's commitment to mass returns in Bosnia and other post-conflict situations around the world, the scope of the right to return under international law requires reassessment.¹¹²

III. THE RIGHT TO RETURN UNDER INTERNATIONAL LAW

Why is the right to return so fundamental? It is because exile is a fundamental deprivation of homeland, a deprivation that goes to the heart of those immutable characteristics that comprise our personal and collective identities. We have a right to our homeland, to live in peace and security in the places of our birth, of our ancestors, our culture, our heritage.¹¹³

The right to return to one's country¹¹⁴ is expressly recognized in most international and regional human rights instruments, and U.N. organs have, on numerous occasions, asserted such a right. This, along with recent state practice, has led to the formation of a norm of customary international law that assures that an individual outside his country has the right to return to it.¹¹⁵ Despite its customary law status and the view that "[t]he right of everyone to leave any country, including his own, and to return to his country, is founded on natural law," the content of this right has nevertheless been the subject of ongoing discussion.¹¹⁶

112. The similarity of the plight of internally displaced persons to that of refugees has increasingly led the UNHCR to extend its humanitarian expertise to instances of internal displacement.

113. Bill Frelick, *The Right of Return*, 2 INT'L J. REFUGEE L. 442, 444 (1990).

114. As noted, *supra* notes 17 and 21, the right to return in the Dayton Accord has been interpreted as a right to return to one's home of origin and repossess property wrongfully taken during the conflict.

115. See, e.g., Lawand, *supra* note 103, at 544; John Quigley, *Family Reunion and the Right to Return to Occupied Territory*, 6 GEO. IMMIG. L.J. 223, 234 (1992) [hereinafter Quigley, *Family Reunion*]; Loius B. Sohn & Thomas Buergenthal, *THE MOVEMENT OF PERSONS ACROSS BORDERS*, vol. 23, at 7 (1992) (noting that the right to return is a "generally accepted principle of international law"); Alfred de Zayas, *The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context*, 6 PALESTINIAN Y.B. INT'L L. 17, 34 (1990/1991) (asserting that "[f]or expelled persons the primordial right must be the right to return"); HANNUM, *supra* note 15, at 7-16; Stig Jagerskiold, *The Freedom of Movement*, in *THE INTERNATIONAL BILL OF RIGHTS* 166, 180 (1980) (Louis Henkin ed., 1981).

116. JOSE D. INGLES, *STUDY OF DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY* 1, U.N. Doc. E/CN.4/Sub.2/229/Rev.1/Corr.1, U.N. Sales No. 64.XIV.2 (1963). According to a publication prepared for the U.N. Committee on the Exercise of the Inalienable Rights of the Palestinian People by the Special Unit on Palestinian Rights, the right of return is an ancient right: "So natural was the principle considered, so axiomatic a corollary

Part III will focus on the debate over whether individuals who are part of a mass movement of a population fall within the scope of this right.¹¹⁷

A. Cyprus and Israel: The Right to Return?

To understand the current debate on whether the right to return applies to individuals belonging to large dislocated groups, one needs to review briefly the Israeli-Palestinian and Cypriot conflicts—two, decades-old disputes—where the right to return has proven to be a major obstacle to any long-lasting resolution. Some commentators use the lack of returns following the displacements during these conflicts as evidence to support their argument that the right to return applies only to individuals who are not members of a large dislocated group.¹¹⁸

1. Israel

In Israel, the first major exodus of Palestinian refugees took place between December 1947 and September 1949 as a result of the Arab-Israeli conflict following the U.N. partition of Palestine.¹¹⁹ During this period it is estimated that between 600,000 and 700,000 Palestinians left, ran away, or were expelled from the territory on which the State of Israel was established.¹²⁰ This flight, which left approximately 370 villages abandoned, involved roughly half of the population of the territory, thus drastically altering the demographic balance between

to the right to life, that juridical works paid little attention to a principle considered self-evident." UNITED NATIONS, COMMITTEE ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINE PEOPLE; PUBLICATION SUBMITTED BY SPECIAL UNIT ON PALESTINIAN RIGHTS, U.N. Doc. ST/LEG/SER (1978), in Lapidoth, *supra* note 15, at 113.

117. Although there has been much discussion over whether this right applies only to nationals or also to permanent residents of the country to which an individual seeks to return, this debate falls outside the scope of this article. For a sense of the arguments, see, for example, MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 218 (1993); MARC J. BOSSUYT, GUIDE TO THE 'TRAVAUX PREPARATOIRES' OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 21 (1987); Hannum, *supra* note 15, at 56-64; Lapidoth, *supra* note 15, at 107-09; Radley, *supra* note 15, at 612-14.

118. See, e.g., Benvenisti & Zamir, *supra* note 15, at 325; Lapidoth, *supra* note 15, at 114; Radley, *supra* note 15, at 613.

119. For a comprehensive analysis of the Arab-Israeli conflict, see generally, THE ARAB-ISRAELI CONFLICT (John N. Moore ed., 1974). For a detailed account of this first exodus, see, for example, Radley, *supra* note 15, at 587-595.

120. See Benvenisti & Zamir, *supra* note 15, at 297. Estimates of the number of those displaced diverge significantly; according to the U.N., 604,000 Palestinians became refugees. See SHALOMO GAZIT, THE PALESTINIAN REFUGEE PROBLEM 3 (1995). Some independent researchers, however, put the number closer to 940,000. See TERRENCE PRITTE & BERNARD DINEEN, THE DOUBLE EXODUS: A STUDY OF ARAB AND JEWISH REFUGEES IN THE MIDDLE EAST 8-9 (1974). See also Justice R. Weiner, *The Palestinian Refugees' "Right to Return" and the Peace Process*, 20 B.C. INT'L & COMP. L. REV. 1, 7 (1997).

Jews and Arabs within the borders of the State of Israel.¹²¹ The second major flight took place in 1967 in conjunction with the Six-Day War when thousands of Palestinians fled the West Bank and Gaza Strip.¹²² Since 1967, Israel has established many Jewish settlements in the West Bank and Gaza Strip and has developed large Jewish neighborhoods in and around East Jerusalem. Many of these settlements were built on lands that were the private property of Palestinians who fled or were forced to leave as a result of the fighting.¹²³

The Palestinian refugee situation has been described as "one of the most intractable" problems in the Middle East peace process and "a focal point in the conflict between Israel and its Arab neighbors."¹²⁴ Since 1948, the Israeli government has viewed the possibility of the return of these Palestinian refugees as both a security and a demographic threat. Thus, despite the Palestinian Liberation Organization's ("PLO") claim of a right of repatriation under international law for the Palestinian refugees, and despite numerous U.N. resolutions¹²⁵ recognizing such a right,

