

# Promoting Safe and Peaceful Repatriation under the Dayton Agreements

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## I. Introduction

Among the greatest difficulties presented by the peace plan for Bosnia-Herzegovina negotiated in Dayton last fall will be the repatriation and reintegration of refugees and displaced persons scattered throughout Bosnia-Herzegovina, neighboring states, and other European countries. The challenge is two-fold: first, to conduct repatriation in a manner that does not subject returnees to renewed threats of persecution or otherwise violate their rights under the Dayton Agreements<sup>1</sup> and international law; second, to ensure that repatriation does not undermine the peace, but rather maximizes the chance that it will prove lasting. While these responsibilities will obviously fall heavily on the shoulders of the parties to the Dayton Agreements themselves, the present analysis focusses on the role to be played by the western European countries currently playing host to hundreds of thousands of refugees. Specifically, it is the intent of this analysis to underscore the dangers of western European plans to pursue swift repatriation early in the peace process. Such plans threaten the rights of displaced persons, including rights acquired under the Dayton Agreements that are not only important to the individual returnees but also to efforts to obtain enduring peace and stability in the region.

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The peace plan for Bosnia-Herzegovina consists of a General Framework Agreement for Peace in Bosnia and Herzegovina (the "Framework Agreement"), together with a new Constitution and a number of additional issue-specific agreements annexed to it. The entire plan contained in this package of agreements will be referred to herein collectively as the "Dayton Agreements."

By way of background, the article begins with a brief description of the problem--the numbers of displaced persons and their legal status in countries of asylum. Next, the article reviews two particularly relevant components of the Dayton Agreements: the Agreement on Refugees and Displaced Persons, attached as Annex VII to the Framework Agreement; and the Agreement on Elections, attached as Annex III to the Framework Agreement. In particular, this discussion emphasizes provisions establishing the rights of displaced persons to participate in elections and to return to their pre-war homes, arguing that these rights are critical to efforts to counter the effects of ethnic cleansing and to rebuild a peaceful, heterogeneous society in Bosnia-Herzegovina. This discussion is followed by a brief description of the repatriation plan developed by the United Nations High Commissioner for Refugees (the "UNHCR") and the faster-track repatriation foreseen by some western European states. In conclusion the article then explains how these latter plans may compromise the rights of displaced persons, including the rights to participate in elections and to return to their pre-war homes, thereby jeopardizing the long-term prospects for peace in Bosnia-Herzegovina.

## **II. The Status of People Displaced by the Conflict in Bosnia-Herzegovina.**

The four-year conflict in Bosnia-Herzegovina has resulted in the largest displacement of people to occur in Europe since World War II. The UNHCR estimates that the war has displaced over two million people.<sup>2</sup> Approximately one million remain displaced in Bosnia-Herzegovina, while more than a half million are currently living in neighboring Croatia (187,000), the Federal Republic of Yugoslavia (450,000), Slovenia (24,000) and the former Yugoslav Republic of Macedonia (7,000).<sup>3</sup> A third group, estimated at 700,000, has received temporary

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<sup>2</sup> United Nations High Commissioner for Refugees, Public Information Section, "Update on Ex-Yugoslavia: UNHCR Presents Bosnia Repatriation Plan," (16 Jan. 1996).

<sup>3</sup> *Id.*

protection in other countries, primarily in Europe.<sup>4</sup> Of this third group, more almost half have received protection in Germany.<sup>5</sup>

Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (collectively, the "Refugee Convention"), in order to obtain refugee protection an individual must generally demonstrate a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".<sup>6</sup> This determination must normally be made on the basis of an individualized analysis of the circumstances surrounding each asylum-seeker's application for protection.<sup>7</sup> In the case of many of those fleeing the conflict in Bosnia-Herzegovina, however, recourse has been made to an alternative regime of temporary protection that by-passes such individualized procedures. The temporary protection regime was implemented in response to an appeal made by the UNHCR in July 1992.<sup>8</sup> While implementation of the concept of temporary protection has varied among the western European countries, its basic elements, as proposed by the UNHCR, were admission to the country of refuge,

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<sup>4</sup> *Id.*

<sup>5</sup> European Action Council for Peace in the Balkans, "Dayton Implementation Review no.1," 4 (31 Jan. 1996).

<sup>6</sup> Art. 1(A)(2), Convention Relating to the Status of Refugees (1951).

