

POST-CONFLICT PROPERTY RESTITUTION
AND REFUGEE RETURN IN BOSNIA AND
HERZEGOVINA: IMPLICATIONS FOR
INTERNATIONAL STANDARD-SETTING
AND PRACTICE

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I. INTRODUCTION

Barely a decade has passed since the end of the 1992-1995 war in Bosnia and Herzegovina (Bosnia, or BiH),¹ a notoriously destructive ethnic conflict in which thousands were killed and half of the population—more than 2.2 million persons—was displaced. Almost unnoticed by the outside world, however, a legal process of returning more than 200,000 properties to people displaced during the conflict has been conceived, implemented, and completed since the end of the

1. "Bosnia" is used throughout this paper for general references to the country of Bosnia and Herzegovina, but the official abbreviation "BiH" is used for specific references to the state and its institutions.

war. This large-scale post-conflict restitution process, commonly referred to in Bosnia as “property law implementation,” is without precedent in the history of international peace building.² Although this process began relatively early, with the passage of restitution laws in 1998, its successful outcome was by no means clear at that time. As recently as March 2000, the rate of implementation of these laws remained so low that completion of the process was thought likely to take up to forty years.³ Instead, restitution was completed in four years, with the bulk of all property claims resolved by the end of 2003 and a process of municipality-by-municipality confirmation of “substantial completion” that continued into early 2004.⁴

The return of virtually all properties claimed by those dispossessed in the conflict has played a key role in ensuring that the more than 2.2 million Bosnians displaced by the conflict have been given an opportunity to return to live in their pre-war homes and municipalities, meeting one of the major requirements set out in the 1995 *General Framework Agreement on Peace in BiH* (GFAP) that ended the conflict in Bosnia.⁵ This achievement is all the more remarkable for having been car-

2. See Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L. L. 1091, 1138-39 (1998).

3. Office of the High Representative, *Non Negotiable Principles in the Context of the Property Law Implementation* (Mar. 1, 2000), available at http://www.ohr.int/plip/key-doc/default.asp?content_id=5511 [hereinafter PLIP Non Negotiable Principles] (“As pointed out previously, at current rate the process will take another 22 years in the Federation and another 40 years in the RS.”); see also Eric Rosand, *The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law*, 33 CORNELL INT'L. L.J. 113, 126-7 (2000) (advocating compensation in lieu of restitution, in part based on skepticism as to whether restitution would be possible).

4. Press Release, Office of the High Representative, Property Law Implementation Ratio in November 2003 stands at 92 percent in both Entities (Dec. 30, 2003), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=31459 (explaining that the implementation ratio reflects only positively decided claims, and that therefore by including claims with negative decisions, the percentage of claims resolved stands higher than ninety-two percent).

5. General Framework Agreement for Peace in Bosnia Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 [hereinafter GFAP]. The GFAP, also known as the “Dayton Accords” or “Dayton Peace Agreement,” was negotiated in Dayton, Ohio, and signed in Paris on December 14, 1995. It consists of an international treaty binding on BiH and its neighboring states, and eleven annexes that set out the constitutional structure of the postwar state of BiH as

ried out primarily by local administrative officials answerable to the ethnic-nationalist parties that had fomented the war and displacement in Bosnia.⁶ The international community⁷ in Bosnia also played a critical role in overcoming the initially fierce political resistance to refugee return, drawing on an unprecedented deployment of legal, political, and financial resources,⁸ as well as an unusual level of unity and perseverance.⁹

Nevertheless, the success of this process is often considered against the fact that the number of people who have actu-

well as specific obligations binding on all BiH authorities, in areas such as human rights, elections, and refugee return.

6. See European Stability Initiative, *Reshaping International Priorities in Bosnia and Herzegovina: Part One: Bosnian Power Structures* (Oct. 14, 1999), available at http://www.esiweb.org/pdf/esi_document_id_4.pdf (discussing persistence of wartime political structures and strategies in the post-war period).

7. References to the “international community” in this paper encompass the various international agencies, inter-governmental organizations, and international NGOs present on the ground and engaged in peace-building in Bosnia.

8. The resource intensiveness of the reconstruction of Bosnia has been particularly high, a factor that must be taken into account in assessing its value as a model for other post-conflict settings. See Marcus Cox & Madeleine Garlick, *Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS FOR REFUGEES AND DISPLACED PERSONS 65-67 (Scott Leckie ed., 2003) (“A return program of this intensity has been possible only because of the scale of international commitment to the Bosnian peace process, involving seven years of foreign military engagement, civilian police monitors and a US\$5.1 billion reconstruction program These tools of intervention are not available in most post conflict situations.”); see also, *Almost Like One Country*, THE ECONOMIST, Sept. 27, 2003, at 32 (“Gerald Knaus, who runs a think-tank in Berlin called the European Stability Initiative, says that foreigners’ huge investment in reconciliation in Bosnia has been a success, but that new policies are needed to ensure that all that [sic] the money spent (by some counts, €17 billion, or \$19 billion) is not wasted.”).

9. See Lynn Hastings, *Implementation of the Property Legislation in Bosnia Herzegovina*, 37 STAN. J. INT’L L. 221, 223 (2001) (“I suggest several reasons for the success of the implementation of the property legislation [in Bosnia] . . . primarily the international community’s more unified and interventionist approach—and the lessons the international community should learn from that success—namely, that property return . . . in a post-conflict area cannot be resolved in one or two years. States and organizations that wish to become involved in post-conflict reparations must be prepared to commit considerable time and resources until the complex task is finished or until it is apparent that their efforts will not prevail.”).

ally permanently returned to live in their pre-war residences in Bosnia has not kept pace with the number of people registered as having simply repossessed their property.¹⁰ In other words, the return of property to people has not always resulted in the return of people to property. While property restitution has been a vital precondition for the actual return of one million of refugees and displaced persons,¹¹ many others who repossessed their properties have opted to sell or rent them instead. Though the proceeds from such sales and rentals often facilitate durable solutions other than return for those displaced by the conflict,¹² the disparity between results achieved in property restitution and refugee return has nevertheless provoked an ongoing debate about the success of the international peace-building effort in Bosnia. For instance, a November 2002 report by a widely-read research group warned darkly of the consequences of “collaboration” by Bosnian authorities

10. According to statistics kept by the UNHCR Representation in BiH, 979,598 refugees and displaced persons had returned to their pre-war homes in Bosnia by December 2003. Only about half of these returns (430,426) were by so-called “minority returnees,” or persons returning to pre-war homes where patterns of war-time displacement had rendered them ethnic minorities. However, these numbers include many who did not have to have their property returned to them. It is therefore safe to estimate that the number of returns, and particularly minority returns, would be considerably higher—in light of the total figure of about 2.2 million people displaced in the 1992-1995 conflict—if each of the over 200,000 families that have had their property returned to them to date had actually returned to live in these properties. Press Release, The UN Refugee Agency, Refugee and displaced persons returns reached 980,000 since Dayton Peace Agreement (Dec. 9, 2003), *available at* <http://www.unhcr.ba/press/2003pr/091203.htm>.

11. Press Release, United Nations High Commissioner for Refugees, One Millionth Returnee Goes Home in Bosnia & Herzegovina (Sept. 21, 2004), *available at* <http://www.unhcr.ba/press/2004pr/210904.htm> [hereinafter UNHCR September 2004 Return PR] (“In all, 1,000,473 people out of a total of more than 2 million people forcibly displaced during the war had returned to their home areas by the end of July according to the latest monthly figures compiled by UNHCR. Of these, 440,147 were refugees who had fled Bosnia and Herzegovina, and 560,326 were forcibly displaced inside the country.”).

12. The term “durable solutions” refers to various means of restoring the protection of a state to refugees otherwise in need of international protection, in accordance with international refugee law. The traditional durable solutions for refugees include voluntary repatriation (to the state of citizenship or habitual residence), local integration (in the state of asylum), and resettlement (to a third state).

to permit property repossession, leaving them free to “pursue other policies that discourage real return.”¹³

International engagement is still necessary to maintain and sustain the decisions of ordinary people to resist their wartime leaders’ invocations of tribal solidarity. This is not just a question of human rights. It is also the principal test of whether or not the Bosnian state conceived at Dayton can endure and evolve as a viable multinational state.¹⁴

The tendency in Bosnia to conceive of property restitution in rhetorical opposition to refugee return became increasingly pronounced as complete property law implementation began to look achievable, emphasizing the fact that the simultaneous upswing in actual return, though considerable, would never achieve complete restoration of the prewar demographic composition of Bosnia. However, despite this controversy, Bosnia has become the leading model for achieving post-conflict property restitution, positioning restitution as both a *per se* right and a means of promoting refugee return. In the years since the war ended, Bosnia has been held up as a model for resolving property disputes in scenarios as disparate as Palestine¹⁵ and Iraq¹⁶ by bodies ranging from national NGOs to the recently appointed U.N. Special Rapporteur examining this topic.¹⁷ Examination of many of the settings in

13. International Crisis Group, *The Continuing Challenge of Refugee Return in Bosnia and Herzegovina*, ICG Europe Report No. 137, 10-11 (Dec. 13, 2002), available at <http://www.crisisweb.org/home/index.cfm?id=1473&l=1>.

14. *Id.* at 3.

15. Paul Prettitore, *The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case-Study* (Apr. 2003), available at http://www.badil.org/Campaign/Expert_Forum/Geneva/paper01.pdf.

16. Press Release, U.S. Institute of Peace, *Avoiding Violence in Kirkuk Requires Settling Property Disputes Quickly* (Apr. 28, 2003), available at http://www.usip.org/newsmedia/releases/2003/0428_NBiraq.html [hereinafter U.S. Institute of Peace] (setting out need “to absorb lessons learned from administrative property claims processes used in Bosnia and Kosovo as well as elsewhere, and to consider whether such processes are needed in Iraq in order to avoid violence.”).

17. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Protection of Human Rights, 55th Sess., *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Preliminary Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/2003/11 (2003) [hereinafter Pinheiro Preliminary Report] (“Much can be learned from [the Bosnia] experience regarding how best to implement housing

which Bosnia has been viewed as a model reveals similarly uneasy questions regarding the relationship between restitution and return.¹⁸

This Article contends that one of the main obstacles to coherent implementation of post-conflict property restitution in Bosnia—and, by extension, in other settings in which Bosnia has become a leading model—is ambiguity regarding the legal source and justification for the right to post-conflict property restitution. International observers have identified an emerging post-conflict right of property restitution, based on both generally applicable human rights norms and recent practice.¹⁹ Almost all of the textual sources describing this

and property restitution programmes in sensitive, and potentially unstable, post-conflict situations.”).

18. See, e.g., Anneke Rachel Smit, *Pushing Restitution, Not Reconciliation*, TRANSITIONS ONLINE, Aug. 7, 2003 (“Property restitution lurches forward in Kosovo, but lack of coordination on returns complicates the process.”); see also Ghada Karmi, *The Right of Return: The Heart of the Israeli-Palestinian Conflict*, OPENDEMOCRACY (Aug. 27, 2003), available at <http://www.opendemocracy.net/debates/article-2-97-1456.jsp> (noting explosive reaction to survey finding many Palestinian refugees willing to settle for compensation rather than return and permanent residence in Israel); *Northern Cyprus: A Glimmer of Hope*, THE ECONOMIST, Dec. 20, 2003, at 72 (“Meanwhile, in a landmark concession, the Turks have agreed to pay a Greek-Cypriot refugee, Titana Loizidou, €1.1m (\$1.3m) awarded in 1998 by the European Court of Human Rights when it upheld her claim that Turkey had obstructed access to her home by its occupation of the north. The Turks succeeded in deferring restitution of Mrs. Loizidou’s property near Kyrenia until 2005. But unless a deal is struck and the UN plan kicks in, Turkey may have to pay out millions more in similar cases.”); Patrick J. McDonnell, *Displaced Iraqi Kurds, Wary Arabs Seek Justice*, L.A. TIMES, Aug. 3, 2002, at A10 (describing the role of the International Organization on Migration (IOM) in taking the claims of expelled persons in Iraq); U.S. Institute of Peace, *supra* note 16 (“It is also important that a process be set up quickly to resolve real property claims and that the resulting decisions be implemented in a way that is transparent and fair to all ethnic groups. Even if resolution is not immediate, the prospect of justice, which may include compensation, will have a stabilizing effect.”). But see Neil MacFarquhar, *Iraqis in Iran: Unwelcome at Home, Unwanted Abroad*, N.Y. TIMES, June 13, 2003, at A19 (“Iran, too, would like to see [Iraqi refugees] gone, but the American and British occupation forces are not particularly eager recipients. For one thing, accepting tens of thousands of families seeking to reclaim confiscated property would only augment the tumult the administrators have barely been able to contain.”).

19. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Protection of Human Rights, *Working Paper: The Return of Refugees’ or Displaced Persons’ Property*, Agenda Item 4 ¶ 42, U.N. Doc. E/CN.4/Sub. 2/

right, beginning with Bosnia's GFAP, posit two autonomous grounds on which it may be found binding. The first and most commonly cited source of the right to post-conflict property restitution derives from its status as an element of the broader right of refugees to return to their homes of origin. The second, independent source of the right to post-conflict property restitution derives from its status as a preferred remedy in cases of gross violations of generally applicable human rights related to peaceful enjoyment of property, adequate housing, and respect for the home.

Both refugee return and restitution are closely related to the key post-conflict goals of redressing crimes such as ethnic cleansing,²⁰ providing durable solutions for refugees and displaced persons,²¹ and restoration of the rule of law.²² Nevertheless, there is an implicit tendency to assume that these policy ends can only be met through actual, physical return of refugees to permanent residence in their restituted properties. In general, the return of refugees remains a far headier prospect than property restitution alone.²³ Return is fraught with

2002/17 (2002) (prepared by Paulo Sérgio Pinheiro) [hereinafter Pinheiro Working Paper] ("It is clear from the above that the principle of housing and property restitution has been enshrined in international and national law, reaffirmed by the international community and recognized by independent United Nations expert bodies.").

20. Rosand, *supra* note 2, at 1131 ("Since [persons displaced by ethnic cleansing] have often fled to countries that are financially unable to accommodate them . . . the right to return in general should not be interpreted to exclude those for whom return may be the only durable solution. Such a broad interpretation . . . would create a legal justification for reversing the gains made in ethnically cleansed areas.").

21. Pinheiro Working Paper, *supra* note 19, ¶¶ 16-21 (citing documentation by UNHCR noting the necessity of resolving housing and property issues in the context of repatriation as a durable solution for refugees).

22. *Id.* ¶ 14 ("[E]nsuring the restitution of housing and property temporarily lost owing to displacement has also become an increasingly prominent component of efforts to protect human rights, restore the rule of law and prevent future conflict in countries currently undergoing post-conflict reconstruction.").

23. In describing the right to return, for instance, one observer supplements a sober legal analysis by citing a relatively passionate defence of the emotional significance of return: "Why is the right to return so fundamental? It is because exile is a fundamental deprivation of homeland, a deprivation that goes to the heart of those immutable characteristics that comprise our personal and collective identities. We have a right to our homeland, to live in peace and security in the places of our birth, of our ancestors, our

short-term security concerns, but raises the long-term possibility of recreating viable and diverse political communities. Return also becomes an understandable focus for international attempts to recreate societies whose initial collapse may have been facilitated by international indifference. For leaders of the victims of ethnic cleansing, marshaling mass-return may become a way to conclude the underlying conflict on more favorable terms.

By contrast, property restitution on its own is a less intuitively satisfactory remedy for ethnic cleansing, as simply restoring refugees' control over their property allows them to sell out of return just as easily as it allows them to effect it. In the face of widespread domestic resistance to return in Bosnia, these concerns justified an initial compensatory bias on the part of the international community in favor of return-based restitution.²⁴ In its most extreme forms, however, this return bias not only derogated from the principle of voluntary return set out in the GFAP, but also was liable to manipulation in ways that actually obstructed return.²⁵ In any case, the success of property restitution is only the first among a number of factors that determine whether refugees and displaced persons perceive return as a viable choice. Without further guarantees of physical security and non-discriminatory access to public services, conditions hardly exist for choices on return to be made in a free and informed manner.²⁶

Thus, while the international community in Bosnia eventually guaranteed completion of property restitution in Bosnia through adoption of a rights-based approach, there is room to question whether more could have been done to address obstacles to return beyond property appropriation. Ultimately,

culture, our heritage." Bill Frelick, *The Right to Return*, 2 INT'L J. REFUGEE L. 442, 444 (1990), *quoted in* Rosand, *supra* note 2, at 1121. *But see* Tania Ghanem, *When Forced Migrants Return 'Home': The Psychosocial Difficulties Returnees Encounter in the Reintegration Process* (Refugee Studies Center, Working Paper No. 16, 2003), *available at* <http://www.rsc.ox.ac.uk/PDFs/workingpaper16.pdf> (questioning the extent to which a country of origin remains a "home" after the experience of displacement).

24. *See infra* Part II.A (discussing return-oriented measures such as international donor-funding of return-related reconstruction rather than general compensation for destroyed properties).

25. *See infra* Part V.B (describing the two-year rule in the Federation).

26. *See infra* Part II.C (describing debates over "return sustainability").

success or failure in mass-displacement settings should be judged not by whether every refugee and displaced person returned, but by whether each was given the opportunity to make a genuinely free and informed choice on the matter.

Examination of restitution and return in Bosnia—where both rights have arguably been more comprehensively implemented than in any other contemporary post-conflict setting—demonstrates the pitfalls inherent in failing to adequately resolve their relationship. The extent to which post-conflict property restitution is emphasized as an autonomous rights-based goal vis-à-vis refugee return can determine both the substantive scope and procedural parameters of the restitution process. In mass-claims situations, such considerations can significantly affect the remedies available to large displaced populations. In the Bosnian case, the initial framing of restitution primarily as a driver of return rather than a *per se* right imposed constraints on the process that jeopardized both return and restitution and required significant international resources to correct. A central lesson of Bosnian restitution is that adoption of a rights-based approach at the outset of restitution processes is more likely to ensure property repossession in a fair, efficient, and transparent manner for all victims of displacement. This, in turn, will facilitate informed choices by each restitution beneficiary on whether to return to their original home or use it as an asset to fund sustainable resettlement elsewhere.

This Article begins with a discussion of the dual legal sources of the right to post-conflict restitution. As reflected in both the GFAP in Bosnia and the current U.N.-led international standard-setting process, independent return-based and rights-based rationales exist for restitution. The subsequent discussion of the politics of restitution and return in Bosnia—how both domestic constituencies and international agencies came to view the dynamic between these peace-building goals—is meant to convey their complicated and politically charged interrelationship in practice. Part III focuses on the war in Bosnia and how consolidation of ethnic displacement through the reallocation of abandoned homes was one of its central tactics. It also introduces the types of property subject to such practices, particularly occupancy rights to urban socially-owned apartments. By virtue of their high desirability, impending privatization, and ambiguous legal status, such

apartments inspired some of the most sustained obstruction of post-war restitution.²⁷

The next three sections examine post-war property law implementation in detail, focusing on successive legal controversies that marked the shift from a return-based to a rights-based approach to restitution in Bosnia. Part IV discusses the international community's early focus on restitution as the best means of implementing the broader return obligations under the GFAP, the locally-administered claims process that resulted, and the efforts by the Bosnian authorities to exploit the return-based rationale of this process to limit the scope of restitution of apartments. Part V describes the international structures developed to coordinate monitoring of the process and their reaction to further attempts to limit restitution of apartments by conditioning restitution on return. Part VI discusses the completion of the process, including a shift in international attention from substantive concerns regarding apartment restitution to procedural concerns regarding arbitrariness, length of proceedings, and legal certainty, many of which implicated the international community's own policies.

II. THE DUAL SOURCE OF THE RIGHT TO POST-CONFLICT PROPERTY RESTITUTION

Under both the Bosnian GFAP and broader international human rights law, the right to property restitution can be justified either as a measure necessary to create the conditions for refugee return, or as a remedy, obligatory in its own right, for serious human rights violations. The existence of this "dual source" for the right to restitution can, in practice, complicate implementation. In Bosnia, restitution was initially conceived primarily in terms of the return of refugees and displaced per-

27. Concerns about restitution of "socially-owned" property exist in other countries where, as in Bosnia, ethnically-motivated population displacement coincided with post-socialist transition. For instance, the U.N. Special Rapporteur on property restitution has noted similar problems with such property in Croatia and Georgia. Pinheiro Preliminary Report, *supra* note 17, ¶ 18, at 6-7 ("[U]nder the Croatian restitution programme, only owners of private property . . . were entitled to benefit from measures of restitution. These restrictions, particularly in a country with a history of social housing, served to restrict severely the scope of restitution."). *Id.* ¶ 35, at 10 (describing abuse, in Georgia, of a "six month vacancy" rule in a Soviet-era law to judicially sanction forced displacement and prevent restitution).

sons, a goal that galvanized international monitors but bogged down in domestic disputes over maximalist and minimalist definitions of “return.” The international community eventually bypassed the domestic debate by shifting its emphasis from “return-based” to “rights-based” restitution. Accordingly, restitution was reframed as a remedy and its implementation as an exercise in rule of law and administrative capacity-building. While this strategy ultimately resulted in the successful completion of property restitution, it was controversial among the international agencies monitoring the process and left them open to accusations of neglecting obstacles to refugee return other than the occupation of homes.

A. *Sources of the Right to Post-Conflict Property Restitution in the GFAP*

The GFAP consists not only of a treaty ending the 1992-1995 conflict between the Bosnian Serbs, Croats, and Muslims (Bosniacs), but also of eleven annexes that set out a new constitutional order and regulate other reconstruction tasks. Under the new Bosnian Constitution in Annex 4 of the GFAP,²⁸ the central institutions of the federal state of Bosnia and Herzegovina are accorded only minimal competences, leaving broad residual powers to the ethnically-based federal units (Entities).²⁹ The administrative boundaries between and within these Entities—the Bosnian Serb dominated *Republika Srpska* (RS) and the Federation of BiH (Federation), consisting of ten cantons dominated by Bosniacs and Croats—correspond closely to the battle lines at the end of the conflict. As a result, the post-war Bosnian constitutional framework has been seen as cementing the ethnic cleansing of the war through a subsequent de facto partition.³⁰

Political recognition of the warring parties’ territorial ambitions was, however, balanced in the GFAP with undertakings

28. GFAP, *supra* note 5, Annex 4 (“Constitution”).

29. *Id.* Annex 4, art. III(3)(a) (“All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.”).

30. See, e.g., Robert M. Hayden, *The 1995 Agreements on Bosnia and Herzegovina and the Dayton Constitution: The Political Utility of a Constitutional Illusion*, 4 E. EUR. CONST. REV. 59 (1995) (arguing that all constitutional structures created in Bosnia since 1993, including the GFAP Constitution, constituted a formula for partition of the country along ethnic lines).

meant to remedy human rights violations, including ethnic cleansing and displacement caused by the war.³¹ In fact, the GFAP contains two independent sources of an obligation on the authorities of Bosnia to return the properties of persons dispossessed in the conflict. The first and best known ground lies in Annex 7 of the GFAP,³² in which restitution is incorporated as one of the core refugee return commitments undertaken by the BiH authorities:

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.³³

Annex 7 sets out a right of refugee return that went significantly beyond the general requirements of international law at the time it was adopted by defining return as not just return to the country of pre-war residence but as return to *the specific home of origin*,³⁴ and backed this obligation by requiring the restitution of these homes as of right. While it is clear that

31. See Timothy William Waters, *The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution*, 40 HARV. INT'L. L.J. 517, 535 (1999) ("The picture that emerges from the Dayton Accords provisions is of a highly confederal state, with the bare minimum of authority and sovereignty at the center, and the concomitant maximum of power and autonomy at the entity and cantonal levels—the very levels that correspond to the ethnic and military division of the country. Counterbalancing this, however, are explicit and extensive guarantees for individual human rights and equally explicit rejections of any exclusion or discrimination on the basis of those very characteristics by which the population was divided during the war.").

32. GFAP, *supra* note 5, Annex 7 ("Refugees and Displaced Persons").

33. *Id.* Annex 7, ch. 1, art. I(1) (emphasis added).

34. Chiara Biscaldi, *The Right to Return in Bosnia and Herzegovina: Obstacles to its Implementation* 5 (2001) (unpublished manuscript), available at <http://see.oneworld.net/article/view/56215/1/3451> ("It should be noted that as it is recognized in international human rights law the right to return is to one's own country or to the country of nationality and not a general right to return to community or home of origin or habitual residence. However, if one sees the right to return as a form of exercise of other rights such as freedom of movement and choice of residence which are recognized in most international human rights instruments, it follows that a denial of the right of return to one's home involves violations of other human rights.").

these rights are to be exercised on a voluntary basis,³⁵ the drafters of Annex 7 appear to have (correctly) anticipated domestic resistance to the return of ethnic “minorities”³⁶ to their pre-war homes.³⁷ Many provisions of Annex 7 appear to favor actual return over local resettlement, beginning with the statement that “[t]he early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.”³⁸ The Bosnian authorities are obliged to “accept the return of . . . persons who have left their territory”³⁹ and create “conditions suitable for return” by repealing discriminatory laws and preventing or punishing incitement of ethnic hostility.⁴⁰ Preference for return over local integration also pervaded international implementation of Annex 7. For instance, international donors refused to fund provisions of Annex 7 permitting compensation for those who did not wish to return,⁴¹ instead devoting their considerable resources to reconstruction of housing for those willing to commit to return.⁴²

35. GFAP, *supra* note 5, Annex 7, ch. 1, art. I(4) (“Choice of destination shall be up to the individual or family . . . 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.”).

36. In the Bosnian context, the term “minority” is often used to describe persons returning or contemplating return to areas now under the control of a different ethnic group, regardless of the pre-war demographic composition of that area.

37. See European Stability Initiative, *supra* note 6, at 2 (“Nationalist leaders have a strategic interest in maintaining the conditions on which their power depends: pervasive ethnic separation; fear and insecurity among the general populace; a lack of democratic accountability; [and] breakdown in the rule of law . . .”).

38. GFAP, *supra* note 5, Annex 7, ch. 1, art. I(1).

39. *Id.*

40. *Id.* Annex 7, ch. 1, art. I(3)(a)-(c); see also *id.* Annex 7, ch. 1, art. II(1) (“The Parties undertake to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group.”).

41. See *id.* Annex 7, ch. 1, art. I(1) (setting out a right to compensation for those whose property cannot be restored); see also *id.* Annex 7, ch. 2, art. XI (allowing claims for compensation in lieu of repossession).

42. In light of the inability of the Bosnian authorities to agree on, let alone fund, a compensation mechanism, and the preference of international donors to fund reconstruction of destroyed properties in exchange for com-

The central role of property restitution in securing the right of return is reflected in Chapter Two of Annex 7, which provides for a quasi-international body, the Commission for Real Property Claims of Refugees and Displaced Persons (CRPC), mandated to “receive and decide” claims for real property in Bosnia abandoned since the beginning of the war.⁴³

While these and other provisions of Annex 7 assume a return-based rationale for property restitution, a less obvious, but equally compelling rights-based basis for restitution was latent in other annexes of the GFAP. The Bosnian Constitution itself, in Annex 4 of the GFAP, provided that Bosnia and its Entities were to “ensure the highest level of internationally recognized human rights and fundamental freedoms,” attributing the European Convention on Human Rights (ECHR)⁴⁴ and its protocols direct applicability in Bosnia, with “priority over all other law.”⁴⁵ The Constitution also protects specifically enumerated rights to the home and to property.⁴⁶

While these constitutional provisions did not go so far as to place Bosnia directly under the jurisdiction of the European

mitments by the beneficiaries to return to live in them, the compensation provisions of Annex 7 have remained a dead letter. Pre-war owners of the numerous properties destroyed in the course of the conflict have an undisputed right to repossess and dispose of such properties, and may seek internationally-funded reconstruction. This has offset arguments that such properties “cannot be restored” in the sense of Annex 7, requiring compensation to be paid. *See, e.g.,* Cox & Garlick, *supra* note 8, at 77-79 (describing “reconstruction-driven return” as one of the key international community strategies in encouraging Annex 7 implementation); Rosand, *supra* note 3, at 129-31 (noting the fact that the provisions for compensation in Annex 7 have remained inactive).

43. *See generally* GFAP, *supra* note 5, Annex 7, ch. 2.

44. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

45. *See* GFAP, *supra* note 5, Annex 4, art. II(1)-(2). Point 6 of Article II further provides that BiH “and all courts, agencies, governmental organs, and instrumentalities operated by or within the entities” shall apply and conform to the ECHR and its protocols. *Id.* Annex 4, art. II(6). These provisions of the GFAP represent the first time that a state was able to be bound by the ECHR without having first acceded to membership in the Council of Europe. BiH eventually did accede to this international organization on April 24, 2002.

46. *Id.* Annex 4, art. II(3)(f), (k). The Constitution specifically affirms the rights of return and restitution of property set out in Annex 7 of the GFAP. *Id.* Annex 4, art. II(5).

Court of Human Rights,⁴⁷ Annex 6 of the GFAP⁴⁸ created a *sui generis* mechanism, the Commission on Human Rights, authorized to consider “alleged or apparent violations of human rights” in terms of the ECHR and its protocols.⁴⁹ The Commission consisted of a judicial body, the Human Rights Chamber, authorized to consider complaints and issue final and binding decisions,⁵⁰ as well as a Human Rights Ombudsman, authorized to investigate human rights violations, issue conclusions, and refer cases to the Human Rights Chamber.⁵¹ The Chamber came to play a significant role in defining both the scope of protected property rights in post-conflict Bosnia and the remedy for interferences with these rights.⁵² Although the Chamber was set up to examine prospective violations of human rights, ethnic cleansing and associated property takings continued in Bosnia even after the entry into force of the GFAP and coherent attempts by the perpetrators to legalize the results really only began in the post-conflict period. Therefore, the Chamber could assume jurisdiction *rationae temporis* over many property complaints⁵³ and rule on their merits in accordance with rights to peaceful enjoyment of pos-

47. Accession to the Council of Europe generally not only entails ratification of the ECHR and its Protocols, but also acceptance of the jurisdiction of the European Court of Human Rights, the primary system for protection of the rights protected under these instruments. *See generally*, CLARE OVEY & ROBIN C.A. WHITE, JACOBS AND WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 6-12 (3d ed. 2002).

