The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law

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Eric Rosand*

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Introduction

For a peace [in Bosnia] to last, several key conditions must be met... any
agreement must guarantee that the human rights of all the citizens of the-

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nic community. All must be able to return home or to receive just compensation.¹

"Not knowing what else to do, the elderly Bosnian-Serb widow just sat down on a rock beside a green stagnant pool, in the middle of a field less than a mile from the home that was once hers."² After having traveled for five hours by bus, the seventy-one year old woman says, "I am desperate . . . . They say there is no money to pay my pension. All I have is my home, over there."³ She is unwilling to return to her home for fear that the Muslims will kill her, yet is unable to receive any compensation to ease her desperation and to assist her in rebuilding her life somewhere else.⁴

This displaced Bosnian-Serb is just one of the estimated 2.2 million Serbs, Croats, and Bosniaks (Bosnian-Muslims)⁵ who either left or were driven from their homes during and in the immediate aftermath of the forty-three month Bosnian war.⁶ Thousands of these victims, unwilling or unable to return, have chosen to relocate. Many more will follow. The vast majority, however, relocated without receiving any compensation for their most valuable, and often only, asset — the home they left behind. Yet most of the survivors of the Bosnian war who lost their homes are left without redress. Numerous observers focused on the importance of securing the

³. Id.
⁴. See id.
⁵. See Susan L. Woodward, Balkan Tragedy: Chaos and Dissolution After the Cold War 315 (1995) (discussing the decision of Bosnian Prime Minister Haris Silajdzic to urge the adoption of the term Bosniak instead of Muslim). The term Bosniak reflects Bosnian Muslims' nationality, as opposed to their religion. The Human Rights Watch group explains:

Their current status as "Muslims" is viewed by some as an inaccurate label because it defines a people's nationality solely on the basis of their religious belief. Furthermore, the term "Muslim(s)" used as a nationality title is disapproved of by many countries in which Islam is the dominant religion, as well as by many "Muslims" of Bosnia-Herzegovina themselves.

⁶. For purposes of this article, the term Serbs refers to Bosnian-Serbs and the term Croats refers to Bosnian-Croats, i.e., those Serbs and Croats who live or lived in Bosnia.

The Bosnian war was one of the conflicts that erupted following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFY). In June 1991, following Slovenia's and Croatia's withdrawal from the SFY after unsuccessful negotiations among the six republics, Prime Minister Markovic and the Parliament ordered the Yugoslav National Army (JNA) 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 gain control of some 30% of Croatian territory. The fighting then spread into Bosnia shortly after the Republic of Bosnia and Herzegovina declared full independence from the SFY on March 3, 1992. For a detailed discussion of the war, see, for example, Laura Silber & Allan Little, Yugoslavia: Death of a Nation (1996); Misha Glenny, The Fall of Yugoslavia (3d ed. 1996); Christopher Bennett, Yugoslavia's Bloody Collapse: Causes, Course and Consequences (1995).
right of return for all Bosnian refugees and displaced persons. No one, however, adequately addressed the right of compensation for those who chose not to return, the impact that the implementation of such a right might have on the region, and the significant precedent it could establish under international law.

On December 14, 1995, representatives of the Bosniaks, Bosnian-Serbs, and Bosnian-Croats signed the General Framework Agreement for Peace (DPA) in Paris. This agreement brought an end to the fighting that had plagued Bosnia since April 1992, in what was the most violent and disruptive war Europe had seen in half a century. Warren Christopher, then Secretary of State, who announced the cease-fire agreement at Dayton, Ohio, stated that the parties "agreed that four years of destruction is enough. The time has come to build peace with justice." One of the foundational principles of the peace negotiated at Dayton was that all refugees and displaced persons would be given the right to return to their homes.

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8. See generally General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, Bosn.-Herz.-Croat.-Yugo., 35 I.L.M. 75 [hereinafter DPA]. The terms of this agreement were negotiated and agreed to in Dayton, Ohio. For a detailed account of the negotiations leading to the agreement, see Richard Holbrooke, To END A WAR (1998). The instrument concluded in Dayton and signed in Paris was the General Framework Agreement for Peace (GFAP) in Bosnia and Herzegovina, to which 11 annexes were attached. Under the GFAP, the parties agreed to accept a single state, Bosnia and Herzegovina (Bosnia), consisting of two entities: the Federation of Bosnia and Herzegovina (the Federation) comprising 51% of the territory of Bosnia in a number of cantons divided ethnically between Bosniaks and Croats, and the largely Serb Republika Srpska (the RS), comprising 49% of the territory. Under the State (i.e., Bosnian) Constitution, laid out in Annex 4, each entity has its own parliament, government, police force, and army, and carries out most of the functions of a state. See DPA, supra, Annex 4, art. III, ¶ 2. The central government of Bosnia, on the other hand, has a loose form consisting of a parliament, council of ministers, and a three-person presidency. Thus, it is responsible for a very limited number of issues: foreign affairs and trade, customs and monetary policy, immigration, inter-entity criminal law enforcement, communications, transport, and air traffic control. See DPA, supra, Annex 4, art. III, ¶ 1.

9. The sovereign state of the Republic of Bosnia and Herzegovina declared its independence on March 3, 1992. Upon the entry into force of the DPA, however, the Republic of Bosnia and Herzegovina became "Bosnia and Herzegovina." See DPA, supra note 8, Annex 4, art. 1.


11. "Refugees" are those who have left their homes and fled to a country outside of Bosnia, whereas "displaced persons" are those who fled their homes but remained in Bosnia. This article shall refer to both refugees and displaced persons as "dislocated persons."
pre-war homes or receive compensation for their property to assist

The 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol, Article 1(2), defines a refugee as any person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.


The Guiding Principles on Internal Displacement submitted by the Secretary-General's Special Representative for Internally Displaced Persons to the U.N. Commission on Human Rights, defines internally displaced persons as:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.


Despite this difference in definition, the root causes that generate refugees and displaced persons are essentially the same: human rights abuses and armed conflicts. Nevertheless, those who cross international borders are protected by a series of international treaties and organizations. See, e.g., Convention Relating to the Status of Refugees Protocol, supra; Protocol Relating to the Status of Refugees, supra. Those who remain within the national border receive minimal formal legal or institutional protection.

12. A sense among the survivors of the Bosnian war that "justice" has followed the atrocities of the war may be necessary to ensure that the violence that has plagued the former Yugoslavia for the entire 20th century does not continue. One observer wrote:

[the] resentments that Serbs harbored against Croats for the unpunished crimes of the Ustasha state during World War II was a major factor in the catastrophic developments in ex-Yugoslavia more than four decades later. Justice provides closure; its absence not only leaves wounds open, but its very denial rubs salt in them.


13. For a discussion of how the inclusion of the possibility of compensation in Annex Seven weakens the right to return, see, for example, Marcus Cox, The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina, 47 Int'l & Comp. L.Q. 599, 611 (1998) [hereinafter Cox, The Right to Return].

them in their efforts to resettle. Implementation of the DPA's declared right to return has been a high priority for the international community, as its main post-war goal has been the reversal of “ethnic cleansing” through the return of refugees and displaced persons. The right to compensation enunciated in the DPA, on the other hand, has been largely ignored for fear that a refugee or displaced person's ability to receive compensation might interfere with the primary goal of ethnic reintegration.

This Article highlights the importance of implementing the DPA's provisions regarding the right to compensation. The availability of compensation would provide financial assistance to the thousands of dislocated persons who wish to resettle, rather than return home. It would also offer these victims some redress for the violations of property rights that constituted the most prevalent human rights abuse during the war as well as the main humanitarian consequence of the displacement. Further, assuming that the Bosnian Government funds any compensation mechanism, it might serve as an important precedent for developing a customary international law principle that refugees who are unwilling or unable to return to their original homes are entitled to be compensated by their State of origin, for property they have left behind. Moreover, if this right becomes part of customary international law, it could be used, along with the more developed right to return, to deter States from creating the conditions that lead to mass flows of refugees and displaced persons. Any gains made as a result of “ethnic cleansing” campaigns would either be reversed through

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16. In the context of the discussions of Bosnia in this Article, the right to compensation refers to the right of refugees and displaced persons to receive compensation for their real property in lieu of return. For a discussion of their right of compensation for other losses, see, for example, Amnesty International, Bosnia: The International Community's Responsibility to Ensure Human Rights, EUR 63/14/96 (June 1996), <http://www.amnesty.it/aipub/1996/EUR/46301496.htm> [hereinafter Amnesty International, The International Community's Responsibility to Ensure Human Rights].

17. See Marcus Cox, Strategic Approaches to International Intervention in Bosnia and Herzegovina, in THIRD INTERNATIONAL SECURITY FORUM, CLUSTER OF COMPETENCE, THE REHABILITATION OF WAR-TORN SOCIETIES 38 (1998) [hereinafter Cox, Strategic Approaches].
the return of the dislocated or would prove too costly, as the responsible State would be required to compensate those refugees and displaced persons for their property to which they chose not to return.

Part I of this article examines the "ethnic cleansing" that took place during the conflict and evaluates the so-far unsuccessful efforts of the international community to achieve its goal of ethnic re-integration. Part II evaluates the right to compensation under Annex Seven, addresses the international community's reluctance to promote the exercise of the right to compensation, and argues the different positive effects the successful implementation of this right would have in the region. Part III analyzes whether the right to compensation provided in Annex Seven and the obligation of the current Bosnian government to provide such compensation are supported by recognized principles of international law. Part IV reviews the right to compensation under international law by first examining the resolutions of the United Nations General Assembly and non-governmental bodies that have supported this principle and then reviewing the State practice in this area. This Article concludes that while the right of refugees to compensation and the corresponding obligation of the state of origin might exist in theory, there is currently insufficient State practice to support them, as the vast majority of implementation efforts have been unsuccessful. The implementation of the right to compensation provided by the Bosnian Government could, therefore, serve as an important precedent under international law where the right to compensation is not only articulated but enforced as well.

I. "Ethnic Cleansing" and Then What?

A. "Ethnic Cleansing" — The Destruction of Homes

Unfortunately, "ethnic cleansing" — the elimination by the dominant ethnic group of a given territory of members of other ethnic groups — has proven to be the "enduring lexicographical legacy of the Yugoslav war."\(^\text{18}\) 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."\(^\text{19}\)

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 their respective centers of habitation.\(^\text{20}\) As a result, the multi-ethnic

\(^{18}\) Silber & Little, supra note 6, at 244.
\(^{20}\) Three broad categories of population movements took place during the war: (1) "spontaneous flight," resulting from direct and indirect methods inducing people to leave, (2) "organized transfers and deportations of populations," and (3) "exchanges of persons and property." Christa Meindersma, Population Exchanges: International Law
character of pre-war Bosnia was shattered. Hundreds of thousands of Bosnian citizens of all three ethnicities were forced from their homes through different techniques of violence and intimidation that generally had the actual or tacit approval of authorities. Confiscation of property and the razing of homes and farms to the ground were carried out to preclude the possibility of return. A recurring practice was to force all civilian inhabitants who sought to flee from the violence to surrender all future rights to property. The United Nations Special Rapporteur on the former Yugoslavia, in his August 1992 report, describes how Bosnian-Serb soldiers "ethnically-cleansed" the Bosniak majority town of Bosanska Dubica. After the initial acts of murder, violence, discrimination, and harassment of the local Muslim population,

Muslims who wanted to leave the village were allowed to do so only together with their entire family . . . . Before those willing to leave were permitted to do so, they were forced to sign documents stating that they would never come back. No reference was made in those documents to their . . . houses [in the village] . . . [T]hey could either sell them at a ridiculous price or give the keys to the municipality for the duration of their absence, which after they had signed the above-mentioned documents, was supposedly forever.
The effects of nearly four years of "ethnic cleansing" were devastating. Not only were many homes abandoned or emptied, but it is estimated that 63% of all housing units were partially damaged and that 18% of all units were destroyed. Moreover, 90% of the pre-war Bosnian-Serb population left the area now called the Federation and over 95% of the pre-war Bosnian-Croat and Muslim inhabitants fled what would become the Republika Srpska (the RS) during this period. According to one estimate, only 2.8 million people, or 64% of the pre-war total, remained in Bosnia following the exodus of refugees. If one includes those internally displaced during the conflict, then only 42% of the people remained in their home of origin following the end of the war. Thus, since the war ended over four years ago, some 2.2 million people have had to decide whether to return to their pre-war home or resettle in another part of Bosnia or the world.

25. See INTERNATIONAL CENTRE FOR MIGRATION POLICY DEVELOPMENT, FRAMEWORK REPORT TO FACILITATE THE LAUNCHING OF THE COMMISSION STIPULATED IN ANNEX SEVEN CHAPTER TWO OF THE DAYTON AGREEMENTS ¶ 82 (1996) [hereinafter ICMPD REPORT]. See also INTERNATIONAL MGMT. GROUP, A DRAFT PROPOSAL FOR A PRELIMINARY APPROACH TO THE RETURN AND RELOCATION OF REFUGEES AND DISPLACED PERSONS IN BOSNIA AND HERZEGOVINA (1997) (estimating that in the Federation approximately 50% of all housing units were damaged during the war, with an additional 6% destroyed; whereas, in the RS, approximately 24% were damaged and an additional 5% were destroyed).