121. Much like the parties to the Dayton Accord nearly fifty years later, the Israeli Government, in an effort to consolidate the territorial gains made during the war, enacted property laws, which in effect, placed Jewish settlers or immigrants into the former homes and on the former land of the Palestinians who fled or were driven from the territory. The Israeli Government, in order to regulate the administration of the property the Palestinian refugees left behind, issued a number of edicts and took a number of measures immediately at the end of the war, culminating in 1950 with the passage of the Absentees Property Law (4 L.S.I. 68). For the text of the Law, see, Jiryis, *supra* note 36, at 19. The law defined an "absentee" as a person who, at any time after November 29, 1947, was a national or citizen of one of the Arab countries fighting against Israel, or was in one of those countries, or had left his ordinary place of residence in Palestine for a place outside Palestine or for a place in Palestine held at the time by forces who were fighting against the State of Israel. According to at least one commentator, this definition was framed in such a way as to ensure that it applied to every Palestinian resident who had fled after the partition of the region. *See id.* at 19. The law vested "absentee" property in the Custodian of Absentees' Property, which was then authorized to transfer the lands to the Development Authority. The Development Authority used this land to resettle Jewish immigrants or Israelis. *See also*, Benvenisti & Zamir, *supra* note 15, at 300-01 (discussing Israeli treatment of Palestinian "absentees" property).

122. No agreement has ever been reached on the total number of Palestinians displaced in 1967, with Israel contending that the number is about 200,000 and Arab parties placing the number closer to 800,000. *See* U.S. COMMITTEE FOR REFUGEES, 1996 WORLD REFUGEE SURVEY 108 (1996) [hereinafter, 1996 WORLD REFUGEE SURVEY]. The result of the 1967 war was the military occupation of the remaining territory of the Palestine Mandate—*i.e.*, the West Bank (including East Jerusalem) and the Golan Heights. For a thorough summary of the Arab-Israeli conflict leading to the 1967 War, see Quincy Wright, *Legal Aspects of the Middle-East Situation*, 33 LAW & CONTEMP. PROBS. 5, at 5-8 (1969).

123. These lands were used to absorb Jewish refugees and immigrants.

124. DON PERETZ, PALESTINIANS, REFUGEES AND THE MIDDLE EAST PEACE PROCESS vii, 3 (1993).

125. *See, e.g.*, G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, ¶ 2, U.N. Doc. A/9631 (1974); G.A. Res. 3089(D), U.N. GAOR, 28th Sess., Supp. No. 30, at 27, U.N. Doc. A/9030 (1974) (referring to the Palestinians' inalienable right to return to their homes and

Israeli apprehension has resulted in a "long-standing policy of Israeli non-acquiescence to the Palestinians' comprehensive claims of a right of 'return.'"¹²⁶ Some commentators assert that the question of the right of return of Palestinian refugees is a complicated political problem that does not concern the freedom of movement under international law.¹²⁷ The return question, however, has been left unanswered in the political negotiations. In September 1993, the PLO and Israel concluded a framework agreement for the establishment of autonomous authority in the Gaza Strip and Jericho.¹²⁸ Although this represented a significant political achievement, the framework failed to resolve the question of the Palestinian refugees' collective right to return. Rather, it postponed the resolution of this issue by relegating it to future negotiations, which are to lead to "a permanent settlement based on U.N. Security Council resolutions 242 and 338."¹²⁹ As one commentator has noted, this merely "commits the parties to no more than an obligation to negotiate in good faith a permanent agreement with respect to the refugee problem."¹³⁰

property). For an extensive list of these resolutions, see, for example, Quigley, *Family Reunion*, *supra* note 115, at 239 n. 109-18.

126. Weiner, *supra* note 120, at 30.

127. See, e.g., HANNUM, *supra* note 15, at 59-60, n.175; Jagerskiold, *supra* note 115, at 180; but cf. John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171 (1998) [hereinafter Quigley, *Displaced Palestinians*].

128. See Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, 32 I.L.M. 1525 (1993).

129. With regard to refugees, resolution 242 "[a]ffirms further the necessity . . . [f]or achieving a just settlement of the refugee problem." U.N. SCOR, 22d Sess., at 8, U.N. Doc. S/INF/22/Rev.2 (1967). Resolution 338 "[c]alls upon the parties concerned to start . . . the implementation [of resolution 242] in all of its parts." U.N. SCOR, 28th Sess., 1747th mtg., at 10, U.N. Doc. S/INF/29 & Add.1 (1973).

130. Lawand, *supra* note 103, at 533. Lawand notes that, in recent bilateral agreements, Israel and Jordan "have adopted a more principled approach to the problem of refugees and displaced persons by committing themselves to negotiations aimed at resolving the problem 'in accordance with international law.'" *Id.*, quoted in the first and fourth 'components' of the *Israel-Jordan Common Agenda for the Bilateral Peace Negotiations*, Sept. 14, 1993, 32 I.L.M. 1522, and quoted in the *Treaty of Peace Between the Hachemite Kingdom of Jordan and the State of Israel*, Oct. 26, 1994, 34 I.L.M. 43. According to Lawand, this is the first reference to international law in relation to the resolution of the refugee problem that has appeared in any of the Arab-Israeli agreements. See Lawand, *supra* note 103, at 533 n.4. According to the 1997 World Refugee Survey, there are 716,930 refugees in the Gaza Strip and 532,438 in the West Bank registered with the U.N. Relief Works Agency. See U.S. COMMITTEE FOR REFUGEES, 1997 WORLD REFUGEE SURVEY 142 (1997) [hereinafter 1997 WORLD REFUGEE SURVEY].

2. Cyprus

In July 1974, after eleven years of civil strife on Cyprus, Turkish military forces occupied the northern third of the island.¹³¹ As a result of the Turkish invasion and the atrocities that ensued, an estimated 180,000 Greek-Cypriots fled to the Greek-controlled southern part of the island.¹³² Some 45,000 Turkish-Cypriots residing in the South moved to the Turkish controlled territory, settling into homes vacated by Greek-Cypriot owners. The Turkish leaders then took measures to transform northern Cyprus into an exclusively Turkish province, including the re-naming of towns and the implantation of settlers from mainland Turkey.¹³³

Despite the fact that Turkey has said that the Greek-Cypriots who fled from the northern part of the island had no right to return, the international community has repeatedly expressed its support for such returns.¹³⁴ Numerous U.N. Security Council and General Assembly resolutions have urged both sides to institute measures to guarantee the "voluntary return of the refugees to their homes in safety."¹³⁵ Furthermore, in the July 15, 1992 "Set of Ideas on an Overall Framework

131. For an overview of the conflict, see, for example, ZAIM M. NECATIGIL, *THE CYPRUS QUESTION AND THE TURKISH POSITION IN INTERNATIONAL LAW* (2d ed. 1996) and PETER LOZIOS, *THE HEART GROWN BITTER: A CHRONICLE OF CYPRIOT WAR REFUGEES* (1981).

