THE RIGHT TO RETURN HOME: INTERNATIONAL INTERVENTION AND ETHNIC CLEANSING IN BOSNIA AND HERZEGOVINA

Marcus Cox*

1. INTRODUCTION

The use of terror to separate the ethnic groups in Bosnia and Herzegovina was a deeply tragic episode, with devastating effects on the lives of millions of people. Although the Dayton Agreement of December 1995 has brought a fragile peace to Bosnia and Herzegovina, it has done so at the cost of the division of its territory, its population and almost every aspect of civil life along ethnic lines. Two years into the peace process, the progress of return of refugees and displaced persons has been extremely disappointing. More than two million people—almost half the population—are still dispossessed of their homes. Some 600,000 of these are refugees abroad who have not yet found durable solutions, many of whom face the prospect of compulsory return into displacement within Bosnia and Herzegovina in the near future. Another 800,000 have been internally displaced to areas in the control of their own ethnic group, living in multiple occupancy situations, in collective centres or in property vacated by the displacement of others, often in situations of acute humanitarian concern. The fundamental issue for the future of the post-war society of Bosnia and Herzegovina is whether these people can or will return to their homes.

The phenomenon of ethnic cleansing in the former Yugoslavia has been one of the most serious challenges to the international order in the post-Cold War era. It demanded a response from the international community through the blatant illegality of its conduct, for the scale of human suffering it caused, for the refugee burden imposed on neighbouring States and

* The author is a former legal adviser to the Commission for Real Property Claims of Displaced Persons and Refugees in Sarajevo, and recently undertook a study on behalf of UNHCR and the Property Commission concerning return and relocation issues in Bosnia and Herzegovina: UNHCR & CRPC, "Return, Relocation and Property Rights: A Discussion Paper" (1997). This article builds upon the results of that study, but represents only the opinions of the author, not the institutions which supported the research.


2. In this article the term “refugee” is used to refer to citizens of Bosnia and Herzegovina displaced outside the borders of Bosnia and Herzegovina, irrespective of their status under the Convention Relating to the Status of Refugees 1951 (“the 1951 Convention”), while “displaced person” refers to those displaced within the borders of Bosnia and Herzegovina.
for the continuing security implications in a highly volatile part of Europe. Civil war represents a breakdown of one of the structural principles of the State system: that a State is responsible for the well-being of its citizens. When civil war is undertaken for the express purpose of excluding entire ethnic groups from a political community, it elevates that breakdown into a highly subversive and dangerous ideology. It has prompted widespread fears that the State system may not be sufficient to contain the centrifugal forces of nationalism.\(^3\) Intervention in Bosnia and Herzegovina, both in the conflict itself and in the reconstruction of society according to the Dayton formula, was undertaken with the aim of opposing separatist nationalism as an ideology, and outlawing ethnic cleansing as its most extreme expression.

Two years into the peace process, the international community does not appear to have the capacity to bring about the reversal of ethnic cleansing directly. Some of the obstacles it faces in trying to do so are described in this article. Even if international actors can for a time achieve sufficient authority to influence the demographics of Bosnia and Herzegovina, they will not achieve any lasting result unless domestic institutions and processes are established that will endure beyond the period of international involvement. Norms of international law cannot be made to apply directly over competing ideologies and legal principles deriving from domestic social processes, however chaotic these might appear to be. International regulation must act indirectly, by seeking to manipulate the content of the domestic legal system. International intervention therefore has an important normative dimension to it. Its dynamics should be studied through the interaction between international and domestic actors, and between international and domestic legal processes.

Intervention in Bosnia and Herzegovina took place in an environment of substantial State collapse. At the point when the Republic of Bosnia and Herzegovina gained widespread international recognition as an independent State, it lacked the objective features of Statehood.\(^4\) The central government had become essentially a Bosniac regime with some intermittent Croat involvement, and controlled barely 30 per cent of the territory. The country was subject both to claims for territorial and political independence from ethnically diverse groups within Bosnia and Herzegovina and to irredentist claims from the neighbouring States of rump Yugoslavia and

---


Croatia. The Dayton Agreement seeks to resolve these claims within a highly decentralised federal structure, with guaranteed independence and power sharing among the three ethnic groups. In the time period required for the constitution to take hold as a new basic norm, and to create a stable legal and political system, the Dayton Agreement provides for substantial military and civilian involvement from the international community. The extent of involvement by a range of different international actors is quite remarkable, and the successes and failures of international policy in an extremely delicate time have an important influence on the shape of post-war society. The Dayton scheme is not yet fully implemented or accepted, and for the time being a curious hybrid legal system is in place, with norms deriving from the former Yugoslav Republic of Bosnia and Herzegovina, from the three separate ethnic political structures, from the Dayton Agreement and from international law all competing for influence.

Through the intervention of the international community, the international legal system comes to play an important role, by supplementing the domestic system where it has failed (most directly through the mandates of the international actors through which the intervention is carried out), and by seeking to dictate the content of emerging domestic norms (through international input into the adoption of the new constitution, and through the creation of supervisory institutions with international involvement). In this article I examine this process of normative development and interaction through the evolution of the key principle in response to ethnic cleansing: the right of refugees and displaced persons to return to their homes.

International involvement in the Bosnian conflict and its resolution occurred at a number of different levels, and with various distinct policy goals. One level I will call “security”, consisting of attempts to suppress the conflict and to limit the range of outcomes to those acceptable to the international community. Various values or policies have competed here: the desire to end the conflict quickly, to prevent its escalation in intensity or area, to minimise destabilising population movements, but at the same time to produce an outcome which would lead to a sustainable peace, without prolonged international military involvement. Action at this level included the years of painstaking mediation efforts by the International Conference for Yugoslavia, the arms embargo, economic sanctions against the Federal Republic of Yugoslavia, the creation of UNPROFOR and its successors and the use of NATO air-power, and culminated in the Washington\(^5\) and Dayton Agreements and their formulae for territorial division and federal structures based on ethnicity. This level of international involvement continues through the efforts of the Peace

Implementation Council and the numerous military and civilian agencies in Bosnia and Herzegovina to implement the Dayton Agreement. A second level was "humanitarian" response. This level included the protection of civilian populations during the fighting, the delivery of humanitarian supplies, the conduct of refugees to safety, the creation of safe havens, the provision of temporary protection status abroad, and reconstruction and return programmes. It also includes the limits of the international community's willingness to devote resources and take risks in implementing palliative measures. A third level of response to ethnic cleansing I will call the "regulatory": the condemnation of ethnic cleansing as illegal and abhorrent, and the punishment of its perpetrators. This is comprised mostly of verbal responses to the aims and methods of ethnic cleansing, including Security Council resolutions, and reactions from States and observer organisations, occurring at various levels of formality up to the indictments, arrests and judgments of the International Criminal Tribunal for the Former Yugoslavia.

The difference in norms, values, interests and actors engaged at these different (but overlapping) levels explains much of the ambiguity of the international response to ethnic cleansing. It has made the intervention a highly fragmented affair, as much prone to producing unintended consequences as advancing a specific policy goal. Without a common legal or policy framework to rationalise actions, it is difficult to identify an actor called "the international community". Yet, at the same time, the idea of the international community as a single agent capable of influencing or regulating the course of events is extremely significant. The horror of ethnic cleansing created a popular expectation that the international community should respond. The perpetrators of ethnic cleansing were conscious of the attention of the international community, and fought for its recognition even while they continued to defy it. The victims of the war turned to the international community for assistance, and the fall of the safe havens of Srebrenica and Zepa and the long years of the siege of Sarajevo were seen as a betrayal by the international community. Within Bosnia and Herzegovina, the Dayton Agreement and its institutions are widely regarded as the handiwork of the international community. This anthropomorphism of the many international actors into a single entity is what gives the intervention its powerful norm-creative character. How-

ever, it also means that the normative product of the intervention is a cumulative and often accidental effect of many discrete actions and events.

The first part of the article examines the right of refugees and displaced persons to return to their homes. The legal context for return is a complex and multi-layered situation, involving international refugee, humanitarian and human rights law, the *lex specialis* of the Dayton Agreement and its institutions, the continuing law of the former Yugoslav Republic of Bosnia and Herzegovina, and wartime legislative regimes in both Entities. The second part examines the dynamics of the international intervention as they relate to the return of refugees and displaced persons. The dilemmas facing UNHCR and other international organisations are examined, and some predictions for the future are presented.