Prior to the war, Bosnia's 4.4 million people were "housed in an estimated 1,295,000 units or approximately the same as the total number of households." THE WORLD BANK, BOSNIA AND HERZEGOVINA: EMERGENCY HOUSING REPAIR PROJECT - Technical Annex 1 (July 1996) (copy on file with author).

26. This includes 20,000 to 80,000 Bosnian Serbs who fled or were forced to leave the suburbs of Sarajevo when these were transferred from the RS to the Federation in the early spring of 1996. The DPA provided that authority over five Sarajevo suburbs would pass from the Republika Srpska to the Federation by March 19, 1996. DPA, supra note 8, Annex 1A, art. 4. Forty-five 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 establish legal authority over the territory allotted to them by 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 Bosnia(k) gangs who ransacked properties in advance of the arrival of the new police. When the dust settled, most of the Serbs had fled. Schear, supra note 7, at 93. See also Report on The Situation in the Territory of the Former Yugoslavia, at ¶ 36, U.N. Doc. E/CN.4/1996 (1996). Such actions went largely unopposed by either the U.N.'s civilian police monitors or IFOR. Schear, supra note 7, at 93.

27. See id. According to estimates, 540,000 or 39% of all Bosnian Serbs, 490,000 or 67% of Bosnian Croats, and 1,270,000 or 63% of Bosniaks were dislocated due to the war. ICMPD REPORT, supra note 25, at ¶ 81.

Today, within the Federation, in six of the 10 cantons, ethnic minorities represent less than 10% of the population, and in the remaining cantons, local regions show a similar degree of ethnic separation. These figures are based on municipal registration figures provided to UNHCR by the Bosnia and Herzegovina Federation Institute of Statistics in Sarajevo, but are not completely accurate due to discrepancies in the registration process. See U.N. HIGH COMMISSIONER FOR REFUGEES, REGISTRATION OF REPATRIATES IN THE FEDERATION OF BOSNIA AND HERZEGOVINA AND ENTITLEMENT TO FOOD ASSISTANCE AND MEDICAL CARE (1997).
B. Return vs. Relocation

Apart from stopping the fighting, the clearest promise of the DPA was that 2.2 million Bosnian refugees and displaced persons could return home and Bosnia would be reconstructed as a single, multiethnic country. Thus, in the post-DPA period, the international community has aggressively sought to promote the mass return of the dislocated in the face of significant demographic changes that resulted from the war. The millions of dollars in international support for numerous programs aimed at enabling the refugees and displaced persons to return to their pre-war homes, however, have produced disappointing results.

Thus far, the large-scale voluntary return movements that the international community anticipated would take place after the war simply have not occurred. Of the over 1.2 million refugees at the end of the war, only 91,000 returnees had arrived by the end of 1996, and by 1997 only 130,000 returnees had arrived.

The International Commission on the Balkans, however, reporting shortly after the signing of the DPA, concluded that “the term ‘multi-ethnic’ has been overused and simplistically praised by Western commentators on Bosnia.”

The international community has already spent well over one billion dollars in its efforts to recreate a multi-ethnic society. The Reconstruction and Return Task Force (RRTF) estimated the 1998 financial requirements for assisting the reintegration of displaced persons in Bosnia at $520 million.

The Office of the High Representative (OHR) established the RRTF in January 1997 as a forum for coordination. The RRTF is chaired by the OHR and is made up of the UNHCR, the European Commission including the European Community Humanitarian Office, the CRPC, the World Bank, the International Management Group, the U.N. International Police Task Force, the Stabilization Force (SFOR), the U.N. Development Programme, the International Organization for Migration, the U.S. Government, and Germany’s Federal Commissioner for Refugee Return and Related Reconstruction.

Critics of the DPA contend that the goal of recreating a multi-ethnic Bosnia, through the mass return of refugees and displaced person, cannot be achieved and that the United States should accept, if not encourage, the partition of Bosnia along ethnic lines. They believe that the DPA’s political provisions, for example, giving refugees and displaced persons the right of return, will never be implemented.

28. 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 [the] 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.


29. According to one Bosnia analyst, “[d]espite the almost bewildering array of initiatives and pilot projects, many of which are aimed at encouraging the return of ethnic minorities, the process of knitting Bosnia together has barely begun.” Bosco, supra note 7, at 68.

30. Critics of the DPA contend that the goal of recreating a multi-ethnic Bosnia, through the mass return of refugees and displaced person, cannot be achieved and that the United States should accept, if not encourage, the partition of Bosnia along ethnic lines. They believe that the DPA’s political provisions, for example, giving refugees and displaced persons the right of return, will never be implemented.
208,000 had returned to Bosnia by the end of 1997, and generally not to their pre-war homes. Another 504,000 had acquired permanent status abroad, leaving some 612,000 refugees without a permanent home of their own. Finally, "by the end of 1997, only 45,000 Bosnians had returned to areas in which they formed a minority, of whom a paltry 2200 had returned to the Republika Srpska." Most of the remaining refugees and displaced persons originate from areas now under control of another ethnic group and fear being persecuted and harassed if they attempt to return to their pre-war home. Despite a number of different initiatives orchestrated by the international community in the three years since Dayton, "minority returns" have continued to be anecdotal. All three eth-
nic groups continue to oppose large-scale “minority return” largely because they fear losing control of territory gained or successfully defended during the war. Thus, in most cantons, international pressure has induced such returns in only one or two municipalities. In fact, the number of returns fell from 250,000 in 1996 to 150,000 in 1997 — a 40% drop — and returns of displaced persons dropped from 160,000 to 50,000. These numbers suggest “that most displaced persons who were able and willing to go home have already done so, and that movements of displaced persons could therefore remain limited in 1998 and beyond, at least so long as minority return continues to be opposed.

The international community’s lack of success in its efforts to induce those dislocated during and in the aftermath of the war to return can be attributed to administrative, economic, psychological, and physical factors. These include harassment and intimidation of minority groups, systematic violation of property rights, a shortage of housing and inappropriate distribution of housing stocks, legal and bureaucratic obstacles to return, and a severe lack of economic activity and employment opportunities. In addition, many potential returnees remain ambivalent about returning because of the continued presence of war criminals in Bosnia who were indicted by the International Criminal Tribunal for the Former Yugoslavia, i.e., those responsible for directing and/or carrying out much of the “ethnic cleans-


39. “An analysis of returns by entity and canton is revealing. For example, nearly 37,000 internally displaced persons returned to Una-Sana Canton in 1996, but only 250 in 1997, a more than 99 percent drop.” U.S. COMMITTEE FOR REFUGEES, 1998 WORLD REFUGEE SURVEY 164 (1998). This same Canton, however, was “second only to Sarajevo to Sarajevo as the destination for repatriating refugees in 1997 (and recorded virtually the same number of returns in both 1996 and 1997 — about 23,500 each year). This could suggest that significantly more repatriating refugees were relocating rather than returning to their original homes.” Id.

In Sarajevo Canton, “authorities had registered 2,556 Serbs as returning to [Bosniak dominated] Sarajevo . . . . [however], [m]any of those registered as returnees had not actually returned . . . . and persons returning to Sarajevo did not necessarily stay there.” Id. Serbs and Croats “sometimes returned to test the waters or to re-establish property claims without intending to return permanently.” Id. The CRPC has concluded that a “significant portion of the 19,000 persons who registered property claims in Sarajevo Canton were more interested in establishing ownership claims in order to sell or trade property than in returning.” Id. at 164-65. See also Interview with Steven Segal, Executive Officer, CRPC (Oct. 20, 1998) (copy on file with author).

40. RRTF March 1998 Action Plan, supra note 29, at ¶ 6. Minority returns for the first half of 1998 have been slower than expected. Between 11,000 to 15,000 have returned, which is well below the UNHCR target figure of 50,000. See Report of the High Representative for Implementation of the Peace Agreement to the Secretary General of the United Nations (July 14, 1998) (visited Apr. 26, 1999) <http://www.ohr.int/reports/r987014a.htm>.

Generally, majority ethnic groups have tolerated minority return to rural areas lacking economic viability, or, for small numbers of returnees, to large urban areas, provided that they do not displace members of the majority group. See Letter from Arthur Helton, Director, Open Society Institute/Forced Migration Project, to Sadako Ogata, U.N. High Commissioner for Refugees 4 (Oct. 16, 1998) (copy on file with author) [hereinafter Helton Letter].
These barriers have left the dislocated population fearful and uncertain as they decide whether to attempt to return. Even if all of these obstacles were removed, a significant portion of the dislocated community would still prefer to relocate permanently. There are a number of explanations for this phenomenon. First, for many survivors of the “ethnic cleansing,” the scars left by acts of violence — assassination, murder, rape, torture, burning and looting — that drove them from their homes run so deep that their return to the scene of the crime is unlikely. Indeed, even to expect their return is “unconscionable.”

One can hardly assume that the “traumatized torture victims and women survivors of the ‘ethnic cleansing’ in Srebrenica, Zepa, Banja Luka, and other communities [would wish to] return to areas controlled by the very forces who victimized them.” For these people, permanent relocation is their desired solution to the displacement.

This interest among Bosnians in resettlement is also due to certain population movements in Bosnia that the war simply hastened, but did not precipitate. It is unlikely that these demographic changes can be reversed. One resulted from the urbanization of the region that began prior to the outbreak of the war, in patterns similar to those of other Central European countries. The war merely accelerated this movement, as it caused a significant number of rural inhabitants to move to the cities, many of whom have since become accustomed to urban standards of living. A majority of these former village dwellers have no desire to return to economically desolate rural areas after having spent the war living in urban centers.

41. For a discussion of these obstacles to return and the international community’s efforts to remove them, see, for example, UNHCR REGIONAL STRATEGY, supra note 33, at 2; OFFICE OF THE HIGH REPRESENTATIVE, REPORT OF THE HIGH REPRESENTATIVE FOR IMPLEMENTATION OF THE BOSNIAN PEACE AGREEMENT TO THE SECRETARY-GENERAL OF THE UNITED NATIONS (1998); AMNESTY INTERNATIONAL, RIGHTING THE WRONGS: RECOMMENDATIONS REGARDING RETURN OF REFUGEES AND DISPLACED PERSONS FOR 1998 (1998).


44. Between 1986 and 1991, a large number of people moved from the countryside to the cities. This trend is mirrored in other Central and Eastern European countries. For example, in the Czech Republic rural employment has declined by 40% since 1989. See RRTF March 1998 Action Plan, supra note 29, ¶ 13.

45. In most of the larger towns and cities in post-war Bosnia, “there is a pattern of relocation from surrounding villages into the town center[s].” Cox Report, supra note 21, at 11. Many villagers sought refuge in the towns during the war, and their homes have been damaged or destroyed. See id. “There are increasing signs that many of them do not want to return to their villages, even when there is no security impediment.” Id.

46. The RRTF has observed that people have not returned to areas where there are few economic prospects. “Many families have not returned to remote villages, (even after their houses have been repaired with international assistance).” RRTF March 1998 Action Plan, supra note 29, ¶ 16. Moreover, the “social and economic structures which sustained many rural communities under the socialist system have disappeared.” Cox, STRATEGIC APPROACHES, supra note 17, at 36.
This is particularly the case for younger people. The second is the result of the substantial economic reform process that Bosnia began before war erupted in the spring of 1992, as it moved from a planned to a market economy. Labor migration is the natural result of this shift, as new economic centers emerge, unprofitable enterprises close, and people are therefore forced to move where there are jobs. In Bosnia today, the distribution of employment opportunities is changing rapidly and this has generated and will continue to generate the migration of a significant element of the labor force.

The removal of the barriers to return that nationalist leaders have erected, therefore, are likely to have little impact on the desire of these people to return to their pre-war homes. "Minority return" programs are

Bosnian Moslem leader Alija Izetbegovic noted:
many of the refugees who poured into Sarajevo have [no] motive to leave... “they are peasants and farmers. Many of these people came from villages without shops [and] medical care... They end up [in Sarajevo]. This is what they have dreamed of. Okay, so they didn’t want to have a war, but now they are here. Why go back?”


In addition, many of the refugees who have returned to Bosnia from abroad have very different life expectations than they had when they fled. The International Commission on the Balkans, reporting in the immediate aftermath of the war, predicted this phenomenon, noting that “refugees in... the West are unlikely to return in large numbers. They are likely to go back only on a modest scale, and only to where they will be in an ethnic majority and where economic conditions permit... [This would be the case] even under the most optimistic scenarios for refugee return.” *unfinished peace, supra* note 28, at 100-01. Thus, the Commission concluded that “most refugees will remain in the West.” Id. at 101.