<sup>7</sup> United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria

protection against *refoulement*,<sup>9</sup> treatment in the country of refuge in conformity with basic human rights and internationally recognized humanitarian standards, and repatriation when conditions in the country of origin made it possible.<sup>10</sup> The UNHCR recommended that such protection be given to "[1] persons who had fled from areas affected by conflict and violence; [2] persons who had been or would be exposed to human rights abuses, including those belonging to groups compelled to leave their homes by campaigns of ethnic or religious persecution; and [3] persons who for other reasons specific to their personal situation are presumed to be in need of protection."<sup>11</sup> The advantages of the temporary protection system for these war refugees have been multifold. First, it has made it possible to provide immediate protection to large numbers of individuals, without overburdening the system of individualized asylum adjudication.<sup>12</sup> Second, it has facilitated protection for many people fleeing the conflict who might not have otherwise qualified for protection under the relatively narrow refugee definition contained in the Refugee Convention.<sup>13</sup> Finally, the emphasis on the *temporary* nature of this solution has

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<sup>9</sup> The principle of *non-refoulement*, which is generally recognized as a peremptory norm of international law binding on all states, is set forth in Article 33 of the Refugee Convention; Article 33 provides in relevant part: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Art. 33, Convention Relating to the Status of Refugees (1951).

<sup>10</sup> UNHCR Programme, *supra* note 8, at 15.

<sup>11</sup> Humanitarian Issues Working Group of the International Conference on the former Yugoslavia, "Survey on the Implementation of Temporary Protection," 87-8 (March 1995).

<sup>12</sup> *Id.* at 87.

<sup>13</sup> *Id.* at 88. This advantage is particularly important in light of trends in the jurisprudence of many industrialized nations toward an increasingly restrictive interpretation of Article 1(A)(2) of the Refugee Convention. More specifically, it has been held that individuals fleeing armed conflict, such as the conflict in Bosnia-Herzegovina, have failed to demonstrate a sufficiently *individualized* threat of persecution to warrant protection. *See generally* United Nations High Commissioner for

made it easier for countries to provide protection in the face of domestic political opposition to large-scale influxes of foreigners.<sup>14</sup> Nonetheless, western European countries are eager to terminate the temporary protection program, which has proved more lengthy and costly than originally anticipated.<sup>15</sup> The process by which temporary protection will be terminated and refugees returned to Bosnia-Herzegovina pursuant to the Dayton Agreement is described and assessed in the discussion that follows.

### **III. Arrangements for Return.**

The return and reintegration of the more than 2 million people displaced by the conflict in Bosnia-Herzegovina represents an important test of the fragile peace negotiated last fall in Dayton. Success will rest on the policies of host governments in western Europe, the efforts of the dozens of international, intergovernmental,

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Refugees, The State of the World's Refugees 1995: In Search of Solutions 86 (1995)[hereinafter "The State of the World's Refugees"]. In other cases, it has been held that protection is available for only those facing a threat of persecution from state authorities; those threatened by non-state entities, such as the Bosnian Serb faction in Bosnia-Herzegovina, may therefore be denied refugee status. United Nations High Commissioner for Refugees, Regional Bureau for Europe, "An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR," 27-8 (Sept. 1995)(describing restrictive jurisprudence in Germany, Sweden, and France). Member states of the European Union recently codified these restrictions on the refugee definition in a non-binding joint position agreed by the Council of Ministers. United Nations High Commissioner for Refugees, "Press Release: UNHCR expresses reservations over EU Asylum Policy," (24 Nov. 1995); Sarah Helm, "Europe to slam door on asylum-seekers," The Independent (24 Nov. 1995).

<sup>14</sup> The State of the World's Refugees, 87 ("As experience with the former Yugoslavs has demonstrated, governments may feel that they can afford to be more generous to a group of asylum seekers if their presence will not become a permanent one.").

<sup>15</sup> "Bosnian Refugees: Switzerland and Germany want their rapid return," Migration News Sheet, 6 (Feb. 1996).

and non-governmental organizations involved in the peace implementation process, and the work of fledgling entities created by the agreements to implement its provisions relating to human rights, elections, and property ownership. The UNHCR has been designated as the lead agency to oversee this monumental process. Certain key provisions of the Dayton Agreements relevant to refugee repatriation and the UNHCR's proposed repatriation program are summarized briefly below, followed by a discussion of issues of particular importance to their successful implementation.