II. THE RIGHT TO RETURN HOME

A. The Dayton Agreement and the Right to Return

The right of displaced persons and refugees to return to their home of origin, and the goal of achieving ethnic reintegration in Bosnia and Herzegovina, is written into the Dayton Agreement at a number of levels, and constitutes one of the foundational principles of the peace process. Textually speaking, the right to return is highly developed, both in terms of legal and constitutional principle and in terms of the institutional structure created to protect it. However, the rights and guarantees contained in the Dayton Agreement have so far proved illusory. The first two years of the implementation of the peace process have demonstrated that the parties are committed to those aspects of the Dayton Agreement which enable them to pursue separate political and social lives, but disregard with impunity the provisions dealing with human rights and refugee return. A legal analysis of the right to return cannot be satisfied with the Dayton Agreement and its formal status, but needs to look behind it to the complications and inconsistencies of the law as it actually applies in Bosnia and Herzegovina.

7. In this article "return" is used to refer specifically to return to home of origin, rather than repatriation to country of origin.

8. The Dayton Agreement takes the form of a brief General Framework Agreement followed by much more detailed annexes. The parties to the General Framework Agreement are the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, with the EU and each of the Contact Group States signing as witnesses. A number of the annexes have different signatories. The three most relevant to this article—Annex 4 (Constitution), Annex 6 (Agreement on Human Rights) and Annex 7 (Agreement on Refugees and Displaced Persons)—each have the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska as parties. At the time of signature, these entities represented the three ethnic groups in Bosnia and Herzegovina, and the term "parties" in this article is used as shorthand for the three separate political and military blocs. For a detailed analysis, see Gaeta, *op. cit.* supra n.4.
In the Basic Principles agreed in Geneva on 8 September 1995, which established the core principles of the Dayton Agreement, the parties agreed “to adopt and adhere to normal international human rights standards and obligations, including the obligation to allow freedom of movement and enable displaced persons to repossess their homes or receive just compensation”. The right of return is therefore foundational to the Dayton Agreement, although it is weakened at the outset by being coupled with the possibility of compensation, as though the parties might legitimately choose between allowing return or providing compensation in lieu of return. The Dayton Agreement itself contains numerous provisions relevant to the right of return, in Annex 4 (Constitution), Annex 6 (Agreement on Human Rights) and Annex 7 (Agreement on Refugees and Displaced Persons). The Constitution provides:

All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them.

In Annex 7 the parties undertake to ensure that refugees and displaced persons may return safely, “without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion”. They further undertake to prevent activities in their territory which would hinder return, to repeal adverse legislation, to prevent incitement of ethnic hostility, to suppress acts of retribution, to protect minority populations and to dismiss officials responsible for violations of minority rights.

Annex 7 also establishes the principle of choice of destination of returning refugees: “The Parties shall not interfere with the returnees’ choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life.”

The Constitution and Annex 6 to the Dayton Agreement provide what is perhaps the most comprehensive set of human rights principles and institutions in any country in the world. The citizens of Bosnia and Herzegovina are guaranteed “the highest level of internationally recognized human rights and fundamental freedoms”. The provisions of the Euro-

10. Constitution of Bosnia and Herzegovina, Art.5.
pean Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols apply directly in the domestic legal system, with priority over all other law. Thirteen fundamental rights are individually conferred by the Constitution, including the right to property and the right to liberty of movement and residence. All courts, agencies, governmental organs and instrumentalities operating in both Entities are obliged to apply and conform to the ECHR and the enumerated rights. Bosnia and Herzegovina is obliged to remain or become party to 15 additional international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights. Finally, to ensure that nothing was left out, the Constitution also provides that “the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities”.

Formally, the condition of displacement is well covered by these human rights principles. The typical case of an individual denied the right to return home involves a violation both of the basic right to return under the Constitution and of a series of specific human rights recognised under the international instruments. The most obvious of these are denial of the right to peaceful enjoyment of possessions (Article 1, Protocol 1 to the ECHR), denial of freedom of movement and residence (Article 12, ICCPR), discriminatory treatment before the law on grounds of race or religion (Article 26, ICCPR), and discrimination in housing (Article 5(e), International Convention on the Elimination of All Forms of Racial Discrimination).

The Dayton Agreement also established a number of institutions with considerable authority on paper to assist refugees and displaced persons with exercising their right to return. Chapter 2 of Annex 7 created a Commission for Displaced Persons and Refugees (now called the Commission for Real Property Claims of Displaced Persons and Refugees, or commonly “the Property Commission”) to adjudicate: any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

18. Art.II-7 and Annex I to the Constitution.
19. Art.III-3(b).
20. Annex 7, Art.XI.
The Property Commission comprises nine members, including representatives of all three parties and three international members appointed by the President of the European Court of Human Rights. The Property Commission has judicial authority to determine the lawful owner of property, and to value the property for the purpose of awarding compensation. It can set aside transactions made under duress during the conflict, sell, lease or mortgage properties which are found to be abandoned or in respect of which a claimant has received compensation, and issue compensation bonds for the future purchase of property. The Commission’s decisions are final, and any title or other legal instrument created by the Commission must be recognised as lawful throughout Bosnia and Herzegovina.21

Annex 6 to the Dayton Agreement establishes a Commission on Human Rights, which comprises an Ombudsperson and a Human Rights Chamber. The Commission on Human Rights has jurisdiction over violations of the ECHR and discrimination in the enjoyment of any other rights and freedoms, where the violation may be attributed to one of the parties.22 The Ombudsperson is appointed by the Chairman of the Organisation for Security and Cooperation in Europe (OSCE), and may investigate human rights abuses suffered by individuals or groups, whether in response to an application by an individual, an allegation by a party or non-governmental organisation, or on her own initiative. The Ombudsperson’s reports are not binding judgments, but a party which fails to take action in accordance with her conclusions is in breach of the Dayton Agreement, and may be referred to the High Representative or the Presidency.23 The Human Rights Chamber comprises 14 members, including a majority of eight international members appointed by the Council of Europe. It is a judicial organ which, as well as facilitating friendly settlement of disputes, issues final and binding decisions on compliance with the ECHR.24 Under Annex 6 the parties also undertake to encourage and cooperate with other non-governmental and international organisations engaged in the protection and monitoring of human rights, including the United Nations Commission on Human Rights and the OSCE.

There are a number of other international institutions with functions under the Dayton Agreement whose operations bear upon return issues.

22. Annex 6, Art.II-2. The Chamber has held that Annex 6 does not have retrospective application, and that its jurisdiction is therefore limited to violations occurring after 14 Dec. 1995. However, although most refugees and displaced persons left their homes before that date, the denial of property rights represents a continuing human rights violation which falls within the Chamber’s jurisdiction: Decision on the Admissibility of Case No.CH/96/23 Kalincevic v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, 6 June 1997, para.11.
23. Annex 6, Art.V.
24. Annex 6, Art.XI.
Annex 10 entrusts implementation of civilian aspects of the Dayton Agreement to a High Representative, appointed by the Peace Implementation Conference. The High Representative is responsible for monitoring and co-ordinating the civilian aspects of the peace process, and establishing the joint institutions of Bosnia and Herzegovina. The High Representative has final authority regarding the interpretation of the Dayton Agreement, including the power to declare whether specific conduct of the parties is in compliance. He may therefore rule upon whether legislation or practices of the Entities are obstructing the return of refugees and displaced persons, contrary to Annex 7. The sanction power of the High Representative is to recommend measures to the Peace Implementation Conference and the Security Council, in particular the suspension of or application of conditions to international aid to the parties, or the reimposition of sanctions on the Dayton parties. The power of interpretation of the Dayton Agreement has itself been interpreted very robustly. At the Peace Implementation Conference meeting in Bonn in December 1997, the High Representative was called upon to take interim measures to overcome deadlocks within the central institutions of Bosnia and Herzegovina, which stand as binding laws until such time as the Presidency or Council of Ministers adopts decisions consistent with the Dayton Agreement.

The Council welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues:

a. timing, location and chairmanship of meetings of the common institutions;

b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;

c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.

26. Annex 10, Art.II.
27. Annex 10, Art.V.
In December 1997 the High Representative took the decision to adopt the Law on Citizenship which had been prepared by the Office of the High Representative (OHR) and submitted to the Parliament of Bosnia and Herzegovina, but had not been adopted within the deadline imposed by the Peace Implementation Conference.  

UNHCR also has official status under the Dayton Agreement as the lead agency responsible for co-ordinating repatriation and humanitarian assistance for refugees and displaced persons. Annex 7 calls upon UNHCR to develop a repatriation plan in consultation with the parties and asylum countries, and obliges the parties to implement the plan and conform their internal laws to it. This appears to give UNHCR an extraordinary power, as repatriation by its nature touches on the most difficult political and social issues in the country, and there is a considerable volume of domestic legislation which is obstructive of UNHCR aims. In Annex 7 the parties “call upon States that have accepted refugees to promote the early return of refugees consistent with international law”, which is a curious inclusion as “early return” seems much more an interest of the asylum States than the parties. As lead agency, UNHCR has involved a large number of international and non-governmental agencies as implementing partners in its very substantial annual repatriation plans, which have included rehabilitation, capacity building, community development and other similar initiatives.