There was nearly a consensus among the participants in a study commissioned by the World Bank that only the older people will return to live in the villages and most predicted that no more than 15% of the people would return from the cities to their pre-war village homes. A young woman from Vitez, supporting this sentiment, noted that “even before the war, younger people were leaving the villages en masse.” *world bank, social assessment of the impact of the war in bosnia and herzegovina* (1998) [hereinafter *world bank, social assessment*]. Younger people of all ethnic groups surveyed cited the poor living conditions, poor communications links with urban centers, distance to schools and hospitals, and the government's inability to subsidize the social infrastructure in the villages as reasons why they would not choose to return to their rural pre-war homes.

For example, “[a] number of pre-war large enterprises are likely to be restructured (e.g., Zenica steel plant), and new businesses are already emerging in many places (e.g., Tuzla).” RRTF March 1998 Action Plan, supra note 29, ¶ 13. Moreover, “[i]ndustries which once supported entire cities are now defunct.” Cox, *strategic approaches, supra* note 17, at 36.

In a recent report on Bosnia, the UNHCR has acknowledged the significance of the various pre-war and wartime demographic changes experienced in that region, noting that “[n]ot all populations displaced by conflict return to their homes following the end of hostilities. In addition to pre-conflict migration patterns, new patterns result from the social and economic upheaval stemming from conflict, the region’s transition to a market economy and other phenomena such as the move of rural populations to urban areas.” *UNHCR regional strategy, supra* note 33, ¶ 3.4.

According to the OHR, four hurdles must be overcome for the process of minority return to become significant and self-sustaining: (1) the international community must press for an immediate and firm commitment of the leadership at both the State and Entity level, which must then be translated into consistent and prompt administra-
unlikely to reverse these population movements. The Reconstruction and Return Task Force (RRTF) reached this conclusion in its March 1998 report, stating that the international community will only be able to reverse those population movements that would not have occurred absent war in Bosnia, i.e., of people who were expelled or had to abandon their homes as a result of the “ethnic cleansing.” The report recognized that the RRTF will have limited success in reversing urbanization trends and transition-related movements that are not significantly different from those that occurred in other post-communist Central European countries.

The numerous remaining obstacles to large-scale “minority return,” as well as the existence of a significant number of people who will not return even if these obstacles are removed, has led many observers in Bosnia to conclude that relocation is a reality that the international community must recognize. The limited results of the various return initiatives have

tive and legislative action at all levels; (2) the security of returning refugees must be assured and the concept of a multi-ethnic police force must become a reality; (3) the lack of adequate housing must be addressed; and (4) a new property market and legislative framework must be instituted to allow all citizens effectively to exercise their property rights. See High Representative to the Steering Board, Report on the Implementation of the Peace Agreement for Bosnia and Herzegovina 3 (1998) [hereinafter Implementation Report].

Providing all refugees and displaced persons with a fair opportunity to sell, lease, or exchange their property, would be a positive step in the development of a real estate market. Moreover, it would enhance the ability of refugees and displaced persons to choose how to exercise their property rights.

50. The most significant program, in terms of resources, is the Open Cities Initiative, jointly sponsored by UNHCR and the U.S. Department of State’s Bureau of Population Refugees and Migration. In March 1997, UNHCR announced the Open Cities Initiative, which represented a commitment to reward those local communities that demonstrated an openness to minority returns with increased international assistance. According to the International Crisis Group, as of April 1998, $60 million has been committed to Open Cities. International Crisis Group, The Konjic Conundrum: Why Minorities Have Failed to Return to Model Open City (visited Apr. 26, 1998) <http://www.intl-crisis-group.org>. While 1790 minorities have returned to these cities since the signing of the DPA, only 582 of them returned after their recognition as Open Cities. ICG Report, Mass Relocation?, supra note 29, at 3.A.1. The Open Society Institute has calculated a cost of $80,750 per returnee under the Open Cities Initiative and accurately noted that such a program, even if expanded, could not be maintained. Helton Letter, supra note 40, at 2.

Other efforts to encourage return include UNHCR’s Pilot Projects in the Federation, the Sarajevo Housing Commission established by the Sarajevo Declaration of February 1998. Under these programs, specific individuals seeking to return to their homes are identified, and local authorities are pressured to accept their return.


52. See id. According to the World Bank sponsored survey, when asked how many displaced persons will return from the city to the village, a common number given was 15%. All three ethnic groups surveyed were in agreement that it will only be the older people who will return to the villages to live, mainly because of emotional ties to their property. World Bank, Social Assessment, supra note 47, at 47.

53. “Relocation” describes the situation when repatriating refugees and displaced persons end up in places that are not their homes of origin. See Reconstruction and Return Task Force, OHR: Outlook for 1998 – “Resources, Repatriation and Minority Return” ¶ 34 (1997). Both UNHCR and the PIC Steering Board have recently voiced their support for relocation so long that it is truly voluntary, although return should remain as the preferred solution. Both agree, however, that resettlement should not be
demonstrated not only the "difficulty of securing compliance by recalcitrant local officials," but also "the limitations of the international community in assuming the management of such processes."\(^5\) Simply put, the international community lacks the ability to directly reverse "ethnic cleansing."\(^5\) At least 50% of repatriating refugees, particularly to the Bosniak areas of the Federation, have chosen to relocate.\(^5\) Those who wish to return, but cannot, due to political and security reasons, are increasingly settling down in new areas, rather than waiting and hoping for the climate to change. In fact, even if the myriad minority return programs were to exceed the expectations of the international community, there is a practical limit in the number of people that can be expected to return. Moreover, the existing minority return strategies have yet to suggest any way of returning minorities to properties that are currently occupied by other displaced persons.\(^5\)

encouraged where it occurs as a result of official local manipulation and intimidation. Since relocation may be promoted for a political objective, i.e., by nationalist political leaders who want to solidify gains made during and in the aftermath of the war, UNHCR has stated that for relocation to be acceptable, it "must respect the property rights of others, be voluntary and based on an informed choice as to the desired place of residence, whether newly built or existing accommodation." UNHCR REGIONAL STRATEGY, supra note 33, ¶ 7.9.

A survey conducted by the CRPC and UNHCR cites three factors that suggest that relocation is an important part of the search for durable solutions for those forced to flee their homes during the war. First, given "[t]he progress and pattern of return so far . . . it is unrealistic to expect a complete return of the population shifts that took place during the war and thus a full return of all refugees and displaced persons to their pre-war homes." Second, "there is an important minority [of displaced persons and refugees] who do not wish to return" to their pre-war homes. Third, as the result of economic factors, "many areas of [Bosnia] will no longer be able to sustain their pre-war populations." Cox Report, supra note 21, at 22.

See also UNHCR REPATRIATION AND RETURN OPERATION 1998, infra note 56, at 5 (noting that population relocation will be an essential component of the search for durable solutions for refugees and displaced persons and it may be supported provided that it is voluntary and does not diminish prospects for return). Despite recognizing the reality of relocation, in November 1998, a UNHCR representative in Sarajevo stated that, except for a small-scale integration program for Bosnian-Serbs and Croats in Serbia, UNHCR would not provide support for relocation in 1999.


56. See RRTF March 1998 Action Plan, supra note 29, ¶ 6. UNHCR reports that "an estimated 70% of repatriation in the second half of 1997 can be characterized as relocation." UNHCR REPATRIATION AND RETURN OPERATION 3 (1998).

Recent CRPC surveys have revealed that a significant number of people have determined that they cannot or will not return — they would rather relocate. See Cox Report, supra note 21, at 12-19.

57. The destruction of property and the massive population movements that occurred during the war led to severe housing problems. In order to accommodate the influx of internally displaced people into the urban areas, and to increase their power by controlling access to housing so as to distribute it for political gain to supporters, local authorities seized many of the dwellings left empty. In these homes they placed displaced persons from their own ethnic group who had been driven from or fled their pre-war homes. Almost everywhere throughout Bosnia, houses of people who left during the war (ethnic minorities in particular) are used to house 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 either illegally or
The drafters of Annex Seven envisioned that some dislocated by the war would not want to return to their pre-war home, but would rather prefer to resettle. Thus, in lieu of return, the dislocated were provided with the right to receive compensation for their homes.

II. The Right to Compensation in Bosnia

A. Annex Seven and the International Response

The international community viewed the right of all refugees and displaced persons to return to their homes as fundamental to any peace agreement in Bosnia. The right to compensation, however, was not simply a creation of the U.S. Department of State lawyers who drafted Annex Seven. Instead, it was also a seminal element of many of the international community's proposals designed to bring peace to Bosnia.

The requirements for permitting the return of refugees and displaced persons and the return of or compensation for property were first included in the Statement on Bosnia by the London Conference held in the summer of 1992. A peace plan formulated by the ICFY the following year provided refugees and displaced persons with the alternative rights of returning home or receiving compensation for lost property. During the war, the General Assembly expressed its support for both of these rights.

with temporary occupancy rights granted by the local authorities. 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. Thus, none of the more than 15,000 people holding CRPC certificates, which certify their ownership or occupancy rights to their pre-war homes have actually been able to return and have the temporary occupant, generally of the majority ethnicity, removed. See Reconstruction and Return Task Force, Assisting Reintegration, An Action Plan in Support of Refugees and Displaced Persons in Bosnia and Herzegovina 32-33 (1998) (copy on file with author).


59. The London Conference, convened a few months after war spread to Bosnia, was, at that time, the most ambitious international summit on Bosnia. 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. See Szasz, infra note 83, at 312. For the complete set of documents adopted at the Conference, see 31 I.L.M. 1531 (1992).

This Conference, co-sponsored by the British and the U.N., was attended by more than 30 countries and organizations. It also established the International Conference on the Former Yugoslavia (ICFY) (initially known as the “Vance-Owen Negotiations” after the then Co-Chairmen of the ICFY Steering Committee: Cyrus Vance and David Owen), with a working group on Bosnia and Herzegovina.

60. The Invincible Plan, was negotiated during the summer of 1993, culminating on September 20, with a final negotiating session on the British carrier HMS Invincible. It 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, largely because of territorial disputes. The final Invincible Plan appears in B.G. Ramcharan, The International Conference on the Former Yugoslavia: Official Papers 275-329 (1997).

61. See, e.g., Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia (Serbia and Montenegro), G.A.
Furthermore, in the Basic Principles affirmed in Geneva on August 8, 1995, which formed the foundation for the discussions at Dayton, the parties "agreed . . . to enable displaced persons to repossess their homes or receive just compensation." Finally, in his remarks at the initialing of the DPA, then Secretary of State Warren Christopher stated that "refugees and displaced persons will have the right to return home or to obtain just compensation."

All of the efforts of the international community culminated in Annex Seven of the DPA, which provides that

[all refugees and displaced persons have the right freely to return to their home of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.]

Although according to Annex Seven, Article I, compensation was only to be made available to those whose pre-war property could not be restored to them, Article XII(5) affords all refugees and displaced persons the choice between return and compensation, providing that the owner has the right to compensation in lieu of return. "Whenever refugees or displaced persons could not envisage returning home, inter alia, because they continued to fear ethnic animosity, they should be entitled to just compensation."

In order to facilitate the implementation of both rights, Annex Seven established the Commission for Displaced Persons and Refugees, later renamed the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), to receive and decide claims of refugees and displaced persons for real property and to award compensation to those who choose not to return to their pre-war homes. According to Article XII(5), compensation may come in the form of a monetary award or a compensa-
tion bond for the future purchase of the real property.\textsuperscript{68} Funds for any compensation awards could come from either grants from the international community or the signatories of the DPA, or the proceeds from the activities of the CRPC selling or leasing the properties it receives in exchange for compensation awards.\textsuperscript{69} The Annex Seven Compensation Plan has yet to become a reality. Neither the parties to the DPA, the Bosnian Government, nor the international community has provided the funds necessary to operate such a program.\textsuperscript{70} Thus, the CRPC claimants' choice between return and compensation has essentially become a Hobson's choice, - essentially no choice at all.\textsuperscript{71}

The failure of the international community to implement the compensation plan of Annex Seven stems from a concern that allowing displaced persons to choose between compensation and return of property will inhibit the re-creation of a multi-ethnic Bosnia and therefore undermine the

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\textsuperscript{68} Compensation would be drawn against a Refugees and Displaced Persons Property Fund. See DPA, supra note 8, Annex Seven, art. XIV.

\textsuperscript{69} See DPA, supra note 8, Annex Seven, art. XII(3); art. XIV(1). According to Annex Seven, the CRPC would gain title to any property for which it compensated a refugee or displaced person.

\textsuperscript{70} See infra notes 87-90 and accompanying text for an argument as to why the Parties to Annex Seven should be responsible for providing the necessary funds.