132. Estimates of the numbers of those displaced as a result of the Turkish invasion vary from 200,000 to 250,000 people. See Meindersma, *supra* note 17, at 352; see also NECATIGIL, *supra* note 131, at 136.

133. See Meindersma, *supra* note 17, at 352; see also Joseph Schechla, *Ideological Roots of Population Transfer*, 14 *THIRD WORLD Q.* 247 (1993). By the end of 1992, the number of mainland Turkish settlers who were implanted into northern Cyprus was estimated at between 69,000 and 87,000. See A. Cuco, Rapporteur of the Committee on Migration, Refugees and Demography of the Parliamentary Assembly of the Council of Europe, *Report on the Demographic Structure of the Cypriot Communities*, Doc. 6589, 1403-23/4/92-4-E (Apr. 27, 1992), at 42, as cited in Meindersma, *supra* note 17, at 353.

134. See Quigley, *Displaced Palestinians*, *supra* note 127, at 214.

135. See, e.g., G.A. Res. 253, U.N. GAOR, 37th Sess., Supp. No. 51, 121st plen. mtg., ¶ 11, U.N. Doc. GAOR A/RES/37/253 (1983) ("call[ing] for . . . the institut[ion] of urgent measures for the voluntary return of the refugees to their homes in safety"); G.A. Res. 30, U.N. GAOR, 34th Sess., Agenda Item 21, 74th plen. mtg., U.N. Doc. A/RES/34/30 (1979) (same language); G.A. Res. 3212, U.N. GAOR, 29th Sess., Supp. No. 31, 2275th plen. mtg., ¶ 5, U.N. Doc. A/RES/29/3212 (Nov. 1, 1974) ("considers that all the refugees should return to their homes in safety and calls upon the parties concerned to undertake urgent measures to that end"), which was endorsed by U.N. SC Res. 365, U.N. Doc. GAOR S/RES/29/353 (1974); see also S.C. Res. 774, U.N. SCOR, 3109th mtg., U.N. Doc. S/RES/774 (1992); S.C. Res. 361, U.N. SCOR, 1795th mtg., U.N. Doc. S/RES/361 (1974).

While these resolutions "have not always made it clear whether [the U.N. organs] acted on the basis of human rights law or humanitarian law, language in U.N. documents indicates that the nations based their calls for return on the understanding of an international-legal obligation to repatriate." Quigley, *Displaced Palestinians*, *supra* note 127, at 214.

Agreement on Cyprus,"¹³⁶ formulated by U.N. Secretary-General Boutros Boutros-Ghali, which provides a basis for negotiations between the leaders of the two communities, all displaced persons have the option to return to their former residences or to claim compensation for property located in the federated state administered by the other community.¹³⁷

Moreover, two European human rights institutions have concluded that the Turkish Government's expulsion of Greek Cypriots and its refusal to allow them to return to their homes constitutes a violation of the European Convention on Human Rights and the Protection of Fundamental Freedoms. In 1976, the European Commission on Human Rights held that Turkey's refusal to permit the repatriation both of those expelled and those who left or were absent for any reason during the conflict constituted, *inter alia*, a violation of Turkey's obligation to respect the home.¹³⁸ In 1996, the European Court of Human Rights concluded that Turkey had violated Article 1 of Protocol 1 of the Convention in preventing the Greek-Cypriot plaintiff, for sixteen years, from returning to her land in northern Cyprus. This, the Court held, interfered with this article's guarantee of the right to enjoy possession of the land which one owns.¹³⁹

136. Report of the Secretary-General to the Security Council, U.N. Doc. S/24472, Annex, at 9-25 (1992) [hereinafter *Set of Ideas*]. Endorsed by the Security Council, this agreement seeks to strike a balance between the interests of the displaced persons and the goal of creating homogeneous communities. It endorses the creation of two zones, each "administered by one community which will be guaranteed a clear majority of the population and of the land ownership in its area." Opening statement of U.N. Secretary-General Perez de Cuellar (June 29, 1989), reprinted in NECATIGIL, *supra* note 131, App. 10, at 433.

137. See *Set of Ideas*, *supra* note 136, at Annex I, Chapter V, at 18-19. According to one commentator, interpreted consistently with the various U.N. pronouncements, which emphasize the right of all refugees to return and the inadmissibility of occupation and acquisition of territory by force, the "Set of Ideas" reflects an attempt to reverse some of the effect of the unlawful occupation and ensuing population movements. See Meindersma, *supra* note 17, at 361.

138. In 1974, the Cyprus Government raised the issue of returns as a legal claim before the European Commission on Human Rights. The Commission found that Turkey was refusing to permit the repatriation of 170,000 Greek Cypriots to northern Cyprus. Although the Fourth Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to return to one's state of nationality was not in force between Cyprus and Turkey, the Commission instead applied Article 8 of the Convention—"everyone has the right to respect for his . . . home." *Cyprus v. Turkey*, 18 Y.B. EUR. CONV. ON H.R. 82 (Eur. Comm'n H.R. 1975).

139. Article 1 of Protocol I provides, *inter alia*, that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions." *Loizidou v. Turkey (Merits)*, No. 40/1993/435/514 (Eur. Comm'n on H.R. 1996), reprinted in 18 HUM. RTS. L.J. 50, 56 (1997). For a discussion of the case, see Beate Rudolf, *International Decisions: Loizidou v. Turkey*, 91 AM. J. INT'L L. 532 (1997).

Despite the international community's repeated declarations that those displaced during the conflict should be allowed to return to their homes, the de facto population exchange in Cyprus has resulted in the ethnic partition of the island.¹⁴⁰

B. International Law

This section analyzes both the "hard law"—*i.e.*, the international human rights conventions enunciating the right to return—and the "soft law"—*e.g.*, U.N. resolutions on this subject.¹⁴¹ It will then examine how many legal commentators have offered an unnecessarily restrictive interpretation of this right under the conventions. Not only does the text of the instruments not require such a narrow reading, but, given the increased occurrence of civil wars and the related growth in the numbers of refugees and displaced persons over the last decade, this right should be interpreted to apply regardless of whether or not one is part of a large-scale displacement. Nevertheless, there is currently insufficient state practice to support such an expansive right. Therefore, facilitating the return of hundreds of thousands of Bosnians, whom the international community has repeatedly stated have the right to return to their pre-war homes, would provide a strong piece of evidence to support a developing right of all individuals to return regardless of their group affiliation.¹⁴²

140. According to the U.S. Committee for Refugees, 265,000 persons remained internally displaced in Cyprus at the end of 1996: 200,000 Greek Cypriots displaced in the south of the island and 65,000 Turkish Cypriots displaced in the north. *See* 1997 WORLD REFUGEE SURVEY, *supra* note 130, at 178.