In terms of guiding international policy approaches to return, UNHCR is clearly the most influential organisation. UNHCR’s involvement has extended well beyond its traditional mandate, encompassing not just assistance to internally displaced persons but also initiatives on behalf of those at risk of displacement and for the population as a whole. The extent of UNHCR involvement in sensitive political questions has in the eyes of some observers pushed it beyond its traditional palliative role, possibly compromising its core function.

All these agreements, constitutional principles and institutional structures provide comprehensively for the right to return, both by ensuring

---

29. OHR Press Release, 16 Dec. 1997. Various other binding measures have since been imposed, including the dismissal of police and municipal officials.
32. Ibid.
34. Barutčiski, op. cit., supra n.30.
that the right exists within the domestic legal system of Bosnia and Herzegovina and by giving the international community a number of points of leverage to ensure compliance by the parties. This wholehearted embrace by the parties to the Dayton Agreement of the rights of refugees and displaced persons to return seems rather incongruous, being committed to paper so soon after the cessation of five years of bitter conflict waged explicitly for the purpose of dividing the population. It does not come as a surprise, therefore, to find that none of the parties has made any substantial effort to allow refugees and displaced persons of other ethnic groups to return to homes within the territory under its control. The war in Bosnia and Herzegovina, and by extension the campaigns of ethnic cleansing which were carried out to a greater or lesser extent by all parties, were suppressed by international intervention with the underlying issues and tensions far from resolved. The diplomatic initiative at Dayton seized upon the psychological and military effects of NATO air-strikes, the alienation between the Bosnian Serbs and the Milosevic regime in Belgrade, and the shift of the military balance in favour of the fragile Bosniac-Croat alliance, to convince the parties that the point of maximum benefit from the conflict had been obtained. As significant as this agreement was, it is a far cry from the strength of common purpose that would be required to create a complex new constitutional structure with sophisticated human rights guarantees. The circumstances of accession to the agreement are grossly mismatched with the content. Small and undemocratic delegations of wartime leaders under immense military and economic pressure, working to tight deadlines in an airforce base in a foreign country, constitute a familiar enough process for a ceasefire agreement, but not for a constitution. The far-reaching provisions on human rights and refugee returns can only be attributed to the creativity and thoroughness of US State Department lawyers, and the substantial indifference of the delegations themselves to much of the text which they signed. Anecdotal evidence tends to support this: the drafts of the Constitution and most of the annexes were prepared in the English language, and were not significantly redrafted during the negotiations before being initialled in Paris on 14 December 1995. Even two years later the Constitution of Bosnia and Herzegovina has not been promulgated in any official publication within the country, and no official version has been produced in the local languages.

35. Political Declaration from the Ministerial Meeting of the Steering Board of the Peace Implementation Conference (Sintra, 30 May 1997), para.44.
36. Security Council Res.1022 of 22 Nov. 1995 would have automatically reimposed sanctions on the Federal Republic of Yugoslavia if the agreement had not been signed by the Serbs.
37. Personal communication to the author from US Department of State officials.
The substance of the agreement itself reflects the incongruity of process. The Dayton Agreement allows for the country to be partitioned along ethnic lines, at least in a bipolar fashion between the Bosniac-Croat Federation of Bosnia and Herzegovina on one side and the Republika Srpska on the other. The Entities are conceived as largely autonomous political communities within a federal structure where very little authority is given to the central government. The Parliamentary Assembly and Joint Presidency of Bosnia and Herzegovina are regulated by the Constitution in such a way that the dominant nationalist party from any ethnic group may effectively block any legislative or executive measure. For so long as monolithic nationalist parties dominate the political processes, as they have done to date, the institutions of Bosnia and Herzegovina are unlikely to take any steps to promote refugee return. In the preamble to the Constitution, Bosniacs, Croats and Serbs are described as constituent peoples of Bosnia and Herzegovina. Each is represented by five members in the House of Peoples, irrespective of the number of voters in each ethnic group. All five members of the House of Peoples elected from Republika Srpska must be Serbs, even though before the war Serbs were only 53 per cent of the population in that area. The structure of representation is not consistent with the possibility of a return to pre-war levels of ethnic integration, and in denying representation to ethnic minorities in both territories may even be in breach of the principles of non-discrimination enshrined in the Constitution.

To rationalise a constitutional structure premised on ethnic separation with the unconditional right to return, one might try to draw on the principle of choice of residence. Is the constitutional structure made coherent

38. The institutions of Bosnia and Herzegovina have responsibility for foreign affairs and trade, customs and monetary policy, immigration, inter-Entity criminal law enforcement, communications and transport, and air traffic control (Art. III-1). The residue of powers go to the Entities, including property matters. The Constitution does provide that Bosnia and Herzegovina shall assume responsibility for the matters agreed in the Annexes (Art. III-5). However, by tacit consent of the parties, no action has been undertaken at that level by any institution of Bosnia and Herzegovina.


40. The term “Bosniac” is an old term revived by the Bosnian Muslims during the course of the war to denote their nationality. Muslims have been recognised as a “Nation of Yugoslavia” in the Yugoslav Constitution since 1991, although the percentage of those practising their religion was lower in the Republic of Bosnia and Herzegovina than in any other Republic. Poulton, The Balkans: Minorities and States in Conflict (1993).

41. Equivalent provisions apply to the Bosniac and Croat representatives from the Federation, and no provision is made for the representation of Serbs in the Federation, even though Serbs constituted 20% of the pre-war population of that territory.

42. Slye argues that the Constitution is in breach of Arts. 2(1) (non-discrimination) and 25 (right to participate in government) of the International Covenant on Civil and Political Rights op. cit. supra n.39.
by the tacit assumption that most refugees and displaced persons will voluntarily choose to remain in an area where their own ethnic group is in the majority? The notion of choice between return and relocation is highly problematic in an environment where lack of freedom of movement, persecution of minorities and widespread ethnic discrimination are the norm rather than the exception. Very little of the relocation which has occurred to date within Bosnia and Herzegovina has been of a voluntary nature but, rather, the direct result of fighting or persecution. The circumstances now facing individuals—political pressures to move or to remain, physical destruction of property, lack of economic activity in their area of origin, illegal occupation of their homes by other displaced persons, fear for their own security—are so many and varied that identifying genuine choices is impossible. The principle of choice of residence cannot provide a justification in principle for a constitutional system based upon ethnic separation.\(^{43}\) The only conclusion that can be drawn is that the Constitution is simply predicated on the continued factual separation of the groups, and therefore by extension on the widespread breach by the parties of their obligations to permit return.

The right of refugees and displaced persons to receive compensation for property that is not restored to them is also highly problematic. Compensation was included as a first principle of the Dayton Agreement at the insistence of the Serbs, who have maintained consistently that Serbs from the Federation do not wish to return to their homes, and must receive compensation instead.\(^{44}\) Compensation is payable for loss of possession, rather than for war damage.\(^{45}\) It is to be determined and awarded by the Property Commission, which becomes the successor in title to any individual who receives compensation. Compensation may take the form of a monetary award or bond, drawn against a Refugees and Displaced Persons Property Fund established in the Central Bank of Bosnia and Herzegovina, which may be funded by direct payments from the parties, States or other organisations, or by the activities of the Property Commission trading with the properties it receives pursuant to compensation awards.\(^{46}\) There are a number of significant practical problems which have prevented this system from operating: there have been no donations from the international community, the parties or anybody else for the purposes

---

43. "Only in the intended end-state of peace implementation, with two multi-ethnic Entities functioning on the basis of the rule of law, equipped with effective judiciary and administrative institutions, achieving the levels of human rights protection and freedom of movement throughout the country to which the Parties have committed themselves, will such decisions [to relocate] be truly voluntary." Statement by the Deputy High Representative, Mr Andrew Bearpark, to the Humanitarian Issues Working Group, Geneva, 17 Dec. 1997.