48. *See* GFAP, *supra* note 5, Annex 6 (“Human Rights”).

49. *Id.* Annex 6, art. II(2). The Commission could also consider alleged or apparent discrimination in the enjoyment of rights and freedoms protected in sixteen further human rights conventions.

50. *Id.* Annex 6, ch. 2, pt. C.

51. *Id.* Annex 6, ch. 2, pt. B.

52. *See generally*, Walpurga Engelbrecht, *Property Rights in Bosnia and Herzegovina: The Contributions of the Human Rights Ombudsperson and the Human Rights Chamber towards their Protection*, in *RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS FOR REFUGEES AND DISPLACED PERSONS* 83 (Scott Leckie ed., 2003).

53. *Id.* at 96 (“To be able to accept the application, the Chamber must deal with events occurring after the GFAP came into force, i.e. after 14 December 1995. In cases, however, where the applicant’s grievance has continued up to the present time the Chamber has jurisdiction to consider such applications.”).

sessions under Article 1 of Protocol 1 to the ECHR⁵⁴ and to respect for the home under Article 8 of the ECHR.

The Chamber's assumption of jurisdiction over property cases highlighted an implicit ambiguity as to the legal basis for property restitution under the GFAP. Was this one of a number of positive obligations undertaken by the authorities in order to create the conditions for free exercise of the right to return under Annex 7? Or was it an obligation to provide a remedy for violations of human rights applicable under the ECHR via Annex 4? The issue of whether property restitution programs were essentially return-based or rights-based would be a central underlying debate throughout their implementation.

B. *Sources of the Right to Post-Conflict Property Restitution in International Law*

In international law and in the GFAP, the most obvious basis for post-conflict property restitution is its inherent relationship with the right of return. Viewed in historical context, the articulation of a right of return represents a marked shift in the international community's approach to peace-building in ethnically-torn communities. As recently as the end of World War II, forced population transfers remained an approved means of reducing ethnic tensions and a standard component of peace settlements.⁵⁵ While mass expulsions and population transfers have been prohibited in accordance with post-World War II international human rights law, the preferred durable solution for victims of displacement remained, until very recently, resettlement as refugees, rather than repatriation.⁵⁶ It is only in the post-Cold War era that increased ethnic conflict and decreased political commitment to asylum policies coincided to shift the focus to repatriation and return.⁵⁷

54. Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 1, 213 U.N.T.S. 262 [hereinafter Protocol to ECHR].

55. Rosand, *supra* note 2, at 1115-17.

56. *Id.* at 1117, 1119.

57. See, e.g., B.S. Chimni, *From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems*, in NEW ISSUES IN REFUGEE RESEARCH (Centre for Documentation and Research, Working Pa-

The right to return is based on a series of guarantees of the right to repatriation beginning with Article 13(2) of the 1948 Universal Declaration of Human Rights (UDHR).⁵⁸ Although the UDHR and other multilateral human rights treaties providing for repatriation are considered binding as customary international law,⁵⁹ some controversy remains regarding the scope of the right of return. This right has traditionally been understood to guarantee one's country of citizenship or nationality, rather than one's specific home of origin,⁶⁰ and its exercise has been limited to individuals, rather than groups that fled or were expelled *en masse*.⁶¹ Annex 7 of the GFAP confirms a recent trend toward broader interpretation by providing support for the right of an entire group—comprised of “refugees and displaced persons”—to return to their “homes of origin.”⁶²

The tendency toward a broader interpretation of the right to return is confirmed by a new standard-setting process initiated by the U.N. Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission), which in 2002

per No. 2, May 1999), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/openssl.pdf?tbl=RESEARCH&id=3ae6a0c50&page=publ>.

58. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 2d Sess., art. 13(2), at 71, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR], reprinted in INTERNATIONAL LAW SELECTED DOCUMENTS (Barry E. Carter & Phillip R. Trimble eds., 1991) (“Everyone has the right to leave any country, including his own, and to return to his country.”).

59. See International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, art. 12(4), 1966 U.S.T. 521, 999 U.N.T.S. 171 [hereinafter ICCPR] (“No one shall be arbitrarily deprived of the right to enter his own country.”); see also International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, art. 5(d)(ii), 660 U.N.T.S. 195 [hereinafter ICERD] (guaranteeing “the right to leave any country, including one’s own, and to return to one’s country”).

60. See Biscaldi, *supra* note 34.

61. Rosand, *supra* note 2. Rosand’s central thesis is that Annex 7 of the GFAP, if implemented, will provide practice in support of numerous recent soft law assertions of the right of post-conflict group return. In describing the history of this debate, Rosand points out that some proponents of individual exercise of this right have viewed mass-return as of right as a security risk in previous refugee crises such as in Cyprus and Palestine, and have argued that any group return can only be accomplished through political agreement. However, where, as in Cyprus and Palestine, individual return is not guaranteed, the right of return is arguably rendered meaningless. *Id.* at 1135.

62. GFAP, *supra* note 5, Annex 7, ch. 1, art. I (1).

appointed Paulo Sérgio Pinheiro as a Special Rapporteur on “housing and property restitution in the context of the return of refugees and internally displaced persons.”⁶³ In June 2002, Pinheiro submitted a working paper setting out the parameters of this right in accordance with relevant legal principles.⁶⁴ The working paper confirmed general acceptance of the terms of refugee return set out in GFAP Annex 7, with regard to both group exercise and destination.⁶⁵ Like Annex 7, the working paper also appears to view property restitution as primarily return-based:

Housing and property restitution must be seen as a *necessary component* of the implementation of the right to return to one’s home. Indeed, within the context of international human rights law, the right to housing and property restitution is recognized as an *essential element* of the right to return for refugees and displaced persons.⁶⁶

Like Bosnia’s GFAP, however, the working paper recognizes a separate rights-based rationale for post-conflict property restitution. This rationale is based on the strength of existing international law protection of housing rights⁶⁷ and the recognition of forced evictions as a gross violation of such rights, giving rise to the obligation to provide a remedy.⁶⁸ In fact, the rights-based rationale for property restitution is closely related to a parallel inquiry by the U.N. Human Rights Commission into the right to remedies and reparation for vio-

63. Pinheiro Working Paper, *supra* note 19, ¶¶ 6-7.

64. *Id.*

65. *Id.* ¶ 22 (“The right of return is now understood to encompass not merely returning to one’s country, but to one’s home as well. Indeed, the right of refugees and displaced persons to return to their homes is recognized by the international community as a free-standing, autonomous right in and of itself.”) (citation omitted).

66. *Id.* ¶ 29 (emphasis added) (citation omitted).

67. *Id.* ¶ 10 (Pinheiro cites provisions in a number of international human rights instruments including the UDHR, ICCPR, and ICERD in stating that “housing rights are enshrined in international law to a far greater degree and encompass far more, substantively speaking, than are more general property rights.”) (citation omitted); *see also* ICCPR, *supra* note 59, art. 17(1) (prohibiting “arbitrary or unlawful interference” with the home).

68. Pinheiro Working Paper, *supra* note 19, ¶ 31 (citing Commission on Human Rights, Res. 1993/77 ¶ 1).

lations of international human rights and humanitarian law.⁶⁹ Where, as in Bosnia, forced evictions were carried out in an egregious manner,⁷⁰ restitution as of right is increasingly recognized as the most appropriate remedy:⁷¹

In several resolutions concerning restitution, compensation and rehabilitation for victims of grave violations of human rights, the [U.N. Human Rights] Commission has consistently referred to the “right to restitution . . . for victims of grave violations of human rights.” It can therefore be construed that

69. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Rapporteur*, ¶ 8, U.N. Doc. E/CN.4/2000/62 (Jan. 1, 2000); see also U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report submitted by Mr. Theo van Boven, Special Rapporteur*, Agenda Item 4, ¶ 13, at 7-8, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) (defining “deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender” as “gross violations of human rights and fundamental freedoms”); *id.* ¶ 21, at 10 (discussing the issue of “forced removals and forced evictions”).

70. See U.N. SCOR Res. 752, ¶ 6, U.N. Doc. S/RES/752 (Apr. 17, 1992) (calling upon “all parties and others concerned to ensure that forcible expulsions of persons from the areas where they live and any attempts to change the ethnic composition of the population, anywhere in the former Socialist Federal Republic of Yugoslavia, cease immediately”); U.N. SCOR, Res. 820, ¶ 7, U.N. Doc. S/RES/820 (Apr. 17, 1993) (reaffirming “endorsement of the principles that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes and should be assisted to do so”); *id.* at ¶ 1 (“Reaffirming once again that any taking of territory by force or any practice of ‘ethnic cleansing’ is unlawful and totally unacceptable, and insisting that all displaced persons be enabled to return in peace to their former homes . . .”).

71. This point—that post conflict restitution is meant to remedy an established wrongful act—is underscored by comparison with the more familiar tradition of post-socialist restitution of nationalized property. Observers have noted that one of the main political obstacles to the latter form of restitution arises where post-expropriation possessors have come to be viewed as having legitimate, competing interests in the property. Thus, both types of restitution, where they occur, can be said to “den[ya] the claims of current occupants or state owners . . . and label as unjust any intervening ownership.” Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385, 1398 (1999).

restitution as a remedy for actual or de facto forced evictions resulting from forced displacement is itself a free-standing, autonomous right.⁷²

The subsequent work of the Special Rapporteur, including a June 2003 Preliminary Report⁷³ and a June 2004 Progress Report including draft implementation guidelines,⁷⁴ continue to refer to both return-based and rights-based rationales for restitution.⁷⁵ However, Mr. Pinheiro's June 2005 Final Report, which includes a set of *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, is less ambiguous.⁷⁶ While these principles affirm both the right of return to homes of origin and rights to housing and property,⁷⁷ they describe restitution itself as "a distinct right . . . prejudiced neither by the actual return or non-return of refugees and displaced persons entitled to [it]."⁷⁸ By adopting a rights-based, rather than a return-based approach to restitution, the Principles comport with lessons learned in Bosnia. As set out below, the balance struck between return-based and rights-based concerns in specific restitution programs will influence the extent to which both sets of goals are met.

72. Pinheiro Working Paper, *supra* note 19, ¶ 32 (citing Commission on Human Rights, Res. 2000/41, 1999/33).

73. Pinheiro Preliminary Report, *supra* note 17.

74. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Protection of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Progress Report of the Special Rapporteur, Paulo Sérgio Pinheiro, submitted in accordance with Sub-Commission resolution 2002/7*, U.N. Doc. E/CN.4/Sub.2/2004/22 (2004).

75. *See, e.g., id.* at 10 (basing the right of refugees and displaced persons to restitution on both "[t]he right to safe, voluntary and dignified return" and "[t]he right to a remedy for human rights violations").

76. U.N. Econ. & Soc. Council [ECOSOC]. Sub-Comm. on the Promotion and Protection of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro*: U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005).

77. *Id.* § IV (on the right to voluntary return in safety and dignity to "former homes, lands or places of habitual residence"); *id.* § III (describing the rights to privacy and respect for the home, peaceful enjoyment of possessions and adequate housing as "overarching principles").

78. *Id.* § III, ¶ 2.2.

C. *The Politics of Restitution and Return in Bosnia*

During the ten years since the GFAP was signed, Bosnia became a testing ground for the idea that the peace-building imperatives of redress, durable solutions, and rule of law could be effected through full property restitution rather than full return.⁷⁹ The question of whether to limit return efforts in Bosnia to ensuring full property law implementation remains controversial for both domestic and international observers, with questions persisting about the adequacy of what has been achieved through restitution in light of the elusive and essentially indefinable goal of “full Annex 7 implementation.”⁸⁰

The clashing understandings of return held by the three ethnic-political groupings in post-conflict Bosnia are crucial to understanding the development of property law implementation and ongoing controversies arising from its completion. As succinctly described by Cox and Garlick:

The Bosniac authorities, who retained a broad political commitment to a multi-ethnic Bosnia, fought for the right of Bosniac displaced persons to return to *republika srpska*, but made no effort to support the return of Serbs to Sarajevo and other Bosniac-majority

79. According to *The Economist*:

Out of a total of 2.2m refugees or people displaced by the war, some 964,000 have either gone home or claimed their properties which they may have sold if they did not want to return. According to the UN's High Commission for Refugees, nearly 420,000 have either returned or reclaimed property in areas where they are now in a minority. Since everyone can either now go home or reclaim and sell their property, the hope is that generations to come will not harbour the same sort of resentment as ejected Palestinians or Cypriots.

Almost Like One Country, *supra* note 8, at 50.

80. Without any clear benchmarks for “full” refugee return, competent international agencies are left to continue supporting return movements in accordance with their mandates and affirming the importance of return. See, e.g., United Nations High Commissioner for Refugees, *UNHCR's Position on Categories of Persons from Bosnia and Herzegovina in Continued Need of International Protection*, ¶ 103, at 30 (Sept. 2001), available at <http://www.unhcr.ba/publications/Position.PDF> [hereinafter UNHCR Position Paper] (noting that “[t]he preferred sustainable solution . . . is clearly that of voluntary return to . . . pre-conflict homes. This is the very heart of Annex 7 of the GFAP and should be pursued by all means if the persons concerned want to return to their pre-conflict homes and the security situation on the ground allows for such return.”).

urban centres. The Serb and Croat regimes engaged in aggressive campaigns to encourage their own population to settle permanently in areas under their control, so as to cement their territorial claims.⁸¹

Put more bluntly, the Bosniacs, as the numerical majority in the Federation and the plurality in all of Bosnia, had the potential to instrumentalize refugee return—and particularly minority return—as a “political strategy for reversing the war gains of the other two parties and regaining territorial control, but through peaceful means.”⁸² Aware that nationalist Serbs and Croats were seeking to shore up local majorities in the territories under their control by encouraging permanent resettlement of displaced persons,⁸³ prominent Bosniac politicians adopted the rhetorical stance that Annex 7 could be satisfied by nothing less than the physical return of every refugee and displaced person. Some even initially advocated the use of force if necessary.⁸⁴ At the same time, attribution of collec-

81. Cox & Garlick, *supra* note 8, at 69.

82. Susan Woodward, *Labours of Sisyphus? A Framework for Considering the Return of Refugees to Bosnia and Herzegovina and Croatia in the Coming Period*, in STRATEGIES FOR THE FUTURE OF BOSNIA-HERZEGOVINA AND CROATIA 2, 8 (Giuseppe de Vergottini et al. eds., 2001).

83. According to ONASA:

Representatives of the Ostanak Serb refugee association requested that a property fund foreseen by the Dayton Agreement starts [sic] its operations at the BiH level, in order that those not willing to return to their pre-war homes be adequately compensated, an ONASA correspondent reported. The association also requested the Republika Srpska government to begin constructing housing units for refugees and displaced persons, who want to stay living in the entity, as well as allocating the construction parcels for the same purpose. Bosko Bajic, the association president, on Friday told journalists that the RS government should make a decision banning the eviction of Serbs, who have still not exchanged, or sold their properties.

Serb Refugee Association Demands Compensations for Those Not Willing for the Return, ONASA, July 9, 1999.

84. According to ONASA:

President of the Party for BiH Haris Silajdzic said he believed the Kosovo model for the return of refugees should also be implemented in BiH, that is, the return should be ensured by the use of force. He told the Sarajevo daily *Oslobodjenje* that the Kosovo model should be implemented in BiH because problems in both areas were the consequences of the activities of the same Belgrade regime He added it is not right that the Kosovo refugees are

tive responsibility to non-Bosniac refugees and displaced persons for atrocities committed in their name was used to justify the failure of many Bosniac dominated municipalities to actively support return.⁸⁵

As a result, Bosniac politicians have tended to view property restitution with double skepticism, fearing that it would both allow refugees and displaced persons to sell repossessed properties rather than return to them and unjustly enrich war criminals among them, who had presumably forfeited any redress for their displacement.⁸⁶ Meanwhile, nationalist Serb and Croat authorities tended to systematically resist early property law implementation, fearing that it would lead to re-mixing of the largely ethnically homogenous territories they controlled. In part for the reasons that Bosniac leaders feared, Serb and Croat authorities ultimately came to embrace completion of the process. This had the ironic result that areas

being sent on force, and that “we have to beg every individual to return.”

Kosovo model for refugee return should be implemented in BiH; Silajdzic, ONASA, June 13, 1999

The idea of “forced return” is not without historical precedent in the region. After World War II, Yugoslav leader Josip Broz Tito famously declared an “eighth offensive” (*osma ofensiva*), under which all those displaced were required to return to their homes of origin en masse. See CHUCK SUDETIC, *BLOOD AND VENGEANCE* 36 (1998) (“Displaced persons were told to return to their villages and towns. Everyone was to go home. Everyone was to face his or her neighbors Anyone who dared utter an unkind word to someone of another nationality would sit for ten days in jail; if the unkind word was about someone’s mother, the sentence would be three months.”).

85. See, e.g., *Staying; Commentary*, ONASA, Nov. 30, 1998 (“Do the Serbs, who first killed and expelled the closest Bosniacs and Croats and then were forced themselves to run away from their houses, deserve the same compassion as the victims of their genocide?”).

86. An early reaction to the process by the Bosniac mayor of the city of Tuzla sums up these fears:

A letter sent by [Mayor] Beslagic said that approximately 3,000 persons have registered for return to Tuzla up to date, the majority of whom are Serbs. The letter also stresses that a great number of them are known as participants in the attacks on Tuzla committed during the aggression. “I would also like to warn you on a great number of data on intentions of returnees to commercialize their Dayton right to return by either selling the residential space or giving it to the present users for high compensation,” the letter said.

Beslagic Sends Letter to Westendorp, ONASA, Nov. 17, 1998.

under Serb and Croat control, long seen as black holes of ethnic exclusivity, completed property law implementation before many Bosniac municipalities that had made early token efforts but failed to truly commit to the process.⁸⁷ Cox and Garlick have described the “wider political logic” whereby property restitution prevailed in Bosnia:

Several years after Dayton, it had become clear to all of the major political players that restoring property rights was the essential pre-condition not only to return, but also to the successful resettlement of those who chose not to return. Those who were able to sell their pre-war homes recovered the means to build or buy in a new location. Even authorities opposed to return came under pressure to help their own citizens reclaim properties in other parts of the country.⁸⁸

Thus, despite the fact that levels of actual return have exceeded all early expectations,⁸⁹ Bosniac rhetoric has clung to the goal of complete return, dismissing all progress made in property restitution as a sop for international public opinion.⁹⁰ This debate sharpened markedly in the wake of Bosnian Constitutional Court decisions on ethnic representation

87. See *infra* Parts VI.C-D.

88. Cox & Garlick, *supra* note 8, at 77.

89. See UNHCR September 2004 Return PR, *supra* note 11; see also Press Release, United Nations High Commissioner for Refugees, 2003 Annual Return Statistics (Feb. 11, 2004), available at <http://www.unhcr.ba/press/2004pr/110204.htm> [hereinafter UNHCR 2003 Return Press Release] (“[E]ight years after the signing of the [GFAP], it is uncontested that real and tangible progress in the return of refugees and displaced persons has been achieved.”); *Refugees in Bosnia: Coming Home*, THE ECONOMIST, Dec. 20, 2003, at 56 (noting that “[a]cross Bosnia the number of returnees has been remarkably high in the past few years” and that current slowdown is due to economic factors rather than ethnic tensions).

90. According to one author:

The purpose of [property law implementation] should not be simply bureaucratic, that is to say, drafting conclusions on paper with the end goal of reaching 100% in order to declare that the process of return is finished. On the contrary, the primary goal should be the return and repossession of property by the real owner and the correction on [sic] war-time injustice.

Edina Šarač, *Povratak na papiru* [Return on Paper], DNEVNI AVAZ, Oct. 2, 2003, at 3 (translation on file with author).

in 2000⁹¹ and subsequent constitutional changes. These 2002 amendments required the RS to accept non-Serb representation in public institutions based on the numbers of Bosniacs and Croats registered on the territory of the RS before the war, until such time as “Annex 7 is fully implemented.”⁹² Because the non-Serb population of the RS was significantly higher before the war than after, this provision encourages Bosniac authorities to perpetuate their newly inflated political representation by defining implementation of Annex 7 so as to make it unattainable. Serb authorities predictably responded by portraying the completion of property restitution alone as fulfillment of the Entity’s Annex 7 responsibilities and arguing for a new census.⁹³

91. Constitutional Court of Bosnia and Herzegovina, Case U 5/98, Decision of January 30, 2000, *reported in* Official Gazette of Bosnia and Herzegovina no. 11/00; Constitutional Court of Bosnia and Herzegovina, Case U 5/98, Decision of February 19, 2000, *reported in* Official Gazette of Bosnia and Herzegovina no. 17/00; Constitutional Court of Bosnia and Herzegovina, Case U 5/98, Decision of July 1, 2000, *reported in* Official Gazette of Bosnia and Herzegovina no. 23/00; Constitutional Court of Bosnia and Herzegovina, Case U 5/98, Decision of August 19, 2000, *reported in* Official Gazette of Bosnia and Herzegovina no. 36/00, *available at* <http://www.ccbh.ba/?lang=en&page=decisions/byyear/2000>. Extracts from the official gazettes of the former Yugoslavia, its internationally recognized successor states and their federal sub-units, and the parties to the 1992-1995 conflict in Bosnia were not always available for verification. However, the author has worked with the citations and unofficial translations cited herein, the authenticity of which he is willing to attest. All references throughout this paper to legislation published in these gazettes is updated and accurately reflects their content as of the date of publication of this article to the best knowledge of the author.

92. Office of the High Representative, *Decision on Constitutional Amendments in Republika Srpska*, amend. LXXXV (Apr. 19, 2002), *available at* http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=7474. The amendment includes the provision that “[a]s a constitutional principle, . . . proportionate representation shall follow the 1991 census until Annex 7 is fully implemented, in line with the Civil Service Law of Bosnia and Herzegovina.”

93. The following reportage on a recent exchange between Serb and Bosniac officials typifies this debate. BiH House of Representatives Speaker Nikola Spiric said in a statement that his proposal on a census was not supported by the predominantly Bosniac SDA. “Latest [sic] census from 1991 suits to SDA [sic], are we supposed to wait for another 50 years for this job to be done. Without census [sic] we don’t know how many citizens we have, nor can we determine GDP or any other relevant data,” explained Spiric. However, SDA Vice President Elmir Jahic claimed that a census would be

Clearly, the extreme positions on both sides are unsatisfactory. Bosniac insistence on the actual return of all persons displaced by the conflict flatly contradicts the provisions of Annex 7 guaranteeing choice of destination.⁹⁴ On the other hand, Serb portrayal of property restitution as the beginning and end of their obligations ignores numerous other positive obligations under Annex 7 that are necessary to ensure, among other things, that those who repossess their properties in the RS are able to make a free and informed decision on whether to return to live in them. The international community in Bosnia has encountered continual difficulties navigating these politicized viewpoints.

In fact, there have been serious internal differences within the international community over the proper relationship between restitution as a right and in aid of return. Nevertheless, the early development of an institutional framework for coordination of restitution accommodated the diverse institutional interests of the international agencies involved, allowing the maintenance of broad international unity throughout the process. This framework, the Property Law Implementation Plan (PLIP) included four international agencies, the Office of the High Representative (OHR),⁹⁵ the U.N. Refugee Agency (UNHCR),⁹⁶ the U.N. Mission to BiH (UNMiBH),⁹⁷

acceptable only after the full implementation of Annex 7, which would guarantee a return to pre-war homes for refugees and displaced persons. Jahic said that otherwise a census would legalize the results of ethnic cleansing in BiH. *Jahic: Population Census Would Be Legalization of Ethnic Cleansing!*, DNEVNI AVAZ, Nov. 11, 2003, at 8 (translation on file with author).

94. See *supra* Part II.A.

95. The OHR is a *sui generis* body with a general mandate under Annex 10 of the GFAP to coordinate civilian aspects of peace implementation in BiH. See GFAP, *supra* note 5, Annex 10 ("Civilian Implementation"). The High Representatives to BiH so far have been Carl Bildt, from Sweden (1995-1997), Carlos Westendorp, from Spain (1997-1999), and Wolfgang Petritsch, from Austria (1999-2002). The current High Representative is Paddy Ashdown, from the United Kingdom.

96. The most active field agency in the early days of PLIP was the BiH Mission of the U.N. Refugee Agency (or UNHCR), based on an Annex 7 mandate confirming its "leading humanitarian role." GFAP, *supra* note 5, Annex 7, ch. 1, art. III(1). The GFAP also entrusts UNHCR with development of a repatriation plan "that will allow for an early, peaceful, orderly and phased return of refugees and displaced persons, which may include priorities for certain areas and certain categories of returnees." *Id.* Annex 7, ch. 1, art. I(5).

and the Organization for Security and Cooperation in Europe (OSCE),⁹⁸ as well as one GFAP institution, the CRPC.⁹⁹

Internal disagreement increased within PLIP as the rationale of property restitution wandered gradually from a heavily return-based beginning in 1998 to an essentially rights-based conclusion in 2003. While the OSCE embraced a rule of law-oriented approach in accordance with its Annex 6 human rights mandate, organizations acting under Annex 7, such as CRPC and UNHCR, remained institutionally committed to return as the basis for restitution. The UNMiBH was primarily concerned with its specialized mandate to supervise police reform, and it therefore fell to the OHR to seek common ground. Coordination of PLIP was largely structured through the Return and Reconstruction Task Force (OHR-RRTF), a department of the OHR focusing on Annex 7 issues.¹⁰⁰ By institutionalizing the engagement of the participating agencies, PLIP ensured their continued rhetorical support for the overall process even when they objected to particular policies or shifted priority attention to other issues. Thus, although the necessity of interagency negotiation acted as a brake on property law implementation at times, it is not clear that the pro-

97. GFAP, *supra* note 5, Annex 11 (“International Police Task Force”). The role of UNMiBH in encouraging domestic police to enforce decisions on return of property was crucial to the early success of property restitution.

98. The OSCE Mission to BiH was initially better known for its role in supervising post-war elections. *See id.* Annex 3 (“Elections”), art. II (“The OSCE Role”). The Mission has a separate mandate under Annex 6 of the GFAP to “monitor closely the human rights situation” in BiH. *Id.* Annex 6, ch. 3, art. XIII(2). Given that the ongoing failure to give effect to pre-conflict property rights arguably constituted the most significant post-conflict human rights violation in Bosnia, the OSCE’s human rights engagement came to focus heavily on this area.

99. *See supra* Part II.A (describing CRPC role under Annex 7 of the GFAP). The CRPC began as an observer in PLIP, in light of its mixed international and domestic characteristics. Eventually, it came to be seen as a *de facto* member organization. Given that decisions on property rights issued by CRPC could only be enforced through a functioning domestic process, CRPC shared a clear interest in the improvement of this system with the PLIP agencies. On the other hand, as a body that issued decisions on property claims, CRPC also shared some of the characteristics of the housing authorities monitored by PLIP.

100. *See generally* Office of the High Representative, Reconstruction and Return Task Force (RRTF), at <http://www.ohr.int/ohr-dept/rrtf/>.

cess could have been completed without it.¹⁰¹ PLIP itself proved sufficiently adaptable to carry on its activities past the expiration of the mandates of three of its constituent agencies and to the end of the restitution process.¹⁰²

The futility of defining return in a manner that conformed to all domestic parties' expectations arguably made the shift to a rights-based approach inevitable. However, this shift left PLIP liable to accusations of abandoning the goal of refugee return.¹⁰³ PLIP agencies were at pains to rebut these charges,¹⁰⁴ but the Annex 7 exit strategy that ultimately took

101. For an incisive description of interagency politics in PLIP during the late phases of property law implementation, see Charles Philpott, *Though the Dog is Dead, the Pig must be Killed: Finishing with Property Restitution to Bosnia-Herzegovina's IDPs and Refugees*, 18 JOURNAL OF REFUGEE STUDIES 1, 1-24 (2005).

102. UNMiBH's mandate was terminated on December 31, 2002. An archive of its documentation is available at <http://www.un.org/Depts/dpko/missions/unmibh/index.html>. Both CRPC and OHR-RRTF transferred their operations to domestic authorities one year later, on December 31, 2003.

103. An ICG report states:

Of greater concern [than failure to complete property restitution] is the temptation that the international community may feel to declare Annex 7 complete as soon as the property laws have been fully implemented for housing. Not only would such a declaration imply the abandonment of tens of thousands of Bosnians who cannot yet return to unreconstructed homes . . . it would also absolve the BiH authorities of their wider obligation under Dayton to provide conditions conducive to return and reintegration.

International Crisis Group, *supra* note 13, at 10. This report was based on a perception that the international community was losing sight of the importance of return in its hurry to disengage from Bosnia, and was quickly picked up by the local press. See, e.g. Adnan Buturović, *Nakon što stranci saopće da je povratak završen, Sarović i Čavić će tražiti popis stanovništva!* [After the international report that return has been completed, Sarović and Čavić will seek a census of the population!], SLOBODNA BOSNA, Jan. 16, 2003, at 40 (translation on file with author) ("According to many indicators, the international community will be able to declare the return of refugees in BiH over by the end of this year; a report by the International Crisis Group (ICG) shows why the foreigners, but also local nationalistic authorities, want to show that the process of return of millions of refugees is successfully coming to an end.").