#### **A. The Dayton Agreement.**

The most significant provisions of the Dayton Agreements for purposes of this discussion are contained in the Annex VII Agreement on Refugees and Displaced Persons and the Annex III Agreement on Elections. Whereas the predominant thrust of the Dayton Agreements is division of Bosnia-Herzegovina--its land and political institutions--along ethnic lines, these agreements contain important provisions, which, as explained below, are aimed at countering the effects of ethnic cleansing and promoting ethnic re-integration. As such, they are critical to efforts to establish a peace that will outlast international military enforcement of cease-fire lines and zones of separation.<sup>16</sup>

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<sup>16</sup> This assertion is based, of course, on the assumption that long-term peace is enhanced by integration. Others may question this assumption. See, e.g., Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 *Amer. J. Int'l L.* 295, 328 (1995)(arguing that "policy considerations militate against the unrestricted return of refugees after mass relocations in situations similar to the Israeli-Palestinian conflict", because "[h]istorically, interethnic friction within heterogeneous communities has been a recipe for violence" and citing the conflict in the former Yugoslavia as evidence for this position.). Nonetheless, I believe that this assumption is legitimate in the context of the current peace effort in Bosnia-Herzegovina, as it has been explicitly endorsed by the Parties and other international actors responsible for implementing the peace effort. See, e.g., Rome Statement on Sarajevo (Supported by President Izetbegovic, President Milosevic, Prime Minister Muratovic, President Zubak, Prime Minister Kasagic)(18 Feb. 1996)("Sarajevo will be a united city in accordance with the Peace Agreement. It is our common

## 1. Annex VII: Agreement on Refugees and Displaced

**Persons.** Annex VII to the Framework Agreement contains the "Agreement on Refugees and Displaced Persons" (the "Refugee Agreement") concluded among the Republic of Bosnia-Herzegovina and its two entities, the Federation of Bosnia-Herzegovina (created by an alliance between the Muslim and Bosnian Croat factions) and the Republika Srpska (representing the Bosnian Serb faction)(collectively, the "Parties").<sup>17</sup> The Refugee Agreement is divided into two chapters. Chapter One sets forth the rights of refugees and displaced persons, as well as general ground rules relating to repatriation, while Chapter Two creates a Commission for Displaced Persons and Refugees to resolve rival property claims likely to arise in the course of repatriation.

The first article of Chapter I sets forth the "Rights of Refugees and Displaced Persons." Most significantly, it specifies that "[a]ll refugees and displaced persons have the right freely to return to their homes of origin", and that "[t]hey shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them." These two rights--to return to one's

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conviction that this will give better possibilities for all -- Bosniacs, Serbs, Croats and Others -- and will be an important contribution to peace in all of Bosnia and Herzegovina. We are determined to work for the reconciliation and peaceful living together in Sarajevo. We appeal to all to stay in the city, and rest assured that their legitimate rights will be taken into account."); Reuters News Service, "Top envoy visits Serb corridor whose fate unclear," (29 February 1996)(quoting High Representative Carl Bildt as stating that "[t]he Bosnian government obviously has to do more, everything it can and somewhat more, to convince Serbs they have a future in Sarajevo. That's very important for the multi-ethnic future of Sarajevo and of course it has implications for the rest of the country.").

<sup>17</sup> It should be noted that although not parties to this agreement, the Republic of Croatia and the Federal Republic of Yugoslavia have, pursuant to Article VII of the Framework Agreement, agreed to and committed to comply fully with the provisions of the first of the two chapters that make up the Refugee Agreement.

home of origin and to have property restored--reflect an aspiration to maintain and restore a measure of ethnic heterogeneity in Bosnia-Herzegovina. Given that the people of Bosnia-Herzegovina have suffered four years of brutal ethnic conflict, brought to a tentative end by a peace agreement that divides the country along ethnic lines, the chances for rebuilding an ethnically mixed society are slim. Whether it is possible may depend on the extent to which displaced persons are able peaceably to exercise their rights to return to their original communities and to repossess lost property.

In support of these rights, the Parties have made broad promises in the Refugee Agreement "to ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion"; and to "take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons". The agreement provides further that "[t]he 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 Parties have specifically committed to take a number of immediate confidence-building measures, namely to repeal discriminatory domestic legislation and administrative practices; to prevent and suppress incitement of ethnic or religious hostility; to disseminate warnings against and to suppress acts of retribution; to protect ethnic and/or minority populations wherever they are found; and to prosecute, dismiss or transfer public officials responsible for serious violations of the basic rights of members of ethnic or minority groups. They have also promised to try to establish political, economic, and social conditions conducive to voluntary return; to facilitate short-term repatriation assistance to returnees and others in need; to regulate military service without discrimination; and to establish a general amnesty for returnees charged with crimes other than those subject to the jurisdiction of the

International Criminal Tribunal for the Former Yugoslavia, and common crimes unrelated to the conflict.