44. Personal communication to the author from US Department of State officials.

45. Annex 7, Art. XI.

46. Annex 7, Art. XIV.
of compensation, the Central Bank has not yet become operative, and the Property Commission has no means of gaining possession of the properties abandoned by those seeking compensation in order to trade with them. There are also more basic problems with the concept of compensation. Compensation by its nature implies an entitlement for those who are prevented from returning, rather than for those who choose not to return. In view of the broad obligations of the parties to facilitate return, entitlement to compensation should only arise following a breach of the Dayton Agreement by one of the parties. Awarding compensation, particularly if international funds are used, effectively cures and rewards that breach by cancelling the property title of the original inhabitant, leaving the temporary occupant or the local authorities in possession of the property. If compensation is offered to individuals who simply do not wish to return to their properties, it facilitates the transfer of property title between the ethnic groups. If compensation takes the form of bonds which may be used for the purpose of buying other property from the Property Commission, the Commission would become in effect a clearing house for the exchange of property, which would ensure that the distribution of property comes to reflect the demographic results of ethnic cleansing.

In sum, despite its frequent articulation of the right to return, the Dayton Agreement reveals a certain ambivalence at a deeper level. This analysis is by no means intended to be critical of those involved in the preparation of the document, who were no doubt well aware of the inconsistencies. The assumption of lasting ethnic separation was a realistic one, as the subsequent two years have proved, and the constitutional system had to be one that could function in that environment. The intention was no doubt to use the rare moment of co-operation among the parties to provide as many guarantees as possible on paper in the hope that some might become operative in the future. However, the result is that the right to return occupies an ambiguous status within the Constitution.

B. The Right to Return Under Domestic Legislation

The Constitution of Bosnia and Herzegovina supersedes any inconsistent provisions of the constitutions and laws of the Entities. In practice, however, there is still a considerable body of Entity legislation which obstructs the right to return in an overt fashion, and which is still applied by local authorities and courts. In both Entities wartime legislation was enacted to regulate the use of abandoned property. In the Federation, in the case of privately owned accommodation, municipal authorities may declare property to be “temporarily abandoned”, and grant certificates of temporary occupancy to other persons.

47. Art. III-3(b).
48. Law on Abandoned Real Property Owned by Citizens During a State of War or in a
The ownership rights of the absent owner are preserved, but the owner's right of possession is suspended. Upon the original owner registering a desire to return, the authorities are supposed to terminate the temporary occupancy right, and allow the original owner to return within a stipulated period. This regulation of possessory rights in the public interest during the course of the war and in the immediate aftermath was not inherently contradictory to the Dayton principles. Protocol 1 to the ECHR allows a State to interrupt the peaceful enjoyment of possessions by a citizen provided that it is in the public interest and in accordance with the law. However, the practices of the Federation and municipal authorities in implementing this legislation go well beyond legitimate public regulation. Very few original owners have succeeded in regaining possession from temporary occupants. Invariably, municipal authorities assign temporary occupancy rights only to members of their own ethnic group, which is intended to obstruct and has the effect of obstructing the return of minorities. The author is unaware of any instance where a local authority has fulfilled its obligation to evict a temporary occupant in favour of an original owner from another ethnic group. Where a local authority refuses to assist, the system provides no further remedy to the original owner.

Approximately 20 per cent of the accommodation in Bosnia and Herzegovina consists of socially owned apartments, which are held by individuals under a form of property right which is sui generis. Occupancy rights to socially owned apartments are allocated to workers by their employers, and subject to various conditions may be held for life. Apartments cannot be sold, sublet in their entirety, or used for any purpose other than as a principal residence. However, the right to the apartment may be inherited by members of the family of the original right-holder, making the occupancy right in practice a permanent one. Shortly after the cessation of hostilities the Federation adopted legislation giving refugees and displaced persons a time period of seven days to repossess their apartments, or 15 days if they were abroad. If they failed to do so, municipal authorities could declare the apartments to be permanently abandoned, and assign new occupancy rights on a temporary or permanent basis. In practice, of course, very few refugees or displaced persons even learnt of this requirement within the time limit, and many thousands of occupancy rights have been cancelled. The future of these socially owned apartments

Case of Direct Threat of War (Official Gazette of the Republic of Bosnia and Herzegovina No.1497/93). All references to domestic legislation are to English translations circulated by the Office of the High Representative in Sarajevo.

49. Usually 8 days: s.15.
50. Basic Law on Housing Relations of the Socialist Republic of Bosnia and Herzegovina.
51. Law on Abandoned Apartments (Official Gazette of the Republic of Bosnia and Herzegovina No.602, 892, 1209, 1692, 1304, 3604, 9/95 and 33/95).
is one of the most politically sensitive issues in the property law area. The local authorities in Sarajevo and other cities consider that those who left as refugees forfeited their occupancy rights, and regard the stock of apartments as a resource at their disposal to reward those who remained “to defend the city”. The problem therefore affects majority returnees (e.g. Bosniacs from Sarajevo) as well as minorities. Often the recipients of new occupancy rights are disadvantaged groups, soldiers or the families of soldiers killed in the war. Any attempt to evict them in favour of returning refugees or displaced persons meets with strong opposition in all quarters, and is not occurring to any significant degree.

In Republika Srpska a single piece of legislation regulates both private and socially owned abandoned property.\(^{52}\) It gives a similar right to the authorities to declare properties to be abandoned, and to assign temporary occupancy rights. However, it also provides that the original owner or occupant cannot return until and unless the temporary occupant returns to his or her original home, or receives fair compensation. As few Serbs for the time being are trying to return to homes in the Federation, and there is no compensation available, this results in the permanent suspension of the rights of the original resident. The Republika Srpska legislation also prevents owners who are outside the territory of Republika Srpska from transacting in any way with their property, except for carrying out an exchange of property.

The breakaway Croat Republic of Herzeg-Bosna, which was officially disbanded by the Washington Agreement, passed a number of laws relevant to property. Even though there is no place for Herzeg-Bosna law in the Dayton scheme, and manifestations of Herzeg-Bosna authority are periodically condemned by the international community,\(^{53}\) the laws continue to be influential in certain Croat-dominated areas of the Federation, and have been used to obstruct the return of minorities to their homes.\(^{54}\) There is further legislation on a number of other subjects in both Entities which obstructs refugee return. These laws include the imposition of prohibitive retrospective war taxes on returnees, customs duties on goods acquired outside Bosnia and Herzegovina, denial of access to public documents and records, and discriminatory and cumbersome citizenship laws.

52. Law on the Use of Abandoned Property of the Republika Srpska (Official Gazette of the Republika Srpska No. 3/96).

53. The Peace Implementation Council has declared that “maintaining administrative or other bodies that are unconstitutional, will not be tolerated. This applies to existing institutions of the former Herceg Bosna as well as of the former Republic of Bosnia-Herzegovina.” Political Declaration from Ministerial Meeting of the Steering Board of the Peace Implementation Council, Sintra, 30 May 1997.

54. E.g. the Decree on Abandoned Apartments (National Gazette of Herzeg-Bosna No. 13/93).
and registration procedures which restrict the access of returnees to social services.\textsuperscript{55}

It has proved extremely difficult to persuade the courts and authorities of both Entities that these legislative regimes have been superseded by the new Constitution and no longer apply. In January 1997 the High Representative issued a legal opinion stating that specific sections of the Law on Abandoned Apartments in the Federation and the Law on Abandoned Property in Republika Srpska were invalid as obstructing the right to return, and contrary to the ECHR.\textsuperscript{56} The OHR later distributed guidelines to the parties, explaining the minimum amendments which would be needed to bring the legislation into compliance, and, when that elicited no response, issued its own draft laws for introduction to the appropriate houses of parliament. In May 1997 the Peace Implementation Council called upon the parties to adopt the OHR drafts, under veiled threat of the suspension of economic aid.\textsuperscript{57} As a result of this pressure, in April 1998 the Federation adopted revised laws providing a procedure for refugees and displaced persons to apply to municipal authorities for permission to return to their homes. The focus of international attention has therefore shifted to supervising the implementation of this procedure across some 150 municipalities, which may prove an impossible task.

Experience shows that the formal invalidity of legislation under the Constitution and the Dayton Agreement is not enough to render it ineffective within the domestic legal system. A number of reasons can be advanced for this. One important factor is that there is no tradition in the legal culture of the former Yugoslavia for judges to adjudicate on the authority of competing legal materials, each with its own claim to legitimacy, or to assess the validity of legislation on substantive grounds. Such an intervention would be regarded as highly political in nature, and the judiciary does not enjoy either the independence or the authority to undertake it successfully. If courts were to take a pro-active role in enforcing the right to return, as has occurred in a few isolated cases, there is little chance that their decisions would be implemented. A number of organisations within Bosnia and Herzegovina, particularly the OSCE and the American Bar Association, have undertaken programmes to educate judges and practising lawyers on their new role under the Constitution and the human rights regime, but cultural change in the legal system in current conditions is proceeding extremely slowly.