104. For example, the Office of the High Representative stated:

The Agencies engaged in the Property Law Implementation Plan . . . would like to clarify that completion of Property Law implementation does not equal completion of Annex 7. While property law implementation is the fundamental first step it is only one among many of the elements underpinning sustainable return. *Full imple-*

shape drew a clear line between restitution and return. In the end, the international community guaranteed the integrity of property restitution to the last claim through rigorous municipality-by-municipality certification of “substantial completion” of the process,¹⁰⁵ but transferred formal competence for all remaining return issues to the domestic authorities.¹⁰⁶ Although PLIP continued to maintain that restitution did not entail the end of the return process,¹⁰⁷ domestic commenta-

mentation of Annex VII means that not only can people return to their homes but that they can do so safely with equal expectations of employment, education and social services. Therefore the PLIP agencies call on the local authorities to accelerate the pace of property law implementation and at the same time redouble their efforts to create the conditions conducive to sustainable return.

Press Release, Office of the High Representative, Property Law Implementation is Just One Element of Annex VII (Feb. 27, 2003), *available at* http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content_id=29347 (emphasis in original).

105. See Office of the High Representative, *PLIP Municipal Guidelines for Substantial Completion of Property Law Implementation* (May 28, 2003), *available at* http://www.ohr.int/plip/key-doc/default.asp?content_id=29969; see also Press Release, Office of the High Representative, Substantial Completion of Property Law Implementation verified for Domavljevac-Samac, Vukosavlje and Orasje (Oct. 30, 2003), *available at* http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content_id=31080.

106. A press release issued by the Office of the High Representative states:

The OHR's Reconstruction and Return Task Force will close on the last day of 2003, when the relevant BiH institutions will formally assume responsibility for the return process. Property Law implementation is nearing completion, almost one million people have returned to their homes, and the BiH institutions have expressed a clear desire to take the lead in maintaining and then completing the return process. As part of the ongoing process of handing back responsibility for key state functions to BiH institutions, the International Community will primarily assist and monitor the newly empowered domestic authorities with Annexe-Seven [sic] implementation as of next year It should be emphasized that Annexe Seven [sic] implementation is not complete. Large numbers of homes have still to be rebuilt and there remain many citizens who wish to move back to their pre-war places of origin but have not yet done so.

Press Release, Office of the High Representative, BiH Institutions Assume Responsibility for Return Process (Dec. 30, 2003), *available at* http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content_id=31466 [hereinafter OHR RRTF Closure Press Release].

107. Press Release, Office of the High Representative, Municipalities to Take Final Steps for Complete Implementation of the Property Laws (June

tors were skeptical. For instance, the Bosnian Helsinki Committee noted in 2003 that “[i]f there were any successes [this year] concerning human rights . . . it was in the area of implementation of property laws,”¹⁰⁸ but cautioned that:

[U]ncritical presentation of enviable data on the implementation of property laws . . . served to push the issue of real return in the background. [The international community] was the most loud in this, desirous of creating the impression that one of the most important processes for the survival of multiethnic Bosnia and Herzegovina was coming to an end. Such [a] position is absolutely in harmony with the ruling parties’ nationalistic concept of ethnically clean territories.¹⁰⁹

In its 2004 World Report, Human Rights Watch arrived at a similar conclusion,¹¹⁰ asserting that the “true measure of effectiveness of return policies pursued by national authorities and the international community [in the Balkans region] . . . is the extent to which minorities have been able to return” and that robust international policies had come too late, allowing nationalist officials to effectively outwait minority return.¹¹¹

3, 2003), *available at* http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content_id=30004 [hereinafter PLIP Substantial Completion Press Release] (“Finalizing Property Laws Implementation is only one step towards the full realization of Annex VII. Municipalities remain obliged to facilitate the return of refugees and displaced persons by other means to make the returns sustainable.”); *see also* UNHCR 2003 Return Press Release, *supra* note 89 (“[T]he return of property to its rightful owners should not be equated with having achieved the sustainable return of all those forcibly displaced in BiH which requires the continuing support of the authorities at all levels of government, as well as the international community, before this painful chapter in the recent history of BiH can finally be closed.”).

108. Helsinki Committee for Human Rights in Bosnia and Herzegovina, Report on the State of Human Rights in Bosnia and Herzegovina (Analysis for period from January to December 2003) § 5, *available at* <http://www.bh-hchr.org/Reports/reportHR2003.htm> [hereinafter Helsinki Committee for Human Rights].

109. *Id.*

110. Bogdan Ivanisevic, *Legacy of War: Minority Return in the Balkans*, in HUMAN RIGHTS WATCH WORLD REPORT 2004 351-75 (2004), *available at* <http://hrw.org/wr2k4/16.htm#Toc58744965>.

111. *Id.* at 352. The report further states:

By the time the authorities, under pressure from the international community or with its direct involvement, finally began to improve

Beneficiaries of property restitution are said to sell out rather than return as a result.¹¹² Therefore, the crucial question for post-PLIP return becomes whether other human rights are respected such that free choice regarding return is possible.¹¹³

In this light, the most grounded criticism of the international community may relate to its withdrawal from return issues prior to clear signals that domestic authorities were pre-

the security and housing situation for returnees, the willingness to return had faltered. Having spent months and years living elsewhere, the refugees and displaced persons had already become acclimated to their new environment. At the same time, return to the place of pre-war residence promised discrimination in employment, education, and law enforcement. Given a choice between local integration and return under such conditions, many opted for the former.

Id.

112. *Id.* at 362 (“[M]ost of those who repossess their pre-war homes in Bosnia then sell, exchange, or rent the property, rather than moving back in, preferring to remain in their new area rather than return to their former homes.”); Helsinki Committee for Human Rights, *supra* note 108 (“The selling or exchange of houses and apartments is a general phenomenon, happening throughout Bosnia and Herzegovina. Although no one keeps records of this, free estimates indicate that in urban settlements more than 75 percent of the repossessed property is being sold Thus demographic picture of ethnically clean territories becomes a reality of Bosnia.”); Global IDP Project of the Norwegian Refugee Council, *Bosnia and Herzegovina: 330,000 people still displaced eight years after the peace agreement 3* (Jan. 30, 2004) (on file with author) [hereinafter IDP Project] (“The near completion of the property repossession process, however, has not boosted returns as might be expected. There has been a widespread practice among property owners to sell repossessed property without actually returning to their pre-war residences.”) (citations omitted).

113. For example, a report submitted to the U.N. Commission on Human rights states:

Implementation of property laws has progressed [H]owever, . . . repossessions are largely technical, with property owners not actually returning to their pre-war residences. The climate of security has not been assured for returnees; eight years after Dayton, those who choose to return to their pre-war homes face threats or outright violence, as well as discrimination in obtaining documentation, finding employment in a generally depressed economy, accessing health care and access to education for their children.

U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Hum. Rts., *Report Submitted by José Cutileiro, Special Representative of the Commission on Human Rights to Examine the Situation of Human Rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia, submitted in accordance with Commission resolution 2003/13, Agenda Item 9, at 7*, U.N. Doc. E/CN.4/2003/38/Add.1 (2003).

pared to commit to measures beyond restitution to support return. As of early 2004, the three remaining PLIP agencies—OHR, UNHCR, and OSCE—had all stated their intent to shift their focus away from return issues upon the completion of property law implementation.¹¹⁴ Nevertheless, as recently as July 2003, UNHCR had stated that “individual refugees or IDPs are still not in a position to return to their pre-war municipalities,” citing continuing security incidents as well as insufficient “access to reconstruction assistance, employment, health care, pensions, utilities and an unbiased education system.”¹¹⁵

On the other hand, return sustainability is far less clear and quantifiable than property restitution, involving issues as disparate as access to retirement benefits and medical care, arrest of persons suspected of war crimes, and availability of quality non-biased education.¹¹⁶ In fact, many commentators

114. OHR has unambiguously withdrawn from work on Annex 7 issues with the closure of the RRTF. See OHR RRTF Closure Press Release, *supra* note 106. Meanwhile, the OSCE and UNHCR have publicly begun to shift their priorities away from return issues. See UNHCR 2003 Return Press Release, *supra* note 89 (“In 2004, UNHCR’s strategic focus in BiH will turn increasingly to the provision of international protection to asylum seekers and refugees through capacity-building efforts with the competent BiH authorities.”); see also *PLI Rate in Eastern Hercegovina Stands at 93%*, NEZAVISNE NOVINE, Nov. 6, 2003, available at <http://www.oscebih.org/public/default.asp?d=6&article=show&id=568> (quoting Director of OSCE Mostar Regional Office as stating that “after the implementation of property laws, OSCE Human Rights Department would shift its focus towards Rule of Law activities and work on implementation of the new Criminal Procedure Code in co-operation with local authorities”).

115. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, UNHCR’S CONCERNS WITH THE DESIGNATION OF BOSNIA AND HERZEGOVINA AS A SAFE COUNTRY OF ORIGIN ¶ 25 (2003), available at <http://www.unhcr.ba/publications/B&HSAF%7E1.pdf>.

116. For example, a press release issued by the Office of the High Representative states:

The High Representative noted that this year further measures must be taken to ensure that large-scale return, the pace of which has markedly increased in the last 24 months, can be sustained. Returnees must have full and equal access to education, employment, welfare services, and utilities, be free from persecution and have confidence that law enforcement agencies, the judiciary and the government will protect them and their rights.

Press Release, Office of the High Representative, Human Rights Priorities for 2002 endorsed (Apr. 16, 2002), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=7409.

believe the most important barrier to return is poor economic conditions, a factor exacerbated by discriminatory access to available jobs which is largely beyond the control of international monitors.¹¹⁷ Discussion of practical measures in support of sustainable return often centers on donor funding for reconstruction of destroyed housing, a policy matter with few direct human rights implications.¹¹⁸ In light of the relatively

117. See Emir Habul, *Real or Administrative Return in Bosnia-Herzegovina: Last Stage: Exchange of Property*, South East European Refugee Assistance Network (July 14, 2003), available at <http://www.see-ran.org/expanded/?id=00247> ("The greatest obstacle to real return, however, is the critical economic situation. According to earlier figures presented by the Independent Bureau for Humanitarian Issues (IBHI), only three percent of returnees have found permanent work. The picture has not changed much—over the last year or two it could only have deteriorated."). See also Tim Judah, *Half-Empty or Half-Full Towns?*, TRANSITIONS ONLINE, Feb. 5 2004 ("It seems unlikely that any more people will return. But that is not necessarily because they don't want to—it is because they can't. There is no work for them."); IDP Project, *supra* note 112 at 4 ("In 2002, the unemployment rate stood at 42.7% in the FBiH and 38.2% in the RS. Limited employment opportunities are compounded by widespread discrimination based on ethnicity, political affiliation, national origin, and gender.") (citation omitted).

118. For example, FENA states:

Federation Refugees and Displaced Persons Minister Edin Music told journalists in Sarajevo today that the conclusion of the return of property process will by no means mark the end of the process of implementing Annex 7. "The percentage of reconstruction is at approx [sic] 40 percent [sic] while the level of implementation in other areas important for return is well below that figure. There is a great need for supporting the return process, both in terms of reconstruction of houses and infrastructure and sustainable return, employment etc," Music said.

Implementation of Annex 7 Needs to Continue, FENA, Jan. 16, 2004 (translation on file with author). And an OHR-RRTF press release states:

It should be emphasized that Annexe [sic] Seven implementation is not complete. Large numbers of homes have still to be rebuilt and there remain many citizens who wish to move back to their pre-war places of origin but have not yet done so An important practical boost to [domestic Annex 7 implementation programming] has been BiH's recent acceptance as a member of the Council of Europe Development Bank, which will make it possible for BiH to receive soft loans for return and reconstruction projects.").

OHR RRTF Closure Press Release, *supra* note 106.

In addition, the IDP Project states:

There is concern that the international community in [Bosnia] may be prematurely wrapping up the return process precisely at a point when reconstruction and reintegration assistance is most

high number of returns that have taken place in Bosnia, the ongoing debate about post-PLIP return reveals a discouraging lack of faith in the domestic institutions that have assumed formal responsibility for the process¹¹⁹ and a tendency to view open-ended international engagement as a panacea for post-conflict problems.¹²⁰ In any case, many economic obstacles to

needed. It is estimated that the overall remaining demands for reconstruction of about 140,000 houses and apartments will cost US \$2 billion. However as donor funds decline, it is likely that the available resources will not be sufficient.

IDP Project, *supra* note 112, at 5 (citations omitted). And the Helsinki Committee for Human Rights reports:

A large number of houses and apartments that have been returned to their owners is either destroyed or devastated, so that the refugees and displaced persons, although expressing their desire to return, do not have a possibility to do so. There are less and less donors. The interest for return surpasses by far the financial capacities for reconstruction.

Helsinki Committee for Human Rights, *supra* note 108, § 5.

119. Most recently, the BiH Government has committed itself to “100% implementation of property laws” and to “improve conditions for sustainable return” as part of a “program of activities for realization of priorities in 2004 from the report of the European Commission to the [BiH Government] on the preparedness of Bosnia and Herzegovina for negotiation of [a stabilization and association agreement] with the EU”. See Bosnia and Herzegovina Council of Ministers, Directorate of European Integration, Program of Activities for Realization of Priorities in 2004 from the Report of the European Commission to the Council of Ministers on the Preparedness of Bosnia and Herzegovina for Negotiations of SAA with EU, *available at* <http://www.dei.gov.ba/en/prioriteti.asp> (last modified Feb. 9, 2005) (providing more details and the specific undertakings of the BiH Government). In addition, a press release issued by OHR-RRTF states:

“Full responsibility for human rights and for refugee return is being formally returned to the BiH authorities, because they now have the tools that they need to complete the work of refugee return and to uphold the human rights of BiH citizens,” the High Representative, Paddy Ashdown, said. “This handover is crucial because the responsibilities being handed over are so important, and because it is part of the process of domestic institutions taking full responsibility for the governance of BiH.”

OHR RRTF Closure Press Release, *supra* note 106.

120. As one commentator states:

Only a resolute response from the international community could have opened a way for successful minority returns. For the most part such resoluteness has been missing Although inadequate policies made many refugees and displaced persons lose interest in returning to their homes, the international community and na-

return reflect Bosnia's ongoing transition from a state socialist system as much as they do the legacy of the war. As such, they affect those displaced by the war disproportionately rather than exclusively. From this perspective, the effect of the shift of international attention away from explicit return issues may be offset to some extent by increasing international attention to Bosnia's governance structures and economic development.¹²¹

III. WARTIME DISPLACEMENT AND PROPERTY REALLOCATION IN BOSNIA, 1992-1995

The background for property restitution in Bosnia was the massive displacement that resulted from both ethnic cleansing and generalized violence during the conflict. Habitable housing abandoned by its fleeing residents was typically allocated to other users. Such reallocations were carried out under local regulations that ostensibly served the purpose of providing humanitarian shelter but ultimately had the effect of consolidating ethnic cleansing; without an available home to return to, ethnic minorities were highly unlikely to return. This pattern of wartime appropriations of property was complicated by the fact that Bosnia's most desirable housing stock—urban “socially-owned apartments”—had been on the cusp of privatization at the outbreak of the war. As a result, most such apartments were still technically subject to socialist laws whereby residents' rights could be cancelled for non-use. The persistence of this “use requirement” would facilitate attempts to permanently reallocate apartments during the war and remained a major obstacle to post-war restitution.

A. *The War and Ethnic Cleansing in Bosnia*

The 1992-1995 conflict in Bosnia and Herzegovina took place in the context of the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). In March 1992, the Socialist Republic of BiH (SRBiH) voted in a referendum to secede

tional authorities should do their utmost to assist those who do want to return or they run the risk of providing succor to those who believe that the forcible expulsion of a population is a legitimate objective of war.

Ivanisevic, *supra* note 110.

121. See Philpott, *supra* note 101, at 17-19.

from the SFRY, becoming the Republic of BiH (RBiH), which would in turn be the legal antecedent to the current state of Bosnia and Herzegovina (BiH) created under the GFAP. Despite the RBiH government's efforts to maintain calm, instability spilled over from the ongoing war over the secession of the neighboring Republic of Croatia from the SFRY.¹²²

Secessionist Bosnian Serbs withdrew from RBiH institutions in April 1992, declared the independence of the Serb Republic (*Republika Srpska*, or RS), and, with considerable support from the former Yugoslav National Army (*Jugoslavenska Narodna Armija*, or JNA), overran over half of the territory of the RBiH. Further fighting broke out in July 1992 between the Bosniacs and Croat secessionists' self-declared Croatian Community of Herzeg-Bosna (*Hrvatska Zajednica Herzeg-Bosne*, or HZHB). Nevertheless, the RBiH, which had come to largely represent the beleaguered Bosniacs, entered into an internationally-brokered political union with the HZHB in 1994. The resulting Federation of BiH (Federation) continued hostilities against the RS until 1995, when both sides were bound by the GFAP and became the respective Entities constituting the state of BiH.¹²³

Like the other conflicts that resulted from the collapse of the SFRY, the war in Bosnia became notorious for the practice of ethnic cleansing, the forcible displacement of local populations based on their ethnicity. Even in parts of Bosnia where such atrocities did not occur, individuals of minority ethnicity often felt compelled to flee their homes due to harassment, discrimination, and propaganda related to the conflict. Although observers trace the roots of the conflict to a complicated interplay of political, economic, historical and cultural factors, the violence, intimidation and discrimination arising from the conflict played itself out along largely ethno-religious lines, as between the Orthodox Serbs, Catholic Croats, and Muslim Bosniacs of Bosnia. The result was the de-mixing of an entire population, with widespread displacement and dispos-

122. For a general overview of the political events leading up to the dissolution of the SFRY, see LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1996).

123. See generally RICHARD HOLBROOKE, *TO END A WAR* (1998) (describing in detail the international negotiations leading up to the signature of the GFAP).

session. One observer notes that, by the end of the war, 90 percent of the Serbs from the Federation and 95 percent of the Bosniacs and Croats from the RS had been displaced, leaving only 42 percent of the population in their pre-war places of residence.¹²⁴ More than half of the housing stock in Bosnia had been abandoned by its pre-conflict residents, with at least 35 percent damaged or destroyed.¹²⁵ Virtually all abandoned housing not destroyed in the conflict was quickly occupied by other users, usually under color of wartime laws on reallocation of property.¹²⁶

B. *Pre-Conflict Categories of Residential Property:
The Occupancy Right*

The nature of the dispossessions arising from the 1992-1995 conflict in Bosnia depended in part on the type of property involved. In pre-conflict Bosnia, as in the former Yugoslavia generally, there were two predominant categories of residential property. The majority of homes in Bosnia were held as private property, based on a land book registration system broadly familiar to Western observers.¹²⁷ Most private residential property was in the form of single family homes in the countryside and on the periphery of urban areas. The other significant pre-war residential category in Bosnia, representing about 20 percent of the housing stock, consisted of “socially-owned apartments” (apartments).¹²⁸

124. Rosand, *supra* note 2, at 1100.

125. Hastings, *supra* note 9, at 221 n.3. The present article focuses primarily on restitution of habitable property where restoration of the pre-conflict residents' rights was complicated by wartime allocations often undertaken under color of law. In practice, there were far fewer legal and practical obstacles to the repossession of properties that had been damaged or destroyed during the conflict.

126. See Cox and Garlick, *supra* note 8, at 68 (“As a result of the conflict, more than half of the housing stock across the country was abandoned, and those houses that were not damaged or destroyed were occupied by new residents.”).

127. Hastings, *supra* note 9, at 225 n.22 (citing a CRPC report indicating that 81 percent of the 1,315,756 housing units that existed before the war in Bosnia were privately owned).

128. *Id.* (noting that 19 percent of Bosnia's pre-war housing stock, or 250,033 units, were in social ownership).

Such apartments¹²⁹ were generally built by state-owned enterprises or other public bodies for allocation to their employees, who became “occupancy right holders” as a result.¹³⁰ All SFRY citizens were required to pay an income-scaled contribution to subsidize housing construction,¹³¹ and occupancy right holders paid a nominal fee (*stanarina*) for upkeep of common facilities. The rights of both the public bodies that formally owned the apartments (allocation right holders) and the occupancy right holders were regulated by laws on housing relations that were largely identical in each of the republics of the former SFRY.¹³² In accordance with the SRBiH Law on Housing Relations, an occupancy right to an apartment, once allocated, entitled the occupancy right holder to permanent, lifelong use of the apartment,¹³³ including the right to ex-

129. As very few apartments in Bosnia were privately-owned before the conflict, the term “apartment” will be used to refer to apartments that were in social ownership at the outbreak of the conflict in Bosnia, unless otherwise noted.

130. The SFRY allowed enterprises to construct apartments on state-owned land in furtherance of a constitutional right to socially-owned housing. See ANKICA GORKIČ, TENANCY RIGHT AS THE OWNERSHIP RIGHT 9 (2001) (“The citizen is guaranteed that the tenancy right he acquired on the socially-owned apartment, will ensure, under the legally binding terms, that he can permanently live in the socially-owned apartment so that he can satisfy his personal and his family housing needs.”) (quoting USTAV SOCIALISTIČNE FEDERATIVNE REPUBLIKE JUGOSLAVIJE [Constitution] art. 164 § 1 (Yugoslavia), reported in Official Gazette of the Socialist Federal Republic of Yugoslavia no. 9/74 (unofficial translation)). In English, the term “occupancy right” (*stanarsko pravo*) is sometimes also translated as “tenancy right” or “specially protected tenancy.”

131. See Law on Contributions and Directing Funds for Housing Needs and Self-Managing Communities of Interest, reported in Official Gazette of the Socialist Republic of Bosnia and Herzegovina nos. 13/74, 34/80, 39/84. Such payments secured an expectation of receiving a socially-owned apartment. However, the amount an individual had contributed was not one of the legal criteria taken into account in waiting-lists for allocation of such apartments.

132. Before the conflict, socially-owned apartments on the territory of what is now BiH were regulated under the Law on Housing Relations, reported in Official Gazette of the Socialist Republic of Bosnia and Herzegovina, no. 14/84 [hereinafter SRBiH Law on Housing Relations]. All republic laws on housing relations in the former SFRY were harmonized due to the need to ensure the equal legal status of all occupancy right holders in their enjoyment of a right flowing from the federal constitution. See Gorkič, *supra* note 130.

133. SRBiH Law on Housing Relations, *supra* note 132, art. 2.

clude others from living there.¹³⁴ When occupancy rights holders died, their occupancy rights transferred, as a matter of right, to their surviving spouses (who held such rights in common) or registered members of their family household who were also using the apartment.¹³⁵

Occupancy rights could be cancelled only in accordance with law and on limited grounds. The most important ground for cancellation was failure by the occupancy right holders to physically use their apartments for their own housing needs for a continuous period of six months or more, without justified grounds (use requirement).¹³⁶ Although the Law on Housing Relations foresaw inspections to ensure compliance with the use requirement,¹³⁷ anecdotal evidence indicates that occupancy rights were rarely, if ever, cancelled on these grounds prior to the conflict.¹³⁸ Nevertheless, the inspection provisions were invalidated prior to the war by a constitutional court decision finding them in violation of rights to privacy and inviolability of the home.¹³⁹

134. *Id.* art. 31.

135. *Id.* arts. 19, 21-22. In practice, these provisions on transfer meant that an occupancy right originally allocated by an enterprise to its employee could pass, as of right, to multiple generations for whom the initial employment-based link to the allocation right holder no longer existed.

136. *Id.* arts. 47-48. "Justified grounds" included military service, prison sentences, or trips abroad for temporary work, education or medical treatment. Alleged failure to meet the "use requirement" had to be demonstrated in court proceedings. *Id.* art. 50. Judgments on cancellation could not be enforced until some other accommodation had been provided by the allocation right holder to the former occupancy right holder. *Id.* arts. 7, 8, 44, 48.

137. *Id.* art. 26.

138. A Croatian commentator notes that these provisions were applied very selectively, noting that it was common for persons working abroad as *Gastarbeiter* to illegally rent out their socially-owned apartments for years during their absence and return to use them without any problems. Goran Milić, *Inhuman Resettlement*, GLAS SLAVONIJE, Nov. 27, 2001 (translation on file with author). The lack of voluntary compliance with the laws on housing relations is indicated by the popular response to an official campaign entitled "Do you have a house? Return your apartment." (*Imaš li kuću? Vрати stan.*). The running joke was "Do you have a house, an apartment, and a weekend cottage? Return your tent." (*Imaš li kuću, stan i vikendicu? Vрати sator.*).

139. Constitutional Court of Bosnia and Herzegovina, Case U 174/90, Decision of Oct. 3, 1991, reported in Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 35/91 (finding articles 26(3)(8), 42, and

While fewer in number than privately owned homes, apartments have been at the center of the most complicated restitution debates in Bosnia. By Bosnian standards, apartments remain a particularly attractive type of home, outfitted with modern conveniences and located in the center of towns and cities. Traditionally, attainment of an occupancy right was seen as being based on merit or service (typically in terms of having persevered for years on a waiting list) as well as ongoing compliance with the use requirement.¹⁴⁰ Local populations accordingly viewed occupancy right holders who fled during the conflict as having forsaken their apartments by virtue of their failure to use them, notwithstanding the conditions under which they had been forced to leave. By the same logic, persons allocated abandoned apartments during the conflict were often seen as having superseded the prior residents, particularly if the newcomers belonged to socially-favored categories, such as war veterans. Thus, even though the use requirement was observed in the breach before the conflict, it has played a powerful role in defining both popular attitudes and legal norms regarding restitution of such apartments during and after the conflict.

A further complicating factor is the fact that apartments throughout the former SFRY were on the cusp of general privatization when the war erupted. By the late 1990s, construction of socially-owned apartments had been supplanted by a legal scheme whereby public employers subsidized the construction of private apartments for their employees.¹⁴¹ Those who already held occupancy rights anticipated legislation allowing them to purchase their apartments, with the revenues earmarked to subsidize housing construction for long-time payers of the general housing contribution who had not

69(1)(6) of the SRBiH Law on Housing Relations incompatible with various provisions of the SRBiH Constitution). In a further decision, taken after independence and the outbreak of the conflict, the RBiH Constitutional Court struck these provisions based on the legislature having failed to do so itself, in accordance with procedures set out in the Constitution. Constitutional Court of Bosnia and Herzegovina, Case U 174/90, Decision of Dec. 24, 1992, *reported in* Official Gazette of the Republic of Bosnia and Herzegovina no. 2/93.

140. See *infra* Part IV.B (describing early provisions in property restitution laws balancing the rights of claimants to apartments in the Federation against rights acquired by subsequent occupants).

141. Gorkič, *supra* note 130, at 15.

received an occupancy right.¹⁴² In a precursor to general privatization, employees of the JNA could purchase their apartments beginning in 1991 under the Law on Securing Housing for the JNA.¹⁴³ Approximately 16,000 JNA apartments were located on Bosnian territory, meaning that about 6 percent of the total stock of apartments in Bosnia was legally available for purchase before the conflict.¹⁴⁴

The pre-war expectation that all apartments would be privatized was quickly confirmed after the conflict. The Federation passed the Law on Sale of Apartments with Occupancy Rights (Federation Apartment Purchase Law)—allowing apartment purchase by occupancy right holders—less than two years after the conflict ended.¹⁴⁵ The RS followed suit with its own Law on Privatization of State-Owned Apartments (RS Apartment Purchase Law) several years later.¹⁴⁶ Both Entities excluded apartment stocks from the balance sheets of state-owned enterprises subject to privatization,¹⁴⁷ reserving them

142. *Id.* at 16.

143. European Court of Human Rights, Decision as to the Admissibility: Application No. 46447/99: Djidrovski against the Former Yugoslav Republic of Macedonia 7 (Oct. 11, 2001) (construing the Law on Housing of the Army Servicemen, *reported in* Official Gazette of the Socialist Federal Republic of Yugoslavia no. 84/90). This 1990 law specified that the purchase price was to be offset for the adjusted total contributions of each purchaser to the housing fund of the JNA. *Id.*

144. *See* Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case Nos. CH/97/60, CH/98/276 CH/98/287, CH/98/362, CH/99/1766: Miholić et al. against the Federation of Bosnia and Herzegovina ¶ 53 (Dec. 7, 2001) (citing a submission by OHR as *amicus curiae* that “prior to 1992 there were approximately 12,500 JNA apartments in the Federation (the majority being in Sarajevo, with approximately 10,500) and approximately 3,500 in the Republika Srpska”).

145. Law on Sale of Apartments with an Occupancy Right, *reported in* Official Gazette of the Federation of Bosnia and Herzegovina nos. 27/97, 11/98, 22/99, 27/99, 32/01, *available at* <http://www.unhcr.ba/protection/plip/property%20law/SALEENG.pdf> [hereinafter Federation Apartment Purchase Law].

146. Law on Privatization of State-Owned Apartments, *reported in* Official Gazette of the Republic of Serbia nos. 11/00, 18/01, 35/01, *available at* <http://www.unhcr.ba/protection/plip/property%20law/rsconsol.pdf> [hereinafter RS Apartment Purchase Law].

147. Law on Privatization of Enterprises of the Federation, art. 8(1), *reported in* Official Gazette of the Federation of Bosnia and Herzegovina nos. 27/97, 8/99, 32/00, 45/00, 54/00, 61/01; Law on Privatization of State Owned Capital in Enterprises, art. 9, *reported in* Official Gazette of the Re-

for individual purchase as of right by their occupancy right holders.¹⁴⁸ The Entity apartment purchase laws reflected a regional trend, in which formerly socially-owned apartments were sold to their occupancy rights holders throughout much of the former SFRY.¹⁴⁹

C. *Conflict-Related Reallocation of Abandoned Property*

As hostilities erupted throughout Bosnia in 1992, ethnic minorities fled to areas controlled by their own groups, leaving behind thousands of empty homes and requiring accommodation where they found themselves displaced. The parties to the conflict were quick to adopt procedures allowing the homes of those who had fled the territory they controlled to be declared “abandoned” and allocated for use by displaced persons.¹⁵⁰ In the territory under control of the RBiH, separate regulations—the Law on Abandoned Apartments¹⁵¹ and the Law on Temporarily Abandoned Real Property Owned by Citizens¹⁵²—allowed the allocation of apartments and private homes, respectively. While the Croat-controlled HZHB issued a sub-legislative Decree on the Use of Abandoned Apart-

public of Serbia nos. 24/98, 62/02, *available at* http://www.rsprivatizacija.com/en/laws/law_on_privatization_of_state_capital.htm.