141. According to one commentator,

[h]ard law encompasses rules of customary international law that are universally binding, conventions (*lex lata* or law that has been laid down) insofar as they bind the parties (although some treaty law may also be considered customary and hence universally binding), and international case law at least as to the parties to a contentious dispute before the International Court of Justice. Soft law, or developing law (*lex ferenda*), includes declarations, certain resolutions, recommendations, and reports of UN organs and other international organizations and has persuasive but not binding force.

De Zayas, *The Right to One's Homeland*, *supra* note 6, at 260.

142. This would be a positive step toward the creation of a customary international norm concerning an expansive right to return. Rosalyn Higgins writes that customary international law is evidenced by a general practice accepted as law. *See* ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 18 (1994). Thus, it is significant that Bosnian refugees and displaced persons are returning as a matter of right—*i.e.*, implying a legal obligation on behalf of the Dayton parties to accept their return—rather than as a matter of political expediency.

1. Hard Law

"Everyone has the right to leave any country, including his own, and to return to his country," as proclaimed by the Universal Declaration of Human Rights in 1948.¹⁴³ This right was thereafter confirmed by the subsequent adoption of the International Covenant on Civil and Political Rights,¹⁴⁴ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁴⁵ and three regional human rights treaties.¹⁴⁶

Although several scholars have argued that the right to return is applicable even where it is being claimed by mass groups of people,¹⁴⁷ the majority of scholars asserts that the above-mentioned international human rights instruments do not recognize such a right.¹⁴⁸ The dominant view maintains that, rather than falling under international human rights law, the issue of returns of masses of dislocated people is either a political problem or one of self-determination.¹⁴⁹ For example, Stig Jagerskiold, writing about the scope of Article 12(4) of the ICCPR, states that the right to return

is intended to apply to individuals asserting an individual right. There was no intention here to address the claims of masses of people who have been displaced as a byproduct of war or by political transfers of territory or population, such as the reloca-

143. UDHR, *supra* note 14, Article 13(2).

144. ICCPR, *supra* note 14, Article 12(4) (stipulating that "[n]o one shall be arbitrarily deprived of the right to enter his own country").

145. ICERD, *supra* note 14, Article 5(d)(ii) (guaranteeing "[t]he right to leave any country, including one's own, and to return to one's country").

All three of these international human rights instruments have attained the status of customary international law. *See, e.g.,* de Zayas, *The Right to One's Homeland*, *supra* note 6, at 271-81; Rex J. Zedalis, *Right to Return: A Closer Look*, 6 GEO. IMMIGR. L.J. 499, 515 (1992); F. NEWMAN & D. WEISSBRODT, INTERNATIONAL HUMAN RIGHTS (1990) (citing *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989)); Louis B. Sohn, *The New International Law: Protection of Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 16-17 (1982).

146. *See* The Banjul Charter on Human and Peoples' Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG167 Rev. 5 (entered into force Oct. 21, 1986) (article 12(2) states that "every individual" is entitled "to return to his country"); The American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (article 22(5) provides that "no one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it"); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Sept. 16, 1963, Europ. T.S. No. 46 (entered into force May 2, 1968) (article 3 provides that "[n]o one shall be deprived of the right to enter the territory of the State of which he is a national").

147. *But cf.* Lawand, *supra* note 103, at 542; NOWAK, *supra* note 117, at 219.

148. The discussion regarding the scope of the right to return focuses on the UDHR and the ICCPR.

149. *See, e.g.,* Benvenisti & Zamir, *supra* note 15, at 325 n.174; Lapidoth, *supra* note 15, at 114 (concluding that the right to return "does not apply to displaced masses of people"); *see also* Radley, *supra* note 15.

tion of ethnic Germans from Eastern Europe during and after the Second World War, the flight of Palestinians from what became Israel, or the movement of Jews from the Arab countries. . . . The [ICCPR] does not deal with those issues and cannot be invoked to support a right to "return". These claims will require international political solutions on a large scale.¹⁵⁰

Another commentator writes that there is "no evidence that mass movements of groups such as refugees or displaced persons were intended to be included within the scope of Article 12 [of the ICCPR] by its drafters."¹⁵¹ According to this view, the right to return applies only to individual persons, or small groups, but when ethnic conflict leads to significant population displacements, the issue must be resolved as a matter of group rather than individual rights.¹⁵²

a. Right to Return, Right to Self-Determination or a Political Problem?

Although political negotiations and the issue of self-determination may be appropriate in situations involving mass displacement, nothing in the text or *travaux préparatoires* of the relevant provisions of the UDHR, ICCPR, or ICERD limits the application of the right of return to individual instances of refusals to repatriate. In fact, based on a close review of these documents, one could conclude that the drafters did not intend to except mass movements of refugees and displaced persons from this right, particularly since the UDHR, the ICCPR, and the ICERD do not indicate that the right to return should be linked to one's group status. In each instance, the relevant language refers to "everyone" having a right to return. In fact, Article 5(d)(ii) of ICERD states that "State Parties undertake . . . to guarantee the right of

150. Jagerskiold, *supra* note 115, at 180. See also, Donna E. Arzt, *Palestinian Refugees: The Human Dimension of the Middle East Peace Process*, 89 AM. SOC'Y INT'L L. PROC. 369, 372 (1995) (arguing that "the resort to the legalese of 'right of return' can only result in the politicized locking of horns").

151. See HANNUM, *supra* note 15, at 59–60. He adds:

[t]he expulsion or flight of large numbers of persons from disputed territory is more appropriately viewed as an issue related to self-determination or national sovereignty, rather than forced into the constraints of the much more narrow question of whether or not there exists a right of entry or return.

Id. n.175. See also Arzt, *supra* note 150, at 372 (asserting that Article 12(4) of the ICCPR "is structured as an individual right and not a collective or group right," and therefore does not provide members of displaced groups with a right of return); Benvenisti & Zamir, *supra* note 15, at 325.

152. See, e.g., Yoram Dinstein, Book Review, 17 ISR. Y.B. HUM. RTS. 318, 319 (1987); HANNUM, *supra* note 15, 59–60 & 169 n.175; Jagerskiold, *supra* note 115, at 180. Cf. Laward, *supra* note 103, at 542; Quigley, *supra* note 115, at 236 (contesting this argument).

everyone, without distinction as to race, color or national or ethnic origin . . . to return to one's country."¹⁵³

To support their narrow interpretation of the right, commentators point out that the drafters of the UDHR regarded the right of return in Article 13(2) as important merely as a means of strengthening the "right to leave" one's country, rather than being significant in and unto itself.¹⁵⁴ Thus, the words at the end of this paragraph, "and to return to his country," were added as an afterthought by a Lebanese amendment which, according to its sponsor, was submitted so that "the right to leave a country, already sanctioned in the article, would be strengthened by the assurance of the right to return."¹⁵⁵