Another important factor is the low degree of loyalty, or even interest, shown by many officials and citizens of both Entities to the Dayton Consti-

\textsuperscript{55. For a fuller description, see UNHCR, "Repatriation and Return Operation 1998" (HIWG/97/7, 1997). Parts VI and VII.}

\textsuperscript{56. Opinion of the Legal Adviser to the High Representative, Jan. 1997.}

\textsuperscript{57. Peace Implementation Council, op. cit., supra n. 53, at paras 38-39.}
tution. Not surprisingly, the illegitimacy of process which marked its adoption is reflected in its subsequent lack of real authority. It is not uncommon to hear Serb officials describe the Dayton Agreement, and by extension the Constitution, as agreements made under the duress of NATO air strikes, and therefore not applicable in Republika Srpska. Within the Federation, political leaders have shown more willingness to participate in the institutions of Bosnia and Herzegovina, and as a result the Federation has received significantly higher levels of international financial assistance than Republika Srpska. However, this co-operation has not extended as far as implementation of the constitutional provisions relating to human rights or refugee return, bringing Federation legislation into compliance, or modifying the activities of authorities at cantonal or municipal levels. The Constitution and other Annexes to the Dayton Agreement are generally seen as documents serving the interests of the international community, rather than any domestic interest.

Also relevant here is the difficulty of making the rule of law take hold in areas which are still substantially lawless. Many temporary occupants of properties have no rights under abandoned property legislation, but are simply occupying illegally the homes of other displaced families. Local courts are not offering any remedy to the original owners, being overloaded with cases and in many locations not functioning effectively, if at all. Under the continuing laws of the former Republic of Bosnia and Herzegovina, legal provisions for eviction favour the current occupant, providing broad grounds for defence or prolonged delay in execution. Returning refugees and displaced persons are finding it extremely difficult and time consuming to obtain a judgment in their favour. When they are able to do so, the police usually refuse to carry out the eviction order, leaving the owner without further recourse. The judicial and police system operates in a highly discriminatory fashion, not merely against minority returnees but also against refugees from the majority in favour of the current resident population. While a number of international agencies have undertaken "rule of law" programmes, in the form of education, lobbying or casework, little progress has been made in the face of opposition from local politicians.

C. International Refugee Law and the Right to Return Home

International refugee law is largely indifferent to the question as to whether refugees return to their original homes or relocate to another

58. The Parliament of Republika Srpska has recently elected a more moderate government with a single-seat majority, which has pledged itself to respecting the Dayton Agreement. The outcome of this development remains to be seen.
60. Law on executive procedure of the Socialist Republic of Bosnia and Herzegovina.
place within their country of origin. Both return and relocation are considered to be "durable solutions", which in UNHCR terminology is the threshold beyond which an individual ceases to be defined as a refugee, and therefore no longer requires the protection of the 1951 Convention. Because international refugee law is humanitarian in purpose, and the mandate of UNHCR is one of protection, the responsibility of the international community ceases once the refugee settles in a place of safety. A purely localised risk of persecution is not in general sufficient to ground refugee status, provided that flight to another part of the country is reasonable and safe. The courts of a number of States, including Germany, use this principle of the “internal flight alternative” in their interpretation of the 1951 Convention, according to which refugees are not considered to be refouled contrary to the Convention if there is any place within their country of origin where they can go without risk of persecution.

Most Bosnian refugees in European States were admitted under temporary protection regimes, and were expected to return to Bosnia and Herzegovina as soon as possible following the cessation of hostilities. The temporary protection regimes were promoted by UNHCR in 1992 as a way of encouraging European States to adopt more liberal admission policies. Under such a regime, the individual has no access to status-determination procedures, and is offered a more limited package of rights than those listed under the 1951 Convention, particularly as regards rights of employment. Barutciski notes that the compromise envisaged by UNHCR was not wholly successful, as the use of temporary protection regimes was accompanied by continued non-admission and a policy of containment of displaced persons within the former Yugoslavia. Bosnians under temporary protection still enjoy protection from refoulement under the Convention, as national refugee status determination is declaratory rather than determinative of that right. Nonetheless, it was clearly the expectation of asylum States that those offered temporary protection would return to Bosnia and Herzegovina soon after the end of the war.

61. UNHCR, op. cit. supra n.55, at p.9.
62. The draft EU Guidelines for Harmonised Asylum Policy state “there must be reasonable guarantees that the alternative location can be reached safely and provides stability and safety”: para.8.
63. Information provided by officials of UNHCR Bonn. For the UK position see Macdonald and Blake, Macdonald’s Immigration Law and Practice (4th edn, 1995), para.12.36.
Continued separation of the ethnic groups in Bosnia and Herzegovina has made it very difficult for most refugees to return, and the anticipated large-scale voluntary return movements after the cessation of hostilities have not eventuated.\(^67\) Most Bosnian refugees remaining in Europe originate from areas which are now under the control of another ethnic group, and would experience persecution or harassment if they attempted to return to their home of origin. Those who could most easily find acceptable living conditions in another part of Bosnia and Herzegovina have probably already returned,\(^68\) and the remainder would have great difficulty in finding shelter or work whatever their destination. The responsible authorities in Germany consider the temporary protection regime to have ended, leaving some 220,000 individuals liable for deportation as at 1 December 1997.\(^69\) Approximately 1,000 Bosnians were deported from Germany between August 1996 and the end of 1997. Most of the remaining refugees have had their "residence" or "toleration" permits revoked, and have been served notice of impending deportation.\(^70\) The threat of deportation, together with the suspension or reduction of social benefits, has been used to induce refugees either to return by their own means or to participate in "voluntary" repatriation programmes organised by UNHCR and the International Organisation for Migration.\(^71\) Approximately 95,000 refugees returned from Germany during 1997, most into internal displacement.\(^72\)

While UNHCR has urged host governments not to oblige individuals to return into internal displacement, it has done so by reference to humanitarian rather than legal arguments.\(^73\) In the absence of more specific individual grounds for refugee status, Bosnians have no legal claim to continued protection on the basis that they would suffer persecution in the part of the country in which their homes are located, because they are considered to have an "internal flight alternative". From the refugees' perspective the relocation alternative is rather bleak. Even if they relocate to a majority area they will suffer continued denial of their property rights,

\(^67\). See infra.

\(^68\). "Those refugees who could easily identify solutions for themselves on return have already done so. As most of the refugees remaining abroad originate from areas where they would now form part of the minority group, the days of 'easy returns' are over." UNHCR, "Information Notes May/June 1997" (1997), p.1.

\(^69\). UNHCR, op. cit. supra n.55, at p.9.

\(^70\). Information provided to the author by UNHCR officials in Germany.

\(^71\). The cost and logistical difficulties associated with deportations from Germany are enormous, and it would take many years to deport the entire refugee population from Bosnia and Herzegovina. Highly publicised deportations, together with threats and curtailment of benefits, are therefore being used strategically to induce the greatest possible number of "voluntary" returns.

\(^72\). UNHCR, op. cit. supra n.55, at p.3, estimates that more than 70% of repatriating refugees in the second half of 1997 did not return to their homes.
which may as a consequence deny them the means of supporting themselves and their families. However, discrimination on economic grounds is not generally considered to amount to persecution under the 1951 Convention.\textsuperscript{74} As a matter of strict legal analysis, in the case of an ethnically partitioned State an individual is not likely to be the victim of persecution in an area in which his or her own ethnic group is dominant, and so has no further grounds for protection under the 1951 Convention.

There is a clear clash here between the palliative aims of refugee law and the development of norms against ethnic cleansing. It is a continuation of a dilemma faced by UNHCR during the course of its wartime humanitarian activities, when evacuation of vulnerable groups tended to assist the perpetrators of ethnic cleansing in their war aims. A UNHCR publication in 1995 noted:\textsuperscript{75}

As the parties to the conflict quickly realized, if UNHCR could be induced to organize the evacuation of threatened populations, the process of ethnic cleansing could be completed under humanitarian auspices. Despite UNHCR’s unwillingness to be exploited in this manner, the organization was ultimately obliged to concede that evacuation was in some cases the lesser of two evils. As UNHCR’s senior official in the region observed, “we chose to have more displaced persons and refugees, rather than more dead bodies”.