148. *See* Federation Apartment Purchase Law, *supra* note 145, art. 7; RS Apartment Purchase Law, *supra* note 146, art. 13. Under both laws, occupancy right holders may purchase their socially-owned apartments as of right, with a court judgment on appeal substituting for the purchase contract if the allocation right holder refuses to sign.

149. *See, e.g.*, Law on Housing, *reported in* Official Gazette of the Republic of Serbia nos. 50/92, 76/92, 84/92, 33/93, 53/93, 67/93, 46/94, 47/94, 48/94, 44/95, 16/97, 46/98, 26/01 (allowing privatization of apartments by their occupancy right holders as of right and at a purchase price offset by lifetime contributions to housing fund of former SFRY); Law on the Sale of Apartments with an Occupancy Right, *reported in* Official Gazette of the Republic of Croatia nos. 27/91, 43/92, 69/92, 25/93, 26/93, 48/93, 44/94, 47/94, 58/95, 11/96, 11/97, 68/98 (providing for purchase of apartments by occupancy right holders).

150. For a detailed discussion of wartime regulations and practices regarding abandoned property see Waters, *supra* note 31, at 536-53.

151. Law on Abandoned Apartments, *reported in* Official Gazette of the Republic of Bosnia and Herzegovina nos. 6/92, 8/92, 16/92, 13/94, 9/95, 33/95 [hereinafter RBiH Law on Abandoned Apartments].

152. Law on Temporarily Abandoned Real Property Owned by Citizens, *reported in* Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 11/93.

ments,¹⁵³ the RS authorities developed an informal but widespread practice of local administrative allocation of private property and apartments that would only be formalized through legislation after the end of the conflict.

Although the ostensible rationale for allocation of property was to provide humanitarian shelter to displaced persons, particularly attractive properties—typically, urban apartments—were commonly awarded to highly placed political, military, judicial, and police officials as an incentive for their loyalty.¹⁵⁴ Allocations of both private property and apartments were initially undertaken on a temporary basis. Nevertheless, none of the regulations on abandoned property included clear deadlines for the cessation of temporary use or effective procedures allowing pre-conflict residents to repossess their homes. Absent such mechanisms, the ongoing presence of temporary occupants constituted an effectively permanent obstacle to repossession, threatening previous owners and occupancy right holders with the virtual expropriation of their homes. This fit with the implicit desire of most parties to the conflict to cement their territorial gains through establishment of ethnically pure populations.¹⁵⁵

Throughout Bosnia, a significant number of abandoned apartments were *permanently* reallocated through wartime application of the Law on Housing Relation's use requirement. These proceedings were generally conducted entirely *ex parte* and failed to recognize the prevailing wartime conditions as justified grounds for absence from the apartments.¹⁵⁶ The number of explicitly permanent reallocations of apartments

153. Decree on the Use of Abandoned Apartments, *reported in* Official Gazette of the Croatian Community of Herceg-Bosna no. 13/93.

154. *See* Cox & Garlick, *supra* note 8, at 68 (“Over time, the pretence that the abandoned property laws represented a legitimate humanitarian measure was dropped. Many genuine displaced persons continued to live in appalling conditions in collective centers or in damaged property, while the military and political elites within each ethnic group occupied housing far in excess of their needs.”).

155. *See* Waters, *supra* note 31, at 536 (“Control of property—of territory—was fundamental to the political and military aims of all three sides, and consequently all three sought to solidify their military gains and stabilize their new ethnic states with reformed property laws that institutionalized ethnic preference, though in tacit fashion.”).

156. According to internal reports of the OSCE Mission to BiH which the author viewed, examples of this practice include about 300 wartime judicial

increased dramatically in the Federation immediately after the war through the application of a controversial provision of the Law on Abandoned Property. Under this rule, abandoned apartments were considered permanently abandoned—effectively canceling the pre-war occupancy right *ex lege*—if the pre-war rights-holder did not return to his or her apartment within seven days (fifteen days for those displaced outside Bosnia) of the decree ending the state of war in Bosnia.¹⁵⁷ Given the manifest impossibility of returning to occupied apartments under such short deadlines, this rule was “condemned by international and local observers as a violation of the Dayton Agreement and international human rights standards.”¹⁵⁸ Nevertheless, numerous occupancy rights in the Federation were permanently cancelled after the December 22, 1995, decree proclaiming the end of the war.¹⁵⁹

One month later, in January 1996, the RS passed the Law on the Use of Abandoned Property,¹⁶⁰ which retrospectively legitimized wartime practices of allocating abandoned private property and apartments. This law did not explicitly provide for permanent cancellation of rights to abandoned property, but it conditioned property repossession on reciprocity; temporary occupants of claimed property in the RS were entitled to remain until they had reposessed or been compensated for their own pre-war homes.¹⁶¹ This requirement constituted a

cancellations of occupancy rights in Trebinje, in the RS, and up to 3,000 such cases in the Federation city of Mostar.

157. RBiH Law on Abandoned Apartments, *supra* note 151, art. 10. This provision was added to the Law by amendment on Sept. 18, 1992; *see also* Human Rights Ombudsperson for Bosnia and Herzegovina, Report of the Ombudsperson: Application No. 212/96: Ivica Kevešević against The Federation of Bosnia and Herzegovina ¶ 44 (Mar. 19, 1997), *available at* http://www.ohro.ba/articles/reports_disp.php?lit_id=1997/0319-0212.e.htm [hereinafter Kevešević Ombudsperson Report].

158. Press Release, Office of the High Representative, Decisions on Property Laws (Apr. 14, 1999), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=4723.

159. *See* Hastings, *supra* note 9, at 226-27. The decree itself was famously posted on the bulletin board of the Presidency building in Sarajevo and was not published in the Official Gazette until Jan. 5, 1996, after the expiration of the first deadline to return and one day before expiration of the second. Kevešević Ombudsperson Report, *supra* note 157, ¶ 49.

160. RS Law on the Use of Abandoned Property, *reported in* Official Gazette of the Republic of Serbia, no. 3/96.

161. *Id.* arts. 39-40. *See also* Waters, *supra* note 31, at 541-42.

de facto barrier to restitution, given that most temporary users' pre-war homes were either occupied or destroyed, and no effective mechanism for compensation existed.

IV. NEGOTIATING RESTITUTION: THE SCOPE OF THE RIGHT, 1996-1999

This section deals with the early period of peace implementation in Bosnia. In the immediate aftermath of the conflict, ethnic cleansing and reallocation of properties continued nearly unabated, shoring up ethnic separation. As a result, return efforts focused on forcing the domestic authorities to repeal laws allowing reallocation and to replace them with new "property laws" allowing pre-war residents to reclaim their homes. These early restitution efforts were explicitly "return-based," and were therefore not geared exclusively to the recognition of pre-war possessory rights as such. This became the basis for limitations on the scope of restitution of socially-owned apartments, which had been held in less clear-cut tenure by their pre-war residents than private property. International measures to address this problem reflected an increasingly firm approach and were supported by judicial rulings that asserted the significance of pre-war rights to apartments. Although international rhetoric continued to focus on return, restitution had made an initial shift in a "rights-based" direction. At the end of this period, harmonized restitution procedures were adopted that would allow the process to begin throughout Bosnia.

A. *Early Return Efforts and Passage of the Property Laws*

In the immediate aftermath of the war, international community experiments in promoting return of refugees through ad hoc local initiatives and domestic political agreements to mutually accept returning refugees failed to yield significant levels of return.¹⁶² Meanwhile, despite Annex 7 of the GFAP, regulations on abandoned property remained in force throughout Bosnia, and ethnic cleansing and reallocation of property continued nearly unabated. In fact, the advent of

162. See Cox & Garlick, *supra* note 8, at 72 ("With differences in views on basic principles and aims, and no mechanism for coordinating different international efforts, the net impact was inevitably limited.").

post-war legislation on apartment privatization presented holders of cancelled occupancy rights with the new threat of irrevocable loss of their apartments.

In the Federation in particular, the combination of widespread cancellations of occupancy rights and the early passage of an apartment purchase law¹⁶³ posed the risk of permanently pre-empting the rights of pre-war occupancy right holders. In the wake of declarations of permanent abandonment, apartments were reallocated to new occupancy right holders who were, as such, entitled to purchase them.¹⁶⁴ The combined effect of these legal provisions threatened to remove numerous apartments in the Federation from the scope of Annex 7's restitution undertakings by permitting the formation of countervailing property interests on the part of subsequent occupiers.

Thus, in the immediate aftermath of the conflict, the authorities throughout Bosnia were not only failing in their positive obligations to facilitate refugee return under Annex 7, but were in fact taking active steps to prevent return through measures to permanently deprive refugees of their property. Moreover, despite the facial neutrality of both Entities' regulations on abandoned property, their implementation in the aftermath of a war fought on the basis of ethnic territorial consolidation was clearly discriminatory in practice, violating the obligation under Annex 7 to "repeal . . . domestic legislation and administrative practices with discriminatory intent or effect."¹⁶⁵ This fact was not lost on contemporary international observers:

All three [parties to the conflicts'] laws hew to a formalistically neutral drafting, but are rife with provisions revealing their pragmatic project, which is to entrench and enforce the ethnic division and hierar-

163. See *supra* Part III.B.

164. Federation Apartment Purchase Law, *supra* note 145, arts. 7-8. The main criterion for eligibility to purchase is status as the holder of a valid occupancy right. Given that wartime judicial cancellations of occupancy rights under the Law on Housing Relations also left the allocation right holder free to allocate the apartment to a new occupancy right holder, the smaller contingent of persons displaced from the Federation whose occupancy rights had been cancelled in this manner faced the same possibility of irrevocable loss of their pre-war homes.

165. GFAP, *supra* note 5, Annex 7, ch. 1, art. I(3)(a).

chy that violence engendered. All three are indirect, relying on law's neutrality to maintain distinctions already established by other means.¹⁶⁶

The BiH Human Rights Chamber concurred in many of its early decisions, noting that the effect of the abandoned property regulations was "to reinforce the ethnic cleansing that occurred during the war."¹⁶⁷ The Chamber noted that these laws constituted part of a system of discrimination against displaced persons and refugees in the exercise of their rights to respect for their homes and peaceful enjoyment of their possessions.¹⁶⁸

The persistence of systematic and discriminatory property takings throughout Bosnia undermined the authority of the international presence.¹⁶⁹ Moreover, the inability of those already displaced to repossess their homes or return began to

166. Waters, *supra* note 31, at 552-53.

167. Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case No. CH/98/659: Pletilić et al. against Republika Srpska ¶ 204 (Sept. 10, 1999).

168. *See id.* ¶¶ 206-08; *see also, e.g.*, Human Rights Chamber for Bosnia and Herzegovina, Decision on the Admissibility and Merits: Case No. CH/96/45: Hermas against the Federation of Bosnia and Herzegovina ¶ 82 (Feb. 18, 1998), *available at* <http://pbosnia.kentlaw.edu/resources/legal/bihhrc/English/4596a&m.htm> (taking into account that, under Article II.2(b) of Annex 6 of the GFAP, the prohibition of discrimination is a central objective to which particular importance must be attached in examining alleged discrimination under Article 14 of the ECHR).

169. For example, one source reports:

In early December, soldiers of the Croatian Defense Council (HVO) helped carry out several illegal evictions of ethnic Muslim and Serbs from their apartments in the Croatian-dominated section of Mostar in Bosnia and Herzegovina. These actions were committed in the name of ethnic purity, and were performed with impunity. Indeed, Bosnian Croatian soldiers effectively scoffed at warnings from the NATO-led Implementation Force to either stop, or suffer unspecified consequences. Unfortunately, the recent cases of illegal evictions in West Mostar are not isolated occurrences. There were over 70 such cases in 1996 in West Mostar alone. A spokesperson for the U.N. High Commissioner for Refugees describes the current rash of evictions as the [sic] getting worse, not better. They are also going on all over Bosnia, performed by all three ethnic groups. What is so discouraging about these incidents is that they are still happening more than a year since the signing of the Dayton peace accords, a pact that was supposed to end arbitrariness and prepare the ground for the rule of law in Bosnia.

pose a threat to the security of the country by 1997, when many of the nearly 700,000 Bosnians taking refuge in western Europe came under increasing pressure to return to Bosnia.¹⁷⁰ As the majority of these refugees fled areas where they would now be unable to return, they faced forcible repatriation into a state of internal displacement, swelling the numbers of dislocated inside Bosnia and placing great strains on fragile local social networks.¹⁷¹ Despite more aggressive international moves to arrest war crimes suspects and foster freedom of movement, existing remedies for property violations remained ineffective at best.¹⁷² The Annex 7 CRPC was hard-pressed to set up a claims receipt system, let alone begin deciding claims.¹⁷³ The Human Rights Commission, established under Annex 6 of the GFAP, issued important precedential decisions in individual property claims cases, but had no mechanism to address mass claims. Domestic courts had compromised their impartiality during the conflict, and the high numbers of property repossession claims—more than 200,000—would have required an impossibly long time to resolve if allowed full judicial process.¹⁷⁴

As a result, by 1997, the international community's efforts came to focus on repealing all regulations on abandoned property and replacing them with streamlined, administrative restitution procedures. Under extraordinary political pressure,¹⁷⁵ the Federation repealed all RBiH and HZHB abandoned property provisions previously in force within its territory in April 1998. In light of the primary importance of the twin RBiH laws, both were explicitly cancelled in the guise of

Bosnia: Property Disputes Cloud Repatriation Prospects, 15 FORCED MIGRATION MONITOR (Jan. 1997), available at http://www2.soros.org/fmp2/html/fm_monitor_97_toc.html.

170. Elizabeth M. Cousens & Charles K. Cater, TOWARD PEACE IN BOSNIA: IMPLEMENTING THE DAYTON ACCORDS 72-73 (International Peace Academy Occasional Paper Series, 2001).

171. *Id.* at 73.

172. *Id.* at 76-81.

173. *Bosnia: Property Disputes Cloud Repatriation Prospects*, *supra* note 169 (noting that CRPC had "received millions of dollars in pledges from the international community, but has yet to resolve a single case as of January 1, 1997.").

174. See Hastings, *supra* note 9, at 228 n.34.

175. The struggle for legislation repealing the regulations on abandoned property is detailed by Hastings. *Id.* at 228-30.

the Law on Cessation of the Application of the Law on Abandoned Apartments (Federation Apartments Law),¹⁷⁶ and a separate Law on Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens (Federation Private Property Law).¹⁷⁷ In December 1998, the RS followed suit with the passage of the Law on the Cessation of the Application of the Law on Use of Abandoned Property (RS Property Law), with provisions on both private and socially-owned property.¹⁷⁸ In light of their unwieldy full names, these laws came to be known collectively as the “laws on cessation,” or, more commonly (if misleadingly), the “property laws.”¹⁷⁹

The immediate effect of the property laws was prospective, through the prohibition of any further allocations of abandoned property under color of law.¹⁸⁰ Their most impor-

176. Law on Cessation of the Application of the Law on Abandoned Apartments, *reported in* Official Gazette of the Federation of Bosnia and Herzegovina no. 11/98, *available at* <http://www.unhcr.ba/protection/plip/Property%20law/apartfin.pdf> (latest enacted version text), http://www.ohr.int/ohr-dept/hr-rol/property/fbih-prop-leg/laws/default.asp?content_id=248 (pre-amendment text) [hereinafter Federation Apartments Law].

177. Law on Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens, *reported in* Official Gazette of the Federation of Bosnia and Herzegovina no. 11/98 [hereinafter Federation Private Property Law]. In repealing previous abandoned property regulations, the property laws swept widely, providing that:

The Law on Abandoned Apartments (‘Official Gazette of RBH’ no. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95), Decree on Use of Abandoned Apartments (Official Gazette HZHB 13/93) and the regulations passed thereunder, as well as other regulations regulating the issue of abandoned apartments passed between 30 April 1991 and the entry into force of this Law which are being applied on the territory of the Federation of Bosnia and Herzegovina (hereinafter: the Federation) shall cease to be applied on the day of the entry into force of this law.

Federation Apartments Law, *supra* note 176, art. 1(1).

178. Law on the Cessation of the Application of the Law on Use of Abandoned Property, *reported in* Official Gazette of the Republic of Serbia no. 38/98 [hereinafter RS Property Law].

179. The texts of all three Entity property laws, as amended, are available at <http://www.legislationline.org/index.php?country=8&org=0&eu=0&topic=242>.

180. For instance, both Federation laws explicitly required the competent authorities to “refrain from undertaking any new actions” by which property would be declared abandoned. RS Property Law, *supra* note 178, art. 1(2); Federation Private Property Law, *supra* note 177, art. 2.

tant provisions by far, however, created a retrospective remedy: a claims system administered by the domestic authorities sitting where claimed property was located (housing authorities).¹⁸¹ Thus, the passage of the property laws not only satisfied the Entities' Annex 7 obligation to repeal discriminatory legislation, but also created the first real possibility that one of Annex 7's core undertakings—property restitution—would be fulfilled.¹⁸²

B. *Limitations on the Scope of Apartment Repossession*

Shortly after passage of the property laws, substantial problems with their restitution provisions became apparent to an increasingly coordinated international field monitoring

181. In the Federation, these administrative bodies generally functioned at the municipal level and were referred to as "municipal housing offices." In some cases in the Federation, separate municipal offices were competent to take claims for socially-owned apartments and real property. Administrative appeals from municipal housing offices in the Federation were usually heard by the competent Cantonal ministry. In the RS, all claims under the property laws were processed by municipal offices of the Entity-level Ministry for Refugees and Displaced Persons (MRDP). As such, they were often referred to in English as "OMIs," a local language abbreviation for "Division of the Ministry for Refugees" (*odsjek ministarstva za izbjeglica*). Administrative appeals from first instance decisions in the RS were heard by the MRDP. For the sake of simplicity this paper refers to all such offices generically as "housing authorities." In both Entities, these officials were often the same that had previously reallocated abandoned properties. Now they were expected to confirm the rights of claimants to repossess their property and ensure the vacation of any temporary occupants. For a detailed overview of the structure and role of both Entities' housing authorities, see Philpott, *supra* note 101, at 5-6.

182. During this period, amendments to both the Law on Housing Relations and the property laws barred further judicial cancellations of occupancy rights and permitted persons whose occupancy rights had been judicially cancelled during the war and its aftermath to claim and repossess their apartments on the same terms as those whose apartments had been declared abandoned under wartime regulations. See Federation Law on Taking Over the Law on Housing Relations, reported in Official Gazette of the Federation of Bosnia and Herzegovina no. 11/98; Federation Law on Amendments to the Law on Taking Over the Law on Housing Relations, reported in Official Gazette of the Federation of Bosnia and Herzegovina no. 19/99; see also Office of the High Representative, *Decision Amending the Law on Housing Relations in the RS and Annuling All Court-Ordered Cancellations of Occupancy Rights of Refugees and Displaced Persons since April 1992 and Reallocations of Apartments Made on the Grounds of Space Rationalisation* (Apr. 14, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=155.

presence.¹⁸³ Domestic intransigence regarding the most fundamental problem—limits imposed on the repossession of apartments—became the catalyst for a more interventionist international approach, aided by two new elements. First, the direct applicability of the human rights provisions of the ECHR under Annex 4 of the GFAP proved critical in defining the scope of the Annex 7 right to restitution. Second, the OHR was attributed authority to impose legislation by decree on behalf of the international community, a power that came to be increasingly important in ensuring that the property laws gave full effect to the Annex 7 right to restitution. Because the Federation's laws were passed earlier and affected more apartments,¹⁸⁴ they became the laboratory for development of principles that would eventually be imposed by OHR amendment to both Entities' laws.

Restrictions on apartment repossession in the Federation property laws played on the vague status of occupancy rights under Annex 7, which explicitly provides only for restitution of "property."¹⁸⁵ Given the technically conditional nature of occupancy rights to apartments abandoned during the conflict (e.g., prior to general privatization), it was unclear whether they constituted property in this sense. Nevertheless, a separate basis for restitution of apartments existed under the Annex 7 requirement that all refugees and displaced persons be allowed to freely return to their homes of origin.¹⁸⁶ Whether apartments technically constituted property or not, they had clearly been homes for many of Bosnia's displaced persons and refugees. Therefore, early restitution of apartments was

183. For a detailed description of early monitoring of restitution in Bosnia, see Hastings, *supra* note 9, at 230-37.

184. Statistics on property law implementation give a rough sense of the imbalance in numbers of socially-owned apartments between the Entities. For instance, as of late 2003, there were nearly three times as many claims for apartments in the Federation (71,161) as in the RS (25,301). The Federation Canton, including Sarajevo, had more claimed apartments on its own (28,284) than the entire RS. Office of the High Representative, *Statistics: Implementation of the Property Laws in Bosnia and Herzegovina* (Nov. 30, 2003), available at http://www.ohr.int/plip/pdf/plip_11.03.PDF.

185. Annex 7 of the GFAP generally refers only to restoration of "property"; for instance, the CRPC is authorized to award return of "real property" to any person determined to be the "lawful owner." See GFAP, *supra* note 5, Annex 7, ch. 2, art. XII.

186. *Id.* Annex 7, ch. 1, art. I(1).

unambiguously return-based, rather than rights-based, in the sense of the dual justification for property restitution discussed above. This understanding suffuses the original property laws; for instance, where real property owners are entitled to simply repossess their homes, implying the ability to dispose over them at will,¹⁸⁷ occupancy right holders are accorded the “right to return in accordance with Annex 7.”¹⁸⁸

An initial inference drawn from the classification of apartment restitution as return-based was that its scope could permissibly be limited to only those who explicitly enjoyed the right of return under Annex 7—“refugees and displaced persons.”¹⁸⁹ As there was no official definition of refugees and displaced persons in Annex 7, concepts from the defunct Law on Housing Relations were revived as proxies for such a definition, with the implicit goal of blocking apartment restitution in as many cases as possible. By contrast, even though restitution of property under Annex 7 was also linked to refugee and displaced person status,¹⁹⁰ the property laws’ provisions on restitution of private property were unambiguous and virtually unconditional from the beginning.¹⁹¹ The differential treatment of apartments and private property may therefore be ex-

187. See, e.g., Federation Private Property Law, *supra* note 177, art. 4 (defining persons entitled to claim for “return of” and “repossession of” private property).

188. See, e.g., Federation Apartments Law, *supra* note 176, art. 3(1).

189. GFAP, *supra* note 5, Annex 7, ch. 1, art. I(1) (“All refugees and displaced persons have the right to return to their homes of origin.”).

190. *Id.* (“They shall have the right to have restored to them property.”) (emphasis added).

191. See Federation Private Property Law, *supra* note 177, art. 4(1) (“The owner of the real property declared abandoned shall have the right to file a claim for the real property at any time.”). This provision was broadened by the OHR in order to explicitly allow repossession by persons who had clearly acquired lawful possession of property prior to the conflict without having perfected their legal title. Office of the High Representative, *Decision Amending Various Provisions of the Federation Law on Cessation of Application of the Law on Temporary Abandoned Real Property by Citizens*, art. 1 (July 2, 1999), reported in Official Gazette of the Federation of Bosnia and Herzegovina no. 27/99, available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=167 (introducing a second paragraph to art. 4 of the Federation Private Property Law stating that “[e]xceptionally, claims for repossession of real property may also be made by persons who were in unconditional possession of the real property at the time it was declared abandoned”); see also RS Property Law, *supra* note 178, art. 4 (allowing repossession of private property by its pre-war “owner, possessor, or user”).

plained not only in light of the less conditional nature of private property rights, but also due to the political stakes involved—the prestigious nature of apartments, their imminent increase in value for those entitled to purchase them under post-war privatization laws, and the fact that many abandoned apartments were occupied by high-ranking officials on all sides.

The scope of the class of beneficiaries entitled to apartment restitution in the Federation was restricted in two ways. First, refugees and displaced persons, for the purposes of the right to return under Annex 7, were defined as those who could prove that they had left their apartment for reasons related to the conflict.¹⁹² Failure to make this showing disqualified claimants from refugee or displaced person status, excluding them from the Annex 7 right to return to their apartments. The vague terms of this provision left broad discretion to the local housing authorities throughout the Federation, who were quickly accused of abusing it to block restitution of apartments.¹⁹³

Second, in the case of apartments previously declared abandoned under the Law on Abandoned Apartments, the property laws balanced the rights of any claimant against the property interests acquired by subsequent users.¹⁹⁴ In other words, while claimants were entitled to reinstatement of their

192. See Federation Apartments Law, *supra* note 176, art. 3(2) (“Paragraph 1 of this Article [allowing for occupancy right holders to return to apartments] shall be applied only to those occupancy right holders who have the right to return to their homes of origin under Annex 7, Article 1 of the [GFAP]”). Prior to amendment, the second sentence of art. 3(2) of this law provided that “[p]ersons who have left their apartments since 30 April 1991 are presumed to be refugees and displaced persons under Annex 7 absent a showing that they left their apartments for reasons wholly unrelated to the conflict.” *Id.*

193. See Hastings, *supra* note 9, at 232 (describing wholesale rejection of claims for apartments on this basis in municipalities that experienced little combat during the war).

194. See Federation Apartments Law, *supra* note 176, art. 3(5). Prior to amendment, the second sentence of art. 3(6) of this law provided that:

[w]ithin thirty days of a Decision under Article 6 of this Law which concerns an apartment inhabited by a new occupancy right holder on the basis of a decision of the allocation right holder, or of a contract (hereinafter: the current occupant), the allocation right holder shall refer the case to the responsible cantonal administrative authority which shall pass a decision on allocation of another

occupancy rights, their claims to the specific apartments they occupied before the war were not automatically superior and they could be left with a right only to other unspecified apartments. Again, the job of weighing the equities of the pre-war and post-war claimants to the apartment was left largely to the discretion of the housing authorities.¹⁹⁵

Taken together, these restrictions allowed the authorities, in the guise of applying Annex 7, to revisit the justification for wartime displacement in light of the interests underlying the otherwise defunct use requirement. If claimants had left their apartments for reasons unrelated to the conflict, their absence was unjustified; therefore, they had forsaken both their occupancy right and any entitlement to return. Even in cases where claims were allowed to go forward on the basis of a finding of justified absence, claimants were effectively required to make the further showing that returning their specific pre-war home to them would be more socially useful than allowing the subsequent users to remain. International observers in Bosnia were quick to reject these restrictions because of the emerging recognition that occupancy rights constituted property interests subject to rights-based restitution and because application of the restrictions appeared likely to prevent any significant repossession of apartments in the Federation. This led to a parting of the ways with the Bosniac political leadership, whose rhetorical commitment to return had hitherto aligned them with the international community, but whose control of the vast majority of apartments in Bosnia (particularly in urban

apartment to the current occupant or the occupancy right holder, within 30 days from the date the case has been submitted.

Id. art. 3(6). The subsequent paragraph stated that:

[i]f the responsible cantonal authority decides that the occupancy right holder should be allocated another apartment, the decision shall be made in accordance with the criteria which must comply with Article 1. of Annex 7 of the [GFAP], in accordance with the [ECHR], as well as the Law on Housing Relations. These criteria shall be developed by the Federation Ministry of Urban Planning and Environment, in consultation with organizations competent for the implementation of the standards mentioned in this Paragraph.

Id.

195. Hastings, *supra* note 9, at 236-37 (describing domestic promulgation of an instruction regulating the application of these provisions with little consultation with international monitors).

centers such as Sarajevo, Zenica, and Tuzla) left them most exposed to effective restitution measures.

C. *International Amendment of the Property Laws*

In its early jurisprudence, before passage of the property laws, the Bosnian Human Rights Chamber examined the status of occupancy rights under Article 1 of Protocol 1 to the ECHR, a provision protecting property interests from arbitrary interference.¹⁹⁶ Finding that an occupancy right constitutes “a valuable asset giving the holder the right, subject to the conditions prescribed by law, to occupy the apartment in question indefinitely,” the Chamber decided that occupancy rights did fall within the ambit of Article 1, Protocol 1,¹⁹⁷ a position supported by other human rights observers.¹⁹⁸ The Chamber went on to find that war-related reallocations of apartments

196. See Protocol to ECHR, *supra* note 54. The full text of Article 1 of the Protocol to the ECHR reads as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The extensive jurisprudence of the European Court of Human Rights regarding this provision is summarized in MONICA CARSS-FRISK, *THE RIGHT TO PROPERTY: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS* (Council of Europe 2001), available at http://www.coe.int/T/E/Human_rights/hrhb4.pdf.

197. Human Rights Chamber for Bosnia and Herzegovina, Decision on the Admissibility and Merits: Case No: CH/96/28: M.P. against Republika Srpska ¶ 32 (Nov. 7, 1997), available at <http://www.hrc.ba/database/decisions/CH96-28%20MJ%20Admissibility%20and%20Merits%20E.pdf> [hereinafter M.P. against Republika Srpska].

198. Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case No: CH/97/46: Kevešević against the Federation of Bosnia and Herzegovina ¶ 72 (Sept. 10, 1998) (citing the submissions of the Human Rights Ombudsman of BiH at a March 11, 1998, oral hearing that occupancy rights “entailed, *inter alia*, the right to use an apartment undisturbed and permanently, the possibility for cohabiting members of the holder’s household to obtain the occupancy right after the holder’s death or after the termination of the latter’s occupancy right on other grounds and the automatic [obtaining] by the holder’s cohabiting spouse of a joint occupancy right.”).

constituted impermissible interferences with the rights protected under this provision.¹⁹⁹ Frequently, the Chamber also found such practices in violation of the right to respect for the home under Article 8 of the ECHR.²⁰⁰ Although the Chamber's findings on occupancy rights were technically applicable only to individual cases, they were of general precedential value in both pushing for adoption of a legislative remedy for property violations—in the form of the property laws—and defining their scope. The Chamber's jurisprudence provided a vehicle for investing concrete meaning into the Annex 7 requirement that property be restored to refugees and displaced persons, in this case establishing that apartments held under occupancy rights constituted not only homes (which could be returned to) but also property interests (subject to restitution). The logic of these rulings supported an ensuing shift, through successive legislative amendments, from return-based to rights-based restitution of apartments.