\textsuperscript{71} Amnesty International has criticized Annex Seven for failing to "expressly guarantee that refugees and displaced persons will be able to return and be compensated for their houses where they were deliberately destroyed as punishment." Amnesty International, supra note 16, at II.A.5. Thus, they are left "with an unpalatable choice between returning to their ruined houses without any compensation for the damage or not returning, but obtaining compensation." Id.
fundamental goal of the DPA. Critics of Annex Seven's compensation plan first assert that the option of receiving compensation will deter refugees from returning to their pre-war homes. They argue that a compensation option will provide the already reluctant refugees with yet another reason to resettle. Second, critics argue that a compensation plan would reward those groups who obstruct the return of displaced persons. Compensation would cancel the pre-war owner's ownership rights, leaving the temporary occupant, most likely a member of the majority ethnic group in the region, in control of the property.

Efforts to build support and raise the funds necessary to implement the compensation plan of Annex Seven are severely hampered by the fact that those local politicians who obstruct minority return tend to be the most vocal supporters for giving people the option of compensation. For example, while in office, Momcilo Krajinik, the hard-line Serb representative of the joint Presidency, an outspoken critic of the DPA and its goal of a unified Bosnia, stated that it was a mistake to insist on the return of refugees and displaced persons, while ignoring the other Dayton remedy of compensation. Thus, the perception is that if the international community were to facilitate the exercise of the right to compensation enunciated in the DPA, it would weaken its efforts on minority returns, provide support for the nationalist leaders who are seeking to consolidate ethnic separation, and "betraying the interests of the victims of ethnic cleansing who are still determined to return." Yet, the international community's failure to focus on implementing the right to compensation betrays the interests of those victims who genuinely do not wish to return.

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72. See Interview with Lisa Jones, UNHCR Sarajevo Protection Officer (July 28, 1998) (on file with author).
73. See Van Houtte, supra note 65, at 559.
74. See DPA, supra note 8, Annex Seven, art. XII(5).
75. See Cox, The Right to Return, supra note 13, at 612.
76. The three ethnic groups have differing interpretations of the DPA: Serb authorities have generally resisted measures that would lead to the return home of non-Serb refugees or displaced persons. Instead, they strongly support compensation schemes for individuals as well as exchanges of property. Bosniaks generally take the opposite position, insisting on an unqualified right of return and opposing compensation, exchange of property and perhaps even housing construction that could facilitate "relocation." On these issues, the Croats' views are more like the Serbs' than the Bosniaks.
77. See Bosnian Serb Leader Says Predecessor Karadzic Will Withdraw "From the Media," BBC Summary of World Broadcasts, Aug. 11, 1997, available on LEXIS, News Library, Curnws File. He sees compensation or exchange as a more practical alternative. Refugees and displaced persons, he argues, should have a choice, "[i]f the emphasis is only placed on the return of refugees, confusion will ensue and we shall not be able to solve refugees' problems." Id.
79. Given the obstacles to return that currently exist, some argue that relatively few refugees and displaced persons are currently in a position to make a free and informed
B. The Importance of Implementing the Right to Compensation

Implementation of the right to compensation would significantly benefit dislocated persons who would not return even if much of the current obstruction disappeared. For most refugees and displaced persons, the property they lost during and in the aftermath of the war is their principal or only asset. In fact, those who owned their pre-war homes likely invested their earnings in the construction, expansion, and upkeep of the dwellings. The opportunity to recover some of that value would enable them to regain part of their substantial investment in their home, while significantly enhancing their ability to start life over in a new location. It would give them "the means to solve their own displacement."81

The obstacles to the exercise of Annex Seven compensation rights might indeed have a negative impact on the prospect of long-term peace and stability in the region. It could reinforce the discontent of the large segment of the population that the international community ignored during the war and continues to do after the cease-fire. Large groups of poor and insecure displaced persons "are a major destabilising factor, contributing to the power of extremist politicians and retarding the process of ethnic reintegration."82 The failure to implement the right to compensation pro-choice regarding whether they wish to return. See, e.g., UNHCR Regional Strategy, supra note 33, at 3; ICG Report, Mass Relocation?, supra note 29. Only when the obstacles are removed so as to make the choice between return and relocation a free one, they argue, should the international community begin to support the right to compensation. See ICG Report, Mass Relocation?, supra note 29.

This argument, however, does not consider the thousands of displaced persons and refugees who do not want to return, regardless of whether the obstruction is removed or not. Moreover, it holds all of those interested in permanent relocation and compensation hostage to the international community's impracticable goal of large-scale minority return. See Cox, The Right to Return, supra note 13, at 627-29.

80. Prior to the war, 80% of the residential property was privately owned, mainly in the countryside. See RRTF March 1998 Action Plan, supra note 29, at ¶ 44, Box 10. The remaining 20% was "socially-owned", mainly in the cities, where public housing accounted for about 1/2 of the housing stock. See id. Under practices of the SFRY, construction of "socially-owned" apartments came from contributions of each working person to the Housing Contribution Fund. Organization for Security and Cooperation in Europe, supra note 22. These obligatory contributions could have amounted to as much as 10% of total income. See id. Although every worker contributed to the fund, not every family received occupancy rights to a socially-owned apartment. See id. Those holding such rights in these socially-owned apartments were more than simply tenants, but did not own their homes and were not allowed to buy them. See id. See also Jessica Simor, Tackling Human 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) (describing the institution of socially-owned housing). An occupancy right has been referred to as "quasi-ownership." Open Society Institute Forced Migration Project, Property Law in Bosnia and Herzegovina 13 (1996).

81. Cox, Strategic Approaches, supra note 17, at 39. Facilitating the exercise of the right to receive compensation for one's property would do more than simply provide some assistance to the thousands of needy refugees and displaced persons who genuinely do not wish to return. Enabling the dislocated to exercise this Annex Seven right, which likely would involve the sale, lease, or exchange of property, would provide refugees with a fair opportunity to exercise their property rights and would assist the development of a mature property market in Bosnia. See supra note 50.

82. See Cox, Strategic Approaches, supra note 17, at 41 (arguing that return to home
vided by Annex Seven has left those who genuinely do not wish to return without redress for the massive property rights violations that occurred during and in the aftermath of the war. It would be ironic if many of Bosnia's citizens, the beneficiaries of an agreement that provides perhaps the most comprehensive set of human rights principles in the world, were to be left without any compensation for their loss of property.  

In addition to the direct assistance that the right to compensation would provide refugees and displaced persons eager to resettle, compensation rights may not, in fact, be incompatible with the international community's primary goal in Bosnia of establishing a multi-ethnic state. If individuals received compensation or a sale price for property lost because of the war it might generate local resources to assist with reintegration. Compensation would assist refugees and displaced persons in their efforts to find permanent accommodation in the area of resettlement. Currently, the lack of such accommodation for nearly 40% of the population within Bosnia makes displaced persons extremely vulnerable to manipulation by nationalist political leaders who oppose minority returns. Moreover, if the responsibility for providing funds for compensation were to fall on the local governments, it might induce them to remove many of the obstacles to return that currently exist. In such a case, they could no longer afford to obstruct return.


84. See Cox, Strategic Approaches, supra note 17, at 38, 39-40, 42.

85. One commentator has written that

[.]s]tressing the refugees' right to compensation may well induce the country of origin to create conditions to voluntary repatriation. In doing so, the country would . . . remove or ameliorate the very conditions that gave rise to refugees in the first place, foremost among which are violations of human rights and international law by the countries of origin themselves.


86. The international community, in its efforts to ensure that compensation mecha-
Finally, Annex Seven compensation rights, if supported by funding from the Bosnian Government, could be an important precedent under international law for the principle that refugees and displaced persons have the right to receive compensation from the State of origin for property to which they are unable or choose not to return. Although not yet fully developed, such a principle would provide the living victims of "ethnic cleansing" with partial redress for the wrongs committed by their State of origin.

III. Legal Principles in Support of the Right to Compensation and their Applicability to Bosnia

This part examines whether there is legal foundation for the principle that refugees have the right to receive compensation for their property from the State responsible for their forced dislocation in lieu of return. Two widely recognized principles of State responsibility in international law are that a State is responsible for every wrongful act attributable to that State which constitutes a breach of an international obligation, and that where a mechanism does not impede returns, could require municipalities to meet certain benchmarks before being able to gain access to any compensation mechanism, e.g., the Annex Seven Property Fund. See DPA, supra note 8, Annex Seven.

At the June 9, 1998 meeting of the Peace Implementation Council (PIC), the body responsible for overseeing implementation of the DPA, the Steering Board, in conjunction with its continued support for minority returns, announced its support for locally funded proposals to provide refugees and displaced persons with the fair opportunity to receive compensation for their property in lieu of return. Declaration of the Ministerial Meeting of the Steering Board of the Peace Implementation Council, Luxembourg, June 9, 1998, at ¶ 28. This represented the international community’s first explicit post-Dayton support for the concept of providing refugees and displaced persons compensation through sale, lease or exchange of property. See id.

Although the Bosnian Government may not have the financial resources necessary to support a compensation scheme, the funding could be provided by a loan from the World Bank. The CRPC has had some preliminary discussions with the World Bank regarding such a loan. See Interview with Steven Segal, Executive Officer, CRPC, (July 28, 1998) (copy on file with author).

87. Article XVI of Annex Seven includes a provision that will place the burden of financing the CRPC on the Government of Bosnia in December 2000. See DPA, supra note 8, Annex Seven (providing that “[f]ive years after this Agreement [i.e., the DPA] takes effect, responsibility for the financing and operation of the Commission shall transfer from the Parties to the Government of Bosnia and Herzegovina, unless the Parties otherwise agree”). The DPA, however, is silent concerning the burden of financing a compensation mechanism after this date. See id.

88. The international law of State responsibility deals with principles and rules governing the conditions for and consequences of liability to a State, or other international actor, for a wrongful act, i.e., an act in violation of an obligation imposed by international law. See A.A. Fatouros, Transnational Enterprise in the Law of State Responsibility, in INTERNATIONAL LAW OF STATE RESPONSIBILITY: INJURIES TO ALIENS 361, 392 (Richard Lillich ed., 1983) [hereinafter INJURIES TO ALIENS]. See generally MALCOLM SHAW, INTERNATIONAL LAW 481-529 (3d ed. 1995); UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY (Marina Spinedi & Bruno Simma eds., 1987); IAN BROWNlie, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, Pt. I (1983).

State has breached such an obligation it has the duty to provide reparation, e.g., compensation.\textsuperscript{90} Although the law on State responsibility traditionally created only inter-State obligations, a recent development has been the imposition of international obligations on States towards individuals.\textsuperscript{91} This part discusses the applicability of these principles, in light of this development, to the situation in Bosnia. Even if one believes that these legal principles are inapplicable to the situation in Bosnia, this part concludes that based on the text of Annex Seven itself, the obligation to provide compensation for property should fall on the current Bosnian Government.

A. Principles of State Responsibility

1. Refugee Creation as an Internationally Wrongful Act

An internationally wrongful act occurs when (a) conduct consisting of an action or omission is attributable to the State under international law and (b) that conduct constitutes a breach of an international obligation of that State.\textsuperscript{92} The Special Rapporteur to the U.N. Commission on Human Rights has asserted that State responsibility comes into play when a State is in breach of the obligation to respect internationally recognized human rights.\textsuperscript{93} The legal basis for this obligation stems from international human rights treaties and customary international law.\textsuperscript{94} In such a situation, the obligation of the State encompasses the duty not only to respect such internationally recognized human rights, but also to ensure these


\textsuperscript{91} The Permanent Court of International Justice, in the Chorzow Factory case, said that "[t] is a principle of international law, that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law." Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (Ser. A) No. 17, 1928, reprinted in ANN. DSG. PUB. INT’L. CASES 258, 260 (1929). See also Draft Articles, supra note 89, art. 43; Covey T. Oliver, Legal Remedies and Sanctions, in INJURIES TO ALIENS, supra note 88, at 71; The Corfu Channel case, ICJ Reports 4, 23, reprinted in 16 INT’L L. Ref. 155 (1949).

In addition to compensation, other forms of reparation include restitution in kind, satisfaction, and assurances and guarantees of non-repetition. See Draft Articles, supra note 89, art. 42. See also Shaw, supra note 88, at 496-99; Brownlie, supra note 88, at 199-227.

\textsuperscript{92} See, e.g., STATE RESPONSIBILITY AND THE INDIVIDUAL (Albrecht Randelzhofer & Christian Tomuschat eds., 1999) (discussing the trend) [hereinafter STATE RESPONSIBILITY].

