

The Right to Housing and Property Restitution  
in Bosnia and Herzegovina  
**A Case Study**

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## ***Abstract***

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The right of refugees and displaced persons to repossess property they have lost in conflict situations is starting to be recognized on a regular basis. This can be directly linked to the fact that return of refugees and displaced persons is more likely to be sustainable if they can return to their pre-conflict homes. The right to property, or at least the right to non-interference with property, has been addressed under international human rights law - in both universal and regional treaties. Property rights are included in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition, a number of treaty bodies have recently elaborated on the rights of refugees and displaced persons to repossess property, including the Commission on Human Rights, the Economic and Social Council and the Committee on Elimination of All Forms of Racial Discrimination. Such rights have also been the focus of many resolutions of the UN Security Council and General Assembly. In addition, varying degrees of property protection are contained in a number of regional human rights treaties involving the Council of Europe, the Organization of American States, the Organization of African Unity and the Council of the League of Arab States. These rights also have some basis in international humanitarian law, as protection of property is required under the Hague Regulations and the Geneva Conventions. Many of the peace agreements signed in the last decade also make reference to the rights of refugees and displaced persons to return to their homes and repossess property.

However, despite the elaboration of these rights, the issue of enforcement remains problematic. In this respect, the example of Bosnia and Herzegovina provides a useful case study on guarantees of these rights. The General Framework Agreement for Peace (Dayton Peace Agreement), signed in 1995, is perhaps the most comprehensive plan for the return of refugees and displaced persons and restitution of property. The rights enshrined in the Agreement include the right to return or resettle, and to repossession of property lost during the conflict or compensation in cases where the property cannot be returned. However, repossession of property is not conditioned on return. Experience in Bosnia and Herzegovina provides important lessons in a number of key areas, including: establishment of the right to repossess property; who is entitled to claim; the claims procedure; enforcement mechanisms; rights of current users of the property; and compensation.

This paper will first provide an analysis of the evolution and enforcement of the right to repossession of property in Bosnia and Herzegovina. Specific attention will be paid to some of the key areas in implementation of these rights. The next section will provide a general overview of these rights in international human rights and humanitarian law.

# I. Introduction

While the right of refugees and displaced persons to return to their homes is well-established in international law, the right to repossession of property lost during displacement is only now starting to be recognized on a regular basis. There are many circumstances by which individuals are deprived of property. There are instances where property is lost through abandonment and subsequent reallocation during conflict situations, as well as nationalization and expropriation by governmental authorities. Sometimes similar actions are carried out under both circumstances. This paper will focus on post-conflict situations because of the unique circumstances surrounding the return of properties in such situations.

As the right of return has become more established, the right to repossession of property lost during periods of displacement has emerged as a topic for discussion. It is becoming apparent that the right to repossession/compensation is becoming an integral part of international human rights law. However, this right has yet to enjoy full and uniform protection, as evidenced in several instances throughout the world. Even in instances where the right has been recognized, political and practical obstructions prevent individuals from reclaiming their property.

The right to repossession of property has most often been addressed under human rights law either through provisions guaranteeing some level of protection of property rights or provisions protecting against discrimination. Both universal and regional human rights treaties and conventions provide some kind of protection of property, home or possessions. Such protections apply to individuals regardless of status as refugees or displaced persons. In many instances, this right has been elaborated in peace treaties ending hostilities, usually under the aim of allowing, in particular, refugees and displaced persons to return to their homes. The reference to 'home' has often been clearly defined as return and repossession of the actual property lost during the conflict.

While repossession of property is not the only issue facing refugees and displaced persons, in many ways it is one of the most basic issues. Without the ability to return to their property, efforts aimed towards reintegration and sustainability, such as employment, education and healthcare, are meaningless. In addition, in a post-conflict situation property may be one of the few tangible belongings refugees and displaced may have, and even if they are not interested in return, they can sell or lease property and thus generate income which could be used to provide for their own durable solution, thus removing them from the status of refugee and displaced persons for which governments must provide benefits. Post-conflict situations may require special remedies to more efficiently address the gross violations of international human rights that took place during the conflict, especially in view of the issues of capacity and neutrality of domestic mechanisms. Specifics need to be worked into the peace agreement/settlement, especially the terms of restitution and compensation, as well as establishment of a legal framework and mechanisms for the enforcement of rights.