With respect to the practical aspects of repatriation and reintegration, the Refugee Agreement calls on the UNHCR to develop a repatriation plan "that will allow for an early, peaceful, orderly and phased return of refugees and displaced persons". The Parties have agreed to implement any such plan and to cooperate fully with UNHCR, the International Committee of the Red Cross, the United Nations Development Programme, and any other international, domestic or non-governmental organization involved in the repatriation process.

In Chapter Two of the Refugee Agreement, the Parties agree to establish a "Commission for Displaced Persons and Refugees". The Mandate of the Commission is set forth in Article XI of the agreement, which provides:

The Commission shall receive and decide 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.

In adjudicating property claims, the Agreement specifies that the Commission "shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing." Significantly, the Commission does not have any discretion to determine whether the appropriate remedy in a given case is the return of property or compensation to its lawful owner. Rather, "[a]ny person requesting the return of property who is found by the Commission to be the lawful owner of that property *shall* be awarded its return"; and vice versa, "[a]ny person requesting compensation in lieu of return who is found by the Commission to be the lawful owner of that property *shall* be awarded just compensation". That is, any claimant determined to be the lawful owner of property is entitled to whichever remedy he requested, regardless of any countervailing considerations.

Thus, the provisions relating to the Commission facilitate the right to return to one's home of origin. They affirm the substantive property right of those from whom property was seized unlawfully; and they provide a legal mechanism by which such dispossessed lawful owners, if they choose, may exercise their right to repossess property. Though many will probably choose compensation over repossession of property, the availability of the latter remedy could significantly counter the legacy of ethnic cleansing.

**2. Annex III: Agreement on Elections.** In addition to the Annex VII agreement on displaced persons discussed above, it is important to consider provisions of the Dayton Agreement relating to elections, the timing of which is often linked to the repatriation process.<sup>18</sup> Annex III to the Dayton

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<sup>18</sup> See e.g., "Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees at the Humanitarian Issues Working Group of the International Conference on Former Yugoslavia," 7 (Geneva, 16 January 1996).

Agreement contains an "Agreement on Elections" concluded by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska ("the Election Agreement"). Pursuant to this agreement, elections are to be conducted between six and nine months from the date that the Election Agreement entered into force.<sup>19</sup> Elections will therefore be held between 14 June 1996 and 14 September 1996. Responsibility for organizing these first elections, including certification that adequate conditions for elections exist, is assigned to the Organization for Security and Cooperation in Europe.

Broad participation in the elections by those who have been displaced by the conflict will be very important to the peace process. Significantly, the Election Agreement creates a presumption that "[a] citizen who no longer lives in the municipality in which he or she resided in 1991 shall . . . be expected to vote, in person or by absentee ballot, in that municipality." Like the right to return to one's home of origin and the right to repossess property, this provision counters the otherwise predominant thrust of the peace plan toward ethnic balkanization. If large numbers of displaced citizens are able to cast their votes in their former communities, it could substantially affect the election results. As a minority, they would probably be precluded from electing their own candidate, but nonetheless, were they to vote in sufficient numbers, majority candidates would have to take their views into consideration. The result could well be parliamentary institutions that are ideologically, if not ethnically, more diverse. Thus, electoral participation by displaced persons could play an important role in efforts to rebuild a healthy, heterogeneous polity.

A number of provisions in the Election Agreement have a bearing on the level of participation by displaced persons. First, the Parties have agreed to ensure conditions necessary for free and fair elections, including a politically neutral

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<sup>19</sup> The Election Agreement entered into force upon signature by the Parties, which took place on 14 December 1995 in Paris.

environment, the right to vote in secret without fear or intimidation, freedom of expression and the press, freedom of association, and most notably for purposes of this analysis, freedom of movement. More significantly, the Agreement provides that votes may be cast in person or by absentee ballot, so refugees will be able to vote from their country of asylum if they have not returned to Bosnia-Herzegovina by election day. In this connection, however, it should be noted that according to the Agreement "[t]he exercise of a refugee's right to vote shall be interpreted as confirmation of his or her intention to return to Bosnia and Herzegovina". As is discussed in greater detail below, depending on how it is interpreted by asylum countries, this provision could serve as a disincentive for refugees to participate in elections, with unfortunate consequences for the electoral process.