The lack of emphasis the drafters seem to have placed on the right to return, however, must be viewed in the context of the political and legal situation existing when the content of the declaration was being proposed—*i.e.*, the 1940s.¹⁵⁶ Not only was the international community then sanctioning population transfers involving millions of persons, but human rights law as a whole was in its infancy; the prohibition of mass expulsions or population transfers was decades away from being established.¹⁵⁷ Thus one should not expect the right to return to have been a focus of the drafters. In fact, the draft of the UDHR was discussed in the Drafting Committee of the U.N. Commission of Human Rights, in the U.N. Sub-Commission on Prevention of Discrimination and Protection of Human Rights, and in the U.N. Commission on Human Rights, without any suggestion that even a reference should be made to a right to return.¹⁵⁸

In the final decade of this century, however, the world now condemns such population transfers, which, along with mass expulsions, are deemed to violate important principles of international law.¹⁵⁹ Nevertheless, ethnic conflicts continue to displace millions of people each year, often as a result of "ethnic cleansing." Their return has become an important aspect of the international community's efforts to bring peace

153. ICERD, *supra* note 14 (emphasis added).

154. The UDHR serves as the source of the right to return in both the ICCPR and the ICERD.

155. Ingles, *supra* note 116 at 87.

156. During the drafting sessions of the ICCPR, the British delegation in the Human Rights Committee moved to strike Article 12—containing the right to return—in its entirety from the Covenant, arguing that freedom of movement was not a fundamental right, but a secondary one. See NOWAK, *supra* note 117, at 198.

157. See generally, *supra* Part II.

158. *Id.*

159. See, *supra* Part II.2.

to these regions.¹⁶⁰ The scope of the right to return should be viewed in this context. Since these masses have often fled to countries that are financially unable to accommodate them, Article 13(2), and the right to return in general, should not be interpreted to exclude those for whom return may be the only durable solution. Such a broad interpretation of Article 13(2) not only remains honest to the text of the article, but would create a legal justification for reversing the gains made in ethnically cleansed areas. In the most recent comprehensive guide to the ICCPR, the right to return in Article 12(4)—the formulation for which can be traced directly to Article 13(2) of the UDHR—has, in fact, been interpreted to apply to individuals who belong to a large dislocated group.¹⁶¹ Moreover, the right to return in both the UDHR and the ICCPR was the basis for guaranteeing this right in recently signed peace agreements in order to resolve conflicts in Rwanda and Georgia, both of which produced hundreds of thousands of refugees and displaced persons.¹⁶²

160. See, e.g., Final Act of the Paris Conference on Cambodia, *supra* note 12; Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons, *supra* note 12; see also *infra* note 163.

161. In discussing the scope of Article 12(4), Professor Manfred Nowak writes that "the establishment of a 'second home country' must be invoked for the purpose of preventing [refugees and stateless persons] from returning home, even if masses of people are claiming this right." NOWAK, *supra* note 117, at 219 (emphasis added); cf. Quigley, *Displaced Palestinians*, *supra* note 127, at 217 (asserting that Jordan's grant of nationality to many Palestinian refugees should not negate a Palestinian's right to return, as "the grant reflected no intent on the part of the Palestinians in question to renounce a connection with Palestine, and no intent on the part of Jordan to interfere in the Palestinians' connection with their state of origin").

Another commentator, discussing the scope of Article 12(4) of the ICCPR, noted that although structured as an individual right, this is true of most rights in international human rights instruments. Cf. Quigley, *Displaced Palestinians*, *supra* note 127, at 211. Rights enumerated in international human rights instruments are ostensibly designed to protect individuals. No reason exists, however, to read this narrowly. Even if a numerical distinction were accepted in principle, it is hard to envision how one might set a meaningful cutoff. See *id.*

Moreover, the U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities invoked both Article 12(4) of the ICCPR and Article 13(2) of the UDHR when it said that "practices of forcible exile, mass expulsions and deportations, population transfers, 'ethnic cleansing' and other forms of forcible displacement of populations within a country or across borders deprive the affected populations of their right to freedom of movement." U.N. Subcomm'n on Prevention of Discrim. and Protection of Minorities, Res. 1995/13, U.N. ESCOR, 50th Sess., at 20, U.N. Doc. E/CN.4/Sub.2/1995/L.11/Add.3 (1995).

162. On October 24, 1994, the UNHCR and the Governments of Zaire and Rwanda entered into a tripartite agreement pertaining to the implementation of the voluntary return of Rwandese refugees from Zaire. The agreement is based, *inter alia* on international instruments, specifically Article 13(2) of the UDHR, Article 12 of the ICCPR and Article V of the 1969 OAU Convention on Civil and Political Rights (guaranteeing the right to return). The parties agreed that all Rwandese refugees who wished voluntarily to return have the right to do so. See KOURULA, *supra* note 108, at 323. On April 4, 1994, UNHCR and the Govern-

Although the actual return of these groups may, in the end, be determined by political feasibility, this should not prevent the international community from grounding their return in international law.¹⁶³ Such a right, within the meaning of the above-mentioned international human rights instruments, is an individual one, which should not be denied on the basis of group affiliation.¹⁶⁴ Similarly, the individual should not lose this right under international law because of any underlying political situation in the country to which return is sought. In fact, were the expansive right to return a recognized norm of international human rights law, the issue of the right of large groups of refugees to return home following a conflict could not become an obstacle to resolving the underlying dispute, as it has been in the case Cyprus and Israel.¹⁶⁵ In short, there is a difference between acknowledging that a right to return exists—although in certain instances it may not be implementable due to the unresolved political situation—and declaring that the issue of the return of large groups is beyond the scope of international law and resolvable only as part of ongoing political negotiations.¹⁶⁶

ments of Georgia, Abkhazia, and Russia signed a Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons, "recognizing that the right of all citizens to live in and to return to their country of origin is enshrined in the UDHR and ICCPR." ¶ 1, text available at <http://www.sanet.ge>; see also *supra* note 12.

163. The return of large numbers of refugees and displaced persons will also depend heavily on both international support and the implementation of a non-discriminatory repatriation procedure by the receiving country.

164. See Lawand, *supra* note 103, at 543.

165. In 1997, in response to the crisis resulting from the 1992–1993 civil war that engulfed Georgia, displacing 250,000 ethnic Georgians from Abkhazia, the Security Council issued a resolution in which it "reaffirm[ed] the right of all refugees and displaced persons affected by the conflict to return to their homes . . . in accordance with international law [and] . . . stress[ed] the unacceptability of any linkage of the return of refugees and displaced persons with the question of the political status of Abkhazia, Georgia." U.N. SC Res. 1097, U.N. SCOR, 51st Sess., 3712th mtg., at ¶ 8, U.N. Doc. S/RES/1097 (1996) (emphasis added).

Unfortunately, recognition that the right to return encompasses even those who belong to large groups is only one step in the process of getting refugees and displaced persons actually to return. Mrs. Ogata has stated that

[r]efugees have fled their homes and their homelands for compelling reasons, which include violence and human rights abuses. For them to return home safely and voluntarily, there must be a significant change in the conditions which caused their flight. . . . Assuring these requires a comprehensive approach that addresses the political, security, human rights, humanitarian and development aspects of the problem.