The mechanism for imposing these amendments was a quasi-legislative power attributed to the OHR by the Peace Implementation Council (PIC), an intergovernmental body overseeing OHR's work.²⁰¹ During a December 1997 meeting in Bonn, the PIC augmented the OHR's modest coordination mandate under Annex 10 of the GFAP²⁰² through the attribution of authority to provisionally impose legislation and dis-

199. *Id.* ¶¶ 50-57, 80 (finding of a de facto expropriation of a protected possession undertaken in a manner not in accordance with law); see also M.P. against Republika Srpska, *supra* note 197, ¶ 33 (finding a failure to protect the applicant against unlawful interference in the enjoyment of his possessions by private individuals).

200. See Kevešević, *supra* note 198, ¶¶ 42, 58. Art. 8 of the ECHR, *supra* note 44, reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

201. The PIC provides guidance to OHR through the issuance of regular communiqués. See Office of the High Representative, *Peace Implementation Council*, at <http://www.ohr.int/pic/archive.asp?sa=on>.

202. See GFAP, *supra* note 5, Annex 10 (“Civilian Implementation”).

miss public officials in Bosnia as necessary in order to implement the GFAP.²⁰³ These so-called “Bonn Powers” were used sparingly at first, but with ever-increasing assertiveness.²⁰⁴ In terms of the property laws, the OHR’s increasing reliance on the Bonn Powers was reflected by a series of twenty-eight OHR decisions, undertaken between April and December 1999, imposing both new legal instruments and amendments to existing legislation.²⁰⁵ The earlier of these amendments were generally agreed to in advance with the competent Entity ministries and imposed purely on the basis of political expediency, while later amendments, including a sweeping package of fourteen separate impositions in October 1999, were undertaken despite significant domestic objections.

203. PIC’s report from this meeting states:

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.

Office of the High Representative, Peace Implementation Council, *Bosnia and Herzegovina 1998: Self-Sustaining Structures* § XI(2) (Dec. 10, 1997), available at http://www.ohr.int/pic/default.asp?content_id=5182#11.

204. The scope, utility, and legitimacy of the “Bonn Powers” have been the subject of a long-running debate. See, e.g., Gerald Knaus & Felix Martin, *Lessons from Bosnia and Herzegovina: The Travails of the European Raj*, 14 J. OF DEMOCRACY 60 (2003). The think-tank to which the authors belong, the European Stability Initiative, has made the reactions to this paper available at <http://www.esiweb.org>.

205. A list of all impositions of a legislative nature undertaken by OHR in 1999 in the field of property law and return is available at <http://www.ohr.int/decisions/plipdec/archive.asp?m=&yr=1999>.

Early amendments to the property laws were made primarily with respect to the Federation property laws, in order to address the most glaring restrictions on apartment repossession. First, in April 1999, the OHR established the primacy of pre-war occupancy right holders' claims over those of subsequent users, ending the practice of treating pre-war and post-war occupancy rights as equivalent. Provisions canceling all new occupancy rights to abandoned apartments *ex lege* and demoting their holders to temporary occupants cleared the way for displaced occupancy right holders to claim and repossess the specific apartments they had occupied before the war.²⁰⁶

Three months later, OHR again amended the property laws, negating the requirement that apartment claimants individually justify their wartime absence in order to be eligible for restitution.²⁰⁷ This was achieved through establishment of a conclusive presumption that all occupancy right holders who left their apartments between the outbreak of hostilities and the entry into force of the property laws were refugees and displaced persons under Annex 7 and, therefore, entitled to return to their homes. In terms of the use requirement, the amendment represented a legislative determination that all decisions to leave apartments during this period were justified in light of the wartime circumstances. This decision reversed the Federation's attempt to limit apartment restitution by justifying it solely in terms of the right of return and narrowly defining eligibility to exercise this right. By facilitating apart-

206. See Press Release, Office of the High Representative, Decisions on Federal Property Laws (July 2, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=4755 [hereinafter OHR July 1999 Press Release]; see also Office of the High Representative, *Decision Cancelling All Permanent Occupancy Rights Issued in the RS during and after the War in BiH and Converting Them into Temporary Occupancy Rights* (Apr. 14, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=161.

207. Office of the High Representative, *Decision Amending Various Provisions of the Federation Law on the Cessation of Application of the Law on Abandoned Apartments, Providing inter alia for the Use of Unclaimed Apartments for Humanitarian [sic] Accommodation* (July 2, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=170 [hereinafter OHR Decision Amending Federation Law]; Office of the High Representative, Decision on the Law on Amendments to the Law on Cessation of Application of the Law on the Use of Abandoned Property, art. 10 (Oct. 27, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=194.

ment restitution as of right, the amendment increased the likelihood that displaced occupancy right holders would return, a point emphasized in presentation of the amendment as necessary to “prevent municipal authorities from denying individuals the right to return based upon untested assumptions about their motivation for leaving the apartment or returning.”²⁰⁸

The Federation was successful in negotiating a highly significant derogation from this principle that was, ironically, imposed by the OHR as an exception to its own rule. This exception applied only in the Federation, with regard to apartments administered before the conflict by the JNA. As noted above,²⁰⁹ these apartments had uniquely been subject to pre-war privatization, and many occupancy right holders had initiated purchase proceedings prior to the conflict. Nevertheless, repossession of all such apartments was made conditional on a provision, Article 3a of the Federation Apartments Law (Article 3a), that tested “which among the former occupants of JNA apartments may be considered genuine refugees and displaced persons”²¹⁰ through criteria correlated to the claimant’s pre-war attachments to Bosnia and likelihood to have received another JNA apartment elsewhere.²¹¹ These criteria

208. OHR July 1999 Press Release, *supra* note 206.

209. *See supra* Part III.B.

210. OHR July 1999 Press Release, *supra* note 206.

211. OHR Decision Amending Federation Law, *supra* note 207. The text of Article 3a reads as follows:

As an exception to [the presumption that those who left their apartments during or after the conflict are “refugees” in the sense of Annex 7 and entitled to repossess their apartments as such], regarding apartments declared abandoned on the territory of the [Federation], at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee if on April 30, 1991 s/he was in active service in the SSNO (Federal Secretariat for National Defence) -JNA (i.e. not retired); and was not a citizen of the [SRBiH] unless s/he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the Former SFRY before 14 December 1995.

A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee if s/he remained in the active military service of any armed forces outside the territory of [BiH] after 14 December 1995, or s/he has acquired another occupancy right outside the territory of [BiH].”

were applicable whether or not the claimant alleged purchase of their apartment before the conflict.²¹²

These provisions represented a dramatic concession to the Federation,²¹³ especially given that rights under pre-war purchase contracts had already been accorded protected status by the Bosnian Human Rights Chamber.²¹⁴ They also reflected the persistence of the argument that eligibility for return-based restitution could properly be limited to refugees and displaced persons, defined, for the purposes of apartment

212. The legislative amendments whereby Article 3a of the Federation Apartments Law was imposed also included changes to the Federation Apartment Purchase Law allowing holders of pre-war purchase contracts to JNA apartments to register current ownership only if they did not abandon the apartment during the conflict, or had been able to “exercise the right to repossess” the apartment under Article 3a. Federation Apartment Purchase Law, *supra* note 145, arts. 39a, 39c. Those denied the right to register ownership were eligible for compensation for any portion of the purchase price paid before the conflict. *Id.* art. 39e.

213. The extent to which the Federation Ministry of Defense was able to assert its interests in early negotiations over the drafting and amendment of the property laws is also reflected by the fact that these laws provide for the Ministry to dispose of unclaimed apartments within its stock. This provision is unparalleled; in all other cases, including apartments within the housing stock of the RS military, the property laws provide for the provisional administration of unclaimed apartments by the municipal housing authorities. See Federation Apartments Law, *supra* note 176, art. 18d(6) (“Exceptionally, in respect of apartments at the disposal of the [Federation] Ministry of Defence, where an occupancy right to an apartment is cancelled [as untimely claimed or not grounded], the . . . [Federation] Ministry of Defence may issue a new contract on use to a temporary user of an apartment in cases where s/he is required to vacate the apartment under this Law to enable the return of a pre-war occupancy right holder or purchaser of the apartment, provided that his/her housing needs are not otherwise met.”).

214. Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case Nos. CH/96/3, CH/96/8, CH/96/9: Medan against the Federation of Bosnia and Herzegovina (Nov. 3, 1997) (finding that pre-war purchase contracts for JNA apartments gave rise to contractual rights protected under Article 1 of Protocol 1 to the ECHR, that wartime and postwar legal acts purporting to retroactively annul such contracts represented a disproportionate interference with these possessions). See *id.* ¶ 32 (“Assuming the applicants’ contracts to have been valid they conferred on the applicants rights to occupy the apartments as owners, and to have themselves registered as owners. Although the contracts did not of themselves transfer to the applicants real rights of property in the apartments they thus conferred on them valuable personal rights which in the Chamber’s opinion constituted ‘assets’ and were ‘possessions’ for the purposes of Article 1 of the Protocol.”).

restitution, through analogy to the use requirement. For instance, in defending Article 3a, the Federation authorities asserted that those who abandoned JNA apartments in the Federation received rights to other JNA apartments where they were displaced,²¹⁵ disqualifying them from repossession based on both the pre-war prohibition on holding two occupancy rights²¹⁶ and the reduced likelihood that they would actually return to use their pre-war apartment if they had effectively resettled elsewhere. Underlying these arguments was a widespread sense of victimization in Federation cities like Sarajevo, which suffered through a four-year siege initiated by the Serb-dominated JNA.²¹⁷ The sense that collective punishment of the aggressors through expropriation of their apartments was

215. While it is true that JNA apartments were distributed throughout all the republics of the former SFRY in order to facilitate the mobility of JNA officers, Article 3a allowed rejection of claims on the basis of likelihood of having received another apartment (e.g., in view of continued service in the armed forces of countries outside Bosnia), rather than individualized proof.

216. The SRBiH Law on Housing Relations states:

A person using more than one apartment is bound to notify the housing authorities within 15 days after he or she started using more than one apartment, and to state, at the same time, the apartment he or she is going to use further, and to move out from the other apartments within 30 days.

SRBiH Law on Housing Relations, *supra* note 132, art. 17. *See also* Miholić, *supra* note 144, ¶ 59 (citing submission by OHR that restrictions on repossession of military apartments were meant to address a post-war housing shortage in a manner consonant with the Law on Housing Relations ban on occupancy rights to more than one apartment). *Id.* ¶¶ 114-115 (citing submissions by the Federation that those who abandoned military apartments in the Federation were likely to have received other apartments from the former JNA stock elsewhere).

217. *See* International Criminal Tribunal for the Former Yugoslavia, Indictment: IT-98-29-I: Prosecutor of the Tribunal v. Galić ¶¶ 2-4a (Mar. 26, 1999), *available at* <http://www.un.org/icty/indictment/english/gal-ii990326e.htm> (establishing participation of elements of the JNA in the initial occupation of strategic positions in and around Sarajevo, the effective transformation of these elements of the JNA into part of the Bosnian Serb army and the forty-four month siege of Sarajevo by this army in which shelling and sniping was used “to kill, maim, wound and terrorise the civilian inhabitants of Sarajevo”).

justified pervaded Federation politics²¹⁸ but was rarely made explicit in legal terms.²¹⁹

D. *The Administrative Procedure for Property Restitution*

In October 1999, the earlier piecemeal OHR impositions culminated in a sweeping set of amendments, laws, and legally binding instructions imposed in order to “harmonize the RS legislation with the Federation legislation and thus create

218. See Ermin Čengiđ, *Šta će biti sa vojnim stanovima: Posljedni juriš JNA* [What will become of the military apartments: last charge of the Yugoslav National Army], *DANI* 18, 20 (Apr. 25, 2003) (translation on file with author) (quoting the vice-president of the Bosniac SDA political party as saying that “[w]hoever would throw defenders of this state out of apartments and return them to soldiers of an aggressor army would risk assuming responsibility for an uncontrollable reaction of the military population.”). Although the Bosniacs traditionally advocated multi-ethnicity, observers noted that post-war political acceptability often closely correlated to ethnicity, implicitly justifying collective retribution against ethnically coded “disloyal” groups. As Waters states:

The Muslim and Croat governments in particular effectively incorporated [a] mixed ethno-patriotic posture into its [sic] legislation. Their use of participation in the “patriotic defense” or “the aggressor’s army” as criteria for full political membership, during and immediately after a war mobilizing populations around ideals of ethnic solidarity, is tantamount to determining the polity along ethnic lines; the few exceptions only prove the rule.

Waters, *supra* note 31, at 571-72.

219. A rare exception is provided by a draft of the Law on Amendments to the Law on Sale of Apartments with Occupancy Rights, distributed in late 2003 by the Federation Ministry of Physical Planning and Environment (translation on file with author). The “explanation” section of this draft, which would restrict the ability of those who signed pre-war purchase contracts to register their ownership, seeks to justify this restriction on the basis of the exceptions clause to Article 8 of the ECHR:

We do not think it necessary to elaborate about danger for security [sic] of the State of Bosnia and Herzegovina if officers of armies of other States—even those who are still in active service—would be allowed to live in the Federation, repossess [sic] their apartments. Secondly, it is immoral for officers who participated in aggression and genocide against the very same state of Bosnia and Herzegovina, to live in it. Thirdly, this is a necessary legal solution for protection [sic] of rights and freedoms of officers of the Federation Army, particularly those who were left without their pre-war JNA apartments in other states, and families of killed soldiers and war veterans for whom the Federation does not have another housing fund.

equal rights and remedies for all refugees and displaced persons across Bosnia and Herzegovina in accordance with Annex 7 of the [GFAP].”²²⁰ Although further amendments would prove necessary two years later, the October 1999 impositions laid the ground for a shift in international focus from securing an adequate legal framework to monitoring its implementation. The international community’s commitment to property restitution was underscored by an unprecedented OHR decision, one month after the property law amendments, dismissing twenty-two officials, ranging from heads of municipal housing offices to cantonal governors, for obstructing implementation of the property laws.²²¹

The primary aim of the October 1999 property amendments was to create effective and functionally identical administrative procedures for property repossession in both Entities of Bosnia. The resulting claims adjudication process consisted of a two-part administrative determination followed by enforcement proceedings. The process began with the responsibility of local housing authorities to receive claims for property within their jurisdiction, establish (ex officio, if necessary) all relevant facts related to each claim,²²² and issue a decision within thirty days setting out the rights of the claimant and any temporary users of the property.²²³ Most municipal housing authorities were soon overwhelmed by the volume of property claims submitted and unable to meet the thirty-day deadline

220. Press Release, Office of the High Representative, A Comprehensive Strategy for a Just and Efficient Returns Process in Bosnia and Herzegovina (Oct. 27, 1999), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=4811 [hereinafter OHR October 1999 Press Release].

221. The November 29, 1999, “removal decisions” are available at <http://www.ohr.int/decisions/removalsdec/archive.asp?m=&yr=1999>.

222. See, e.g., Office of the High Representative, The High Representative’s Decision on the Instruction on Application of the Law on Cessation of Application of the Law on Abandoned Apartments, ¶ 45 (Oct. 27, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=254 [hereinafter Federation Apartments Instruction] (“Given the public interest in this matter, the responsible body shall continue the procedure according to Article 154 of the Law on Administrative Procedures and establish, ex officio, (e.g., inspection) or through documents presented with the claim all material facts relating to the occupancy right of the claimant or the status of the current occupant of the claimed apartment.”).

223. See, e.g., Federation Apartments Law, *supra* note 176, arts. 6(1), 7.

for decisions.²²⁴ For less justifiable reasons, most housing authorities also failed to process claims in the order received, as implied by this provision.²²⁵

In each decision, the housing authorities first determined whether the claimant was entitled to repossession. For apartments, eligible claimants included the pre-war occupancy right holder or a member of their registered family household.²²⁶ For real property, the pre-war owner or possessor was eligible.²²⁷ Eligibility was generally easy to establish, given that most claimants could present documentation of their pre-war status and destruction of property records in Bosnia was a relatively isolated phenomenon. Moreover, with very few exceptions, occupants of claimed properties—uniformly considered temporary users by the property laws—did not contest the title or status of the claimant but sought only to vacate the property on the most favorable terms possible.

The second component of each property decision determined the status and rights of any temporary users. An important threshold question was whether the temporary users had been allocated the claimed property under color of law or simply occupied it on their own.²²⁸ Those occupying property

224. By May 2000, when reliable statistics began to be kept, over 220,000 property claims had been received throughout Bosnia. Office of the High Representative, *Statistics: Implementation of the Property Laws* (May 31, 2000), available at <http://www.ohr.int/plip/pdf/PLIP5.00.PDF>.

225. See *infra* Part VI.C (describing later amendment of the property laws explicitly requiring chronological processing).

226. See, e.g., Federation Apartments Law, *supra* note 176, arts. 3(1), 4(1).

227. See, e.g., Federation Private Property Law, *supra* note 177, art. 4.

228. Although the original property laws only provided for repossession of properties formally declared abandoned, the 1999 OHR amendments allowed claimants to de facto abandoned apartments to repossess their property on the same basis. According to an OHR press release:

At present, the administrative authorities are competent to receive claims only for apartments and houses that were formally declared abandoned. However, many houses and apartments were never declared abandoned, but are now occupied by someone else. Refugees and displaced persons in this category are obliged to commence a court proceeding, which in many cases is a slow and difficult process. The legislation is now changed so that all refugees and displaced persons who lost possession of their apartment or house before 4 April 1998 may make their claim to the administrative authorities, in the usual ways.

OHR July 1999 Press Release, *supra* note 206.

without formal allocation decisions were considered illegal users and required to vacate the property within fifteen days with no right to alternative accommodation.²²⁹ The rights of legal users in possession of allocation decisions depended on whether they had independent means of providing for their own housing needs, in accordance with criteria set out in the property laws. If so, they were considered double or multiple occupants,²³⁰ and also given fifteen days to vacate the property with no right to alternative accommodation.²³¹ Temporary users unable to meet their own housing needs were given ninety days to vacate the property and had the right to look to the housing authorities in the municipality where they were displaced for alternative accommodation.²³²

Upon issuance of a positive decision, appeal did not suspend enforcement.²³³ As a rule, enforcement could not proceed until the deadline to vacate the property voluntarily had expired and the claimant subsequently requested enforcement.²³⁴ Exceptionally, the housing authorities were required to initiate enforcement proceedings *ex officio* against multiple occupants.²³⁵ Temporary users entitled to alternative accommodation technically faced eviction even if the housing authorities failed to provide it, should all other conditions be

229. For example, the Federation Apartments Law provides:

Holder of occupancy right in the apartment which is inhabited by a person using the apartment without legal basis or which is vacant as of the date this Law enters into force shall be able, without any restrictions, to repossess the apartment in which he has an occupancy right. Persons using the apartment without legal basis shall, *ex officio*, be evicted immediately or at the latest within 15 days and the competent authority shall not be obliged to provide alternative accommodation to such persons.

Federation Apartments Law, *supra* note 176 art. 3(3). While illegal users had no right to alternative accommodation under the property laws, they were often eligible for provision of similar "emergency accommodation" under Entity laws regulating the status of displaced persons. *Id.*

230. Strictly speaking, the terms "double occupant" or "multiple occupant" only referred to a sub-group of the category of temporary users whose housing needs could otherwise be met, in the terms of the property laws as amended in October 1999. *See generally* Hastings, *supra* note 9.

231. *See, e.g.*, Federation Apartments Law, *supra* note 176, arts. 3(3), 11.

232. *See, e.g., id.* art. 3(5).

233. *See, e.g., id.* art. 8(3).

234. *See, e.g., id.* art. 11(1)-(2).

235. *See, e.g., id.* art. 11(3).

met.²³⁶ Alternative accommodation was meant to be of a temporary and humanitarian nature, with entitlement ceasing when the beneficiary could house herself.²³⁷ Due, however, to widespread destruction of property and limited funds to rebuild, many temporary users placed in alternative accommodation effectively received an open-ended entitlement to it.

By late 1999, the CRPC had begun issuing decisions confirming the status of claimants as owners or occupancy right holders as of the outbreak of the conflict in Bosnia (April 1, 1992). While the scope of such decisions fell short of CRPC's Annex 7 mandate to rule on the voluntariness of transfers of property after April 1, 1992,²³⁸ the decisions were nevertheless nominally enforceable.²³⁹ In practice, CRPC decisions were rarely implemented due to their unclear status under domestic law. As a result, the October 1999 amendment package included laws incorporating CRPC decisions into domestic claims procedures (Federation and RS CRPC Implementation Laws).²⁴⁰ Accordingly, when recipients of CRPC decisions actively sought their enforcement, housing authorities were

236. See, e.g., *id.* art. 3(10) ("In no event shall the failure of the competent bodies to meet their obligations under this Article [to provide alternative accommodation] operate to delay the ability of an occupancy right holder to enter into possession of the apartment."); but see *id.* art. 7a(3) (setting out the possibility of extension of ninety day deadlines to vacate for up to one year in municipalities that demonstrated an absence of available alternative accommodation to the satisfaction of OHR). This provision was never successfully invoked.

237. See, e.g., *id.* art. 3(6).

238. GFAP, *supra* note 5, Annex 7, ch. 2, art. XI ("The Commission shall receive and decide any claims for real property in [BiH], 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.").

239. *Id.* Annex 7, ch. 2, art. XII (2) ("Any 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.").

240. Office of the High Representative, *Decision on the Recognition and Implementation of CRPC Decisions in the Federation* (Oct. 27, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=198 [hereinafter Federation CRPC Implementation Law]; Office of the High Representative, *Decision on the Recognition and Implementation of CRPC Decisions in the RS* (Oct. 27, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=201 [hereinafter RS CRPC Implementation Law]. Note that the texts of both Entity CRPC Implementation Laws have remained largely identical to each other, both as originally passed and as subsequently amended.

obliged to treat this request as a claim, merging it with any prior claim filed directly with them by the same claimant.²⁴¹ CRPC decisions were deemed “final and binding” proof of the eligibility of claimants to repossess.²⁴² Nevertheless, the status of the claimant was generally uncontested and the more labor intensive task of adjudication and enforcement against temporary users remained the sole responsibility of local housing authorities. Given that most claimants could, and often did, claim through both CRPC and the housing authorities, the added value to the overall process of the tens of thousands of decisions eventually issued by CRPC remains questionable.²⁴³

V. IMPLEMENTING RESTITUTION: THE RETURN REQUIREMENT, 2000-2001

This section reviews early restitution under the “property laws,” in the wake of the 1999 amendments harmonizing their provisions. International monitoring of the process intensified during this period in the guise of the “PLIP” coalition, an institutional framework that facilitated both horizontal coordination between its five constituent agencies and vertical coordination between the head offices and field presences of each. Successful implementation tactics developed in the field were quickly institutionalized country-wide and problematic application of property laws, where observed, was countered with legal interpretations meant for adoption by domestic authorities. As a result of these efforts, implementation of the property laws began in earnest in both Entities and substantial progress was made.

241. *Id.* art. 7(6).

242. *Id.* art. 2(1).

243. Cox & Garlick, *supra* note 8, at 74 (“Over time, CRPC decisions came to be widely accepted and enforced by municipal authorities. The implication, however, was that CRPC did not become an effective claims mechanism until the domestic institutions themselves had begun to function effectively. The attempt to bypass the domestic institutions through an internationalized body was therefore unsuccessful.”); *see also* Philpott, *supra* note 101, at 16-17 (noting that in continuing to focus on mass-resolution of its most easily solved claims, CRPC duplicated the work done by the domestic housing authorities and missed an opportunity to focus on technically complex and politicized cases, thereby systematically excluding itself “from the parts of the restitution process to which it could have added the most value as an independent and impartial arbiter.”).

The most pressing implementation concerns during this period remained substantive—the continued obstruction of apartment restitution. Obstructive practices played on the fact that return of apartments continued to be justified primarily as a means of facilitating return. Such practices targeted minority claimants, restricting or canceling their rights if they did not take adequate steps to return to and resume use of their apartments. International interpretations and amendments affecting both the restitution and privatization of apartments shifted these processes firmly to a “rights-based” footing—apartments, like private properties, were to be treated as a fungible asset to be restored to pre-war residents as of right, whether they intended to return or not.

A. *Monitoring Implementation: The PLIP Structure*

In the wake of the October 1999 property law amendments, new international efforts to monitor implementation took the form of the interagency PLIP coalition.²⁴⁴ The primary goal of PLIP was to encourage consistent and effective property law implementation by the domestic authorities by ensuring that the international community itself spoke on the matter with a single voice.²⁴⁵ The need for international coordination was particularly strong in the field, where the overlapping monitoring structures of OHR-RRTF, UNHCR, UNMiBH and OSCE could be played off against each other by local authorities. To counter this risk, each field officer was assigned some municipalities within their organizational area of responsibility where they would act as the sole PLIP focal point for property issues on behalf of the entire international commu-

244. See *supra* Part II.C (introducing member agencies of PLIP).

245. According to its Framework Document:

The PLIP harnesses all of the resources available to the international community in Bosnia to achieve [property law implementation]. This includes the principal organisations involved in property law implementation . . . , the main sectors of peace implementation . . . , and the available tools of influence. The PLIP is the mechanism through which international agencies develop *common policy* frameworks, perform *comprehensive monitoring* of progress in the field, and develop *consistent strategies* for overcoming problems.

Office of the High Representative, *PLIP Inter-Agency Framework Document*, § II (Oct. 15, 2000), available at http://www.ohr.int/plip/key-doc/default.asp?content_id=5510 [hereinafter PLIP Framework Document] (emphasis added).

nity.²⁴⁶ Central coordination of this field network fell to the PLIP Cell, a working meeting of headquarters-level representatives of the PLIP agencies that developed and oversaw implementation policies.

Several PLIP policies were crucial to achieving early breakthroughs in property law implementation. Foremost among these was the creation of double occupancy commissions, bodies consisting of international monitors and local housing authorities that jointly verified the double occupant status of individual temporary users.²⁴⁷ By targeting temporary users who had access to other housing—and were therefore most expedient for local authorities to evict—PLIP monitors provided political cover for the beginning of a process that would eventually sweep more broadly, confronting all temporary users, regardless of their status, with the credible threat of eviction. Decisions issued against double occupants began to be enforced because UNMiBH's International Police Task Force (IPTF) ensured that the domestic police reliably assisted in evictions and took legally appropriate action against protesters seeking to prevent lawful evictions.²⁴⁸

246. *Id.* § IV (A) (1) (“Together, these local representatives of the international agencies are expected to develop consensus on joint objectives and effective deployment of their limited resources.”). Each field monitor remained responsible for implementing their agency’s mandate throughout their entire area of responsibility and their exclusive remit as Focal Point in any given municipality was only to carry out specific and explicitly appointed PLIP tasks.

247. *Id.* § IV(C) (1). *See also* Hastings, *supra* note 9, at 238-39 (discussing the evolution of double occupancy commissions). Technically, the innovation of double occupancy commissions came prior to both PLIP and the October 1999 amendments to the property laws; the introduction of the double occupant legal category in the latter was an example of internationally imposed amendments responding to successful field practice.

248. The PLIP Framework Document states:

Local police are an essential element in the property repossession process To date, the police have not uniformly supported the property repossession process. Accordingly, it is essential that the actions of the police be also closely monitored. The IPTF Commissioner has issued clear instructions to the Ministries of Interior of both entities as to their duties in connection with evictions.

PLIP Framework Document, *supra* note 245, § IV(A)(2); *see also* Hastings, *supra* note 9, at 239-43 (describing the process of overcoming initial obstruction of evictions).

The PLIP agencies also pioneered the collection and publication of detailed statistics on property law implementation. Beginning in mid-2000, Focal Points collected updated information on claims received, decisions issued, and enforcements for each municipality of Bosnia every month, with the resulting PLIP Statistics available to the press and public.²⁴⁹ The reporting system was improved over time, with increasingly detailed guidelines²⁵⁰ and the short-term deployment of data-entry clerks hired by OSCE to systematically address municipal shortcomings in processing and reporting on property claims.²⁵¹ By providing a reliable indicator of progress in each municipality, the PLIP statistics created a competitive dynamic between municipalities and regions that almost undoubtedly accelerated the process.²⁵²

249. An archive of all published monthly PLIP statistics packages since the first in May 2000 is located under the section "Property Law Implementation Statistics" at <http://www.ohr.int/plip/>.

250. Office of the High Representative, *PLIP Statistics Guidelines* (Nov. 25, 2002), available at http://www.ohr.int/plip/key-doc/default.asp?content_id=30053. A quick reference version of these guidelines as well as the standard reporting form are also available. See Office of the High Representative, *PLIP Quick Reference* (Jan. 13, 2003), available at <http://www.ohr.int/plip/key-doc/doc/plip-quick-ref-13.jan.03-eng.doc>; Office of the High Representative, *PLIP Questionnaire* (Jan. 13, 2003), available at <http://www.ohr.int/plip/key-doc/doc/plip-questionnaire-13.jan03-eng.doc>. Housing authorities were required to retroactively correct statistics for their municipalities on the basis of these standardized guidelines, eliminating disparities due to the previous lack of uniform interpretation on some aspects of reporting.

251. The OSCE data entry clerk program began as a response to systematic under-resourcing of municipal housing offices in light of the huge caseload of property claims they faced, a problem identified by PLIP as one of the major obstacles to early property law implementation. See PLIP Framework Document, *supra* note 245, § II(b). In addition to supporting better case processing and filing practices, clerks typically created electronic claims databases. Databases were based on a standardized model developed by OSCE that generated updated reports based on the PLIP statistics reporting form. Installation of such databases often required the de novo entry of data on all resolved and pending case-files. As such, it served as a powerful tool for clearing up inaccuracies that existed in early reported statistics.