\textsuperscript{93} See Draft Articles, supra note 89, art. 3.

rights, which may imply an obligation to prevent violations.95

Significant flows of refugees generally result from massive human rights violations in the State of origin.96 This was emphasized in the Cairo Declaration that states: "since refugees are forced directly or indirectly out of their homes in their homelands, they are deprived of the full and effective enjoyment of all articles in the Universal Declaration of Human Rights that presuppose a person's ability to live in the place chosen as home."97 For example, forced displacement is the denial of the exercise of freedom of movement and choice of residence since it deprives a person of the choice of moving or not and of choosing where to live. These freedoms are expressly recognized as a basic human right in the Universal Declaration of Human Rights (UDHR) (Article 13[1] and [2]) and guaranteed in the International Covenant of Civil and Political Rights (Article 12),98 which provides that "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."99


Moreover, forced displacement or expulsion would violate not only UDHR Article 9, which guarantees the right to be free from “arbitrary arrest, detention, or exile,” but Article 17(2) as well, which states that “[n]o one shall be arbitrarily deprived of his property.” 100 Furthermore, as Alfred de Zayas argues, the right to live in one’s homeland, despite not being expressly recognized in international human rights instruments, is a necessary prerequisite to the enjoyment of most other human rights, and thus must undoubtedly be a fundamental human right. 101 For example, people who are deprived of the right to their homeland are also deprived of the ability to exercise most civil, political, economic, social, and cultural rights that are widely recognized in international law. 102

In addition to contravening nearly all of the provisions of the UDHR, a State’s creation of refugees violates a number of other customary international legal principles as well, such as the prohibition of deliberate mass expulsion of a population and forced population transfers. 103

100. UDHR, supra note 98, at 76. For a discussion of the right to property as an internationally recognized human right, see RESTATEMENT, supra note 94, § 702, cmt. k.
102. See id.

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 ¶ 17, U.N. Doc. E/CN.4/Sub.2/1994/18 (1994) (statement by Awn Shawhat Al-Khasawneh, Special Rapporteur, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities). The report concluded that “[i]nternational 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.

2. The Duty to Compensate

A State that has breached an international obligation, such as forcing large numbers of citizens from their homes, is obligated to make reparation.\(^{104}\) Compensation appears to be the preferred and practical form of reparation in State practice and international case law.\(^{105}\) Although the State is obligated to provide compensation, to whom is this duty owed?\(^ {106}\)

Traditionally, "the offending State carries responsibility for its conduct vis-a-vis the injured State at the inter-State level" instead of the injured individual person or group of persons.\(^ {107}\) However, some have argued that the notion of State responsibility for breaches of internationally recognized standards has been broadened in recent years. It has come to be applied

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\(^{104}\) The duty to make reparation is based on the fact that "[i]n international law, as in domestic law, rights without remedies are illusory, i.e., 'no rights' at all." Covey T. Oliver, in INJURIES TO ALIENS, supra note 88, at 61. See also Lee, supra note 85, at 536. Absent the obligation "to make good the loss," there would be no duty on the part of States to observe rules of international law. H. Grotius, De Jure Belli AC PACIS, bk. II, ch. XVII, pt. 1, at 430 (1646 ed. Carnegie Endowment trans. 1925). See also Draft Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum, International Law Association, 63d Conference, Warsaw 1988, at 679 [hereinafter Draft Declaration], citing A. Verdross, VERFASSUNG DER VOLKERRECHTGEMEINSCHAFT 164 (1926).


\(^{106}\) Principle 2 of the Cairo Declaration provides that "[a] State that turns a person into a refugee commits an internationally wrongful act, which creates the obligation to make good the wrong done." Cairo Declaration, supra note 97, at 158.

\(^{107}\) van Boven Report, supra note 93, ¶ 42. Thus, States and not individuals or groups, could claim reparation from the violating State. See id. See also Christian Tomuschat, State Responsibility and the Country of Origin, in THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY LEGAL ISSUES 59, 64 (V. Gowlland-Debbas ed., 1995) (noting that none of the Special Rapporteurs on the International Law Commission on the topic of State responsibility even addressed the rights of individuals injured in the case of a State's breach of a human rights obligation); Nigel Rodley, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 97 (1987).
“to persons within the jurisdiction of the offending State whenever those persons are the victims of violations of internationally recognized human rights committed by that State.”

Thus, “the obligations resulting from State responsibility for breaches of international human rights law . . . entail corresponding rights on the part of individual persons and groups of persons who are under the jurisdiction of the offending State and who are victims of those breaches.”

A number of international judicial bodies have heard individual complaints of victims who claimed

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108. van Boven Report, supra note 93, ¶ 45. See also Preliminary Report on Diplomatic Protection, Mohamed Bennouna, Special Rapporteur to the International Law Commission ¶ 34, 55th Sess., U.N. Doc. A/CN.4/484 (1998) (noting that “since the adoption of the Charter of the United Nations and the Universal Declaration of Human Rights, there has been a trend towards recognition of the right of the individual through a number of large multilateral treaties,” e.g., ICCPR and the International Covenant on Economic, Social, and Cultural Rights).

With respect to human rights treaty law, the Inter-American Court has asserted that the American Convention on Human Rights is designed to protect individuals and that principles of State responsibility should be applied with respect to individuals. The Court, in an advisory opinion, concluded that

... modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality . . . . In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.

The Effect of Reservations of the Entry into Force of the American Convention, Inter-American Court, Advisory Opinion OC-2/82 of Sept. 24, 1982, Inter-American Court of Human Rights, Series A, Judgments and Opinions, No. 2, ¶ 29. See also Meindersma-Part 2, supra note 20, at 639 (asserting that “the violation of any human right gives rise to a [basic] right of reparation for the victim”). The United States, however, does not accept this broadened view of the law of State responsibility, believing instead, that the offending State bears responsibility for its actions only towards the injured State at the inter-State level.


Note that States of asylum, forced to bear much of the burden of refugee flows, are also victims of the wrong committed by States responsible for creating refugee flows. For a discussion of the rights of States of asylum vis-à-vis States of origin, see, e.g., Beyani, supra note 95, at 131-32; Lee, supra note 85, at 566.

110. Such bodies include the Inter-American Court of Human Rights, the European Court of Human Rights, and the Human Rights Committee (HRC). The ICCPR created the HRC, a special body of independent experts to oversee the covenant’s implementation.

Fifty-one states have accepted the Optional Protocol to the ICCPR, under which the HRC is granted competence to consider communications from individual victims alleging violations of the ICCPR. Although the HRC is not a court with
violations of the rights guaranteed in international human rights treaties. These judicial authorities developed a significant body of case law where the State was held responsible for a breach of obligation owed to an individual under the particular treaty regime.\textsuperscript{111} These developments could eventually have an impact on the traditional law of State responsibility. One such complaint was precipitated by the situation on Cyprus, described in Part IV.B. In 1996, the European Court of Human Rights held Turkey in violation of Article 1 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms\textsuperscript{112} for preventing the Greek Cypriot plaintiff from returning to her land in Turkish-controlled northern Cyprus for sixteen years. The Court held that this interfered with the Article's guarantee of the right to enjoy possession of the land which one owns.\textsuperscript{113} Nineteen months later, the Court further held that the applicant was entitled to compensation from Turkey for the continuing violation.\textsuperscript{114}

Thus, individual victims of violations of international human rights norms are now often entitled to effective remedies and just reparations under international law. In practice the two alternative remedies following “ethnic cleansing” seem to be the right to return to one’s home of origin, the power to issue judgments and it may only “forward its views” to the State and individual concerned, its consideration of hundreds of communications under the Optional Protocol has enabled it to interpret the ICCPR in a wide-variety of specific fact situations.


\textsuperscript{111} van Boven Report, supra note 93, ¶ 49. For a discussion of the case law, see id. ¶¶ 53-68. See also State Responsibility, supra note 91 (various papers discussing individual claims for reparations under ICCPR, CHR, and Inter-American Human Rights Court); Jo M. Pasqualucci, Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure, 18 Mich. J. Int'l L. 1, 2-8 (1996).

\textsuperscript{112} Article 1 of Protocol 1 provides that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.” European Convention on Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262.


\textsuperscript{114} See Loizidou v. Turkey, 81 Eur. Ct. H.R. at 1807 (1998) (concluding that the “applicant was entitled to be fully compensated for loss of access to and control of her property, but not for the diminished value of that property due to the general political situation” and awarding 300,000 Cypriot Pounds (CYP) in pecuniary damages, CYP 20,000 in non-pecuniary damages to compensate for “the anguish and feelings of helplessness and frustration which the applicant must have experienced over the years in not being able to use her property as she saw fit,” and CYP 137,084.83 for costs and expenses).

Article 50 of the ECHR provides as follows:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the . . . Convention, and if the internal laws of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.
2000 Right to Compensation in Bosnia

restitutio in integrum, or the right to receive adequate compensation for one's property.  

B. Compensation: The Bosnia Precedent?

This section discusses whether the legal principles that underlie the refugees' right to compensation and the state of origin's duty to compensate discussed above can be applied to the situation in Bosnia.

1. Refugee Creation and Internal Displacement in Bosnia – Internationally Wrongful Acts

The gross human rights violations committed by all parties to the conflict during the forty-three month war in Bosnia have been well documented. On a number of occasions, in addressing the situation in Bosnia, the Security Council condemned the practice of "ethnic cleansing" in the region and reaffirmed that any such practice is unlawful. In addition, the United Nations Committee on the Elimination of Racial Discrimination (CERD) denounced the massive, gross, and systematic human rights violations occurring in the territory of Bosnia and Herzegovina, most of which are committed in connection with the systematic policy of "ethnic cleansing" in the areas under

Arr. 4, 1950, 213 U.N.T.S. 221.

115. See Meindersma-Part 2, supra note 20, at 638. The return to one's pre-war home is the preferred remedy in such a situation. See id.

Principle Five of 1992 Declaration of Principles of International Law on Compensation to Refugees provides that

a State that has committed an "internationally wrongful act" through the generation of refugees shall be required, as appropriate (a) to discontinue the act; (b) to apply remedies provided under the municipal law; (c) to restore the situation to that which existed prior to the act; (d) to pay compensation in the event of the impossibility of restoration of the pre-existing situation; and (e) to provide appropriate guarantees against the repetition or recurrence of the act.

Cairo Declaration, supra note 97, at 158-59.

The question as to the level of compensation that should be required is beyond the scope of this article.

116. For detailed accounts of the violence and terror that were perpetrated against one another by the three ethnic groups, see, for example, TADEUSZ MAZOWIECKI, THE SITUATION OF HUMAN RIGHTS IN THE TERRITORY OF THE FORMER YUGOSLAVIA (1992-1994).


118. 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]. It is composed of 18 independent experts who meet twice a year in Geneva.
control of the self-proclaimed Bosnian-Serb authorities. All these practices [constitute] a grave violation of all basic principles underlying the Interna-
tional Convention on the Elimination of Racial Discrimination.\textsuperscript{119} In its 1995 decision on the situation in Bosnia, the Committee reiterated that "any attempt to change or uphold a changed demographic composi-
tion of an area, against the will of the original inhabitants, by whichever
means, is a violation of international law."\textsuperscript{120} Furthermore, the Special Rapporteur of the U.N. Commission on Human Rights concluded in his first report on the situation in the former Yugoslavia that "massive and grave violations of human rights are occurring throughout the territory of Bosnia and Herzegovina; violations are being perpetrated by all parties to the conflicts."\textsuperscript{121} He added that these "acts of violence are tolerated and often even encouraged by responsible authorities."\textsuperscript{122} In a later report, the Special Rapporteur reiterated

his outright condemnation of [practices of "ethnic cleansing" and popula-
tion transfer] which violate fundamental human rights including the right to
life, integrity of the person, property, privacy and family life, freedom of
thought, conscience, religion and of movement, to earn one's livelihood, to
nationality, and rights as a member of an ethnic or cultural group.\textsuperscript{123}

The "ethnic cleansing" campaigns that drove over two million people
from their homes, half of them across international borders, could qualify
as an "internationally wrongful act." The violations by the parties to the
conflict of the applicable norms of international humanitarian and human
rights law prohibiting mass expulsions, deportations and population trans-
fers, and demanding respect for private property, should therefore trigger
the international responsibility of the State, and provide grounds for the
obligation to make reparation.\textsuperscript{124} The question then becomes whether the
Bosniak, Bosnian-Serb, and Bosnian-Croat political leadership can be held
legally responsible for acts committed during and in the aftermath of the
conflict.

2. The Obligation to Compensate in Bosnia

One could make a strong argument for imposing the burden of compensa-
tion on the current Bosnian Government. Not only is that government a
continuation, albeit in a different form, of the wartime Government of the
Republic of Bosnia and Herzegovina, but the three nationalist political par-
ties largely responsible for the dislocation of over two million people, and

the source of many of the principles enunciated in the ICERD.

\textsuperscript{120}. CERD Report, supra note 119, ¶ 26.


\textsuperscript{122}. \textit{Id.} ¶ 53.

\textsuperscript{123}. \textit{Id.} ¶ 7.