Statement by the United Nations High Commissioner for Refugees at the World Conference on Human Rights, Vienna, June 16, 1993 (visited Sept. 30, 1998) <<http://www.unhcr.ch/refworld/unhcr/hcspeech/16ju1993.htm>>.

166. The failure to recognize the right of return of individuals who fled from their homes as part of a mass movement, could exacerbate an already unstable political situation. For example, the refusal of the Bosnian-Serb authorities in the RS to accept that Bosniaks have the right to return could pose a threat to the territorial integrity of the Bosnian-Serb

b. The Right to Return: Derogation from Treaty Obligations

In addition to the above arguments, scholars have relied on the provisions in both the UDHR and ICCPR that grant a potential receiving state the right to limit the exercise of rights and freedoms guaranteed by these conventions in order to justify its refusal to accept the return of masses of dislocated people.¹⁶⁷ This argument has generally been used to

Entity. As a result of being denied their right to return, Bosniaks, who sought refuge in the surrounding countries, could become a politically mobilizeable force that could be recruited to take back territory that they feel is their homeland, through the use of violent means. *See* Discussion with Susan L. Woodward, Senior Policy Fellow, Brookings Institution, March 1, 1998. Israel's prolonged unwillingness to recognize the right of return of Palestinian refugees has likely produced a more militant irredentist response by the Palestinian Liberation Organization than if the Palestinians had been allowed to return.

167. This presumes that an expanded right to return exists. *See, e.g.,* Lapidoth, *supra* note 15, at 114; Radley, *supra* note 15, at 613. Article 29(2) of the UDHR states:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

See Quigley, *Displaced Palestinians*, *supra* note 127, at 201; NOWAK, *supra* note 117, at 218. Although the ICCPR allows states to derogate from certain Covenant obligations during a declared emergency (Article 4(1)), it does not contain a general limitations clause. Some articles include limitations provisions applicable to that specific article. Article 12 contains such language:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

See Quigley, *Displaced Palestinians*, *supra* note 127, at 201; NOWAK, *supra* note 117, at 686. The right to return enunciated in Article 12(4), however, is not subject to the restrictions of Article 12(3). *See id.* Unlike the UDHR, therefore, the ICCPR does not allow a state to condition right to return on security considerations. Return to "one's own country" can only be denied if the denial is not arbitrary. Although on its face, the term "arbitrarily" could give a state a significant degree of discretion to exclude its own nationals, the drafting history suggests that this was not the intent. *See* Quigley, *supra* note 127, at 202. In fact, the term was intended to be interpreted quite restrictively.

As Professor Nowak writes, "there can be no doubt that the limitation on the right to entry expressed with the word "arbitrarily" ("arbitrairement") is to relate exclusively to cases of *lawful exile as punishment for a crime*. . . ." NOWAK, *supra* note 117, at 219. Some states that participated in the drafting used exile as a penal sanction under their criminal law and were thus unwilling to accept an absolute obligation to accept returnees. Other states, however, considered exile to be an unlawful punishment and refused to include language stating that exile was permitted as a penal sanction. In the end, "arbitrarily" was inserted to accom-

justify Israel's refusal to accept that Palestinian refugees have a such a right. Supporters of the Israeli position argue that even if the Palestinian refugees have a right to return, the general limitation clause of Article 29 (UDHR) permits its non-application where "the influx of more than one and a half million mostly hostile refugees would without doubt violate the 'rights and freedoms of others in Israel' and it would damage 'public order and the general welfare in a democratic society.'" ¹⁶⁸

While this argument can and should be used to prevent the return of those refugees who are truly "hostile" to the receiving state and thus could not be expected to live in peace after their return, this argument should not be used to justify a blanket denial of the return of all of the members of the dislocated group. ¹⁶⁹ This overly broad approach would

moderate those countries that used exile as a penal sanction, but without explicitly stating so. See BOSSUYT, *supra* note 117, at 260–63 (providing relevant quotations from drafting process); see also, Quigley, *Displaced Palestinians*, *supra* note 127, at 201–02.

The ICERD does not contain a derogation clause.

As a general rule, however, all "limitations on rights must be interpreted restrictively and not so as to legitimise unnecessary, arbitrary or discriminating measures aimed at objectives contrary to the general aim and purpose of the specific right and the instrument in which it is contained." Christa Meindersma, *Population Exchanges: International Law and State Practice—Part 2*, 9 INT'L J. REFUGEE L. 613, 642 (1997).

168. Lapidoth, *supra* note 15, at 114–15 (arguing that since Israel was still in a time of public emergency in 1986, it could derogate from recognizing the right of Palestinians to return under the ICCPR); see also Radley, *supra* note 15, at 613; Rona Aybay, *The Right to Leave and the Right to Return: The International Aspect of Freedom of Movement*, 1 COMP. L. Y.B. 121, 125 (1977).

169. In December, 1948, the General Assembly resolved that Palestinian refugees "wishing to return to their homes [in Israel] and live in peace with their neighbors should be permitted to do so at the earliest practicable date. . . ." G.A. Res. 194(III), U.N. GAOR, 3d Sess., pt. I, at 24, ¶ 11, U.N. Doc. A/81024 (1948) (emphasis added). The "Set of Ideas on an Overall Framework Agreement on Cyprus" includes a similar restriction on the right to return. It provides that "persons who are known to have been actively or are actively involved in acts of violence or incitement to violence and/or hatred against persons of the other community may, subject to due process of law, be prevented from returning to the federated state administered by the other community." *Set of Ideas*, *supra* note 136, at ¶ 85.

With respect to Bosnia, the international community was apprehensive that, in the aftermath of the war, the local authorities would abuse such a justification for derogating from their obligation to allow refugees and displaced persons to return to their pre-war homes. They feared, *inter alia*, that the local leaders would use the threat of arrest and prosecution on war crimes charges to discourage minority returns. In an effort guard against this, the Peace Agreement included a commitment from the parties to enact legislation to guarantee that any returning refugee or displaced person charged with a criminal offense would enjoy an amnesty, provided that the crime was not a serious violation of international humanitarian law or a common crime unrelated to the conflict. See Annex Seven, Art. VI, *supra* note 12. In February 1996, the parties agreed to the so-called "Rules of the Road." Under this agreement, the Entity governments must submit a list of suspected war criminals to the International Criminal Tribunal for the Former Yugoslavia, which will then review the list and, upon its approval, those people will be liable for arrest. Only those people approved for detention by the Tribunal can be apprehended by the governments on war crimes charges. Despite these undertakings, however, the possibility of prosecution on false charges of al-

imply that each individual's right to return is superseded by a group right. Moreover, the government making the determination whether to deny this mass group the right to return, and thus derogate from its obligations under these human rights instruments, would usually be the same government that caused that group to flee the country in the first place.¹⁷⁰ Therefore, it would likely perceive the impending return of this same group to be a threat to the national welfare.¹⁷¹