UNHCR promoted the use of limited temporary protection by Western European States as a compromise solution to the urgent security needs of large numbers of displaced individuals. As a consequence, it cannot now assert that host States have an obligation to offer a more lasting status to the Bosnian refugees, pending the possibility of minority return on a large scale. For as long as the refugees in Germany and elsewhere remain without durable solutions, it is part of UNHCR’s responsibility under its mandate to facilitate repatriation. UNHCR is inevitably also responsive to pressures from European host States seeking to be relieved of their refugee burden, who as major donors offer funding tied specifically for the purpose of conducting repatriation programmes. Some of the enormous practical problems faced by UNHCR in seeking to carry out repatriation in an orderly manner are examined below. Lacking the means to return large numbers of refugees to areas where they would now be in the ethnic minority, UNHCR may have no alternative but to facilitate internal relocation. Through the terms of its mandate, the lead agency of the international community for refugee matters may be obliged to accept the

\textsuperscript{75} UNHCR, \textit{loc. cit.}, supra p. 64.
reality of ethnic separation, and to begin to implement programmes which complete the process of ethnic cleansing.

III. ETHNIC CLEANSING AND INTERNATIONAL INTERVENTION

The outcome of this contested course of normative development remains unknown. The continued involvement of the international community, and its ability to adhere to common policy goals, will be an extremely important influence in determining whether the right to return can be realised, or is allowed to die quietly. In this part, I give an overview of the progress made to date in implementing the right to return, the mechanics of the international involvement, the prospects for success, and the dilemmas which face UNHCR and other international organisations. The figures provided are a compilation of data and estimates published by UNHCR and the national authorities of Bosnia and Herzegovina, and, except where otherwise noted, the observations are based on the author’s own field research.

A. The Extent of Population Displacement

A picture of the population structure of the former Republic of Bosnia and Herzegovina immediately prior to the dissolution of Yugoslavia is given by the 1991 census. The total population was just under 4.4 million, with an ethnic breakdown (rounded) of 43 per cent Bosniac, 31 per cent Serb, 17 per cent Croat and 8 per cent “other”. The area which is now the Federation of Bosnia and Herzegovina had a total population of 2.8 million, while the Republika Srpska had a population of 1.5 million (see Table 1).

Table 1 Pre-war population of the entities according to ethnicity

<table>
<thead>
<tr>
<th>Entity</th>
<th>Bosniaa</th>
<th>Croats</th>
<th>Serbs</th>
<th>Others</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federation</td>
<td>1,441,931 51%</td>
<td>611,901 21%</td>
<td>564,457 20%</td>
<td>234,682 8%</td>
<td>2,852,431</td>
</tr>
<tr>
<td>Rep. Srpska</td>
<td>461,565 30%</td>
<td>148,951 10%</td>
<td>801,647 53%</td>
<td>112,439 7%</td>
<td>1,524,602</td>
</tr>
<tr>
<td>Total</td>
<td>1,902,956 43%</td>
<td>760,852 17%</td>
<td>1,366,104 31%</td>
<td>347,121 8%</td>
<td>4,377,033</td>
</tr>
</tbody>
</table>

The pre-war ethnic map of the Republic of Bosnia and Herzegovina was an intricate one. While there was a broad distribution of ethnic groups in every region, the situation was more complex at the local level. As a
general rule, the larger cities had substantial ethnic integration, which was reflected in residential arrangements and the incidence of mixed marriages. In all regions there were significant numbers of localities where residential districts were divided along ethnic lines. In rural areas many small villages were dominated by a single ethnic group, and larger towns were frequently amalgams of two or more areas with a separate ethnic identity.

According to the best available estimates, 2.3 million people left their homes during and in the immediate aftermath of the war. Approximately 1.3 million citizens of Bosnia and Herzegovina received asylum or temporary protection in other parts of the former Yugoslavia, in Western Europe and elsewhere, of whom 617,500 were from the territory of the Federation, and 682,500 from the territory of Republika Srpska. The largest group of refugees in Western European host countries are Bosniacs originating from Republika Srpska, originally representing a little over 50 per cent of the total, but now more than 90 per cent as a result of higher rates of return among majority groups. While no precise figures are available, it appears that the overwhelming majority of refugees without durable solutions in Western Europe come from an area in which they would now represent an ethnic minority.

As at 1 December 1997, 712,000 of the refugees had obtained durable solutions, leaving some 612,000, or 46 per cent of the original total, awaiting a solution (see Table 2).

Table 2 Status of refugee populations in host countries as at 1 December 1997

<table>
<thead>
<tr>
<th></th>
<th>Durable and other solutions</th>
<th>Without durable solutions</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Republic of Yugoslavia</td>
<td>4,381</td>
<td>249,006</td>
<td>253,387</td>
</tr>
<tr>
<td>Croatia</td>
<td>178,748</td>
<td>77,091</td>
<td>255,839</td>
</tr>
<tr>
<td>Germany</td>
<td>125,000</td>
<td>220,000</td>
<td>345,000</td>
</tr>
<tr>
<td>Other countries</td>
<td>404,446</td>
<td>65,872</td>
<td>470,318</td>
</tr>
<tr>
<td>Total</td>
<td>712,575</td>
<td>611,969</td>
<td>1,324,544</td>
</tr>
</tbody>
</table>

Over a million individuals, representing approximately one third of the remaining population, were displaced from their homes but remained within the territory of Bosnia and Herzegovina. Another 80,000 people were displaced in the early months of 1996 following the transfer of terri-

---

78. Defined by UNHCR, op. cit. supra n.55, at p.10, to include repatriation and local integration measures, refugee or permanent resident status, or resettlement to a third country.

tory in the Sarajevo suburbs. Of this total, UNHCR estimates that some 800,000 are still displaced, approximately half of whom are in each Entity.\(^\text{80}\)

These figures show that the population left in Bosnia and Herzegovina following the exodus of refugees was just under 2.8 million, or 64 per cent of the pre-war total. With internal displacement, only 42 per cent of people were left in their home of origin.

According to municipal registration figures,\(^\text{81}\) the Federation saw the departure of over 90 per cent of its original Serb inhabitants, and over 95 per cent of the original Croat and Bosniac inhabitants left Republika Srpska. Within the Federation, in six of the ten cantons ethnic minorities represent less than 10 per cent of the population, and in the remaining cantons local regions show an equal degree of ethnic separation. In sum, the policies of ethnic cleansing carried out in all parts of Bosnia and Herzegovina during and after the war were extremely effective in separating the population.

**B. Return of Refugees and Displaced Persons**

The progress of return movements since the signing of the Dayton Agreement has been consistently disappointing. Refugee returns to 1 December 1997 total 189,200, with 173,000 of those to the Federation and only 16,200 to Republika Srpska. This represents 15 per cent of the original refugee population, with most of the returning refugees unable to take possession of their pre-war homes.\(^\text{82}\) Owing to the difficulty of recovering possession of their homes, most refugees are returning to multiple occupancy situations or temporary accommodation of one kind or another. In a survey carried out by the Property Commission among displaced persons and returned refugees, 95 per cent of respondents reported that no member of their family was in paid employment.\(^\text{83}\) Most returnees report that their savings and any repatriation assistance payments received from the host government are depleted on temporary accommodation and basic living expenses within a short period of arriving. In sum, the return of refugees to date has contributed significantly to the displacement problem within Bosnia and Herzegovina, and this is likely to worsen with future returns.

As at 1 December 1997, approximately 217,000 of the one million persons displaced within Bosnia and Herzegovina have returned to their

---

80. *Idem*, p.15.

81. These figures are based on municipal registration figures provided by the Bosnia and Herzegovina/Federation Institute of Statistics in Sarajevo, but are not completely accurate due to discrepancies in the registration process: UNHCR, “Registration of Repatriates in the Federation of BiH and Entitlement to Food Assistance and Medical Care” (1997).

82. UNHCR, *op. cit., supra n.55, at p.3.

of these returns, 150,000 were to homes within the Federation, and 67,000 were to Republika Srpska. The number of displaced persons returning in 1997 in both Entities was significantly less than in 1996, suggesting that, as with refugee return, the easier cases returned earlier on.

Of the total returns of refugees and displaced persons of 408,000, the authorities of Bosnia and Herzegovina estimate that only 33,000 have been returns of ethnic minorities, or 8 per cent of the total. The great majority of these have occurred in the Federation, principally to Sarajevo. Most of those who returned into minority situations were elderly people or single individuals, rather than families. Owing to inaccuracies in municipal registration figures, these totals are very difficult to verify, and it is likely that a significant percentage of these individuals are in fact transients who have visited but not necessarily remained in their home of origin.

C. International Efforts to Promote Return

There has been no lack of innovative programmes implemented by UNHCR and many other organisations to promote return. These have included shelter programmes, employment creation, micro-credit and community development, special return procedures in the Zone of Separation and the Brcko Arbitration Award area, pilot return projects within the Federation, organised assessment visits, bus services and freedom of movement initiatives, human rights programmes, lobbying for reform of property laws, blacklisting of municipalities and economic conditionality, and most recently the UNHCR Open Cities initiative. Although these projects carry political significance which cannot be measured in purely quantitative terms, they have not singly or collectively achieved the essential goal of promoting self-sustaining return.