\textsuperscript{124}. See Meindersma-Part 2, supra note 20, at 638.
the corresponding property rights violations during the war, continue to play significant roles in the post-war government.

a. The Facts

The Republic of Bosnia and Herzegovina declared its independence from the SFRY in March 1992, following a two-day referendum on independence requested by the European Community in which 99.7% of those who went to the polls — most Bosnian-Serbs boycotted — voted for independence.\(^{125}\) Shortly thereafter, in reaction to this declaration, both the Bosnian-Serbs and Bosnian-Croats established separate break-away entities. In April 1992, the “assembly of the Serb nation in Bosnia-Herzegovina” proclaimed the independence of the Republika Srpska of Bosnia-Herzegovina (RS). During that same month, the war in the former Yugoslavia spread to Bosnia.\(^{126}\) On July 3, 1992, Mate Boban, the de facto leader of the Bosnian-Croats, and their branch of the Croatian Democratic Union (HDZ), proclaimed the state of Herceg-Bosna. This rump State consisted of much of western Herzegovina, where the majority of Bosnian-Croats lived.\(^{127}\)

At its height, the RS controlled some 70% of the territory of the sovereign Republic of Bosnia and Herzegovina. As a result of the DPA, although the Bosnian-Serbs still control 49% of the territory, their efforts to break away from a sovereign Bosnia failed. The Bosnia created by Dayton is sim-

\(^{125}\) Only 63.4% of the eligible voters went to the polls; most Serbs did not. Voting was rendered virtually impossible in the areas controlled by the Serbian Democratic Party (SDS), the Serbian nationalist party. See, e.g., Woodward, supra note 5, at 195-96; Tim Judah, The Serbs 202-03 (1997); Conference on Security and Cooperation in Europe, Referendum on Independence in Bosnia-Herzegovina Feb. 29-Mar. 1 1992 23 (1992).

\(^{126}\) There has been considerable debate regarding the nature of this war, i.e., whether it was an internal or international armed conflict. The trial chamber of the International Criminal Tribunal for the Former Yugoslavia, in an opinion and judgment of May 7, 1997, recognized that a state of international armed conflict existed in at least part of Bosnia because of the armed conflict between the Bosnian forces and the JNA, but determined that the nature of the conflict changed after May, 19, 1992, when the JNA troops were withdrawn. Since then, the Court concluded, an internal armed conflict, i.e., civil war, was being waged between the forces of the Republic of Bosnia and Herzegovina and the rump Serb republic, the RS. Prosecutor v. Tadic, Case IT-94-1-T (May, 7, 1997), excerpted in 36 I.L.M. 908, 922 (1997), summarized in Michael P. Scharf, Case note, 91 Am. J. Int’l L. 718 (1997). Although in early April 1992 Belgrade did call for the withdrawal of all JNA troops from Bosnia, a great part of the command of the JNA stayed in Bosnia as a Bosnian-Serb army. Silber & Little, supra note 6, at 222-24. See also Theodor Meron, Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout, 92 Am. J. Int’l L. 236 (1998) (criticizing this aspect of the opinion).

\(^{127}\) Although they engaged in fierce fighting in 1993, in March 1994, the Bosnian-Croats and Bosniaks, under strong American pressure, signed the Washington Framework Agreement, which established a Muslim-Croat Federation, within the internationally recognized borders of Bosnia. See, e.g., Warren Bass, The Triage of Dayton, 77 For. Affairs 95, 103 (1998); Marcus Tanner, Croatia: A Nation Forged in War 292 (1997); Woodward, supra note 5, at 314.
ply the continuation of the Republic of Bosnia and Herzegovina, with a modified internal structure. The heading of the article in the Constitution providing for such continuity is appropriately labeled “Continuation.” Thus, Bosnia remained one state divided into two parts, the Federation, the Muslim and Croat entity that controls 51% of the territory, and the RS. The DPA maintained the sovereignty of Bosnia but the Bosniaks were not the victors. Despite failing to create an independent Bosnian-Serb state, the Bosnian-Serb land grab, commenced in April 1992, was rewarded with the ratification of the RS, which has essentially become the Bosnian-Serb fiefdom. For the Bosnian-Croats, the Muslim-Croat Federation affirmed by the DPA, while not an independent state, is, nevertheless, “a makeshift halfway house to secession by the self-proclaimed ‘Croat Community of Herceg-Bosna.’” Although the Dayton Accords stipulated the dismantling of Herceg-Bosna, this has yet to occur.

The “continuity” in Bosnia, however, goes well beyond simply the articulation in the Constitution. It extends to the ethnic-based political parties responsible for the armed conflict that ravaged the region and forced the displacement. These parties have largely remained in power following the cease-fire agreement. In fact, many of the members of these

128. According to Article I.1 of the Constitution (Annex Four), “[t]he Republic of Bosnia and Herzegovina shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations.” DPA, supra note 8, Annex Four, art. 1. The Constitution provides for two functioning levels of government: a central government, with its capital in Sarajevo, headed by a three-persons presidency that essentially consists of one member of each ethnic group; and the two regional Entities: the Croat-Muslim Federation and the Bosnian-Serb Republika Srpska.

129. Id.

130. Article I.3 of the Constitution provides that “Bosnia and Herzegovina shall consist of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska.” DPA, supra note 8, art. I(3).

131. See UNFINISHED PEACE, supra note 28, at 101.

132. See Bass, supra note 127, at 102. See also CHUCK SUDETIC, BLOOD AND VENGEANCE: ONE FAMILY’S STORY OF THE WAR IN BOSNIA 52 (1998) (noting that the DPA “left the Bosnian-Serb nationalists . . . the very thugs who had started the violence in the first place in de facto control” of half of Bosnia); HOLBROOKE, supra note 29, at 361 (discussing the ramifications of allowing Radovan Karadzic to keep the name Republika Srpska that he had invented in the early spring of 1992).

133. UNFINISHED PEACE, supra note 28, at 81.

134. See id. at 82. The hardline Bosnian-Croat HDZ (Croatian Democratic Union) continues to obstruct the return of Bosnian-Serbs and Bosniaks to their pre-war homes in the Croat dominated region of western Herzegovina. These are indicators, however, that this may change after the death of President Fudjman in December 1999.

135. In preparation for the then-Republic of Bosnia and Herzegovina’s first free elections on November 9, 1990, the Serbs, Muslims, and Croats, the three main communities in the republic, each formed separate political parties: the Serbian Democratic Party (SDS), of which Radovan Karadzic was elected the first president, the Bosnian branch of the Croatian Democratic Union (HDZ), and the Muslim Party of Democratic Action (SDA). See SILBER & LITTLE, supra note 6, at 206-09. These nationalist parties captured a majority of the votes in the first post-war elections held in September 1996. The first three co-Presidents of Bosnia and Herzegovina were Alija Izetbegovic, head of the SDA, Momcilo Krajisnik, the RS Parliamentary Sepaker
parties have yet to demonstrate that they have abandoned the objective of ethnically pure regions.136 Almost three years after the DPA brought an end to the fighting, Bosnia continues to be governed by ethnic-based parties that effectively dominate three mini-states.137

b. The Law

Since the Bosnian-Croats and Serbs joined the sovereign entity they were fighting, the Republic of Bosnia and Herzegovina, to form a new government, that government should bear responsibility for the acts of both the insurgents and the legitimate government during the civil war.138 This is supported by a recognized principle of state responsibility: the act of an insurrectional movement which becomes the new or part of the new government of the State shall be considered as an act of that state.139

This principle has been adopted by the International Law Commission (ILC).140 In explaining its rationale, the ILC notes that in such a situation "the State does not cease to exist as a subject of international law"141 — as it has in post-DPA Bosnia — when "its identity remain[s] the same, without any break in continuity, despite the changes, reorganizations and adaptations which occur in the institutions of the State."142 Therefore, it is necessary to continue to attribute to the State, after the success of the insurrectional movement, the conduct previously engaged in by the organs of the pre-existing State apparatus. The principle is essentially "a categorical imposition of responsibility for all acts of the insurgent forces," i.e., the de facto government.143 The ILC Commentary adds that "there is nothing surprising in this" conclusion,144 which is "logically deducible from the..."
fact that the acts of the insurgents have now become the acts of the government, for which it must accept responsibility.”

This principle, which international tribunals have expressly recognized, is “firmly rooted in the practice of states and there seems little practical point in raising doubts” as to its validity.

Thus, under recognized principles of State responsibility, the post-DPA Bosnian Government could be held responsible for the acts that drove 2.2 million from their homes, and thus be legally obligated to provide compensation to those who are unable or choose not to return.

c. The Text of Annex Seven

Even if one does not accept that the principles of State responsibility should be applied to the situation in Bosnia, one could still argue that, based on the text of Annex Seven, the Government of the Republic of Bosnia and Herzegovina is obligated to provide funding necessary to establish the Refugees and Displaced Persons Fund, the Annex Seven mechanism through which refugees and displaced persons are to receive compensation for their property in lieu of return.148

Annex Seven, Article XIV(1) provides that a “Refugees and Displaced Persons Property Fund (the Fund) shall be established in the Central Bank of Bosnia and Herzegovina to be administered by the Commission.”149 There is, therefore, a good faith obligation on the signatories of Annex Seven to set up the Fund.150 Article XIV(1), however, fails to specify who shall bear responsibility for the initial cash injection that is needed to create and begin operating the Fund, as it addresses only the “replenishing” of the Fund.151 Given this omission, one could argue that this duty, there-

145. BROWNLEI, supra note 88, at 178, quoting CLYDE EAGLETON, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 147 (1928). See also GEORG SCHWARZENBERGER, INTERNATIONAL LAW 1 627-29 (3d ed. 1957); EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CIVILIZATION 241-42 (1915).

146. See, e.g., BOLIVIA RAILWAY COMPANY CASE, 9 Rep. Int’l Arb. AWARDs 445 (1903). For a discussion of this and other decisions, as well as of the general consensus among international legal scholars in support of this principle, see 1975 Y.B. OF THE INT’L L. COMM’N V. II, at 102-05.

147. BROWNLEI, supra note 88, at 178; MARJORIE M. WHITEMAN, 8 DIGEST OF INTERNATIONAL LAW 819 (1967) (noting U.S. support for this proposition). Professor Brownlie does, however, note that the legal logic of this principle is far from certain.

148. See supra notes 67-68 and accompanying text.

149. DPA, supra note 8, Annex Seven, art. XIV(1) (author’s emphasis).

150. The three signatories are the Republic of Bosnia and Herzegovina, the Federation, and the Republika Srpska. Article VII of the General Framework Agreement explicitly states that the Parties, i.e., the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia, “agree to and shall comply fully with the provisions concerning ... refugees and displaced persons as set forth in Chapter One of the Agreement at Annex 7.” DPA, supra note 8, art. VII. Since the articles dealing with the establishment of the Fund appear in Chapter Two of Annex Seven, one could argue that the obligation to establish the Fund does not apply to them.

151. Article XIV(1) provides that the “Fund shall be replenished through the purchase, sale, lease and mortgage of real property which is the subject of claims before
fore, should fall on the signatories to Annex Seven, who agreed to implement all provisions of the Annex.

Thus, with the current lack of international donor support for the establishment of the Fund, the Government of Bosnia, as one of the signatories to Annex Seven, must, at a minimum, share the responsibility with the other signatories, i.e., the Entity governments, for providing the money necessary to operate the Fund.152

IV. The Refugees' Right to Compensation under International Law

Many commentators support the notion that refugees who are unwilling or unable to return to their original homes are entitled to be compensated by their State of origin, i.e., the State responsible for their plight, for property they have left behind.153 This is asserted even though such a right does not appear explicitly in any international human rights convention,154 though a number of U.N. General Assembly resolutions and declarations by non-governmental bodies do bolster this right.155 Despite this support and the principles of State responsibility on which it rests, there have been too few examples where the dislocated have actually been able to exercise this right to receive compensation for it to be deemed part of customary law. Despite this lacuna, however, “the right and duty of compensation in

the Commission [CRPC]. It may also be replenished by direct payments from the Parties, or from contributions by States or international or nongovernmental organizations.” DPA, supra note 8, Annex Seven, art. XIV(1).

152. Although there are three signatories to Annex Seven, this article addresses the liability of the national government, not those of the Entities. In doing so, it does not discuss the proportion of the financial burden for compensation that should fall on the Entity-level governments.

The Entity governments are largely controlled by the same ethnic-based political parties that control the national government and were largely responsible for the “ethnic cleansing” during the nearly four year war. Thus, even if the three Annex Seven signatories shared the burden of providing the money necessary to jump-start the Fund, those responsible for the forcible mass dislocation that occurred during and in the aftermath of the brutal war would still be the ones compensating those refugees and displaced persons for property to which they are unable or choose not to return.

153. See, e.g., Garry, supra note 95, at 117; Benevisti & Samir, infra note 177, at 330 (asserting that “the principle that refugees are entitled to compensation for their lost property is generally gaining recognition”); Dowty, supra note 37, at 26.

The refugees' right to compensation for non-property related injuries is beyond the scope of this article.