252. More recently, by quantifying the restitution process, the PLIP statistics allowed imposition of a verifiable deadline for all municipalities to substantially complete the process. Press Release, Office of the High Representative, A New Strategic Direction in PLIP: IC principals demand an end to selective implementation of the property laws (Sept. 12, 2002), available at: http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=27893 [hereinafter PLIP NSD Press Release] (setting out expectation of "full imple-

One further policy tool available to PLIP in response to systematic obstruction of the property laws was the issuance of legal interpretations and instructions. Although such measures did not change the laws in the manner of imposed amendments, they were backed by OHR's authority under the GFAP as "the final authority in theater regarding interpretation of [Annex 10],"²⁵³ as well as the Entities' obligations to "fully cooperate with the High Representative."²⁵⁴ The interpretations and instructions issued during the early implementation period reflected PLIP's evolving approach to property law implementation and, particularly, to the crucial issue of restitution of apartments.²⁵⁵

This approach was initially shaped by the general rhetorical assumption that those who repossessed their properties would, by and large, return to live in them.²⁵⁶ The optimistic conflation of restitution and return allowed the PLIP process to appear to address human rights violations and reverse ethnic cleansing at a single stroke, serving the mandate interests of all PLIP agencies.²⁵⁷ As long as the actual numbers of both property repossessions and physical returns remained rela-

mentation of the property laws by end 2003"); *see also* Office of the High Representative, *Communiqué by the PIC Steering Board* (Sept. 26, 2003), available at http://www.ohr.int/pic/default.asp?content_id=30898 ("The Steering Board welcomed the significant progress in property law implementation, noting that 88 percent of all property claims had been resolved by the end of August. While complimenting the local authorities, the Steering Board called for redoubled efforts to ensure that the process is completed by the end of this year.").

253. GFAP, *supra* note 5, Annex 10, art. V.

254. *Id.* Annex 10, art. IV.

255. These interpretations and instructions also formed much of the substance of a final round of OHR-imposed amendments to the property laws in December 2001. *See infra* Part VI.C.

256. For instance, imposed amendments to the property laws were generally presented first and foremost as measures to facilitate return. *See* OHR October 1999 Press Release, *supra* note 220 (announcing property law amendments as a comprehensive strategy for a just and efficient returns process in Bosnia). Human rights reporting in Bosnia also tended to treat restitution and return in an undifferentiated manner. *See* Office of the High Representative, *HRCC Human Rights Quarterly Report, February 2000* (Feb. 15, 2000), available at http://www.ohr.int/ohr-dept/hr-rol/thedept/hr-coord-cent/info-reps/hr-reports/default.asp?content_id=5097 (covering both return and property restitution under a single heading "Right to Return / Right to Property").

257. *See supra* Part II.C (on mandate interests of PLIP agencies).

tively low, there was little empirical evidence to rebut this assumption. As restitution numbers picked up, a more complicated pattern emerged, testing international unity. Moreover, the return-oriented focus of these assumptions initially played into the hands of obstructive local authorities who had devised strategies to deploy return as condition rather than a right, blocking apartment restitution anew.

B. *Return as a Requirement to Repossess
and Privatize Apartments*

As described in Part IV.C, *supra*, the 1999 OHR amendments largely frustrated the Federation's attempts to block the restitution of apartments by restrictively defining eligibility to return, with the notable exception of JNA apartments. By 2000, however, both Entities, but particularly the Federation, had fallen back on measures to block apartment restitution through manipulation of provisions effectively requiring that apartment restitution claimants physically return. Thus, although virtually all pre-war occupancy right holders were now eligible to *claim* restitution of their apartments as a matter of right, the preservation of both their claim and all their subsequent rights to the apartment (including purchase in the Federation) remained contingent on a battery of conditions not applicable to repossession of private property.

International monitors were initially slow to react to this strategy because the legal provisions involved were ostensibly meant to encourage return; in fact, some of the provisions in question had even been imposed on this basis by the OHR. As it became clear that they were being applied in ways that pre-empted both restitution and return, domestic authorities were, in turn, baffled by the strong international reaction. From a Bosnian, and particularly a Bosniac, perspective, the concept of return to apartments had become intuitively linked with the pre-war use requirement. Claimants who did not actively exercise the right of return by physically reoccupying and using their apartments had thereby forfeited both the right and the apartment. The coherence of this argument was, however, undermined by the manifest intent of the authorities in both Entities to convert occupancy rights into private property,²⁵⁸ leav-

258. See *supra* Part III.B (describing rapid post-war passage of Entity laws allowing occupancy right holders to purchase their apartments).

ing the international community to conclude that selective application of the defunct use requirement to returning ethnic minorities was little more than discrimination.

The special legal conditions for apartment repossession began with preclusive deadlines for claims. Although these deadlines were repeatedly extended by OHR decision,²⁵⁹ they had expired by 2000, and housing authorities routinely barred claims lodged thereafter.²⁶⁰ As a result, all apartments left unclaimed (as well as those for which timely claims had been rejected on their merits) were to be provisionally administered by the housing authorities as alternative accommodation and later returned to their allocation right holders.²⁶¹ Parallels between the deadlines provisions and the use requirement were manifest, including the six-month timeline of the original deadlines, mirroring the time period for which demonstrated non-use of apartments could result in cancellation of occupancy rights under the Law on Housing Relations.²⁶² Even in the case of timely claims, subsequent failures to initiate enforcement of positive decisions and personally reoccupy the apartment could result in *de novo* cancellation of claimants'

259. The general deadline for claims made directly to municipal housing authorities in the Federation was July 4, 1999, with an extension to October 4, 1999 for certain categories of apartments. The general deadline to claim in the RS was April 19, 2000. Similar deadlines existed for claiming apartments located in each Entity through CRPC. Commission for Real Property Claims of Displaced Persons and Refugees, Overview of Deadlines for Socially-owned Apartments (on file with author).

260. See, e.g., Federation Apartments Law, *supra* note 176, art. 5.

261. See, e.g., *id.* art. 18d. Early provisions setting out specific dates for return of such apartments to allocation right holders were replaced by OHR imposition in December 2001 with provisions linking return of such apartments to full property law implementation in individual municipalities. Although the law specified that all such apartments were generally to be used as alternative accommodation, a narrow exception existed by which temporary users might, under criteria set out in the property laws, "revalidate" permanent occupancy rights they had received to unclaimed apartments during or after the conflict. See, e.g., *id.* art. 18c.

262. In addition, prior to the October 1999 amendments, apartments not timely claimed were meant to be reallocated "in accordance with the Law on Housing Relations," instead of used as alternative accommodation. See *id.* (Prior to the October 1999 amendments, article 13(1) of this law stated that "[u]pon the cancellation of an occupancy right [for failure to timely claim], the allocation right holder may allocate the apartment for use to the temporary occupant or to another party in accordance with the provisions of the [Law on Housing Relations].").

occupancy rights.²⁶³ Again, the terms of this requirement closely tracked the pre-conflict procedures for canceling occupancy rights under the use requirement, specifying a nearly identical list of grounds justifying inaction and providing for cancellation through judicial proceedings.

A final return-related restriction on the exercise of rights over apartments—the so-called “two year-rule”—was imposed by OHR in 1999 and applied solely in the Federation. The rule was triggered *after* repossession, conditioning the right to buy the apartment under the Federation Apartment Purchase Law on two years of residence.²⁶⁴ Although this provision replaced a harsher five-year rule,²⁶⁵ it nevertheless represented a significant intrusion into the rights of returnee occupancy right holders that was inapplicable to any other would-be purchasers in the Federation or to any category of occupancy right holder in the RS.²⁶⁶ The OHR’s explicit intention was to

263. This was the case prior to amendments imposed by the High Representative in December, 2001. *Id.* art. 12. RS Property Law, *supra* note 178, art. 21 set out this requirement and the consequences for failing to meet it. Roughly parallel to these provisions, the right to seek administrative enforcement of CRPC decisions confirming a pre-conflict occupancy right through the property laws remains subject to expiration within a set time from the issuance of such decisions. See Federation CRPC Implementation Law, *supra* note 240, art. 5(2); RS CRPC Implementation Law, *supra* note 240, art. 5(2).

264. Office of the High Representative, *Decision Amending Various Provisions of the Federation Law on Sale of Apartments with Occupancy Right, Providing Inter Alia for a Two-Year Delay on Purchase of Apartments That Were Declared Abandoned During the War and until April 1998*, art. 1 (July 2, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=173 [hereinafter *Sale of Apartments Amendments*] (imposing a new article 8a in the Federation Apartment Purchase Law, *supra* note 145, specifying that “[t]he occupancy right holder to an apartment which was proclaimed as abandoned by special regulations applied at the territory of [the Federation] during the period from 30 April 1991 to 4 April 1998 shall acquire the right to purchase the apartment in compliance with the provisions of this Law upon the expiry of a two year deadline after his or her reinstatement in the apartment”).

265. Federation Apartments Law, *supra* note 176. Prior to the July 1999 OHR amendments, article 15 of this law required the pre-war occupancy right holder to use the apartment for six months after reinstatement in order to be able to purchase it, and a further five years in order to be able to sell it.

266. Federation Apartment Purchase Law, *supra* note 145, arts. 7, 8 (permitting immediate purchase as of right by the occupancy right holder as a general rule).

coerce return in the context of an increasing implementation gap between the Entities. Higher rates of repossession in the Federation were thought to allow temporary occupants to repossess their own prewar homes in the Federation without giving up the properties they occupied in the RS:

[The two year-rule] will prevent refugees and displaced persons from participating in the privatisation of apartments until they demonstrate they are genuinely committed to return. The OHR and the Federation Government have agreed that the practice of some displaced persons of buying and selling their apartments without returning, and therefore without vacating their current accommodation, is inhibiting the return process. This change to the Law will help to prevent double occupancy, and encourage the permanent return of refugees and displaced persons.²⁶⁷

By unapologetically conditioning rights flowing from property restitution on performance of a legal obligation to return, the two-year rule represented the high water mark in the international community's conflation of restitution and return. Meanwhile, the RS Apartment Purchase Law was passed in April 2000²⁶⁸ but suspended by a High Representative decision, pending amendment of a number of provisions "patently at variance" with Annex 7 of the GFAP.²⁶⁹ Most problematic was the failure to provide special deadlines for returnees to seek purchase of their apartments running from the date of their repossession. OHR noted that this omission could prevent the "vast majority" of displaced claimants to RS apartments from purchasing them:

[T]he law states that persons who fail to purchase their apartments one year after the implementation date of the law will . . . have no longer the chance to purchase their apartments. Given the notoriously slow rate of property law implementation in the [RS], it is conceivable that only a small number of refugees

267. OHR July 1999 Press Release, *supra* note 206.

268. RS Apartment Purchase Law, *supra* note 146.

269. Press Release, Office of the High Representative, High Representative Suspends Application of the RS Law on the Privatisation of State Owned Apartments (June 29, 2000), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=3955.

and displaced persons would return within one year and [be] allowed to purchase their apartments.²⁷⁰

As a result of the Federation two-year rule and general suspension of the RS Apartment Purchase Law, persons who repossessed their apartments under the property laws in both Entities faced significant waiting periods before they could purchase them. During these periods, they would continue to be occupancy right holders by default and, therefore, technically be subject to the original use requirement under the Law on Housing Relations. As a result, field monitors rapidly became aware of practices targeting minority apartment claimants.²⁷¹ Recipients of positive decisions often received inadequate notice of the possibility of cancellation for failure to seek enforcement or reoccupy the apartment.²⁷² “Re-occupation” of apartments was defined as resumption of personal use, excluding mere repossession through the pickup of the keys by the claimant or their legal proxy.

Several Federation cantons went further, passing regulations allowing unannounced inspections to verify whether those who had re-occupied their apartments were actually using them; such regulations were passed with a view to canceling returnees’ occupancy rights for non-use under the Law on Housing Relations.²⁷³ Local authorities’ assertions that they

270. *Id.*

271. In some cases, the authorities even alleged technical violations of the Law on Housing Relations in order to attempt a priori to disqualify claimants from repossessing their apartments. According to the property laws, however, positive decisions should have been made on claims by any pre-war *titular* occupancy right holder without regard to evidence that they might have been in formal violation of the Law on Housing Relations before the conflict. See Federation Apartments Law, *supra* note 176, art. 4(1).

272. Such notice was technically required, but this was often overlooked. See *id.* art. 12 (prior to amendments imposed in December 2001, the third paragraph of this article stated that “[t]he competent body shall inform the claimant about her/his obligations under this article in the decision”).

273. Such inspections were particularly insidious because they often blurred the line between legitimate efforts to provide local support to returnees and discriminatory efforts to cancel their occupancy rights before they could privatize their apartments. See, e.g., *Police Station of Municipality Stari Grad Is Taking Care of Returnees’ Safety*, OSLOBODJENJE, Nov. 2, 2000 (translation on file with author). This article asserts that the “[p]rotection of property and individual safety is the only reason why Serb and Croat returnees are visited by policemen from the . . . Police Station of [the Sarajevo district of] Stari Grad. Visits are scheduled according to the list given by the

were simply upholding the law were increasingly unconvincing in light of both their selective application of provisions requiring return and the context of general privatization. It was clear, however, that OHR's interventions into both Entities' apartment purchase laws, although intended to promote return, had the unintended effect of leaving ethnic minority returnees exposed to strict application of the use requirement, threatening the renewed cancellation of their rights.

C. *PLIP Interpretations: Equating Apartments with Private Property*

The response of the PLIP agencies began with a November 2000 letter to the Federation Cantonal Ministries of Justice seeking repeal of the inspection provisions. This letter noted that the provisions appeared to violate both a pre-conflict Constitutional Court decision²⁷⁴ and post-conflict obligations not to discriminate against refugees and displaced persons and concluded that “[i]n the context of the transition to privatised property, such inspections and efforts to cancel occupancy rights, which would otherwise soon be converted into private property, seem inappropriate.”²⁷⁵ By April 2001, several Cantons had withdrawn their inspection provisions, and a letter to the RS authorities appeared to have pre-empted a similar practice in that Entity.²⁷⁶

Ministry of [Displaced Persons and Refugees] of Sarajevo Canton.” The article quotes the Stari Grad police chief as saying that “It happens sometimes that someone misunderstands [the police] visit and ask [sic] them whether they are checking if returnees are in their apartment or not.”

274. See Constitutional Court of Bosnia and Herzegovina, Case U 174/90, *supra* note 139.

275. Letter from Paul Prettitore, Property Law Implementation Coordinator, Office of the High Representative to all Federation Cantonal Ministries of Justice (Nov. 16, 2000) (on file with author).

276. See Press Release, Office of the High Representative, Control of Socially-owned Apartments (Apr. 12, 2001), available at http://www.ohr.int/ohr-dept/preso/preso/default.asp?content_id=4340; see also Letter from Ambassador Valerie Sluijter, Deputy High Representative for Reconstruction and Return Task Force, Office of the High Representative to Boro Mandić, Deputy Minister, Ministry for Urbanism, Housing, Construction and Environment, Republika Srpska and Milan Trbojević, Acting Minister, Ministry for Refugees and Displaced Persons, Republika Srpska (Dec. 21, 2000) (on file with author).

In March 2001, PLIP went on to clarify that “for the purposes of meeting the requirements of re-occupancy set out under the respective property laws, an occupancy right holder is considered to have re-occupied the property when he/she, a member of his/her 1991 family household, or his/her legal proxy, receives the apartment keys.”²⁷⁷ The following month, PLIP reminded the competent authorities of both Entities that positive decisions on claims for apartments must include full and explicit notice of the consequences—court cancellation of the occupancy right—for failure to seek enforcement of positive decisions and re-occupy the apartment.²⁷⁸

The new PLIP interpretations recognized that requiring apartment claimants to return to and use their pre-war apartments (on pain of cancellation of their rights) had become an invitation to abusive practices that effectively discouraged return. Ironically, in order to safeguard the possibility of return, it had become necessary to break the formal links between apartment repossession and return. Repudiation of return-based restitution of apartments and the shift to a rights-based approach involved viewing apartments (like private property)

277. Letter from Valerie Sluijter, Deputy High Representative and Head of RRTF, Office of the High Representative to Mićo Mičić, Minister for Refugees and Displaced Persons, Republika Srpska and Ramiz Mehmedagić, Ministry of Physical Planning and Environment, Federation of Bosnia and Herzegovina (Mar. 22, 2001) [hereinafter Sluijter Letter of Mar. 22, 2001] (on file with author). This interpretation was explicitly to be applied retroactively: “[A]ny individual subject to revocation of their occupancy right based on the assumption he/she failed to repossess the apartment should be notified of this interpretation and given ninety days, from the date of this subsequent notification, to pick up their keys.” *Id.*

278. Letter from Ambassador Valerie Sluijter, Deputy High Representative for Reconstruction and Return, Office of the High Representative to Mico Micic, Minister for Refugees and Displaced Persons, Republika Srpska (Apr. 24, 2001) (on file with author). As with the Sluijter Letter of Mar. 22, 2001, *supra*, note 277, this interpretation was also to be retroactively applied:

If any cancellation procedure has been initiated before the court, it should be discontinued, and the additional explicit notice mentioned above should then be sent to the claimant. Where the court has cancelled an occupancy right, and full and explicit notice of the possibility of cancellation was not set out in the repossession decision, or in a subsequent written notification, the competent body should *ex officio* apply to the court to have the cancellation revoked. The competent body should then send the required explicit notice to the claimant, and the 90-day deadline shall run from the date that this additional notice is received by the claimant.

as assets that refugees and displaced persons might choose to return to or to sell in order to finance their resettlement elsewhere in Bosnia.

The next step in this process was abolition of the Federation's two-year rule. Despite having withstood scrutiny by Bosnia's Constitutional Court in February 2001,²⁷⁹ the two-year rule's efficacy in achieving its stated goals—promoting return and preventing double occupancy—were questionable. Textually, the rule applied only to apartments formally “proclaimed as abandoned.”²⁸⁰ This provision allowed housing officials to demand bribes in exchange for declarations that claimed apartments were exempt from the rule (by virtue of not having been formally declared abandoned), allowing the immediate sale of the apartment.²⁸¹ To the extent such practices occurred, the two-year rule had not only failed in promoting return, but had also become a means for corrupt housing

279. Constitutional Court of Bosnia and Herzegovina, Request of Eleven Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for Institution of Proceedings for the Evaluation of Constitutionality of Article 8a para.1 of the Law on Sale of Apartments with Occupancy Rights, Case U 16/00, Decision of Feb. 2, 2001, reported in Official Gazette of the Federation of Bosnia and Herzegovina no. 13/01. In this decision, the Court considered a challenge to constitutionality of the two-year rule on the basis of Article 1 to Protocol 1 and Article 14 of the ECHR, as applicable in Bosnia via Article II of the Constitution. Referring to submissions made by OHR, the Court found that the rule represented a proportionate limitation on the rights of returnees and foresaw a justified difference in treatment between groups of apartment purchasers in the Federation in light of the aim of refugee return:

Since the return of refugees and displaced persons to their homes of origin is a major objective of the General Framework for Peace in Bosnia and Herzegovina and is also reflected in Article II paragraph 5 of the Constitution, it must be concluded that the objective was in itself reasonable and legitimate.

Id.

280. See Sale of Apartments Amendments, *supra* note 264, art. 1. See also OHR July 1999 Press Release, *supra* note 228 (describing expansion of the claims process to allow claims for all occupied property, not just that which had been declared abandoned and formally reallocated).

281. Reports of widespread and systematic corrupt practices involving misapplication of the two-year rule were detailed in internal OSCE reports as well as numerous meetings with OSCE Human Rights Department field officers at which the author was present. However, because those who reported such practices had often themselves paid bribes to housing officials for exemption from the rule, they generally wished to remain anonymous.

officials to extract part of the revenues refugees and displaced persons received from the sale of what was often their only remaining asset. The argument that the two-year rule prevented double occupancy by those who repossessed their Federation apartments without giving up properties they occupied in the RS was based on the idea that the property laws were not being applied in the RS, an assumption that was no longer true by mid-2001.²⁸²

Responding to these concerns, the OHR replaced the two-year rule in July 2001 with a requirement that returnees in both Entities prove that they no longer occupied abandoned property elsewhere in order to purchase their apartments.²⁸³

282. When the two-year rule was imposed in July 1999, the property laws remained largely unimplemented in the RS, while evictions were just beginning to take place in the Federation. However, by June of 2001, the RS, though still trailing well behind the Federation, had nevertheless resolved one-fifth of all claims for property on its territory. See Office of the High Representative, *Statistics: Implementation of the Property Laws* (June 30, 2001), available at <http://www.ohr.int/plip/pdf/PLIP6.01.PDF>.

283. Office of the High Representative, Amending the Law on Sale of Apartments with Occupancy Rights (July 17, 2001), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=129 (replacing the two-year rule with a requirement to vacate abandoned property and specifically protecting returnee purchasers against use of provisions of the Law on Housing Relations to cancel newly repossessed occupancy rights while purchase proceedings were pending); Office of the High Representative, Further Amending the Law on the Privatization of State Owned Apartments (July 17, 2001), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=131 (replacing the two-year rule with a requirement to vacate abandoned property). The requirement that refugees and displaced persons demonstrate vacation of previously occupied abandoned property was never applied as a condition for actual repossession of pre-war properties. Although such measures were considered, they would have raised both logistical difficulties and legal issues. In particular, it was unclear whether such a limitation could legally be imposed on what had effectively become a constitutionally protected right to repossession of pre-war property. However, application of such a condition to privatization was both practicable and less legally problematic, given that apartment purchase was as of statutory entitlement rather than constitutional right. Nevertheless, the property laws did include measures meant to link repossession with an obligation to vacate other property. See, e.g., Federation Apartments Instruction, *supra* note 222, ¶ 46 (requiring persons repossessing their pre-war property to give a statement that they will unconditionally vacate any abandoned property they occupy on pain of prosecution). The cognate instructions on application of the Federation Private Property Law (¶ 16) and the RS Property Law (¶ 35) contained functionally identical provisions.

As these amendments also included changes to the RS Apartment Purchase Law guaranteeing returnees a significant discount in purchasing their apartments, they were presented as a harmonization of the Entity laws that would ensure that refugees and displaced persons could “return and purchase the apartments to which they have occupancy rights without being discriminated against compared to those who did not have to leave their apartments.”²⁸⁴ Moreover, because the RS had, in the meantime, amended its deadlines for apartment purchase to allow returnees to initiate the process upon repossession, OHR lifted its suspension, allowing apartment privatization in the RS to go forward.²⁸⁵

The July 2001 amendments to the Entity apartment purchase laws completed the shift to a rights-based approach to apartment restitution. This was by no means a repudiation of the goal of return. Instead, it represented the recognition that restitution provisions ostensibly meant to promote return were liable to application in a manner that subverted restitution and pre-empted the possibility of return for those affected. Return to apartments remained a political goal of the international community, but, like return to private property, it would have to come solely as the result of free and informed choice.

VI. COMPLETING RESTITUTION: RULE OF LAW AND PROCEDURAL FAIRNESS, 2002-2004

This section describes the late stages of property restitution in Bosnia, culminating in the substantial completion of the process in 2004. The primary focus during this phase shifted from substantive issues related to the repossession of apartments to procedural issues regarding the processing of claims. However, several features of past developments in res-

284. Press Release, Office of the High Representative, High Representative Amends Entity Laws on Privatization of Socially-owned Apartments (July 17, 2001), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=4495. Because the Federation apartment purchase scheme allowed for extensive use of vouchers, its costs were generally negligible for returnees and non-returnees alike. *See* Federation Apartment Purchase Law, *supra* note 145, art. 24.

285. Office of the High Representative, *Decision Giving Approval to the Amended RS Law on Apartment Privatisation* (July 17, 2001), *available at* http://www.ohr.int/decisions/plipdec/default.asp?content_id=133.

stitution policy remained constant in this period. First, international emphasis continued to shift from ostensibly return-based provisions and practices to ones that were explicitly rights-based. Second, this shift continued to be motivated by concerns that return-based policies invited domestic application of the laws calculated to curtail the rights of significant classes of claimants. Finally, because the international community had initiated restitution as an exercise in promoting return, the shift of emphasis to restitution as of right proved to be increasingly divisive, testing international unity.

International concerns during late implementation focused on the tendency of domestic authorities to process claims in haphazard order, cherry-picking expedient cases and indefinitely setting aside complicated or difficult claims—particularly where the occupants of the claimed property were politically connected. The international community had traditionally reserved similar discretion to itself to intervene on behalf of individuals or even entire classes of claimants whose return was thought likely to encourage further return. As a result, the international response to arbitrary processing involved both demanding and embracing change. The resulting policies, which focused on strict chronological processing and routine enforcement procedures, succeeded in hastening the end of the restitution process, benefiting the vast bulk of claimants. However, the section concludes by noting the ongoing lack of a remedy for several categories of claimants who fell under early return-based restrictions on restitution that were challenged unsuccessfully or too late.

A. *De-Politicization of Return: The Rule of Law Approach and Prioritization*

Already in the wake of the harmonization of the property laws in October 1999, international rhetoric began to focus on property law implementation as an exercise in rule of law. The utility of this approach lay in its ability to bypass politicized and unproductive domestic political debate over refugee return.²⁸⁶ In practice, however, the PLIP agencies often tolerated practices and even promulgated policies that exempted certain groups from clear rules on the basis of pol-

286. See *supra* Part II.C.

icy and expediency. In most cases, exemptions were justified as necessary to facilitate return. The tension between rule of law and prioritization reflected significant debates among the PLIP agencies and field monitors. On one hand, proponents of human rights and rule of law took the relatively positivist view that strict adherence to impartial procedures would serve all affected parties better in the long run. Others saw important opportunities to promote specific policies, allay humanitarian concerns and promote return by bending the law.

The first statement of the rule of law approach was a March 2000 field implementation guide for Focal Points.²⁸⁷ This document instructed all international monitors to seek rigorous implementation of the property laws, including chronological processing of claims based on the date they were filed.²⁸⁸ Chronological processing was not an explicit requirement under the property laws, but was implicit in many provisions, such as the uniform thirty-day deadlines for issuing decisions upon receipt of each claim.²⁸⁹ Focal Points were further instructed that the sole exception to chronology was for claims to property occupied by double occupants, who were prioritized by law through provisions requiring ex officio enforcement. Provisions requiring temporary occupants to be evicted, without alternative accommodation if necessary, were also to be enforced without exception, for fear of setting “a precedent that you can expect to be perpetuated by the authorities for each scheduled case that follows.”²⁹⁰ These guidelines were followed by an instruction on rule of law and prioritization of claims,²⁹¹ which affirmed the “overriding principle” of chronology but went on to state that:

[T]o manage and to support the return process, as well as to open up certain areas, exceptions from the rule are justified and “prioritisation of claims” is therefore part of the PLIP package. This prioritisa-

287. PLIP Non Negotiable Principles, *supra* note 3.

288. *Id.*

289. See *supra* Part IV.D (describing claims-receipt and decision-making procedures under the property laws).

290. PLIP Non Negotiable Principles, *supra* note 3.

291. Conclusions of the PLIP Cell Meetings, *Rule of Law and Prioritisation of Claims* (Feb. 29, 2000 and Mar. 7, 2000) (on file with author).

tion, though, may not be left to the discretion of the municipalities.²⁹²

The instruction authorized Focal Points to request housing authorities to prioritize both decision issuance and enforcement in certain non-double occupancy cases. Intended beneficiaries included public figures, such as “police officers, elected and appointed officials, as well as managers of public enterprises, judges and prosecutors” whose presence in return communities was deemed likely to encourage further return.²⁹³ Displaced persons residing in collective centers were also eligible, primarily on humanitarian grounds related to poor living conditions.²⁹⁴ Despite the fact that prioritization contradicted PLIP’s rule of law message, all PLIP agencies had at some point embraced it in order to assist groups of special concern under their mandates in a manner believed, at the time, to benefit to the overall return process.²⁹⁵

292. *Id.*

293. *Id.* In addition to the enumerated categories eligible for prioritization, this instruction provided catch-all language pertaining to difficult return areas:

[I]n exceptional circumstances, certain groupings may be prioritised due to the nature of the return environment. In these cases, the PLIP Cell must approve the prioritisation, based on information of the rationale in order to justify them against the principle of the rule of law. This may be applicable to specific Eastern RS destinations and other areas of hardline resistance to the implementation of Annex 7.

Id.

294. *Id.*

295. In particular, UNMiBH favored prioritization of ethnic minority police officers’ property claims where they were willing to serve in their pre-war municipalities. See Press Release, Office of the High Representative, High Representative Prioritises Return of Properties to Police Officers (Apr. 30, 2002), available at http://www.ohr.int/print/?content_id=7598. UNHCR has consistently viewed the prioritization of property claims of “humanitarian cases” such as collective center residents as a means of facilitating durable solutions. See UNHCR Position Paper, *supra* note 80, ¶ 31, at 10. OSCE initially advocated prioritization of property claims of returning minority elected officials as a means of “ensuring that the democratically elected individuals would be given the possibility to effectively perform their duties at all levels” in accordance with OSCE’s mandate under Annex 3 of the GFAP. See Global IDP Project of the Norwegian Refugee Council, *First Phase of PLIP Characterized by Prioritization of Cases and Monitoring of Public Official’s Housing Situation: 1999-2001* (2005), available at <http://www.db.idpproject.org/>

Nevertheless, the public focus on rule of law intensified with a 2000 interagency public information campaign entitled *Poštovanje* (Respect).²⁹⁶ Billboards, leaflets, and radio and television spots throughout Bosnia emphasized property law implementation as an invocation of the golden rule; by respecting the rights of others, in the sense of vacating their property according to law, individuals could contribute to the working of a legal system that would eventually secure their own right to restitution. Both this initiative and the more strident *Dosta Je* (Its enough) campaign in 2001 were generally credited with unsettling temporary users' sense of entitlement to the property they occupied and preparing them for the eventuality of having to vacate it.²⁹⁷

The October 2000 PLIP Framework Document was a policy statement meant to publicly define the approach of the international community to property restitution.²⁹⁸ Although the Framework Document begins by defining property restitution as a means of achieving the Annex 7 right of return, it goes on to provide the most comprehensive and explicit assertion of property restitution as a rule of law exercise that had been published to date. PLIP was defined as "an evolution" from earlier ad hoc return strategies:

The PLIP varies from these earlier policies by promoting the neutral application of the law across the board, rather than the notion of "minority return" to rural areas. By insisting that no deviation is permit-

Sites/idpSurvey.nsf/wViewCountries/D62439FAFE8D7AD2C1256A4E002E3F34?OpenDocument.