The impending return of hundreds of thousands of refugees of a particular ethnic group may indeed present national security concerns to the receiving state. The fact that an individual fled his country as part of a mass movement, however, should not prejudice his individual right to return. To subsume an individual's rights into those of the displaced group and to subordinate them so easily to alleged national security concerns contravenes the objects and purposes of human rights instruments generally and renders superfluous most of the rights they were designed to protect.¹⁷²

2. Soft Law

Since the right to return was first enunciated in 1948 in the UDHR, various U.N. organs have called for the return of all refugees and displaced persons created by a particular conflict that resulted in mass

leged war crimes, or for desertion from the armed forces has served as an obstacle to return. See *Amnesty Report*, *supra* note 8, at 10. In the spring of 1997, the local RS authorities in Brcko continued to refer to "lists of war crimes suspects" in the hope of blocking returns. *UNHR Periodic Report*, *supra* note 2, at ¶¶ 5-8.

170. Moreover, arguments of national security or public order should not be used to justify restrictions that are designed to facilitate and consolidate practices of "ethnic cleansing," or "to serve racial policies or ethnic segregation." Meindersma, *supra* note 167, at 642-43.

Just as the derogation provisions in the UDHR and ICCPR should be interpreted restrictively so as not to legitimize arbitrary or discriminating measures designed to vitiate the right to return under these instruments, States should not be allowed to use arbitrarily the denial of nationality to avoid their obligation to accept the return of their nationals. *See id.*

171. The U.N. has, however, discouraged states from invoking security considerations in order to evade an obligation to repatriate. The U.N. Security Council set in motion a process for the return of displaced Namibians, despite that fact that many of these Namibians had gone abroad to fight to drive South Africa out of Namibia. See *Letter dated 10 April 1978 from the Representatives of Canada, France, Germany, Federal Republic of, the United Kingdom of Great Britain and N. Ireland, and the United States of America Addressed to the President of the Security Council*, U.N. SCOR, 33d Sess., Supp. for Apr.-June 1978, at 17, 18 ¶ 7(c) & (d), U.N. Doc. S/12636 (1978) (these five states, which had been asked by the Security Council to make recommendations, stated that the displaced Namibians be allowed to return). The Security Council issued a resolution stating that repatriation of Namibians should be implemented by South Africa "pending the transfer of power" without awaiting a political settlement. S.C. Res. 385, ¶ 11(d), U.N. SCOR, 31st Sess., *Res. & Decs.* 8, U.N. Doc. S/INF/32 (1977).

172. See Lawand, *supra* note 103, at 543.

dislocation. During the Cold War, however, in the two conflicts that attracted much of the U.N.'s attention, in Cyprus and Israel, the numerous calls for the return of the refugees and displaced persons went unheeded.¹⁷³ Thus, despite the plethora of resolutions declaring the right to return following mass displacement, commentators have argued that international practice, as evidenced by the lack of actual returns, did not support the claim that international law recognized the right to return in such situations.¹⁷⁴

Since the end of the Cold War, the U.N. has addressed a number of additional conflicts that resulted in mass displacement of populations. In many of these situations, the U.N. organs have called for or supported the return of all refugees and displaced persons. For example, in addition to the many Security Council resolutions endorsing the return to both Croatia¹⁷⁵ and Bosnia, the Council has issued a number of resolutions in response to the humanitarian crisis that resulted from the Rwandan genocide, in which the Security Council "underlin[ed] the urgent need for the orderly and voluntary repatriation and resettlement of refugees and the return of internally displaced persons which are crucial elements for the stability of the region."¹⁷⁶ In addition, the Security

173. For a detailed review of the numerous General Assembly resolutions on the right of Palestinians to return, see, for example, Zedalis, *supra* note 145, at 508–13; Quigley, *Family Reunion*, *supra* note 115, at 239; W. Thomas Mallison & Sally V. Mallison, AN INTERNATIONAL LAW ANALYSIS OF THE MAJOR U.N. RESOLUTIONS CONCERNING THE PALESTINE QUESTION, U.N. Doc. ST/SG/SER.F/4, U.N. Sales No. E.79.I.19 (1979).

For an account of the U.N. resolutions finding a right to return for Greek Cypriots who were displaced from northern Cyprus by Turkish forces in 1974, see, for example, Meindersma, *supra* note 17, at 357; NECATIGIL, *supra* note 131; Quigley, *Family Reunion*, *supra* note 115, at 237 n.96.

174. See, e.g., Benvenisti & Zamir, *supra* note 15, at 325 (making such an argument).

175. See, e.g., S.C. Res. 1145, U.N. SCOR, 52d Sess., 3843d mtg., preamb. & ¶ 7, U.N. Doc. S/RES/1145 (1997) (reaffirming the right of all refugees and displaced originating from Republic of Croatia to return to their homes of origin throughout the Republic of Croatia); S.C. Res. 1079, U.N. SCOR, 51st Sess., 3712th mtg., ¶ 4, U.N. Doc. S/RES/1079 (1996) ("reaffirm[ing] the right of all persons originating from the Republic of Croatia to return to their homes of origin throughout the Republic of Croatia"); S.C. Res. 1019, U.N. SCOR, 50th Sess., 3591st mtg., ¶¶ 6–7, U.N. Doc. S/RES/1019 (1995) (demanding that the government of Croatia "respect fully the rights of the local Serb population including their right to remain or return in safety"). Two hundred-thousand Croatian-Serbs fled their homes following Croatia's military action at the beginning of August 1995. In March 1998, in response to international pressure, Croatia finally acknowledged that the Croatian-Serb refugees who had been driven from their homes by the Croatian Army in August 1995, had the right to return and removed many of the remaining barriers that had been hindering the return of refugees. For a detailed account of the war in Croatia and the resulting mass displacement, see, for example, MARCUS TANNER, CROATIA: A NATION FORGED IN WAR (1997).

176. S.C. Res. 1078, U.N. SCOR, 51st Sess., 3710 mtg., preamb., U.N. Doc. S/RES/1078 (1996); see also S.C. Res. 1029, U.N. SCOR, 50th Sess., 3605th mtg., preamb., U.N. Doc. S/RES/1029 (1995) ("underlining the need for increased efforts to assist the Government of Rwanda in the promotion of a climate of confidence and trust in order to facilitate

Council emphasized the importance of the return of masses of dislocated people in response to the large-scale displacements that occurred in the former Soviet republics since the collapse of the Soviet Union.¹⁷⁷ In many of these situations, the U.N. statements were indeed accompanied by the return of hundreds of thousands of refugees and displaced persons. In only a few of these resolutions, however—*e.g.*, those concerning the conflicts in Bosnia and Croatia—did the U.N. assert a “right” to return.¹⁷⁸ In the majority, the U.N. simply “encouraged” or “urged” the international community and humanitarian organizations to “facilitate” or “assist” the return of refugees and displaced persons.¹⁷⁹ Thus, it did not imply the existence of a legal obligation. The return of large groups of refugees and displaced persons in the aftermath of many of these conflicts, therefore, fails to provide additional evidence of state

the return of Rwandan refugees in neighboring countries”); a number of other Security Council resolutions concerning Rwanda and the Great Lakes region stress that the return of Rwandan refugees to Rwanda is a crucial element for attaining long-lasting peace in the region.