The poor progress in returns can be blamed on a whole series of factors: the harassment and intimidation of minority groups, the systematic violation of property rights, the shortage of housing and the inappropriate distribution of existing housing stocks, legal and bureaucratic obstacles to return, and the severe lack of economic activity and employment opportunities. It is estimated that in the Federation approximately 50 per cent of housing units were damaged in the war, with a further 6 per cent totally damaged in 1996.

84. This is a net figure, taking into account additional displacement occurring in 1996.
destroyed, while in Republika Srpska approximately 24 per cent were damaged and a further 5 per cent destroyed.\textsuperscript{86} Population centres with lower levels of war damage, such as Banja Luka and Tuzla, have become centres for internal displacement, and as a result are severely overcrowded. In many parts of the country, people from rural areas and small towns moved into larger towns during the war for security, and because of the destruction of their homes or livelihoods have not returned. As a result, in most areas there are few if any housing units that are both habitable and vacant. This means that the great majority of returnees, whether they fall into majority or minority categories, face enormous difficulties in finding shelter.

The housing problem is sometimes described as a game of musical chairs, in which it is impossible to return one family to its home without causing the further displacement of another. Any substantial return movement of refugees from abroad would need to be co-ordinated with the movement of displaced persons within Bosnia and Herzegovina, and the logistical problems alone would be overwhelming. As the humanitarian needs of the temporary or illegal occupants of housing are often as acute as those of the original owner, there is limited scope for improving the situation without a significant increase in housing stocks. Housing reconstruction programmes are extremely resource intensive—during 1996 and 1997 UNHCR reconstructed some 26,000 houses and apartments at a total budgeted cost of US$70 million\textsuperscript{87}—and the funding which is likely to be available in the coming years will fall well short of the required amounts. In view of the expected shortfall, there has been discussion of alternative funding methods, in particular individual credit schemes,\textsuperscript{88} but none has yet become operative. The problem is exacerbated by problems of multiple occupancy. The discriminatory housing laws and the lack of policing by local authorities have enabled many families to take and keep possession of more than one property.\textsuperscript{89}

Because of the practical and legal difficulties associated with gaining possession of occupied properties, minority return programmes conducted by the international community operate by identifying housing which is presently uninhabited due to war damage, locating the original owners, and repairing the properties for their benefit. These programmes are

\textsuperscript{86} International Management Group, "A Draft Proposal for a Preliminary Approach to the Return and Relocation of Refugees and Displaced Persons in Bosnia and Herzegovina" (1997).

\textsuperscript{87} UN Dept of Humanitarian Affairs, \textit{op. cit. supra} n.33, at p.30.

\textsuperscript{88} The German development bank Kreditanstalt für Wiederaufbau has been developing a housing construction loan programme using local commercial banks, but implementation has been delayed by the poor condition of the local banking system.

\textsuperscript{89} UNHCR, \textit{op. cit. supra} p.55, at p.24.
enormously resource intensive, and are feasible only in strictly limited circumstances. As a general rule, a successful minority return programme incorporates the following elements. First, the international agency must identify a local community in which the authorities are willing to accept the return of minorities. In the summer of 1997 UNHCR commenced the Open Cities initiative, which gives local authorities the opportunity to declare themselves publicly to be open to minority return, and therefore become candidates for increased levels of reconstruction aid and other economic assistance. This concept represents the best-articulated and publicised example of the use of economic conditionality. Most agencies engaged in reconstruction targeted for minorities adopt a “one for one” policy, whereby an equal number of houses are reconstructed for the benefit of the majority group. This helps to minimise local opposition to return.

By December 1997 UNHCR had recognised six municipalities out of 109 as Open Cities. In each of these the ethnic group now controlling the return area was also the pre-war majority group. In such cases the authorities are less likely to view the return of minorities as a challenge to territorial control. However, where return would pose a threat to wartime territorial gains, it is opposed more stridently by local authorities. Where members of the returning ethnic group are numerous, the local authorities are resistant to allowing even a small number of them to return, for fear of beginning a larger-scale return movement. In these circumstances small numbers of returns can sometimes be achieved quietly, but are jeopardised if the return becomes too public. As a general rule, the group most hostile to minority return is displaced persons of the majority group who fear being once again displaced by the return of the original inhabitants. In the Sarajevo suburbs the widows of Srebrenica are one of the most vocal groups opposed to the return of Serbs. Where such groups are the major constituency, the local authorities are hostile to minority return. For this reason, the typical location selected for a return programme is a small village without strategic or economic significance.

Second, the agency must identify appropriate beneficiaries who are willing and able to participate in the programme. One of the major lessons learned in return programmes in 1997 was the necessity to ensure that the beneficiaries were genuinely committed to returning to their home once reconstructed, and to vacating their current residence. Early experience showed that some participants were willing to receive the benefits of

---

91. These are Bihac, Busovaca, Gorazde, Kakanj, Konjic and Vogosca.
92. Examples of this include Bugojno (now a Muslim town) and Jajce (Croat), where a substantial number of families were allowed to return to surrounding villages during 1996, but were subsequently driven out again. In the case of Jajce, most of the evicted families were later able to return.
reconstruction work, but either sought to sell the property once repaired, or else to retain possession of their current temporary accommodation. This was particularly the case in remote rural areas, where economic prospects were extremely limited. Often only elderly people were willing to return, or else a single member of the family would return to work the land, while keeping the rest of the family in other accommodation. Agencies now seek to involve the local authorities from the areas where the beneficiaries are expected to depart, to ensure that the programme has the effect of freeing accommodation for further returns. Some agencies are also complementing their return programmes with short-term employment creation initiatives, which give beneficiaries a guaranteed income in the early phase of return.

Third, the agency must select target properties in communities which are suitable for reconstruction. Most agencies report that it is difficult to secure funding for reconstruction above a certain sum per unit, leading to pressure to identify less severely damaged housing for repair. However, in order that return can take place into a viable small community, the target properties must be clustered together, irrespective of the degree of damage, and are therefore expensive to reconstruct. The project must also re-establish basic infrastructure, in particular water, sanitation and electricity. In remote areas this is extremely expensive, and the cost per beneficiary in small minority return programmes can be very substantial. The better programmes also take an integrated community development approach, which involves supplying the needs of the returning community for schools, basic health care and other services. Nonetheless the scope for creating a decent standard of living in remote areas is very limited. The risk is that those of working age will choose to relocate to an urban area as soon as the opportunity arises, leaving non-viable communities populated solely by the elderly.

For all these reasons, the minority return programmes are enormously resource intensive for the agencies involved. While it would be impossible to implement programmes of this intensity for the entire field of minority return, the idea of the programmes is to provide a catalyst to encourage further returns. It is hoped that once a certain number of returns have been successful, other families may be encouraged to return to the area by their own devices. However, there is currently no sign that minority return programmes in carefully selected localities provide a catalyst for returns in other areas, where the local political, social and economic conditions may be quite different. Even if the success of the Open Cities and other minority return programmes exceeds expectations, they are likely to reach a natural ceiling in the number of returns that can be achieved. Areas which are currently hostile to return have, over the past few years, proved extremely resistant to influence through economic conditionality, and may remain untouched by the Open Cities initiative. Perhaps most
important, the current modalities of return do not suggest any means of returning people to properties which are currently occupied by other displaced persons. Despite the intensity of efforts involved, return programmes of this type can have a limited impact on the overall situation of displacement.

The longer the ethnic groups spend living apart, the less the chance of a significant movement towards ethnic reintegration. Individuals begin to lose their attachment to their place of origin. Displaced persons living in vulnerable circumstances are easily influenced by separatist ideology, and become less open to the possibility of ethnic reintegration over time. For many, the experience of suffering or witnessing atrocities before leaving their homes discourages them from returning. In a recent survey carried out by the Property Commission, the results showed that while the dominant pressure from displaced persons is still for return, there is a significant minority who have decided that they cannot or will not return. Approximately 80 per cent of Bosniacs were determined to return to their homes, with most of the remaining 20 per cent originating from Republika Srpska. Among Croats, some 60 per cent wished to return to their homes, but among Croats whose homes are in Republika Srpska, only 46 per cent wished to return. Among Serbs, only 20 per cent expressed the desire to return to homes in the Federation. It is likely that the variation in response among the ethnic groups is influenced by local political pressures, and might average out if there were a relaxation in the political environment.