296. An archive of materials from the "Respect" campaign is available at <http://www.ohr.int/ohr-dept/rrtf/pics/prop-leg-claim-proc/respect/>.

297. See Office of the High Representative, *A New Strategic Direction: Proposed Ways Ahead for Property Law Implementation in a Time of Decreasing IC Resources*, § 3.3.3 (Sept. 12, 2002), available at http://www.ohr.int/plip/keydoc/default.asp?content_id=27904 [hereinafter PLIP New Strategic Direction] ("[Property Information Campaigns (PICs)] have been used to change the perceptions of those affected by the property laws and counter systematic misinformation by local authorities. The summer 2000 'Postovanje/Respect' PIC and fall 2000 'Dosta Je/Its Enough' PICs have, for instance, been widely credited with dispelling the myth that temporary occupants were entitled to remain in other people's property indefinitely."). An archive of materials from the "Its Enough" campaign is available at <http://www.ohr.int/ohr-dept/rrtf/pics/prop-leg-claim-proc/dostaje/>.

298. PLIP Framework Document, *supra* note 245, § I.

ted from the strict requirements of the law, it ensures that equal standards, procedures and international pressure are applied throughout the country.²⁹⁹

The rule of law approach was described as a means to depoliticize the property issue in Bosnia, institutionalize restitution through the creation of “legal-administrative structures that deal with property claims in a standardised and professional manner,” and “show to the people of BiH and its Government(s) that following the law strictly is the only way to ensure fair outcomes.”³⁰⁰ PLIP was distinguished from other return projects by virtue of its emphasis on property repossession, permitting its beneficiaries “a free choice whether or not to return.”³⁰¹ Thus, although return remained a central goal, a new procedural emphasis on the exercise of individual rights was emerging alongside it.

B. *Enforcement of Property Decisions and Alternative Accommodation*

The period from mid-2000 through 2003 saw rapid progress in restitution, with the proportion of claims resolved jumping from under 12 percent to 21 percent at the end of 2000,³⁰² 40 percent by the end of 2001,³⁰³ and nearly 70 percent by the end of 2002.³⁰⁴ The early gap between the Entities began to close, with improved implementation in the RS and local housing authorities across Bosnia routinely issuing deci-

299. *Id.* § III.

300. *Id.* In underscoring the responsibility of domestic authorities for property law implementation, the Framework Document endorsed longstanding international community policies requiring that public officials such as police officers, elected office-holders and judicial officials personally comply with the property laws. *Id.* § IV.A.3.

301. *Id.*

302. Office of the High Representative, *Statistics: Implementation of the Property Laws* (May 31, 2000), available at <http://www.ohr.int/plip/pdf/PLIP5.00.PDF>; Office of the High Representative, *Statistics: Implementation of the Property Laws* (Dec. 31, 2000), available at <http://www.ohr.int/plip/pdf/PLIP12.00.PDF>.

303. Office of the High Representative, *Statistics: Implementation of the Property Laws* (Dec. 31, 2001), available at http://www.ohr.int/plip/pdf/PLIP_12.01.PDF.

304. Office of the High Representative, *Statistics: Implementation of the Property Laws* (Dec. 31, 2002), available at http://www.ohr.int/plip/pdf/plip_12.02.PDF.

sions and enforcing them. Although an end to the process appeared to be coming into view, significant procedural obstacles remained in late 2001. There were new concerns over PLIP policies, particularly double occupancy commissions and prioritization, which had resulted in an undue level of discretion for the housing authorities in processing claims.

The early success of double occupancy commissions in opening up property restitution had been due to the discretion this approach inherently afforded to housing officials to address only the most expedient cases. Double occupancy cases were both technically straightforward, due to the property laws' unambiguous provisions on ex officio enforcement,³⁰⁵ and politically palatable, as double occupants would not, by definition, be rendered homeless in the wake of their eviction from claimed property. As a result, housing officials continued to focus on double occupancy to the exclusion of all other cases, meaning that non-double occupants—temporary occupants entitled to the longer ninety day vacation deadline and alternative accommodation³⁰⁶—were effectively placed beyond the threat of eviction.

Technically, eviction in cases involving non-double occupants should not have posed a problem. The property laws required enforcement of expired ninety-day decisions upon the request of the claimant, whether or not alternative accommodation had been provided.³⁰⁷ Nevertheless, housing authorities throughout Bosnia uniformly ignored available alternative accommodation resources, and then cited lack of alternative accommodation as an excuse not to evict non-double occupants. Over time, international accommodation of this practice, through continued focus on double occupants, was recognized as posing a significant threat to completion of the PLIP process:

[The] requirement for eviction in accordance with the legal deadlines is the most widely breached provision of the property laws In effect, the current strategy risks creating the appearance of tacit [international community] approval of two illegal practices—the failure to provide [alternative accommoda-

305. See *supra* Part IV.D.

306. See *id.* (describing legal categories of temporary occupants).

307. *Id.*

tion] . . . and the related failure to nevertheless return properties occupied by [users entitled to alternative accommodation] to their rightful owners.³⁰⁸

The loophole created by non-enforcement of non-double occupant cases was exploited by politically connected occupants of abandoned property who pressured or bribed housing authorities to declare them (rightly or wrongly) entitled to alternative accommodation in order to avoid eviction.³⁰⁹ In other cases, the authorities simply refused to initiate proceedings against such VIPs, a practice facilitated by the lack of an explicit chronology requirement in the law and the mixed messages from the PLIP agencies' own prioritization policies. The resulting procedural vacuum was seen to invite "both bribery and pressure not to act against politically protected groups,"³¹⁰ leaving many claimants' rights to their pre-war homes dependent on factors that had slid beyond the realm of the law. Whether the temporary occupant of their pre-war home was deemed entitled to alternative accommodation or was simply well connected, claimants were faced with the possibility of indefinite dispossession.³¹¹

As awareness of this problem sank in, the PLIP Agencies' initial reaction was to pressure Bosnian authorities to make better use of alternative accommodation. PLIP Cell promoted

308. PLIP New Strategic Direction, *supra* note 297, § 2.

309. According to a press release issued by PLIP NSD

It has become clear that the reason for such widespread human rights violations is selective enforcement of the property laws. Property laws have not been enforced in a uniform, efficient and transparent way. Even in some of the best-performing municipalities, local officials still violate the law in order to allow privileged groups—such as judges, politicians, police and war veterans—to remain illegally in other people's homes.

PLIP NSD Press Release, *supra* note 252.

310. PLIP New Strategic Direction, *supra* note 297, § 2. Ironically, the very obstructive strategies facilitated by PLIP's early focus on double occupancy commissions and prioritization resulted in the latter policy being rendered largely ineffective. As long as decisions were only enforced against the subcategory of temporary occupants deemed to be multiple occupants, many persons "prioritized" at PLIP's request would merely receive a decision that would not be implemented because the temporary occupant was deemed entitled to alternative accommodation.

311. *Id.*

elaborate strategies to ensure appropriate use of existing categories of collective housing and urged all levels of government to budget for this need.³¹² Meanwhile, field officers struggled to ensure appropriate use of local resources, often becoming bogged down in protracted technical questions for which they had no prior expertise.³¹³ It soon became clear that, by taking on the issue of alternative accommodation in such detail, PLIP had unintentionally relieved local housing authorities of all responsibility in the matter, reinforcing their passivity.³¹⁴ It is

312. For example, an OHR press release states:

One month ago PLIP sent a letter on [alternative accommodation] to [the competent Federation authorities] . . . which reminded all Federation authorities of their obligation to provide sufficient budgetary funds for alternative accommodation and ensure that this money was spent efficiently. With a few notable exceptions, the cantons and municipalities have not begun to exhaust the supply of low-cost alternative accommodation options Attached to the letter sent to [the Federation authorities] was a list of over 80 local sources of inexpensive alternative accommodation for locations throughout the Federation. These included suitable buildings in need of minor repair, state-owned hotels, and unused military barracks, as well as low-cost strategies such as renting unused private houses from their owners. Until the stock of efficient low-cost alternative accommodation freely available throughout the Federation has been put to use, the responsible authorities must take the blame for their own failures rather than passing it on to refugees and displaced persons.

Press Release, Office of the High Representative, PLIP Agencies Call on Relevant Authorities to Fulfill Their Obligations under the Property Laws (Jan. 24, 2002), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=6787; *see also* Press Release, Office of the High Representative, Collective Center Closure Program in RS Expected to Provide Alternative Accommodation (Aug. 30, 2001), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=5547.

313. The author participated in many PLIP and OSCE meetings where issues such as repair of damaged plumbing systems and fair distribution of heating costs among alternative accommodation beneficiaries were discussed. At one point, an OSCE field officer in eastern Bosnia came across an unused hotel suitable for use as alternative accommodation while jogging and spent months afterwards negotiating for it to be put to use.

314. *See* PLIP New Strategic Direction, *supra* note 297, § 3.4 (“Experience has shown that while it is relatively easy to identify buildings that could be used for [alternative accommodation], negotiations about their actual use become mired in inter-ministry arguments with negligible results. The IC should step back from micro-managing this process and reiterate strongly and publicly the responsibilities of the authorities to provide [alternative accommodation].”).

telling that the most successful means of providing alternative accommodation ultimately turned out to be the provision of lump sum payments calibrated to local rents, a solution that burdened beneficiaries, rather than housing authorities, with the logistical details of finding shelter.³¹⁵

A second line of PLIP policy focused on limiting entitlement to alternative accommodation to persons who could demonstrate genuine need. One approach involved strategies for reliably identifying typical classes of double occupants. The first move in this direction came with a system to verify individual cases of “reconstruction-related double occupancy,” in which beneficiaries of donor-funded housing reconstruction continued to occupy abandoned property.³¹⁶ This was followed by an instruction, drafted jointly by PLIP monitors and domestic authorities, requiring all housing authorities to mutually share and act on information related to “repossession related double occupants”—persons who had reposessed their pre-war home but continued to occupy abandoned properties in the municipality where they had been displaced.³¹⁷ PLIP monitors also encouraged housing authorities to apply a strict means-testing rationale in interpreting the double occupancy criteria set out in the property laws, for instance, by arguing that benefits such as alternative accommodation should not be provided to those who had not actively sought to avail themselves of the property laws to repossess any available pre-war property of their own.³¹⁸

315. Office of the High Representative, *Guidelines on the Lump-sum Payments for Alternative Accommodation* (July 29, 2002), available at http://www.ohr.int/plip/key-doc/default.asp?content_id=30751 (instructing housing authorities on international expectations of how and under what circumstances this form of alternative accommodation should be provided).

316. See Office of the High Representative, *Legal Guidelines on Processing Multiple Occupancy Reports by the Housing Verification & Monitoring Unit (HVM)* (May 9, 2002), available at http://www.ohr.int/plip/key-doc/default.asp?content_id=30739 (setting out detailed instructions to PLIP field monitors on monitoring and reporting on enforcement of decisions against reconstruction related double occupants).

317. Instruction on Exchange of Information Related to the Sealing and Repossession of Property, reported in *Official Gazette of the Federation of Bosnia and Herzegovina* no. 30/01, available at http://www.ohr.int/plip/key-doc/default.asp?content_id=30640.

318. Press Release, Office of the High Representative, *Claims for Private Property Increase—Those Who Fail to Claim Risk Losing Right to Alterna-*

Steps to better target double occupancy were successful on their own terms but came to be recognized as a good refinement of a bad approach, perpetuating an exclusive focus on resolving double occupancy cases. With this realization came efforts to ensure broader procedural rigor and transparency in order to guarantee that the property laws would be applied impartially to all cases.

C. *Chronology: The December 2001 Amendments
and New Strategic Direction*

The OHR extensively amended the property laws for the last time on December 4, 2001, imposing a package of thirteen legislative decisions.³¹⁹ These amendments responded to numerous technical problems noted by international field monitors, including the inadequate regulation of wartime exchanges and transfers of property between private persons.³²⁰

tive Accommodation (Apr. 17, 2001), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=4348.

319. A further set of High Representative amendments to the Entity property laws imposed on May 16, 2003 were of a more limited nature. *See* Press Release, Office of the High Representative, High Representative Imposed Decisions to Accelerate Resolution of Property Disputes (May 16, 2003), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=29900 [hereinafter OHR May 2003 Press Release].

320. Repossession claims by parties to private exchanges and transfers of property during and after the conflict were not clearly and consistently regulated prior to the December 2001 amendments. Basic principles for resolving such claims were set out in the December 2001 amendments:

Problems arising from property exchanges will be regulated. Contracts on exchange will be confirmed in cases where both parties agree the exchange was voluntary. If only one party claims, the other party will be deemed to have claimed even if a deadline has passed. And in cases of exchanges of property outside of BiH the party outside of BiH will have to prove that the property they currently possess can be returned to the pre-war owner/occupant.

Press Release, Office of the High Representative, High Representative Imposes Amendments to Property Laws (Dec. 5, 2001), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=6482.

However, the Entity CRPC Implementation Laws continued to regulate this matter inconsistently with the property laws after December 2001. After a number of BiH Human Rights Chamber decisions found this inconsistency to give rise to Entity responsibility for violations of the ECHR, the Entity CRPC Implementation Laws were harmonized by later OHR amendment:

The High Representative also enacted corrective technical amendments to the property repossession laws, the need for which was

They also codified prior PLIP legal instructions easing return-related restrictions on apartment repossession³²¹ and introducing stricter criteria for alternative accommodation,³²² including means-testing and shifting of the burden to temporary occupants to demonstrate eligibility.³²³ A related measure al-

identified during the implementation of those laws, and in the decisions of the Human Rights Chamber. These amendments will help refugees and displaced persons by preventing unnecessary administrative proceedings both when an exchange contract is presented to a housing body, and when enforcing CRPC decisions. This will apply to both private and socially-owned property.

OHR May 2003 Press Release, *supra* note 319; *see also* Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case No. CH/02/9130: Samarždić against Republika Srpska (Jan. 10, 2003); Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case No. CH/01/7257: Borota against Republika Srpska (Feb. 7, 2003); Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case No. CH/01/7224: Vučkovic against Republika Srpska (Feb. 7, 2003).

321. *See supra* Part V.C (describing PLIP interpretations facilitating apartment repossession); *see also* Office of the High Representative, Decision Enacting The Law on Amendments to the Law on the Cessation of Application of the Law on Abandoned Apartments, art. 6 (Dec. 4, 2001), *available at* http://www.ohr.int/decisions/plipdec/default.asp?content_id=6543 (inserting a new second paragraph into article 6 of the Federation Apartments Law, providing that “[t]he competent authority shall not reject a claim on the basis of provisions of the [Law on Housing Relations], other than for failing to fall within the definition of member of household set out in Article 6 of the [Law on Housing Relations]. The competent authority also shall not reject a claim on the basis of a foreign citizenship acquired by the claimant since 30 April 1991.”); *id.* arts. 13, 14 (amending article 12 of the Federation Apartments Law and inserting a new article 12a to provide for temporary use of apartments as alternative accommodation instead of cancellation of occupancy rights as a penalty for claimants’ failure to take steps to repossess apartments; requiring suspension of pending cancellation cases under the previous provision where no final decision had yet been issued; replacing the previous requirement to “re-occupy” the apartment with the requirement to “collect the keys” to the apartment; and allowing for such collection to be effected by legal proxy). The same set of amendments added functionally identical provisions in the RS. *See* RS Property Law, *supra* note 178, arts. 17(2), 21, 21a.

322. *See* Federation Apartments Law, *supra* note 176, arts. 7a, 11; Federation Private Property Law, *supra* note 177, arts. 12a, 16, 16a; RS Property Law, *supra* note 178, arts. 11a, 18a, 24a, 24b.

323. Press Release, Office of the High Representative, PLIP Agencies Reiterate Alternative Accommodation Criteria (Apr. 11, 2002), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=7371. This press release notes the new requirement that temporary occupants document their own eligibility and sets out in detail the stricter criteria for enti-

lowed the imposition of fines on double occupants who overstayed deadlines to vacate abandoned properties.³²⁴ The most significant change wrought by the December 2001 amendments was the explicit requirement that every claim “shall be solved in the chronological order in which it was received, unless specified otherwise in law.”³²⁵

The new chronology rule was aimed at “prevent[ing] manipulation of the order of claims processing for political and other purposes and ensur[ing] that claimants and temporary users have a clear expectation as to where determination of

tlement to alternative accommodation under the property laws as amended in December 2001:

The entitlement to Alternative Accommodation under the property laws can only be met by those who fall below a certain income threshold, have no assets, including allocated land, and have demonstrably made, by the date of 28 February, every effort in their power to gain repossession of their pre-war property. This includes making efforts to reconstruct this property, if uninhabitable. Temporary occupants who have at any point rejected any offer of Alternative Accommodation, either from the local authorities or from the claimant, or any offer of housing construction assistance, have no right to Alternative Accommodation. Nor do those whose parents, children, spouse, or family household members of any date since 1991 have regained access to pre-war accommodation, or who have found accommodation anywhere in the same Entity of displacement, or the pre-war city or municipality. Temporary occupants who were subtenants before the conflict also have no right to Alternative Accommodation.

Id.

324. Federation Apartments Law, *supra* note 176, art. 18f(3); Federation Private Property Law, *supra* note 177, art. 17(c)(3); RS Property Law, *supra* note 178, art. 37(3). Also noteworthy is a press release issued by OHR:

Multiple occupants must leave the property they are illegally occupying or face heavy fines. All multiple occupants, who do not voluntarily vacate the property they occupy, within the 15 days prescribed by the decision issued by the housing officials, can be fined between 250 to 5,000 KM. Upon the expiration of the 15 days deadline, the housing authorities can immediately report the multiple occupants to the competent body who will fine them.

Press Release, Office of the High Representative, Housing Officials To Fine Double Occupants (June 26, 2003), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=30171.

325. Federation Apartments Law, *supra* note 176, art. 6(1); Federation Private Property Law, *supra* note 177, art. 12(1); RS Property Law, *supra* note 178, arts. 9, 17(1).

their rights stands.”³²⁶ This provision also reflected international community awareness that its own resort to individual interventions and policy-based prioritization had reinforced the sense that the property laws could be selectively applied:

Until now, implementation of the property laws has been largely subject to the discretion of local authorities. Decision-making has been conducted with little regard to principles of administrative fairness. Political interference, corruption and, often, pure arbitrariness have dictated which claims are processed and when In response, the [international community] has all too often focused on ad hoc interventions in individual cases. While this undoubtedly benefited individual claimants, it hurt the process by undermining the principle of chronology.³²⁷

As a result of these procedural concerns, OHR had eliminated the discretion of the housing authorities and PLIP agencies alike to prioritize claims. Nevertheless, several PLIP agencies remained committed to priority return for groups of particular concern under their mandates, and were reluctant to support implementation policies in support of the amended property laws until these concerns were addressed. Thus, while international rhetoric sharpened after the amendments,³²⁸ there were few specific demands for implementation of chronology. Although OSCE disseminated guidelines on chronological implementation to its own field officers in April 2002,³²⁹ there was no consensus to adopt them as general PLIP guidance for all Focal Points.

The text of the new chronology rule allowed for exceptions “specified in law,” a phrase meant primarily to ensure that double occupant cases could still be dealt with in expe-

326. PLIP New Strategic Direction, *supra* note 297, § 3.2.

327. *Id.*

328. See, e.g., Press Release, Office of the High Representative, PLIP Principals Condemn Violation of the Property Laws by Political Pressure Groups (Apr. 23, 2002), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=7496.

329. Internal memorandum, Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (Apr. 25, 2002) (on file with author).

dited ex officio proceedings.³³⁰ Given the legally binding nature of OHR decisions, this exception provided the basis for a compromise under which any further policy-based prioritization would be imposed by OHR. Ultimately, two categories of claimants benefited from OHR decisions on prioritization crafted to avoid returning unsupervised discretion over the order of claims processing to the housing authorities.

First, on April 30, 2002, the OHR issued a legally binding decision “prioritising the return of residential properties to returnee police officers in both Entities.”³³¹ The decision was meant to assist UNMiBH in implementing police reform and restructuring goals before the then-imminent end of its mandate.³³² For PLIP purposes, the procedure was justified by the proposition that “accelerated return of minority police officers is important for the overall return process as most minority returnees point to the presence of minority police officers on the local police forces as a guarantee of their safety in their pre-war municipalities.”³³³ The decision itself included a number of safeguards to prevent abuse, including explicit definition of the procedures as an exception to chronology,³³⁴ limitation to cases verified in writing by UNMiBH,³³⁵ restrictions

330. At the time the December 2001 amendments were imposed, double occupancy cases were the only clear legal exception to chronology.

331. Press Release, Office of the High Representative, High Representative Prioritises Return of Properties to Police Officers (Apr. 30, 2002), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=7598.

332. *Id.* (“The High Representative has issued this Decision in order to promote the return of so called minority police officers in accordance with [agreements with the Entities], as well as the recent amendments to the Entity Constitutions under which the ethnic composition of the public administration at all levels must reflect the 1991 census.”).

333. *Id.*

334. Office of the High Representative, *Decision Prioritising, as an Exception to the Chronological Order Rule, the Repossession of Property by Returning Police Officers*, (Apr. 30, 2002), *available at* http://www.ohr.int/decisions/plipdec/default.asp?content_id=7607.

335. *Id.* art. 1(1) (requiring beneficiaries to present “[a] certificate issued by the United Nations Mission to Bosnia and Herzegovina, as the authority responsible, in accordance with Annex 11 of the GFAP, stating that the holder of the certificate is returning to serve as a police officer in his/her place of residence of 30 April 1991”).

on opportunistic post hoc claims,³³⁶ and a sunset clause.³³⁷ Because the latter coincided with the end of UNMiBH's mandate, the decision was never extended.

Three months later, a second OHR decision effectively prioritized the property claims of residents of collective centers,³³⁸ mass accommodation originally set up to provide temporary housing to persons displaced by the conflict.³³⁹ Because of the poor conditions prevailing in such centers, their closure had become a matter of priority for UNHCR.³⁴⁰ While the previous decision on minority police had involved straightforward prioritization of the claims of a relatively limited category of persons, the larger pool of potential beneficiaries in collective centers dictated a more creative approach. In theory, the decision was to be implemented by offering places in collective centers to the temporary occupants of collective center residents' homes, thereby transforming them from temporary to double occupants.³⁴¹ The decision delegated to

336. *Id.* art. 1(2) (requiring beneficiaries to present evidence that they had claimed their property prior to entry into force of the prioritization decision).

337. *Id.* art. 2 ("This Decision shall come into force forthwith, and shall remain in force until December 31, 2002.").

338. Transit Centers, also covered by the decision, are mass accommodation set up after the conflict for BiH citizens repatriated from countries where they were no longer entitled to protective status but unable to return to their pre-conflict homes. Their poor living conditions are comparable to those in collective centers.

339. Office of the High Representative, *Decision on the Use of Collective/Transit Centre Space in Bosnia and Herzegovina to Promote the Phased and Orderly Return of Refugees and Displaced Persons* (Aug. 1, 2002), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=27620 [hereinafter OHR Collective Center Decision].

340. According to FENA:

"Helping [displaced persons and refugees] fulfil [sic] their right to return has to be the priority of UNHCR and the local authorities in the upcoming period," UNHCR Mission to BiH Acting Head Udo Janz said at a press conference in Sarajevo today. He said that this is especially true in the case of some 10,000 people who live in collective centers throughout the region under difficult conditions.

UNHCR: *Progress in the Return Process*, FENA, Feb. 5, 2003 (translation on file with author).

341. OHR Collective Center Decision, *supra* note 339, art. 3 (requiring competent authorities to "offer collective centre space in BiH occupied at the date of this Decision by [beneficiaries] of this Decision, to the current occupants of the property claimed by [beneficiaries], in such a way as to

UNHCR the authority to provide guidance to the competent authorities in identifying eligible beneficiaries.³⁴² Despite reporting requirements³⁴³ and the extension of the decision for a further six months after its initial expiration at the end of 2002,³⁴⁴ its overall impact on collective center populations remains unclear. The decision did, however, facilitate property law implementation in some municipalities through a provision requiring use of available space in collective centers as alternative accommodation.³⁴⁵

Only after issuance of the OHR prioritization decisions could consensus be achieved around an updated PLIP policy

ensure that the current occupants are offered space in a facility as close as is feasible to their municipality of current residence”).

342. *Id.* art. 2 (requiring that “the competent ministries shall, under the guidance of the UNHCR, create a phased and orderly Plan for the allocation and use of space in these facilities in BiH”).

343. *Id.* art. 4 (“Periodic progress reports on the implementation of the plan shall be made available to the members of the State Commission for Refugees and Displaced Persons and of the Reconstruction and Return Task Force.”).

344. Office of the High Representative, *Decision on the Use of Collective/Transit Centre Space in Bosnia and Herzegovina to Promote the Phased and Orderly Return of Refugees and Displaced Persons*, art. 6 (Jan. 1, 2003), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=28864 (“This Decision shall be valid until 30 June 2003 or until the property claims of all beneficiaries are resolved, whichever date is the earlier.”).

345. The decision states:

The Ministries responsible for the management of all habitable facilities meeting the minimum standards for temporary accommodation and currently in use as Collective/Transit Centres as of the date of the issuance of this Decision, that are located on the territory of Bosnia and Herzegovina . . . must maintain these facilities at their current operational level until the date this Decision expires. All space in these facilities shall from the date of this Decision be designated as alternative accommodation, as well as continue to be used for persons in need of emergency accommodation.

OHR Collective Center Decision, *supra* note 339, art. 1; see also Press Release, Office of the High Representative, High Representative Issues Decision on Collective/Transit Centres (Aug. 2, 2002), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=27607 (“The High Representative, Paddy Ashdown, on Friday issued a Decision requiring the domestic authorities to take steps to ensure that all collective centres and transit centres in Bosnia and Herzegovina are used as both alternative and emergency accommodation.”).

paper, the New Strategic Direction (NSD).³⁴⁶ It is somewhat ironic that the novelty of the NSD lay solely in its declaration of international intent to insist on compliance with two legal principles that had long been implicit, at the very least, in the property laws but were downplayed for the sake of expediency. Specifically, it was now not only a legal obligation, but also an article of international policy, that “[a]ll evictions must be carried out in strict accordance with legal deadlines . . . [and that] in the interest of legality, efficiency, transparency and fairness, all cases must be processed in chronological order.”³⁴⁷ The new insistence on enforcement of all decisions in their turn broke the last line of resistance to property law implementation. Overnight, housing authorities found solutions for the shortage of alternative accommodation in the face of international demands for timely evictions.³⁴⁸

A further novelty of the NSD was the declaration of a deadline (December 2003) for completion of the process, a departure from previous prudent refusal to commit to an expected end-date.³⁴⁹ The RS authorities were quick to publicly commit themselves to fulfilling the deadline in hopes that the end of the PLIP process would be taken as fulfillment of the

346. PLIP New Strategic Direction, *supra* note 297. See also Philpott, *supra* note 101, at 14 (noting that the NSD was meant to have been “released as PLIP policy in conjunction with the High Representative’s December 2001 law amendment package” but was shelved for nine months until September 2002 pending resolution of the debate over exceptions to chronology.).

347. PLIP NSD Press Release, *supra* note 252.

348. See, e.g., Beth Kampschorr, *Evictions Part of International Community Strategy to Implement BiH Property Laws*, SOUTHEAST EUROPEAN TIMES (Dec. 26, 2002), at http://www.setimes.com/cocoon/setimes/xhtml/en_GB/document/setimes/features/2002/12/021226-BETH-001. This article quotes a UNHCR representative in BiH as stating:

“The authorities have taken the issue of alternative accommodation more seriously in view of the new strategic direction These authorities have been asked by the [international community] to adequately budget for temporary accommodation so that the right to accommodation of the most vulnerable who are entitled to it and are facing evictions is respected.

Id.

349. PLIP NSD Press Release, *supra* note 252 (setting out the announcement by the heads of all PLIP agencies of “a New Strategic Direction for the full implementation of the property laws by end 2003.”).

Entity's obligations under Annex 7.³⁵⁰ In the Federation, by contrast, neither Croat nor Bosniac politicians publicly endorsed the NSD, and the latter continued to express public skepticism about the entire exercise.³⁵¹

D. *PLIP Substantial Completion and Unresolved Issues*

Implementation rates rose rapidly throughout Bosnia in the wake of the NSD, and lagging municipalities and regions raced to catch up with those further ahead. The most striking progress was made in the RS, which overtook the Federation in August 2003.³⁵² This achievement resulted from improvement in RS municipalities previously seen as obstructionist black holes, such as Bijeljina, which leapt from 49 percent implementation at the end of 2002 to 91 percent one year later, achieving about twice the average national rate during this time period.³⁵³ A number of previously hard-line Croat-con-

350. In March 2003, discussions with Ambassador Michael Humphreys of the EU Delegation to BiH, RS President Dragan Čavić stated that "the [RS] authorities intended to implement Annex 7 of the Dayton Agreement . . . as soon as possible, regardless of the consequences which would follow the accelerated resolution of property right issues." *Bosnian Serb President Says Government Will Implement Dayton Refugee Provision*, SRNA, Mar. 18, 2003 (translation provided by BBC monitoring). Notably, the Ambassador appears to have reminded the RS President of the independent nature of return and restitution obligations: "The EU ambassador said that he was pleased with the determination of the [RS] government to continue the implementation of Annex 7, *as well as* the return of property and the implementation of property laws." *Id.* (emphasis added).