While the agreements that make up the Dayton Accords provide the framework pursuant to which displaced persons will return to Bosnia-Herzegovina, they leave many of the details of the return program to relevant domestic and international agencies, most notably the UNHCR. The contours of the return program, as preliminarily devised by the UNHCR, are outlined below.

## **B. The UNHCR Programme.**

Pursuant to its mandate under the Dayton Accords, the UNHCR has been working together with the Parties and the countries of asylum to develop a repatriation/return programme for Bosnia-Herzegovina. UNHCR plans a "peaceful, orderly, and phased process."<sup>20</sup> Details of the UNHCR's programme were presented in Geneva on 16 January 1996 to a meeting of representatives of some 20 agencies and 40 governments, including representatives of the parties to

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<sup>20</sup> United Nations High Commissioner for Refugees, "Briefing Notes: Bosnia and Herzegovina; Highlights of a statement made by UNHCR's Special Envoy Mr. Soren Jessen-Petersen, in Sarajevo on 31 January 1996," 1 (1 February 1996).

the Dayton Accords.<sup>21</sup> While no large, organized returns are expected before spring, UNHCR plans that it will assist some 870,000 people in returning to or relocating within Bosnia-Herzegovina during 1996. The UNHCR wants to give priority to the estimated one million internally displaced people, of whom 500,000 are expected to move in 1996. Another 170,000 are expected to return from the other republics of the former Yugoslavia, while 200,000 are projected to return from Europe and other countries.<sup>22</sup>

UNHCR emphasizes that repatriation should be voluntary and plans to publish "Repatriation Information Reports," providing detailed information about the situation prevailing in different communities in Bosnia-Herzegovina to assist refugees in deciding when and where to return.<sup>23</sup> Nonetheless, the UNHCR has conceded that once asylum countries terminate the temporary protection regime, forcible repatriation will be a possibility.<sup>24</sup> The High Commissioner has urged, however, that temporary protection be maintained until the following three conditions are satisfied: (1) full implementation of the military aspects of the Dayton Accord; (2) proclamation of the required amnesty for crimes other than common crimes unrelated to the conflict and those falling within the jurisdiction of the International Criminal Tribunal; and (3) the establishment and functioning of mechanisms for the protection of human rights envisioned in the Dayton Agreements.<sup>25</sup> In addition, the UNHCR has suggested that temporary protection

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<sup>21</sup> United Nations High Commissioner for Refugees, Public Information Section, "UNHCR Update on ex-Yugoslavia: UNHCR Presents Bosnia Repatriation Plan," (16 January 1996).

<sup>22</sup> *Id.*

<sup>23</sup> See UNHCR Programme, *supra* note 8, at 7, 16; United Nations High Commissioner for Refugees, "Briefing Note: UNHCR Repatriation Information Reports for Bosnia and Herzegovina," (1 Feb. 1996).

<sup>24</sup> UNHCR Programme, *supra* note 8, at 16.

<sup>25</sup> *Id.*

should not be lifted until the OSCE has seen fit to certify that conditions are satisfactory for elections.<sup>26</sup>

Even after temporary protection is lifted, the UNHCR has urged asylum states to allow repatriation to proceed on a voluntary basis.<sup>27</sup> Moreover, she has emphasized that although the lifting of temporary protection would indicate that it is safe for refugees to return to their place of choice in Bosnia-Herzegovina, some refugees will be in need of continued protection.<sup>28</sup> In particular, she has urged states to exempt from repatriation any who have a well-founded fear of persecution (as defined by the Refugee Convention), those who have suffered particularly traumatic persecution, and those who are stateless.<sup>29</sup>

For those returning to Bosnia-Herzegovina, the UNHCR has called on asylum countries to arrange to provide return transportation, cash subsistence for the journey, as a minimum, and additional financial assistance for initial expenses if possible.<sup>30</sup> The UNHCR anticipates a three-phased return process. In the first phase, during the winter of 1995-96, she expects only small-scale spontaneous return. Refugees with skills that can be instrumental in the reconstruction process

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<sup>26</sup> *Id.* ("when deciding on the lifting of temporary protection, Governments are invited to take into consideration the assessment of the OSCE, which in accordance with Annex 3 [Election Agreement] is mandated to certify whether elections can be held").