155. Although General Assembly resolutions are generally non-binding on member states, they have “contributed to defining more clearly certain general principles of international law for states parties and have frequently served as the genesis for subsequent multi-lateral treaties drafted and promulgated under U.N. auspices.” Christopher Joyner, Conclusion: The U.N. as International Lawyer, THE UNITED NATIONS AND INTERNATIONAL LAW, supra note 110, at 432; see also Brownlie, Principles of International Law, supra note 109, at 107.
the refugee context are justified and should be further advocated even if this may remain largely symbolic at present.\textsuperscript{156}

A. Support for the Right

As early as 1939, it was noted that refugees are entitled to reparations from the State responsible for their plight.\textsuperscript{157} The international community's initial affirmation of this principle came on December 11, 1948, when the United Nations General Assembly addressed the then nascent Israeli-Palestinian conflict, and adopted Resolution 194(III). The General Assembly resolved that "the refugees wishing to return to their homes . . . should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property . . . which, under principles of international law or in equity, should be made good by the Governments or authorities responsible."\textsuperscript{158} In an earlier report, Count Bernadotte, the U.N. Mediator on Palestine, had named the twin rights of repatriation and compensation as forming part of "the basic premises" and "the specific conclusions" for the settlement of the Palestine question.\textsuperscript{159} One of the seven basic premises states: "the right of innocent people, uprooted from their home by the present terror and ravages of war, to return to their home, should be affirmed and made effective, with assurance of adequate compensation for the property of those who choose not to return."\textsuperscript{160} General Assembly Resolution 194(III) affirmed Bernadotte's conclusions.

Some commentators have asserted that the General Assembly, in attributing the refugees' right to compensation to "principles of international law or . . . equity," was simply "restating pre-existing law or equity."\textsuperscript{161} One observer, in fact, contends that Resolution 194(III), paragraph 11, "explicitly bas[ed] the right of refugees to compensation on

\textsuperscript{156} Garry, supra note 95, at 117


\textsuperscript{160} Id.


George Tomeh, in an article he wrote while Permanent Representative of Syria to the United Nations, asserts that paragraph 11 of the resolution recognizes both a right of refugees to return to their homes and a right to compensation for those choosing not to return, and foresees implementation of these rights "under principles of international law or equity." George Tomeh, Legal Status of Arab-Refugees, in 1 The Arab-Israeli Conflict 687 (Moore ed., 1974). In criticizing this interpretation of the language regarding refugee return, some commentators have stated that the paragraph merely "recommends that the refugees 'should' be permitted to return," but does not recognize their "right" to do so. While they question whether "the reference to principles of international law or equity" applies to "return", they share the view that such language does apply to the right to compensation. Ruth Lapidoth, The Right of Return in International Law, with Special Reference to the Palestinian Refugees, 16 Isr. Y.B. Hum. Rts. 103, 116 (1987). See also Kurt Rene Radley, The Palestinian Refugees: The Right to Return in International Law, 72 Am. J. Int'l L. 586, 601 (1978).
'principles of international law or equity,' in its efforts to "imbue the right with a legal, and not merely a moral and political character." As part of its continuing efforts to address the Israeli-Palestinian conflict, the General Assembly has reaffirmed Resolution 194(III), paragraph 11, every year since 1948, "with the support of the United States and virtually every member nation except Israel." Thus, annual and near unanimous support of this paragraph has strengthened the legal validity of this right.

Despite the non-legally binding nature of individual General Assembly Resolutions, the plethora of resolutions that reaffirm the right of refugees to receive compensation could be deemed to have legal significance because of the role they serve in the codification and progressive development of international law. When a resolution, such as Resolution 194(III), paragraph 11, restates existing international law, as it clearly does, its binding force on Member States of the United Nations is not based on the resolution per se, but on the declared law, which remains binding on all States.

162. Lee, supra note 85, at 534-35.
164. In each of these repeated reaffirmations of Resolution 194 (III), paragraph 11, by focusing on compensation only for one's "property," the General Assembly has refrained from passing judgment on whether countries of origin are obliged to compensate refugees for other losses such as deaths, personal injuries, wrongful arrest, detention or imprisonment, and emotional and mental anguish. Given the General Assembly's emphasis on property losses, refugees seeking compensation for such losses may have a stronger legal argument to make than those seeking compensation for other losses. Moreover, since property losses are often easier to value, they are more easily compensated. See Lee, supra note 85, at 546.

Further, the repeated reaffirmation of the resolution, by a near-unanimous vote, constitutes evidence of the opinions of governments in the widest forum for the expression of such views. See Brownlie, PRINCIPLES OF INTERNATIONAL LAW, supra note 109, at 14; see also Shaw, supra note 88, at 94.

165. Article 13(1)(a) of the United Nations Charter states that the "General Assembly shall initiate studies and make recommendations for the purpose of: (a) ... encouraging the progressive development of international law and its codification." U.N. CHARTER art. 13(1)(a). The work of the International Law Commission and the adoption by the General Assembly of numerous declarations, e.g., the Universal Declaration of Human Rights and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, are good examples of such activities. See, e.g., Lee, supra note 161, at 829; Draft Declaration, supra note 161, at 686. See also Hurst Hannum, Human Rights, in THE UNITED NATIONS AND INTERNATIONAL LAW 145 (Christopher Joyner ed., 1997) (noting that adoption by the General Assembly and other bodies of formally non-binding declarations, statements of principles and ordinary resolutions can have an impact on the creation of international law).

For a thorough discussion of the legal significance of the re-citation of General Assembly resolutions, see, for example, Blaine Sloan, General Assembly Resolutions Revisited (Forty Years After), 38 B UTA. Y.B. INT'L L. 39, 74-76 (1987); Samuel A. Bleicher, The Legal Significance of Re-Citation of General Assembly Resolutions, 63 AM. J. INT'L L. 444 (1969).
Some thirty years after it first spoke on the subject of a refugee’s right to compensation in lieu of repatriation, the General Assembly addressed the topic once again. In 1981, it established a Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, whose tasks were to study the root causes of massive flows of refugees and to propose a strategy to avert such phenomena.\textsuperscript{166} As the guiding principle for the Group, paragraph 3 of Resolution 36/148 stressed “the right of refugees to return to their homes in their homelands and reaffirm[ed] the right . . . of those who do not wish to return to receive adequate compensation” for their property.\textsuperscript{167} This resolution, however, addressed only the right of refugees, remaining silent as to any corresponding obligation of the State of origin.

During the 1985 session of the General Assembly, Singapore emphasized that if the “root causes [of refugee flows] were to be tackled in an effective manner, there must be a firm resolve to increase the political and economic cost” to refugee-generating countries through the imposition of appropriate sanctions.\textsuperscript{168} The most fitting sanction, one commentator has asserted, would be to require “countries of origin to pay compensation to refugees.”\textsuperscript{169} Not only would this provide them with some redress for the violations of international law that their country of origin committed when it forced or induced their flight, but it might also deter such countries from future acts.\textsuperscript{170} In a report transmitted by the Secretary General to the General Assembly, the Group specifically recommended that the General Assembly call upon Member States to respect, as their obligation, the right of refugees to be facilitated “in returning voluntarily and safely to their homes in their homelands and to receive adequate compensation therefrom, where so established, in cases of those who do not wish to return.”\textsuperscript{171} The General Assembly unanimously endorsed the conclusions and recommendations of this report.\textsuperscript{172}

Neither this report nor Resolution 194(III), however, identifies or elaborates upon specific principles of international law that should govern compensation to refugees. Thus, following the General Assembly’s endorsement of the above report, the International Committee on the Legal Status of Refugees of the International Law Association (ILA) began work on refining and elaborating the U.N. Group’s conclusion that the rights of refugees include the right to be adequately compensated by the country

\textsuperscript{167} Id. ¶ 3. For a general discussion of Palestinian refugee and international law, see, e.g., ALEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES UNDER INTERNATIONAL LAW (1998).
\textsuperscript{169} Lee, supra note 85, at 566 (adding that such countries should also pay compensation to countries of asylum to shift the refugee burden off of the latter and onto the countries responsible for the crises).
\textsuperscript{170} See id.
responsible for the creation of their refugee status. In the Declaration of Principles of International Law on Compensation to Refugees, adopted by the ILA at its 1992 Conference in Cairo (Cairo Declaration), the ILA declared that legal principles support the conclusion that countries responsible for the creation of refugee flows have a legal obligation to compensate refugees should they choose not to return to their homes.\textsuperscript{173} Although the declarations of a non-governmental body such as the ILA are non-binding, there appears to be support for the legal principles that the ILA invokes in support of its conclusions.\textsuperscript{174}

B. Implementation?

Despite the legal foundation on which the refugees' right to compensation and the numerous statements in support of the right itself over the last fifty years, the implementation of this right following the forcible dislocation of a population has generally been unavailable.\textsuperscript{175} Rather, it remains "little more than a pious ideal."\textsuperscript{176} The reasons for this unavailability include the complexity and volume of the claims, the lack of political will on the part of the parties, the inability to reach agreement on the level of compensation to be provided, and the failure to include provisions regarding compensation for property left behind in a prior agreement on the exchange of populations.

The 1919 Treaty of Neuilly, signed by Bulgaria and Greece, provided for the relocation of 46,000 Greeks from Bulgaria and 96,000 Bulgarians from Greece.\textsuperscript{177} The 1923 Treaty of Lausanne,\textsuperscript{178} which, according to one

\textsuperscript{173} See Cairo Declaration, \textit{supra} note 97, Principles 1, 4. Principle 4 states that a "State is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated by international law to compensate an alien." \textit{Id.} at 4. See \textit{supra} Part III for a discussion of these principles.

\textsuperscript{174} See Beyani, \textit{supra} note 94, at 134, n.15 (noting that the Cairo Declaration, although not legally binding, "is persuasive and may have an indirect legal effect in the context of the specific application of State responsibility as general principles of law").

\textsuperscript{175} See Tomuschat, \textit{supra} note 106, at 74 (writing that "[a]lthough the legal reasoning may be developed to [support a right to compensation] without any apparent flaws, one cannot ignore the fact that there is little practice confirming the existence of a duty to pay financial compensation"); James C. Hathaway, \textit{Reconceiving Refugee Law as Human Rights Protection}, 4 J. Refug. Stud. 113, 119 (1993).

\textsuperscript{176} \textsc{Guy Goodwin-Gill, The Refugee in International Law} 221-22 (1996).


\textsuperscript{178} Treaty of Peace, July 24, 1923, 28 L.N.T.S. 11. This Treaty was a reaction to the significant 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 as a result of the military disaster in Smyrna in September 1922, by the end of the Greco-Turkish war, hundreds of thousands of Greeks were either massacred or forcibly uprooted from their homelands and compelled to flee to Greece." Christa Meindersma, \textit{Population Exchanges: International Law and State Practice - Part I}, 9 Int'l J. Refug. L. 335, 338 (1997).
commentator, "wrote 'ethnic cleansing' into the formal language of diplomacy,"179 provided for the compulsory mutual exchange of populations between Greece and Turkey: more than a million Greeks who had previously been Turkish citizens and about 500,000 Turks who had formerly been Greek citizens were forced to depart for the other side.180 Following conclusion of these two treaties, the national governments seized the immovable property that the expellees left behind and used it, when necessary, for public purposes. Although these agreements did not grant the expellees the right to repossess this property, they did provide procedures for compensating refugees for lost property and for calculating the amount of compensation.181

Although Bulgaria and Greece paid some compensation for property, the Greek-Turkish arrangement proved too difficult to implement. After a series of negotiations, the two sides agreed that each would assume the rights to the property left in its jurisdiction. They then proceeded to set off the claims for compensation, and Greece was required to make a one-time payment of 425,000 drachmas to the Turkish government.182

To settle the dispute between Hindus and Muslims in British India, an agreement on population transfer was adopted in 1947. This resulted in the partition of the subcontinent into two states, India and Pakistan, requiring the relocation of millions.183 As with the population transfers described above, the two governments seized the immovable property left by the expellees, which they then used to settle incoming refugees,184 and

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180. See id. Article 1 states that "[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, supra note 178, art. 1.
182. Convention Greco-Turque, signed on June 10, 1930, reprinted in LADAS, supra note 181, at 817. See also Benvenisti & Zamir, supra note 177, at 330; Meindusma I, supra note 178, at 344-45.
183. See id. at 323; RUSSELL BRINES, THE INDO-PAKISTANI CONFLICT 18-48 (1968); CHAUDHRI MUHAMMAD ALI, THE EMERGENCE OF PAKISTAN (1967). Ali estimates that nine million people relocated to West Pakistan. Id. at 274.
184. See Benvenisti & Zamir, supra note 177, at 323 n.164; Ali, supra note 181, at 267-70. Benvenisti and Zamir write:

Legally, the property left by refugees was administered in each province by a custodian of evacuee property. This system stemmed from an Indian-Pakistani agreement to protect the property of refugees, expressed in a joint declaration of the Prime Ministers of India and Pakistan issued on September 3, 1947, which stated that "both governments will take steps to look after the property of refugees and restore it to its rightful owners." . . . The system was based on the assumption that the relocation of populations might be a temporary phenomenon, and that many would eventually return to their homes. As time passed, and return seemed more and more unlikely, the attitude of the Governments changed, and "the refugee's title to property he had left in the other Dominion became thin and shadowy and finally disappeared."
agreed on a compensation scheme for property left behind.\textsuperscript{185} Although India and Pakistan agreed on a system of compensation, disagreements over the actual valuation of the property, as well as political difficulties, impeded implementation.\textsuperscript{186}