351. For example, FENA reported that:

[Federation Minister for Physical Planning and Environment Ramiz Mehmedagić] said that the international community indirectly supports the staying of refugees in the places of provisional residence by supporting their alternative accommodation in these areas. "This indicates that the IC does not care about the actual return of refugees. If OHR, OSCE and UNHCR were to use the same energy for return, and if the money for alternative accommodation is invested in recovering of devastated houses, the return rate would probably be much greater," said Mehmedagić.

Mehmedagić on Property Repossession and Refugee Return, FENA, Apr. 22, 2003 (translation on file with author).

352. Press Release, Office of the High Representative, RS and FBIH Reach Same Ratio of PLIP at End August (Oct. 1, 2003), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=30913.

353. Office of the High Representative, *Statistics: Implementation of the Property Laws in Bosnia and Herzegovina* (Dec. 31, 2003), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=30913.

trolled municipalities also experienced rapid progress during the same period.³⁵⁴ As a result, the bulk of municipalities had largely completed PLIP by late 2003, and the remaining laggard municipalities could not be ascribed to any single ethnic group in Bosnia.³⁵⁵

In reaction to this sudden progress, PLIP developed municipal guidelines on verifying “substantial completion”³⁵⁶ of the process.³⁵⁷ These guidelines reiterated the specific legal obligations of the housing authorities under the property laws

ohr.int/plip/pdf/plip_12.03.PDF. The overall rate of property law implementation for BiH rose from 69 percent to 92 percent during the same period. *Id.*

354. Municipalities that had been ethnically cleansed by Croats during the conflict—such as Prozor-Rama, Stolac, and West Mostar—began to see rapid progress in PLIP implementation beginning in 2002. For example, an OHR-South spokesperson stated:

In the Herzegovina-Neretva Canton, we would like to say with a special satisfaction that Prozor-Rama municipality has three cases left in order to complete the process, or 98%. We expect this process to be completed as soon as possible. It is also worth mentioning that Stolac has reached over 90%. As for Mostar municipalities, let me emphasize that Mostar municipalities South and West are approaching the Federation average.

Office of the High Representative, *Transcript of the Press Conference in Mostar* (Oct. 30, 2002), available at http://www.ohr.int/ohr-offices/mostar/transcripts/default.asp?content_id=28334 (quoting OHR-South spokesperson Avis Benes).

355. Press Release, Office of the High Representative, Property Law Implementation in Bosnia and Herzegovina Nears Completion (Feb. 11, 2004), available at http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content_id=31827 [hereinafter PLIP February 2004 Press Release] (raising concerns about the failure of several municipalities to take serious steps to complete the process; namely, Croat-dominated Jajce, and Bosniac-dominated Tuzla and Donji Vakuf). See also Press Release, Office of the High Representative, Banja Luka and Donji Vakuf Last Municipalities in Bosnia to Complete Property Repossession (July 27, 2004), available at http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content_id=33024 (criticizing Serb-dominated Banja Luka and Bosniac Donji Vakuf for trailing all other Bosnian municipalities in completing the process).

356. The use of the qualified term “substantial completion” is meant to reflect the fact that even after the vast bulk of property claims in any given municipality has been resolved, further claims may be received and must be implemented. This is particularly relevant with regard to private property, claims to which are not limited by any deadlines.

357. Office of the High Representative, *PLIP Municipal Guidelines for Substantial Completion of Property Law Implementation* (May 28, 2003), available at http://www.ohr.int/plip/key-doc/default.asp?content_id=29969. Related

and the circumstances under which the international community would consider each to have been discharged.³⁵⁸ PLIP also announced a process whereby municipalities could document their compliance with the guidelines with a view to formal certification by PLIP Cell.³⁵⁹ Actual verification of substantial completion in individual municipalities began in late 2003.³⁶⁰ By early 2004, about one-third of all Bosnian municipalities with significant property claims caseloads had been verified, and virtually all other municipalities were in the process of compiling documentation demonstrating their substantial completion.³⁶¹ In effect, property law implementation had been completed.

documentation is available under “Key Documents” at <http://www.ohr.int/plip/>.

358. According to a press release issued by PLIP:

To ensure transparency and a standardized approach, the [PLIP] agencies . . . have approved a set of guidelines to verify that municipalities have complied with all the legal obligations under the law. These guidelines indicate concrete measures that the housing authorities are expected to take in their own municipalities before declaring PLIP substantially completed. The municipalities are required to report all solved claims, to make unused alternative accommodation available to neighboring municipalities, to regularly review the lists of alternative accommodation beneficiaries, and to maintain sufficient administrative capacity to deal with any property claims submitted to their offices in the future.

PLIP Substantial Completion Press Release, *supra* note 107.

359. According to a press release issued by PLIP:

International agencies working in the field will assess together with the housing bodies that all requirements to declare Property Law Implementation substantially completed have been met. The State Commission for Refugees and Displaced Persons [a coordination body for authorities of both Entities and the Bosnian state] will be kept fully informed on the completion in the respective municipalities as will the media. This will ensure transparency of the process and ensure that it is equally applied throughout BIH.

Id.

360. Press Release, Office of the High Representative, Substantial Completion of Property Law Implementation Verified for Domavljevac-Samac, Vukosavlje and Orasje (Oct. 30, 2003), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=31080 (congratulating the first three Bosnian municipalities to be formally verified as having substantially completed property law implementation).

361. PLIP February 2004 Press Release, *supra* note 352 (noting that “[a] total of 41 municipalities have been verified as having substantially completed the implementation, and 88 municipalities which have completed all

The closure of Bosnian property restitution has set an historical precedent.³⁶² Taking into account that ethnic cleansing and reallocation of property continued for more than two years after the end of the conflict, through the PLIP process, local administrative officials resolved more than 200,000 property claims in six years. Nevertheless, criticism has focused, not only on the unresolved nature of the relationship between restitution and return,³⁶³ but also on the fates of several specific groups of property claimants that have effectively remained excluded from the process.³⁶⁴ Both sets of concerns

pending cases have established concrete timetables to demonstrate their substantial completion of all legal obligations under the property laws.”).

362. A press release issued by UNHCR states:

BiH can be proud of what has been achieved in implementing the Property Laws throughout BiH underpinning the rule of law in this country, which serves as an example of best practise in the region and beyond, and increasingly has become a model for emulation in other post-conflict societies around the world suffering from mass displacement of its [sic] population.

UNHCR 2003 Return Press Release, *supra* note 89.

363. *See supra* Part II.C.

364. One related category of displaced persons left without a remedy that falls outside the ambit of this paper is that comprised by the former residents of an estimated 30,000 abandoned socially-owned apartments in Croatia. Unlike Bosnian occupancy right holders who were generally able to repossess their apartments, Croatian occupancy right holders, overwhelmingly minority Serbs, have seen their rights terminated and their apartments transferred to – and often purchased by – other users. *See* NORWEGIAN REFUGEE COUNCIL, CIVIL RIGHTS PROJECT, TRIUMPH OF FORM OVER SUBSTANCE? JUDICIAL TERMINATION OF OCCUPANCY RIGHTS IN THE REPUBLIC OF CROATIA AND ATTEMPTED LEGAL REMEDIES 4-5 (2002), *available at* [http://www.db.idpproject.org/Sites/idpSurvey.nsf/C4578F8B0F26EC99C1256BFB00339ECD/\\$file/REPORT.pdf](http://www.db.idpproject.org/Sites/idpSurvey.nsf/C4578F8B0F26EC99C1256BFB00339ECD/$file/REPORT.pdf). In lieu of a legal remedy for these lost homes, the Croatian Government has offered assistance with housing conditioned on the actual return of the beneficiary, a measure largely accepted by international agencies working in Croatia. *See* Press Release, Org. for Security and Cooperation in Europe, Mission to Croatia, OSCE Croatia mission welcomes declaration on refugee return in south-eastern Europe (Feb. 1, 2005), *available at* <http://www.osce.org/item/8888.html> (“In Croatia, [the creation of adequate conditions to enable refugee return in the region] requires further efforts in order to provide housing for all those who want to return.”). However, as of the writing of this paper, a challenge to Croatia’s policy of occupancy right terminations remained pending before the European Court of Human Rights in Strasbourg. *See* Press Release, Amnesty International, Croatia: European Court of Human Rights to consider important case for refugee returns (Sep. 14, 2005), *available at* <http://web.amnesty.org/library/Index/ENG640032005>.

originate from the gradual shift from treating property restitution as primarily return-based to primarily rights-based. In the case of claimants arguably left without a remedy, both major categories of barred claims—JNA apartment claims and time-barred claims—involve restrictions on the repossession of apartments imposed early in the process, in accordance with the logic of return-based restitution. Unlike other restrictions on apartment restitution,³⁶⁵ however, these provisions were challenged unsuccessfully or too late.

In the first category of apartment claimants likely to remain without a legal remedy are claimants to JNA apartments in the Federation. As set out above, repossession of such apartments was subject to an exceptional test for eligibility for return set out in Article 3a of the Federation Apartments Law.³⁶⁶ This restriction was all the more extraordinary for having been imposed by the OHR and for its applicability to many claimants who had initiated purchase proceedings for their JNA apartments prior to the war.³⁶⁷

In December 2001, the Human Rights Chamber invalidated the application of Article 3a to block registration of ownership of JNA apartments by claimants who had concluded pre-war purchase contracts.³⁶⁸ The Chamber dismissed com-

365. See *supra* Parts IV.C, V.C (describing international measures to facilitate apartment repossession, first by eliminating restrictions on eligibility and later by eliminating return and use-related conditions).

366. See *supra* Part IV.C (discussing the general presumption that all claimants who left their apartments during the conflict were “refugees and displaced persons” in the sense of Annex 7, qualifying them for return-based restitution, and the exceptional test set out for claimants to JNA apartments).

367. *Id.*; see also *supra* Part III.B (discussing pre-war privatization program for JNA apartments).

368. Miholić, *supra* note 144. The Chamber begins by affirming jurisprudence of the Constitutional Court of BiH according to which decisions of the High Representative that have the character of domestic legislation may be subject to review. *Id.* ¶¶ 126-133. The Chamber then goes on to find that application of any of the criteria under Article 3a to prevent current registration of ownership on the basis of concluded pre-war purchase contracts constituted a disproportionate interference with the applicants right to peaceful enjoyment of property “based, in part, on discriminatory grounds” under Article 1 of Protocol 1 of the ECHR. *Id.* ¶ 167.

pensation as a remedy,³⁶⁹ ordering the Federation to take necessary steps “by way of legislative or administrative action,” to allow all the claimants to register their ownership of the claimed apartments.³⁷⁰ Sixteen months later, the Chamber ruled on the application of Article 3a to apartment claimants who had *not* concluded a pre-conflict purchase contract and whose claims were therefore made on the basis of pre-conflict occupancy rights.³⁷¹ The Chamber invalidated application of some of the Article 3a criteria to pre-war occupancy right holders while upholding the application of other criteria as proportionate to the Federation’s aim of “free[ing] scarce housing space for former soldiers of the RBiH Army and their families.”³⁷² This holding was arrived at despite the Federation

369. *Id.* ¶ 165 (finding that the unjustifiable nature of application of Article 3a to dispossess the applicants rendered consideration of the adequacy of compensation schemes unnecessary).

370. *Id.* ¶ 179(10)-(11). The Chamber did not order all of the claimants to be administratively reinstated under the property laws, finding that some criteria under Article 3a may properly be applied to prevent administrative repossession by persons who are thereby deemed not to be “refugees and displaced persons” in the sense of Annex 7 of the GFAP. *Id.* ¶ 177. This holding perpetuated ambiguities, both as to whether apartment restitution was primarily rights-based or return-based, and as to whether it was appropriate to evaluate claims based on pre-war purchase contracts under the Federation Apartments Law at all, as opposed to the Federation Private Property Law.

371. Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and Merits: Case Nos. CH/02/8202, CH/02/9980, CH/02/11011: M.P., Dušan Brdar and Zorka Štrbac against the Federation of Bosnia and Herzegovina (Apr. 4, 2003), *available at* [http://www.hrc.ba/data base/decisions/CH02-8202%20et%20al.%20M.P.%20Admissibility%20and%20Merits%20E.pdf](http://www.hrc.ba/data/base/decisions/CH02-8202%20et%20al.%20M.P.%20Admissibility%20and%20Merits%20E.pdf) [hereinafter M.P. et al. against Federation of Bosnia and Herzegovina]

372. *Id.* ¶ 150. In recognizing this aim as legitimate, the Chamber accepted the Federation’s assertions.

The Chamber is aware that JNA apartments, where the repossession request of the pre-war occupant was refused on the basis of Article 3a . . . are not necessarily being used for the purpose asserted by the respondent Party Notwithstanding, the Chamber can accept, in principle, that the national authorities’ decision to provide with housing former soldiers of the RBiH Army and their families pursues the legitimate aim of “protection of the rights and freedoms of others” in the sense of Article 8, paragraph 2 of the [ECHR].

Id. ¶ 151. This approach is hard to square with the Chamber’s prior decision in Miholić, in which the applicants’ complaint under Article 1 of Proto-

Ministry of Defense's documented failure to report on its obligation to use JNA apartments for vulnerable populations,³⁷³ as well as persistent anecdotal evidence of allocation of such apartments to high-ranking members of the Federation military.³⁷⁴

Implementation of the Human Rights Chamber decisions on JNA apartments remains incomplete. The Federation eventually amended Article 3a in June 2003, deleting the criteria that had been rejected out of hand by the Chamber and significantly broadening the scope of those the Chamber had allowed.³⁷⁵ The amendments were challenged before Bosnia's Constitutional Court and upheld in September 2004.³⁷⁶ For

col 1 to the ECHR was examined in conjunction with their assertion of discrimination, giving rise to a "particular onus on the [Federation] to justify otherwise prohibited differential treatment." Miholić, *supra* note 144, ¶ 145. In the M.P. case, the Chamber examined the discrimination issue separately from the issues under Article 8 and Article 1 of Protocol 1 to the ECHR. See M.P. et al. against Federation of Bosnia and Herzegovina, *supra* note 367 ¶ 190.

373. See Miholić, *supra* note 144, ¶ 61 (citing OHR submissions on failure to report on the allocation of apartments).

374. See, e.g., E. Šarać, *Vojne stanove dobili i sinovi generala* [*Military apartments also went to the sons of generals*], DNEVNI AVAZ, Nov. 10, 2001, at 10 (translation on file with author) (reporting on a Federation parliamentarian's inquiry into allegations that military apartments were being allocated inappropriately, including to the sons of generals and highly placed politicians).

375. Law on Changes and Amendments to the Law on Cessation of the Application of the Law on Abandoned Apartments, *reported in* Official Gazette of the Federation of Bosnia and Herzegovina no. 29/03. The amendments deleted the first paragraph of Article 3a and amended the operative date for barring repossession based on continued active service in a foreign military in the second paragraph of Article 3a from December 14, 1995 to May 19, 1992:

[T]he occupancy right holder shall not be considered a refugee nor have a right to repossess the apartment if after May 19, 1992 s/he remained in active service as a military or civilian personnel of any armed forces outside the territory of Bosnia and Herzegovina, unless s/he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the Former SFRY before 14 December 1995.

Id. Cf. OHR Decision Amending Federation Law, *supra* note 207 (pre-amendment text of Article 3a).

376. Constitutional Court of Bosnia and Herzegovina, Request by Nikola Špirić, Deputy Chair of the House of Representatives of Bosnia for Evaluation of the Constitutionality of the Law on Changes and Amendments to the Law on Cessation of the Application of the Law on Abandoned Apartments,

claimants who initiated pre-war purchases, however, the issue of eligibility for administrative repossession under Article 3a remains strictly secondary to their outstanding claims for outright registration of ownership, in accordance with the Chamber's settled jurisprudence.³⁷⁷ To date, the Federation has failed to amend the relevant provisions of its Apartment Purchase Law and registration of ownership remains technically dependent on eligibility for repossession in accordance with Article 3a.³⁷⁸

In the meantime, temporary occupants of JNA apartments for which repossession and registration claims have been rejected under Article 3a may be entitled to legally purchase such apartments.³⁷⁹ Although the bona fides of any such purchases that have taken place since the Chamber's December 2001 decision may be disputed, it is apparent that the longer the Federation delays amendments implementing the Chamber's decisions, the more likely that holders of pre-conflict purchase contracts will have to settle for compensation rather than restitution. If the Federation's intransigence outlasts international attention to property restitution issues,

Case U 83/03, Decision of Sept. 22, 2004, *reported in* Official Gazette of Bosnia and Herzegovina no. 02/04 (holding that Article 3a, as amended, is in accordance with Article 1 of Protocol 1 to the ECHR). *But see* Constitutional Court of Bosnia and Herzegovina, Case U 83/03, Separate Opinion of Judge David Feldman, *reported in* Official Gazette of Bosnia and Herzegovina no. 02/04 (finding that the first paragraph of Article 3a, as amended, serves a legitimate aim, but is disproportionate in that it would deprive claimants of their occupancy right without compensation).

377. Although the Chamber's mandate ended on December 31, 2003, its successor body—the Human Rights Commission—has also addressed the issue. Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and the Merits: Case No. CH/98/1162: Prole against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (May 7, 2004), *available at* <http://www.hrc.ba/database/decisions/CH98-1162%20Prole%20Adm%20and%20Merits%20E.pdf> (holding that Articles 39c and 39d of the Federation Apartment Purchase Law, *supra* note 145, have no legitimate aim, under Article 1 of Protocol 1 of the ECHR, as applied to deny holders of valid pre-war purchase contracts the right to register ownership of their property).

378. *See supra* Part IV.C (describing applicability of Article 3a of the Federation Apartments Law to registration procedures for pre-war purchase contracts under Articles 39a-d of the Federation Apartment Purchase Law).

379. Federation Apartments Instruction, *supra* note 222, ¶ 23-24 (setting out procedures for granting new contracts on use to temporary occupants of unclaimed military apartments).

claimants in this relatively small but not insignificant class of cases may be left without any remedy whatsoever.³⁸⁰

In the second category of apartment claimants left without a remedy are those who failed to claim apartments before the expiration of deadlines to do so under the property laws.³⁸¹ Although PLIP abolished other analogous conditions for apartment repossession,³⁸² these changes came after the claims deadlines had already passed. Thus, any remedy for those who had thereby lost the right to claim would have had to take the form of sweeping retroactive legislation extending or eliminating the deadlines. There was, however, little incentive to revisit the claims deadlines given that the stock of unclaimed apartments resulting from their application was to be used as alternative accommodation in support of the broader restitution process.³⁸³

Although the precise number of unclaimed apartments has never been known, it is estimated to be close to 9,000, with about two-thirds in the Federation and one-third in the RS.³⁸⁴ The immediate availability of unclaimed apartments made them an unparalleled resource for the provision of alternative

380. *Law on Military Apartments against Constitution*, NEZAVISNE NOVINE, July 21, 2003 (translation on file with author) (citing Nikola Spiric, then-First Deputy of the Chairman of House of Representatives of the Bosnian Parliamentary Assembly, as saying that from “1,300 up to 1,500 military apartments are disputable in the Federation, whose pre-war owners have not reposessed them”).

381. *See supra* Part V.B.

382. *See supra* Part V.C.

383. *See supra* Part V.B (describing the provisions of the property laws requiring unclaimed apartments to be provisionally administered by the housing authorities as alternative accommodation).

384. The Federation Minister of Physical Planning and Environment has stated that there are 6,700 unclaimed apartments in the Federation. Az. B., *Prodavat će se stanovi za koje nije podnesen zahtjev za povrat* [Apartments for which claims for restitution were not submitted are to be sold], DNEVNI AVAZ, Feb. 8, 2004, at 3 (translation on file with author). Assuming that the ratio of unclaimed apartments is similar to claimed apartments, as between the Entities, the number of unclaimed apartments in the RS should be approximately 2,400. *See* Office of the High Representative, *Statistics: Implementation of the Property Laws in Bosnia and Herzegovina* (Dec. 31, 2003), available at http://www.ohr.int/plip/pdf/plip_12.03.PDF (recording 70,812 claims for apartments in the Federation and 25,279 in the RS).

accommodation.³⁸⁵ As property restitution has accelerated toward completion, however, an increasing number of displaced persons groups have challenged the deadlines as an unjustified barrier to return.³⁸⁶ The Federation Ombudsman took up the issue, noting that many time-barred claimants had either been discouraged from claiming through promises that they would be allowed to remain indefinitely in the apartments they occupied,³⁸⁷ or had accidentally filed a claim with a body not competent to receive it.³⁸⁸ As a result, the Federation Ombudsman has questioned the compatibility of the dead-

385. See Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case No. CH/02/8939: M.H. against the Federation of Bosnia and Herzegovina (Mar. 7, 2003) (upholding ex officio eviction, with non-suspensive appeal, of temporary occupants from unclaimed apartments, based on the importance of such apartments as a source of alternative accommodation); *Id.* ¶ 41 (“[b]ecause unclaimed apartments are the most inherently appropriate and readily available form of alternative accommodation . . . there is a direct link between the public purpose of protecting the right of pre-conflict owners to repossess their property and the challenged procedure for securing unclaimed apartments as alternative accommodation”) (quoting submission by OSCE as amicus curiae).

386. See, e.g., *Mostar: Round Table on Property Law Implementation*, FENA, Oct. 31 2003 (quoting Djordje Andrić, president of the Mostar Association of Citizens for Human Rights Protection, on problems with the property law implementation process, including the fact that “a significant number of citizens had not filed apartment repossession claims, suggesting for the deadline to be extended”) (translation on file with author).

387. The Ombudsman Institution of the Federation of Bosnia and Herzegovina, Report on Activities of the Ombudsman and Situation of Human Rights in the Federation of B&H for 2002, Implementation of Annex VII of the Dayton Peace Agreement (Mar. 2003), available at <http://www.bihfedomb.org/eng/reports/2002/rpt2002main.htm> (“[A] number of citizens, ‘deceived’ by promises given by ‘their authorities’ that as refugees they would remain in someone else’s property, missed the legal time frames to seek repossession of apartments that they lived in before the war, as a human right on which the law places a time restriction.”).

388. The Ombudsman’s report states:

Citizens also cite other reasons why they lost the right to return, such as lodging claims with various bodies, or collective centres outside BiH or, upon invitation through the press, to the Human Rights Ombudsman of BiH—which means to non-responsible bodies or organisations, in good faith that they are responsible to act on them. As their claims are not sent to bodies that are responsible to act on them, and as the time frames for this, according to present laws, have long expired, they are deprived of the right to return.

lines with the ECHR, recommending “that a possible way out of the present situation in the country would be to restore the right from Article 8 of the [ECHR] [setting out the right to respect for the home] to all those who lost it for good under the present domestic regulations.”³⁸⁹ Surprisingly, however, despite occasional lower court decisions ordering that the deadline be waived under specific circumstances,³⁹⁰ the conformity of the claims deadlines with Annex 7 and the ECHR has yet to be challenged before one of Bosnia’s higher courts.

A human rights challenge to the deadlines would be supported by the fact that their only practical justification—use of unclaimed apartments as alternative accommodation—is now irrelevant in the wake of completed property restitution. Moreover, a 2001 decision of the Bosnian Constitutional Court provides a strong precedent for a protective approach to apartment claims barred by formally strict application of the property laws.³⁹¹ In analyzing the appeal of an apartment claimant whose occupancy right had not been technically perfected prior to the conflict and who, therefore, was not eligible for repossession under the property laws, the Court took into account the length of the claimant’s uncontested pre-war residence in the apartment. The Court concluded that the

389. *Id.* In legal terms, the Federation Ombudsman’s proposal for abolition of the claims deadlines rests on an assertion that “[i]nternational conventions, including the [ECHR], do not put a time frame on any human right that they guarantee.” *Id.* Although there can be little doubt that deadlines for submission of a claim may in fact be found to be a proportional restriction on the exercise of rights guaranteed under the ECHR in some cases, the question of the proportionality of the Bosnian claims deadlines for apartments to any legitimate aim remains open. The Federation Ombudsman notes that there does not appear to be a clear legitimate aim behind the deadlines. *Id.* (“[I]t is unclear why [the Federation Apartments Law] put a time frame on the rights that it guaranteed to individuals.”).

390. *See* Cantonal Court Sarajevo, Matter of S. O., Case U 666/01, Decision of Mar. 21, 2003 (translation on file with author) (canceling the negative first instance decision on the appellant’s claim for his pre-war apartment and ordering a new decision to be issued taking into account that the appellant was found to have filed a timely claim with a body not competent to receive it, which had failed in its legal duty to inform the claimant of his error).

391. Constitutional Court of Bosnia and Herzegovina, Appeal of Ž.M., Case U 14/00, Decision of May 4, 2001, ¶¶ 21, 30, *reported in* Official Gazette of the Federation of Bosnia and Herzegovina no. 33/01, *available at* <http://www.ccbh.ba/?lang=en&page=decisions/byyear/2001>.

claimed apartment represented the claimant's home in the sense of Article 8 of the ECHR and his possession in the sense of Article 1 of Protocol 1 to the ECHR and that application of the property laws to bar the applicant's claim was not a proportionate restriction of his rights in light of Bosnia's obligations under Annex 7 of the GFAP:³⁹²

[I]t is irrelevant that the competent authorities and the courts may have applied the [Federation Apartments Law] according to its exact wording, i.e. not returning the apartment to the appellant because they did not consider him an occupancy right holder. In view of their obligation to apply the ECHR and the BiH Constitution as prevailing law they are to interpret the [Federation Apartments Law] in a manner that is compatible with the ECHR and the Constitution of Bosnia and Herzegovina, namely equating the status of the appellant with that of an occupancy right holder.³⁹³

In this case, the appellant was ordered reinstated into the claimed apartment.³⁹⁴ Serious practical obstacles exist, however, to the formulation of a legislative remedy for those whose claims were rejected on such grounds. The primary obstacle is the fact that the property laws allow for subsequent users of unclaimed apartments (including apartments to which all claims were finally rejected on their merits) to acquire valid ownership rights over such apartments under limited circumstances.³⁹⁵ Although allegations of widespread abuse of these

392. *Id.* ¶¶ 27, 34-35.

393. *Id.* ¶ 37.

394. *Id.* ¶ 38 (ordering reinstatement of the appellant into the claimed apartment).

395. The Federation Apartments Law provides:

A temporary user referred to in the previous paragraph who does not have other accommodation available to her/him has the right to a new contract on use to, or an extension of temporary use of, the apartment, in accordance with the provisions of this Law, when the occupancy right of the former occupant is cancelled under Article 5 of this Law [setting out claims deadlines] or a claim of the former occupant to repossess the apartment is rejected by the competent authority in accordance with this Law.

Federation Apartments Law, *supra* note 176, art. 2(4). The law also sets out precise conditions under which temporary users may have the right to a new contract on use of the unclaimed apartment. *Id.* art. 18c; *see also* RS Property

provisions, particularly in the Federation, led international monitors to demand a review of their application,³⁹⁶ there can be little doubt that a significant number of unclaimed apartments in both Entities are currently available for legal purchase by their occupants. Moreover, with the recent advent of Entity legislation allowing general return of unclaimed apartments to the bodies that originally built them for reallocation to new users, the prospect of returning such apartments to their pre-war occupants may have become irretrievable.³⁹⁷ In this light, any future legislation providing for waiver of claims deadlines or other legal bars to repossession of unclaimed apartments would need to provide for compensation to be provided in cases in which the legitimately acquired property interests of a subsequent user render restitution manifestly impossible.³⁹⁸

VII. CONCLUSION

The experience of property law implementation in Bosnia clearly shows that post-conflict property restitution and refugee return can and do complement each other. Lessons learned in Bosnia suggest that, in order to function coherently on its own terms (and thereby facilitate return), property restitution should be viewed, first and foremost, as an intrinsic human rights goal. In Bosnia, rights-based restitution came to

Law, *supra* note 178, arts. 2(3), 27 (setting out functionally identical provisions to those in the Federation Apartments Law on granting new contracts on use to temporary occupants). Holders of new contracts on use to unclaimed apartments are eligible to purchase their apartments under both Entity laws on apartment purchase.

396. See Press Release, Office of the High Representative, OSCE and OHR Call for Revalidation Review to be Completed (Sept. 5, 2002), *available at* http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=27993.

397. See Law on Return, Allocation and Sale of Apartments, *reported in* Official Gazette of the Federation of Bosnia and Herzegovina no. 28/05. This law, which entered into force in the Federation in May 2005, allows for unclaimed apartments to be returned to their original allocation right holders (art. 2.1), which must then allocate them to new users (art. 7) who are entitled to purchase them (art. 9).

398. Such a solution would be in general accordance with the provisions of Annex 7 providing for compensation for property that "cannot be restored" to refugees and displaced persons. See GFAP, *supra* note 5, Annex 7, ch.1, art. I(1).

be an article of international policy based on hard-won experience:

The right of displaced persons and refugees to repossess and return to their pre-war property has long been one of the central concerns of the [PLIP agencies] and is guaranteed in Annex 7 of the [GFAP]. This is based on the recognition that the failure to return properties to their rightful owners represents a violation of the right to property *inter alia* under Article 1 of Protocol 1 to the [ECHR]. Return of property is essential to the creation of durable solutions for refugees and displaced persons. This can take the form of either actual return to the property or sale of the property in order to finance one's own local integration elsewhere, through purchase or rental of a home that does not belong to someone else.³⁹⁹

This shift from return-based to rights-based restitution depoliticized the property law implementation process, prevented efforts to block return of apartments by limiting eligibility and conditioning restitution on return, and ensured fair, transparent procedures. Completion of the restitution process, in turn, achieved one of the major conditions for refugees and displaced persons to be able to take free and informed choices whether to return. Many, though not all, opted to return, and those who opted instead for resettlement did so with greater security. If the goal of return efforts is to be measured in terms of creating the conditions for free choice, rather than insistence on return in every case, then a great deal has been achieved in Bosnia.

399. PLIP New Strategic Direction, *supra* note 297, § 1.