Focus groups conducted among displaced persons suggest that most people are prepared to live with their pre-war neighbours, whatever their ethnicity. However, in all groups, people are wary of living under authorities of another ethnicity, and among large groups of displaced persons from another ethnic group. The determination of some people to return seems premised on securing a change of administrative control in the return destination, and if that were not possible the determination to return might decrease. Those living in desperate economic conditions, which is the overwhelming majority, would choose to return to their homes even without employment prospects, rather than remain in temporary accommodation. However, most people would consider relocating to find employment. Younger people, people with families and those with better economic prospects are more concerned about discrimination in employment opportunities and social services if they live as a minority population, and would relocate to obtain better economic circumstances.

This analysis highlights the dilemmas facing UNHCR in its role as lead agency of the international intervention in Bosnia and Herzegovina. Is it obliged to further the goal of reversing ethnic cleansing, and to direct its
efforts to making the right to return provided in the Dayton Agreement and the Constitution into a reality? Is its first duty under its mandate to find a durable solution for the 600,000 refugees abroad, facilitating their resettlement into whichever location offers them maximum security and opportunity to sustain themselves? Should it be furthering the humanitarian needs of the internally displaced by helping them to find permanent accommodation among their own ethnic group? Having secured the assistance of Western States through strictly temporary undertakings, does it now owe them a duty to relieve them as quickly as possible of their refugee burden? Is it still engaged in preventive intervention, trying to keep the situation inside Bosnia and Herzegovina as stable as possible and prevent further displacement? The different security, humanitarian and regulatory levels of involvement are still intersecting, making it difficult to develop a coherent international policy. Of its 1998 appeal budget for Bosnia and Herzegovina of US$87 million, UNHCR proposes to devote 80 per cent to Open Cities and other minority return projects. In its public documents, UNHCR gives strong rhetorical support to reversing ethnic cleansing.

As Bosnia and Herzegovina enters the third year of peace, the rights of refugees and displaced persons [to return home] remain hollow promises, despite the intensive efforts of the international community. Without a concerted push to make these rights a reality, confidence in the peace process will waiver, relocation to majority areas will intensify owing to a lack of other alternatives, and the vision of a multiethnic Bosnia and Herzegovina will give way to the brutal reality of division.

At a more pragmatic level, UNHCR is clearly aware that it does not have the influence to effect a dramatic breakthrough in minority return in the short term. What minority return it can achieve during 1998 may be of symbolic importance, perhaps beginning a process of slow and incremental ethnic reintegration, but is unlikely to solve the bulk of the displacement problem. In recent UNHCR statements there is a tentative willingness to support relocation that is voluntary in nature, and does not have the effect of limiting the scope for minority return.

The Office of the High Representative, with its mandate to ensure compliance with the Dayton Agreement, has taken a strong policy position against internationally facilitated relocation.

94. UN Dept of Humanitarian Affairs, op. cit. supra n.33, at p.48.
95. UNHCR, op. cit. supra n.55, at p.24.
97. Statement by Bearpark, supra n.43.
We cannot produce sustainable peace and stability in Bosnia and Herzegovina against the background of unfulfilled desires for return; they will remain destabilising factors for generations to come. We cannot betray the right to return to homes of origin . . . [The OHR] prioritises support of minority return movements and discourages at this stage potential grant aid to relocation.

This position draws upon both the security implications of continued ethnic separation, and the moral responsibility of the international community towards the displaced. The risk in such a position is that it neglects the humanitarian needs of the internally displaced, for whom the normalising of living conditions may be held hostage indefinitely to an unobtainable agenda. As the modality of international involvement in Bosnia and Herzegovina begins to shift from humanitarian to development assistance, there is an increasing awareness of the need to stabilise social and political conditions, to re-establish the rule of law, and to reduce the dependence of the population on international aid. If the primary objective of the international community is to create stability and self-sustaining economic activity, this may be more easily achieved by accepting the "brutal reality" of the current ethnic divisions. To a mixed domestic–international organisation such as the Property Commission, whose mandate derives solely from the Dayton Agreement, the dilemma is also acute. Both return and compensation are formally equal rights under Annex 7, although giving effect to either right is rarely feasible. For most displaced persons and refugees, the property which they have lost represents their principal or only asset. Many ask for the Commission's assistance in selling or exchanging their property, in order to recover its value and enable them to acquire property in a new location. With its powers to effect transactions, the Property Commission could certainly facilitate this process, but might do so at the cost of undermining minority return initiatives. The position of the Property Commission has been to emphasise the right of the individual to choose between return and relocation, despite the many restrictions on free choice which currently exist. 98

IV. CONCLUSIONS

When complex emergencies occur within shattered domestic societies and threaten to spread subversive ideologies, cause enormous human suffering, threaten the security of the region and generate massive refugee flows, the international community cannot avoid engagement in the situation on a whole series of levels. The principle of national sovereignty as a doctrinal limit to the possibility of joint international action in internal matters seems to be receding steadily, as more and broader grounds for

The end of the Cold War has opened new possibilities for collective intervention, and in a short period of time major initiatives have been undertaken in Iraq, Somalia, Haiti, Cambodia and of course the former Yugoslavia. Despite the mixed success of these operations, the idea of international intervention continues to represent an aspiration for a new dimension of international social order—in short, an aspiration for a true international community. This study of intervention into ethnic cleansing in Bosnia and Herzegovina offers a number of interesting lessons.

The influence which the collected actors in the international community can bring to bear on a complex domestic situation should not be overestimated. Where an entire population is caught up in a violent confrontation, in which extreme nationalist ideology is reinforced by common experience of atrocity, there are significant limits to what can be achieved through military or economic power. The international community cannot replace domestic social and political structures, merely try to supplement, suppress or reinforce them. For that reason, an important dimension of international intervention is the need to manipulate the content of domestic norms, and to create self-sustaining structures which will outlast the period of international involvement. The Dayton Agreement in Bosnia and Herzegovina represents the most ambitious attempt to do this, beginning with the adoption of a new constitution, and including continuing supervisory roles for a number of different international actors.

There exist in the international legal system various bodies of principle, in particular the international human rights instruments, which can be incorporated by reference into a domestic system. However, the relationship between the domestic and international legal systems during the period of intervention is highly problematic, and imported international norms will struggle for influence with contrary domestic norms. The authority of the norms promoted by the international community may be limited by problems of legitimacy and acceptance. It remains an open question whether a new basic norm of a legal system, in the form of a constitution, can be imposed externally. The Dayton peace process in Bosnia and Herzegovina will continue to provide interesting material to study how this dynamic works.

The effectiveness of international intervention can be undermined by conflicts of norms and values, and by the number of different international actors with different interests or mandates. The goal of reversing ethnic cleansing in Bosnia and Herzegovina intersects with different agendas at the security and humanitarian levels. There are no principles within the international legal system that provide a basis to rationalise these compet-
ing goals. Nor are there any institutional structures capable of managing or effectively co-ordinating the influence of different actors. Lacking a coherent framework, the actors involved in the intervention follow their own interests or responsibilities, each casting about to find a means of influencing the domestic social processes into which it has intervened. In the process the practicalities and daily political imperatives become so compelling that it is difficult to keep sight of the ultimate goal of the intervention. Lacking in co-ordination, the ultimate impact of the intervention is a cumulative and unintended effect of all these different influences, in which pragmatic and operational considerations play the most important role.

In Bosnia and Herzegovina, the prospect of a large-scale shift of population back to its pre-war levels of ethnic integration now seems extremely remote. Large numbers of people still live in unacceptable humanitarian conditions, and the reconstruction of the country has barely begun. There is very little self-sustaining economic activity, and unemployment rates are very high. The political situation is still extremely unstable, necessitating the continuing presence of foreign troops, and demographic pressures and territorial claims resulting from ethnic separation could fuel further conflict. Success on all levels of the intervention has therefore been limited, although gradual progress is being made on many fronts. The competing goals of the intervention are likely to continue to cause problems. If the Entities were to become multi-ethnic, the constitutional structure would become obsolete. More realistically, if ethnic separation continues into the future, the extensive provision of the right to return in the Constitution will become a dead letter, slipping quietly off both domestic and international political agendas. If there are no large-scale returns, the domestic actors will have proved able to pick and choose from the principles which the international community sought to impose. This will ultimately dictate the status of ethnic cleansing within the international legal system, perhaps more profoundly than the prosecution of the individuals directly responsible for ethnic cleansing. For as long as the international community’s response to ethnic cleansing appears to be ambiguous, the prohibition against ethnic cleansing will not be firmly established. The key arena for normative development will therefore be the operative choices and the successes and failures of the intervention itself.