<sup>27</sup> *Id.* ("Conceptually, once temporary protection is lifted by host countries in the framework of close multilateral consultations, return movements other than on a strictly voluntary basis would not be excluded. Asylum States are, however, encouraged to make every effort to let repatriation proceed on a voluntary basis.")

<sup>28</sup> *Id.* at 17.

<sup>29</sup> United Nations High Commissioner for Refugees, Public Information Section, "UNHCR Update on ex-Yugoslavia: UNHCR Presents Bosnia Representation Plan," (16 Jan. 1996).

<sup>30</sup> *Id.*

are being encouraged to return during this early period. More significant spontaneous and organized voluntary returns are expected during a second phase throughout the spring and summer of 1996, when reconstruction and election preparations should be well under way. During a third phase, marked by the completion of elections and the lifting of temporary protection, UNHCR anticipates return movements to increase considerably.<sup>31</sup> The plan emphasizes, however, that "[p]ersons unable or unwilling to return to their place of previous residence due to changes in territorial control and in the ethnic composition of the region concerned, should, as far as they have no adequate alternative accommodation elsewhere, be the final category considered for return, since their position is likely to be the most vulnerable."<sup>32</sup>

With respect to human rights monitoring and implementation, UNHCR has indicated that it will play a relatively limited role, focussing on "issues only insofar as they directly impact upon the process of return and relocations, such as freedom to choose one's residence, personal safety, respect for the principle of unity of the family, and non-discriminatory treatment of returnees."<sup>33</sup> For implementation of the broader human rights agenda set forth in the Dayton Agreements, the UNHCR will look to the Human Rights Ombudsperson, the Office of the High Representative, the OSCE, the UN High Commissioner for Human Rights, and the Council of Europe.<sup>34</sup> According to the UNHCR plan, the physical security of returnees will for the most part depend on the Parties' willingness to live up to their

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<sup>31</sup> UNHCR Programme, *supra* note 8, at 17.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 4.

commitments in the Dayton Agreements and a "security umbrella that the NATO-led Implementation Force (IFOR) will attempt to provide."<sup>35</sup>

Although the UNHCR repatriation/return plan clarifies the situation of displaced persons under the Dayton Agreements, it leaves a number of significant issues for ultimate resolution by the Parties, asylum states, and other organizations and institutions responsible for implementing the peace plan. The discussion that follows highlights these issues and recommends steps toward their successful resolution.

#### **IV. Promoting Safe and Peaceful Return.**

In reviewing provisions of the Dayton Agreement relating to repatriation, one is struck by the recurrent assertion that repatriation must occur swiftly. Some of these provisions seem strangely forced and out of place; one suspects a self-interested insertion by western powers eager to rid themselves of the burden of refugees from Bosnia-Herzegovina. For example, in its first article, the Refugee Agreement asserts that "[t]he early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina." Subsequently, the agreement calls for the UNHCR to develop a repatriation plan "that will allow for an *early*, peaceful, orderly and phased return of refugees and displaced persons" (emphasis added). The agreement specifies that the Parties agree to implement any such plan, and then, in what seems a non-sequitur, states: "[The Parties] accordingly call upon States that have accepted refugees to promote the *early* return of refugees consistent with international law" (emphasis added). In a similar vein, the Election Agreement contains the superfluous observation that "[b]y Election Day, the return of refugees should already be underway". These provisions contrast markedly with the subsequent statements of the Parties. For example, according to the UNHCR's Special Envoy, Mr. Soren Jessen-Petersen,

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<sup>35</sup> *Id.*

"[t]he parties have specifically requested not to rush the return, in view of the huge number of people involved and the limited absorption capacity of the country."<sup>36</sup> The UNHCR has echoed these pleas, urging forbearance on the part of asylum states and insisting that the previously mentioned conditions be met before temporary protection is lifted. Nonetheless, western European states have threatened earlier repatriation in apparent disregard for the UNHCR's repatriation plan. Most notably, according to media sources, German Interior Minister Manfred Kanther has announced Germany's intentions to terminate temporary protection and begin repatriation as early as 1 July 1996, with plans to return 200,000 by July 1997.<sup>37</sup> Because Germany houses nearly half of the Bosnian refugees in western Europe, its policies may dictate a similar stance in neighboring countries fearing that otherwise they will face a mass influx of Bosnian refugees from Germany.<sup>38</sup> The remainder of this article explains how such plans for early termination of the temporary protection regime followed by large-scale repatriation could compromise the rights of displaced persons and undermine efforts to achieve lasting peace in the region.