177. *See, e.g.*, (Tajikistan) S.C. Res. 999, U.N. SCOR, 50th Sess., 3544th mtg., ¶¶ 8, 14, U.N. Doc. S/RES/999 (1995). For discussion of Security Council response to mass displacement following the Georgia civil war, see *supra* note 165.

According to the UNHCR,

[s]ince the breakup of the Soviet Union, as many as nine million people have been on the move at any one time within the successor nations of the Commonwealth of Independent States (CIS), trekking in as many directions as there are points on the compass; civilians fleeing conflict, economic and ecological migrants and people returning to their homes of ethnic origin, some after 50 years in exile.

UNHCR Refugees Magazine, Issue 109, (visited Sept. 30, 1998) <<http://unhcr.ch/pubs/rm109/rm10905.htm>>.

178. *See, e.g.*, Security Council resolutions on Bosnia, *supra* note 73; Security Council Resolution 1145, *supra* note 175; Security Council Resolution 1097, *supra* note 165.

The Council of Europe’s Parliamentary Assembly recently identified certain key conditions for the establishment of peace in the Nagorno-Karabakh and Abkhazia regions of the Caucasus. These included: inviolability of frontiers, guaranteed security for all people, extensive autonomy status for Abkhazia and Naborno-Karabakh and *the right to return* for 1,500,000 refugees and displaced persons. *Assembly calls for a political settlement of Caucasus conflicts*, Council of Europe Press Release (Apr. 4, 1997) (visited Sept. 30, 1998) <[http://www.coe.fr/cp/97/233a\(97\).htm](http://www.coe.fr/cp/97/233a(97).htm)>.

179. *See, e.g.*, S.C. Res. 1100, U.N. SCOR, 52d Sess., 3757th mtg., 8, U.N. Doc. S/RES/1100 (1997) (stressing the “importance of assisting with the prompt repatriation of refugees who are willing to return to Liberia”); S.C. Res. 1080, U.N. SCOR, 51st Sess., 3713th mtg., ¶ 3, U.N. Doc. S/RES/1080 (1996) (“welcoming offers by Member States . . . to facilitate orderly voluntary repatriation of refugees” to Rwanda); S.C. Res. 1014, U.N. SCOR, 50th Sess., 3577th mtg., ¶ 14, U.N. Doc. S/RES/1014 (1995) (“calls on [Member States] to increase efforts already made to handle the voluntary and rapid return of refugees to Liberia”). *See also* Security Council resolutions, *supra* notes 175–76.

practice supporting both a legal right to return and a legal obligation to allow such returns following mass dislocation.¹⁸⁰

In order to show that international practice is starting to support an expansive right to return, which, as demonstrated above, is grounded in the international human rights covenants, mass returns must take place in conjunction with the international community's assertions and the acknowledgment by the parties to the underlying conflict that these people are returning as a matter of "right." As described in Part I, on many occasions since 1992, the international community expressed its view that the Bosnian refugees and displaced persons have the "right" to return to their homes. While some have indeed returned,¹⁸¹ too few have been able to do so for it to be considered an example of state practice supporting the right to return of all individuals under international law.

CONCLUSION

Many observers view the return of Bosnian refugees and displaced persons as a key to lasting stability in Bosnia.¹⁸² Securing this right on behalf of refugees and displaced persons and recreating the multi-ethnic communities that characterized Bosnia before the war is important not only for re-establishing political stability in the region and ensuring United States and NATO credibility, as some have argued,¹⁸³ but is also

180. These examples of large-scale returns, therefore, cannot be used as evidence to support a developing customary international norm regarding an expansive right to return. See *supra* note 142.

Despite the Security Council's failure to enunciate a *right* to return in these post-conflict situations, the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, in recent resolutions concerning the right to freedom of movement, has nonetheless "affirm[ed] the right of refugees and internally displaced persons to return voluntarily, in safety and dignity, to their country of origin and/or within it to their place of origin or choice." U.N. Subcomm'n Discrim. & Minor. Res. 1996/9, ¶ 2 (visited Sept. 30, 1998) <<http://www.unhcr.ch/html/menu4/subres/9609.htm>>; see also U.N. Subcomm'n Discrim. & Minor. Res. 1995/13, ¶ 2 (visited Sept. 30, 1998) <<http://www.unhcr.ch/html/menu4/subres/9513.htm>>.

181. As of early 1998, out of the 2.2 million dislocated during the war, only some 200,000 refugees and 220,000 displaced persons have managed to return so far. See UNHCR-Washington Update, *supra* note 51.

182. See, e.g., *Gelbard Speech*, *supra* note 83; Arthur C. Helton, *Bosnia's Unjust Laws*, WASH. POST, Aug. 26, 1997, at A15; *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, *supra* note 8, at para. 7; *Amnesty Report*, *supra* note 8, at 1; Schear, *supra* note 30, at 94.

183. See *Gelbard Speech*, *supra* note 83; see also *Cox Report*, *supra* note 8, at 22 (asserting that the ethnic reintegration of Bosnia through the return of displaced persons and refugees to their pre-war homes is the foundational principle of the peace process, "both as an overwhelming moral imperative in the face of 'ethnic cleansing,' and as a political prerequisite for peace and stability in the region").

important in establishing a precedent supporting the right to return to one's home under international human rights law, even if one is a member of a mass dislocated group. Such a precedent could then help pave the way for eventual full recognition in international law of the right of everyone to return as provided in numerous international human rights covenants. The international community must continue to remove the numerous barriers to return erected by the Bosniak, Bosnian-Croat, and Bosnian-Serb authorities, and thus must facilitate the voluntary return of thousands of refugees and displaced persons. If it can, whereas "ethnic cleansing" will be the legacy of the war, the guarantee of the right to return of all individuals following mass dislocation, regardless of one's group affiliation, will be the legacy of the peace.

If the international community is unable to remove the barriers to return, however, one can predict that Bosnia will become another Cyprus or Israel, where the right to return of individuals belonging to mass groups of people, although clearly articulated by the international community, is simply not recognized by the parties. Such a failure would show that state practice remains an obstacle to the recognition of a broad right that is firmly grounded, although not explicit, in international human rights instruments.