With respect to the Israeli-Palestinian conflict, the General Assembly established a three-member U.N. Conciliation Commission for Palestine (CCP) to press for a settlement and seek implementation of other aspects of Resolution 194(III), including the right to compensation. In 1951 the CCP proposed a scheme to settle the issue of compensation for Arab refugees.\textsuperscript{188} According to this plan, Israel would pay

\begin{quote}

as compensation for property abandoned by those refugees not repatriated, a global sum based upon the evaluation arrived at by the Commission's Refugee Office; . . . a payment plan, taking into consideration the Government of Israel's ability to pay, [would] be set up by a special committee of economic and financial experts to be established by a United Nations trustee through whom payment of individual claims for compensation would be made.\textsuperscript{189}
\end{quote}

Given the limit of Israel's economy at that time, "the CCP suggested that Israel make piecemeal payments to the special committee over a period of many years. Until the full payment was made, other sources would provide the committee with funds for disbursement to the refu-

\begin{footnotes}
\item[185] Benvenisti & Zamir, supra note 177, at 323 n.164 (quoting Au, supra note 183, at 268).
\item[186] See Au, supra note 183, at 270 (discussing Inter-dominion agreement in January 1949).
\item[187] Id.
\item[188] During the period between December 1947 and September 1949, as a result of the Arab-Israeli conflict following the U.N. partition of Palestine, a major exodus of Palestinian refugees took place. 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. This flight, which involved roughly half of the population of the territory, left some 370 villages abandoned. See Benvenisti & Zamir, supra note 177, at 297. Estimates of the number dislocated differ; according to the U.N., some 700,000 Palestinians became refugees. See Shlomo Gazit, The Palestinian Refugee Problem 2 (1995). Some independent researchers, however, think that the number was closer to 539,000. See Terrence Prittie & Bernard Dineen, The Double Exodus: A Study of Arab and Jewish Refugees in the Middle East 8-9 (1974).
\end{footnotes}
While Israel accepted the principle of compensating Arabs for property they had abandoned in Israel and was willing to try to resolve this issue, it insisted that further discussions were needed to determine how to value the property. The Palestinians, on the other hand, demanded prompt payment based on the “true value” of the property and provided on an individual basis rather than in the form of a lump sum. In addition, they refused to allow the size of Israel’s economy to be linked to the total amount of compensation that the Palestinian refugees should receive. Because of these differences, the parties were unable to agree on a mutually acceptable compensation scheme at that time and have never been able to agree on a scheme that would compensate Palestinian refugees for property they abandoned during the conflict.

Finally, in an effort to provide a basis for resolving the decades-old conflict between the Turkish and Greek communities on Cyprus, a cons-

190. Benvenisti & Zamir, supra note 177, at 336. See also Progress Report, supra note 189, at 6.
192. The issues affecting valuation were: that Arab property had been abandoned following the Arab aggression of 1948; that Israel’s ability to pay was affected by the Arab boycott and the need to absorb Jewish refugees from Arab countries; that Jewish property had been abandoned in the West Bank and Gaza Strip during the 1948 war; and that Jewish property had been confiscated in other Arab countries. See id. at 8, 18-19.
194. See id.
196. See supra notes 161-62 and accompanying text. Analysts of the Arab-Israeli conflict have almost universally viewed compensation for lost property as a central and necessary feature of a final settlement of the refugee issue. In addition to these examples of the failure to implement provisions regarding compensation in agreements following or precipitating mass population transfers, the Inter-American Commission’s recommendation that Nicaragua pay adequate compensation to the Miskito Indians for their loss of property following their mass flight across the border into Honduras has been completely ignored, i.e., the Government of Nicaragua has never paid the Miskitos. Interview with Milton Castillo, Staff Attorney, Inter-American Commission on Human Rights, Washington, D.C. (Dec. 4, 1998); ORGANIZATION OF AMERICAN STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS OF A SEGMENT OF THE NICARAGUAN POPULATION OF MISKITO ORIGIN AND RESOLUTION ON THE FRIENDLY SETTLEMENT PROCEDURE REGARDING THE HUMAN RIGHTS SITUATION OF A SEGMENT OF THE NICARAGUAN POPULATION OF MISKITO ORIGIN, 21 (1983).

The Inter-American Commission on Human Rights recommended that the Nicaraguan Government not only had to assist in the resettlement of displaced persons who wished to return to their former lands, but also had to provide them with adequate compensation for their property. The Commission found Government of Nicaragua was responsible for the mass flight of Miskitos, some 8000 of whom were subsequently settled in refugee camps in Honduras. See id. at 29-31.
197. In July 1974, following 11 years of civil strife of Cyprus, Turkish military forces occupied the northern third of the island. As a result of the Turkish invasion and the ensuing atrocities, some 180,000 Greek Cypriots fled to the Greek controlled southern part of the island. An estimated 45,000 Turkish Cypriots living in the south moved to the Turkish controlled territory, settling into homes vacated by Greek Cypriot owners.
flict that has resulted in the displacement of some 200,000 people on the island, the U.N. Secretary General Boutros Boutros-Ghali formulated a “Set of Ideas on an Overall Framework Agreement on Cyprus.”\(^{198}\) As part of the Secretary General's efforts to strike a balance between the interests of the displaced persons and the goal of creating homogeneous communities, the Framework provides that 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.\(^{199}\)

Although the Set of Ideas was endorsed by the Security Council, neither the Greek- nor Turkish-Cypriots have accepted it, and the thousands of displaced persons remain unable either to return to their home or to receive compensation for property left behind when they fled following the Turkish army's landing on the island in 1974. Thus, despite being included in many of the agreements that precipitated or resulted from mass population movements in the twentieth century, compensation has generally not been available to those refugees unable or unwilling to return to their homes.\(^{200}\)

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\(^{199}\) The Set of Ideas, in fact, provides a structure for settling the displaced persons' compensation claims, in which one can see the seeds of the framework of DPA Annex Seven, Chapter II:

76. Each community [i.e., Greek and Turkish] will establish an agency to deal with all matters related to displaced persons.

77. The ownership of the property of displaced persons, in respect of which those persons seek compensation, will be transferred to the ownership of the community in which the property is located. To this end, all titles to properties will be exchanged on a global communal basis between the two agencies at the 1974 [time of the Turkish invasion] value plus inflation. Displaced persons will be compensated by the agency of their community from funds obtained from the sale of the properties transferred to the agency, or through the exchange of property. The shortfall in funds necessary for compensation will be covered by the federal government from a compensation fund. . . .

The Department of State lawyers used the Framework Agreement’s provisions concerning compensation for property of displaced persons who do not wish to return to their homes as a model when drafting Annex Seven of the DPA, which enunciates the right of refugees and displaced persons to receive compensation for their property, and establishes the CRCP.

\(^{200}\) The agreements that led to the most significant population movements of the 20th century neglected to address the issue of compensation. The Potsdam Declaration, issued by the Allies at the end of the second world 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. 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, A TERRIBLE REVENGE: THE ETHNIC CLEANSING OF THE EAST EUROPEAN GERMANS, 1944-1950 (1994); ALFRED DE ZAYAS, NEMESIS AT POTSDAM (3d ed. 1988) [hereinafter DE ZAYAS, NEMESIS]. Other transfer agreements, involving smaller numbers of people, were implemented in parts of Central and Eastern Europe.
In short, very few examples exist where States of origin have compensated refugees for property which they abandoned following forcible displacement. One significant instance involves the payment of 78.4 billion Deutsche Marks by the German Government to victims of Nazi persecution who were forced to leave Germany during the Nazi era, as compensation for loss of property, liberty, and dignity.\footnote{201} Fulfilling its obligations under the 1954 Transition Agreement, the Federal Republic of Germany (FRG) enacted the “Supplementary Federal Law for the Compensation of the Victims of National Socialist Persecution” of June 24, 1956, and the “Final Federal Compensation Law” of September 14, 1965. Under these laws, programs for restitution and compensation were established. The former law sought to compensate those persecuted for political, racial, religious, or ideological reasons, whereas the latter provided compensation for property lost or confiscated. To date, this is the most comprehensive system of compensation for victims of persecution let alone refugees.\footnote{202} In a review of this important precedent, one commentator, remarking on the positive impact that such compensation has had in Germany, noted that for numerous victims,

payments have meant the difference between abject poverty and a dignified life with modest security. . . . The persecutions by the Nazi regime were unparalleled and unique in their scope and inhumanity. They cannot be atoned and cannot be forgotten. However, from an historical and legal point

following the redrawing of borders after the war. See \textsc{Eugene Kulisher}, \textit{Europe on the Move} 282-88 (1948).

The Declaration failed to deal with the return or compensation of the refugees. 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 \textsc{Julius Stone}, \textit{Israel and Palestine} 22 n.27 (1981). 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 Allies, but no formal commitment was made, apart from the general promise in the Potsdam Declaration for "orderly and humane" transfers. \textsc{De Zayas, Nemesis}, supra, at 103.

In the early 1990s, following the collapse of the East and Central European communist regimes, the Czech Republic rejected the claim to compensation for Sudeten German property and this difficult issue, one of many resulting from the post-war population transfers, remains unresolved. See \textsc{Benevisti & Zamir}, supra note 177, at 322, n.153. The Czechoslovak-German Treaty on Good Neighborly Relations and Friendly Cooperation of February 27, 1992 did not address this issue. See id. at 322-23.

\footnote{201} See \textit{German Restitution for National Socialist Crimes} (last modified Oct. 21, 1999)\http://www.germany-info.org/newcontent/index_gic.htm>.\footnote{202} For a thorough discussion of the different mechanisms the FRG Government used to compensate the victims of Nazi persecution, see, for example, \textsc{Kurt Schwerin}, \textit{German Compensation for Victims of Nazi Persecution}, 67 NW. U. L. Rev. 479 (1972); for a discussion of the restitution and compensation for property taken by the U.S.S.R. and the German Democratic Republic, see, for example, \textsc{Annette D. Elinger}, Comment, \textit{Expropriation and Compensation: Claims to Property in East Germany in Light of German Unification}, 6 Emory Int’l L. Rev. 215 (1992); \textsc{Peter E. Quint}, \textit{The Constitutional Law of German Unification}, 50 Md. L. Rev. 475 (1991); \textsc{Dorothy Ames Jeffress}, Note, \textit{Resolving Rival Claims on East German Property upon German Unification}, 101 Yale L.J. 527 (1991).
of view, the compensation program and reparations constitute a unique operation. 203

Conclusion
For many of the dislocated Bosnians, receiving some compensation for the property to which they are unable or choose not to return would mean the difference between a life dependent on international aid and one affording them the means to resolve their displacement. Many Bosnia-observers, however, fear that implementation of the right to compensation in Annex Seven of the DPA will have a negative impact on the efforts of the international community to recreate a multi-ethnic Bosnia. Yet securing compensation, provided for in Annex Seven and arguably supported by accepted principles of international law, on behalf of Bosnian refugees and displaced persons is important for a number of reasons. Beyond the needed financial assistance it would provide individual refugees and displaced persons, it would render a measure of justice to those dislocated during the war who genuinely do not wish to return to their pre-war homes and who, four years after the signing of the DPA, have largely been ignored by the international community. Although the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY) has indicted a number of individuals allegedly responsible for, inter alia, the "ethnic cleansing" campaigns that ravaged Bosnia during the war, a more individualized measure of justice may be needed. After all, "is it realistic to suggest that symbolic prosecutions will somehow vindicate the suffering of victims?" 204 Even if the ICTY is successful, and convicts fifteen to twenty defendants, including people of high position and responsibility for crimes, will the millions of Bosnians who bear the scars of the conflict feel that justice has been attained — particularly if their situations continue to be desperate? 205

Implementing the right to compensation enunciated in Annex Seven and requiring the current Bosnian Government to provide such compensation, would have ramifications beyond Bosnia as well. It could serve as an important precedent supporting the right of the dislocated, following a mass dislocation to receive compensation from their State of origin for property in lieu of return and would be an important step toward this principle becoming more than simply a "pious ideal." 206 The further development of this right, with its corresponding obligation on the State of origin, may be one way to address the dramatic rise in the number of refugees and displaced persons in the last forty-five years. 207 It might not only provide

206. Goodwin-Gill, supra note 176, at 221.
207. Since 1951, the number of refugees, largely the result of ethnically motivated conflicts, has grown rapidly from 1.2 million to a total of 13.2 million in 1996, with an
the international community with a mechanism to hold governments responsible for the consequences of their gross human rights violations but guarantee a remedy to the dislocated victims of such breaches of international law.


The further development of this right and corresponding obligation of the State of origin would only have a deterrent effect in a State where there is an identifiable government that can be held responsible for the refugees fleeing from that territory. Thus, while it might have had an impact in Kosovo, where Slobodan Milosevic, the authoritarian President of the Federal Republic of Yugoslavia, and his military police bear responsibility for the massive refugee flows of this past year, it would not have had an impact in preventing the recent mass dislocation that has affected Sierra Leone, where there has been a complete collapse of the State.