As previously noted, the temporary protection programme for refugees from Bosnia-Herzegovina by-passed the individual adjudication of asylum claims that would otherwise have been required under the Refugee Convention. In the event that temporary protection is terminated, refugees opposing repatriation must be given access to regular asylum proceedings. Such proceedings must include individualized consideration of each case and afford applicants full procedural

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<sup>36</sup> United Nations High Commissioner for Refugees, "Briefing Notes: Bosnia and Herzegovina: Highlights of a statement made by UNHCR's Special Envoy, Mr. Soren Jessen-Petersen, in Sarajevo on 31 January 1996," (1 Feb. 1996).

<sup>37</sup> Reuters News Service, *Belgium, Netherlands worried by Bonn's refugee stand* (29 Feb. 1996); "Bosnian Refugees: Repatriation to begin on 1st July," Migration News Sheet, 8 (Feb. 1996).

<sup>38</sup> *Id.*

rights, including the right to appeal any negative decision and to remain in the country of asylum pending a decision on the appeal.<sup>39</sup> Any other procedure would risk violation of the principle of *non-refoulement* in at least some cases. If, as the UNHCR has recommended, asylum countries would postpone repatriation until conditions in Bosnia-Herzegovina have improved, they would not only reduce the risk of *refoulement*, but also cut their administrative costs for adjudicating asylum claims because undoubtedly fewer refugees would contest repatriation.

In the event that they proceed with early repatriation and face renewed applications for asylum, western European countries of refuge should take a flexible approach to applicants' participation in the Bosnian elections scheduled for some time during the summer of 1996. As recognized in the Election Agreement discussed above, participation in the elections suggests an intention on the part of an asylum applicant to return to Bosnia-Herzegovina and may therefore be relevant to an assessment of his fear of persecution. Nonetheless, applicants should be permitted to rebut any presumption created by electoral participation; and adjudicators should be sensitive to the fluid nature of the peace process, making it practically impossible for a refugee to make an accurate assessment--by the very early date set for elections--of his prospects for safe return to Bosnia-Herzegovina.<sup>40</sup> Indeed, the outcome of the elections themselves could

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<sup>39</sup> See United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, 46 (1992)(identifying minimum procedures required for adjudication of asylum claims under the Refugee Convention, as determined by the Executive Committee of the High Commissioner's Programme). In an ominous note, German Interior Minister Kanther is reported to have counselled refugees not to apply for asylum after termination of temporary protection because they would "'with great probability' be rejected quickly." "Bosnian Refugees: Repatriation to begin on 1st July," Migration News Sheet, 8 (Feb. 1996).

<sup>40</sup> Comparison of the Bosnian peace plan with those implemented in other countries in recent years underscores the unfairness of putting disproportionate weight on a Bosnian refugee's participation in the elections. First, the Bosnian elections are scheduled for a comparatively early date in the peace process. Whereas here elections will take place within nine months from the

legitimately alter a refugee's assessment of the threat of persecution. Accordingly, western European governments should place relatively minor emphasis on refugees' electoral participation in connection with any subsequent applications for permanent asylum. Moreover, this approach should be widely publicized prior to the elections, in order to avoid chilling refugee participation in elections, which, as previously mentioned, is their right under the Dayton Agreement and is of critical importance to the success of the electoral aspect of the peace process.

Western European policies toward repatriation should also give substantial deference to refugees' right to return, not only to their country of origin, but wherever possible, to their home of origin. Although the right to return is recognized in numerous instruments of international law--including the Universal Declaration of Human Rights,<sup>41</sup> the International Covenant on Civil and Political Rights,<sup>42</sup> and the Fourth Protocol to the European Convention on Human

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signing of the peace agreement, in Mozambique, for example, UNHCR aimed to return refugees by election day, scheduled a full two years after the peace agreement was signed. *See State of the World's Refugees*, at 174. Other repatriation schemes have not only given refugees longer to decide their futures, but in at least one case also permitted them to change their minds. *See, e.g., id.*, at 62 (describing repatriation plan for refugees from Myanmar resident in Bangladesh, pursuant to which once registered for repatriation refugees are free to change their minds at any time before they cross the border). These examples illustrate how a western European approach to electoral participation that effectively requires Bosnian refugees to decide whether to return by election day places an unrealistic and unfair burden on those refugees.

<sup>41</sup> Art. 13, Universal Declaration of Human Rights, U.N. Doc. A/811 (1948)("1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own, and to return to his country.").

<sup>42</sup> Art. 12(4), International Convention on Civil and Political Rights, reprinted in Ian Brownlie, ed., *Basic Documents on Human Rights*, (1994)("No one shall be arbitrarily deprived of the right to enter his own country.").

Rights<sup>43</sup>--its existence and content in international law is the subject of on-going debate.<sup>44</sup> In the context of the peace plan for Bosnia-Herzegovina, however, the right has been explicitly recognized by the Parties. Moreover, in the Dayton Agreements, it has been specifically interpreted as a right to return to one's home of origin and repossess property wrongfully taken during the conflict.

Early return could compromise this right in a number of ways. First, as a practical matter, it may be difficult or impossible for refugees to exercise this right if they must return to Bosnia-Herzegovina before the new Commission on Refugees and Displaced Persons--created to adjudicate rival property claims--is fully operational. At this writing, two and a half months after the signing of the peace agreement, the Commissioners have not been appointed, let alone begun the difficult process of establishing their practice and procedures. Even if there exists a legal structure through which returnees can return to their homes of origin, they may decline to do so if they are forced to return to Bosnia-Herzegovina before new human rights monitoring and enforcement measures are in place and the Parties have fully implemented the confidence-building measures designed to support the right to return. The recent exodus of Bosnian Serbs from the Sarajevo suburbs due to change hands suggests that rather than taking steps to build confidence in

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<sup>43</sup> Art. 3, Fourth Protocol, European Convention on Human Rights, 1950 ("1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national. 2. No one shall be deprived of the right to enter the territory of the State of which he is a national."); see also, Executive Committee of the High Commissioner's Programme, Conclusion No. 40, 36th Sess. (1985)("the voluntary and individual character or repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected").

<sup>44</sup> See, e.g., Eyal Benvenisti & Eyal Zamir, Private Claims to Property Rights in the Future Israeli-Palestinian Settlement, 89 Amer. J. Int'l L. 295, 324-26 (1995); Guy Goodwill-Gill, *Voluntary Repatriation: Legal and Policy Issues*, in Gil Loescher & Laila Monahan, Refugees and International Relations, 258-60 (1989).

prospects for multi-ethnic communities, the Parties continue, at least tacitly, to pursue ethnic cleansing.<sup>45</sup> Until these policies change and the Parties are held to their commitments under the Dayton Agreement, returnees cannot be expected to fully realize their right to return.

Western European governments implementing the repatriation plan should be mindful of these circumstances. While a refugee's inability or unwillingness to return to his home of origin would not necessarily preclude his return to Bosnia-Herzegovina,<sup>46</sup> it suggests that repatriation, at least in such cases, should be postponed until implementation of the peace plan has advanced and circumstances in Bosnia-Herzegovina have improved. Otherwise western governments risk undermining the refugees' right to return home and missing this opportunity to counter the effects of ethnic cleansing.

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<sup>45</sup> See Laura Silber, "UN accuses Bosnian leaders of pressing Serbs to quit," The Financial Times (26 Feb. 1996).

<sup>46</sup> In many jurisdictions, an individual will not be entitled to refugee protection if he could obtain the protection of his government in another part of his country. This interpretation of the Refugee Convention has recently been endorsed in a non-binding joint position adopted by member states of the European Union. "European Union: Harmonized Definition of a Refugee," Migration News Sheet, 5-7 (Dec. 1995).

#### **IV. Conclusion.**

As has been suggested throughout the foregoing discussion, early return policies could substantially undermine refugees' willingness to participate in elections and their ability to return to their original homes -- the two aspects of the peace plan most likely to support efforts to rebuild an ethnically heterogeneous, tolerant, and peaceful society. In announcing her plans for the repatriation and reintegration of refugees and other displaced people from Bosnia-Herzegovina, the UNHCR cautioned her audience about the threatened Serb exodus from the Sarajevo suburbs, stating "[w]e must not allow ethnic division, so cruelly carried out during the war, to be completed in this time of peace." In the intervening weeks, her worst fears have been realized and the ethnic division of Bosnia-Herzegovina continues. The provisions of the Dayton Agreements relating to refugees' right to return to their home of origin and their right to participate in elections provide an opportunity to stem this tide, but short-sighted western European repatriation policies threaten to squander this opportunity. Unless they take a longer view, these asylum states are likely to rid themselves of the refugee burden in the short-term, only to face another mass influx of asylum-seekers when conflict reignites in Bosnia-Herzegovina in the not-so-distant future.