The restitution of housing and property is important in the context of providing real means to the success of voluntary repatriation<sup>1</sup> of refugees and displaced persons. In most cases one of the prime concerns of refugees and displaced persons is repossession of lost property. Where returnees are unable to repossess property in a reasonable amount of time voluntary repatriation becomes

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<sup>1</sup> Voluntary repatriation, along with integration into countries of asylum and resettlement in third countries, had been identified by the United Nations High Commissioner for Refugees (UNHCR) as a key durable solution to refugee situations. See UNHCR EXCOM Conclusion No. 56 (XL)-1989 (13 October 1989). The concept of voluntary repatriation developed from the UN General Assembly resolution of 14 December 1950, in which the statute of UNHCR was adopted and member states were called on to cooperate fully with the activities of UNHCR. Additionally, the UNHCR *Handbook on Voluntary Repatriation* states that the issue of restitution of property for returnees should be included in any agreements or declarations concerning the rights of returnees. See UNHCR, *Handbook on Voluntary Repatriation*, Geneva, UNHCR (1996).

less of an effective option. Restitution also allows those who wish to resettle elsewhere means for a durable solution, if they are able to access property and sell it, or be compensated, thus easing the strain on host countries and countries of resettlement. It is also important in the context of reversing ethnic cleansing and promoting respect for the rule of law and human rights.

This paper will elaborate on the right to restitution under current human rights treaties, both universal and regional. It will also look at the protection of the right in practice, with special emphasis on enforcement of the right to restitution in post-conflict Bosnia and Herzegovina.

## **II. Case Study - Bosnia and Herzegovina and Annex 7 of the Dayton Peace Agreement**

### ***Background***

In 1992, war erupted in Bosnia and Herzegovina (BiH) following the break-up of the Federal Republic of Yugoslavia. For the next three and a half years violence, much of it aimed at displacement of different ethnic/religious groups, created over 2.3 million refugees and displaced persons. Some individuals fled active fighting, while others were forcibly evicted and displaced because of their ethnicity. The General Framework Agreement for Peace, otherwise known as the Dayton Peace Agreement (DPA), was signed in Paris on 14 December 1995 and ended the conflict by establishing the state of Bosnia and Herzegovina (BiH) consisting of two entities, the Federation of Bosnia and Herzegovina (Federation of BiH) and the Republika Srpska (RS). The DPA contains annexes governing both civilian and military matters, with the Office of the High Representative taking the lead role of monitoring and fostering all aspects of civilian implementation.<sup>2</sup> Included in the DPA is the right of refugees and displaced persons to return and repossess their prewar property.

Immediately after the signing of the DPA, a Peace Implementation Conference was held in London to mobilize support for the agreement. This conference resulted in the establishment of the Peace Implementation Council (PIC), which consists of 55 countries and international organizations that sponsor and direct the peace implementation process.<sup>3</sup> The PIC provides political guidance to OHR, and has met periodically to elaborate on its mandate. The PIC also funds OHR, with contributions assessed at: 53% by the EU, 22% by the US, 10% by Japan, 4% by Russia, 3% by Canada, 2.5% by the Organization of Islamic Conference and 5% by others. Meetings of the PIC Steering Board are held on a regular basis and issue communiqués that elaborate on the priorities for civilian implementation of the DPA. A number of these communiqués have addressed the issues of return of refugees and displaced persons and property repossession.

According to the United Nations High Commissioner for Refugees (UNHCR), to date over 426,000 refugees and 511,000 displaced persons have returned to their prewar homes.<sup>4</sup> In general, it has proven difficult to determine accurate numbers of returnees, as many returnees spent time in

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<sup>2</sup> The Parties to the Dayton Peace Agreement are the Republic of Bosnia and Herzegovina and its two entities - the Federation of Bosnia and Herzegovina and the Republika Srpska. It consists of a general framework agreement and ten annexes, of which the Constitution of BiH (Annex 4), the Agreement on Human Rights (Annex 6), the Agreement on Refugees and Displaced Persons (Annex 7) and the Agreement on Civilian Implementation (Annex 10) are most relevant to the rights of refugees and displaced persons to return and repossess their property.

<sup>3</sup> PIC members include, among others: Germany, France, United Kingdom, United States, Russia, Italy, Belgium, Netherlands, Japan, Turkey, the European Commission, the Council of Europe, the International Committee of the Red Cross, the International Monetary Fund, NATO, the Organization for Security and Cooperation in Europe, the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees and the World Bank.

<sup>4</sup> For full information on refugee returns, see the United Nations High Commissioner for Refugees' (UNHCR) mission to BiH website at: [www.unhcr.ba](http://www.unhcr.ba)

both their prewar homes as well as their areas of displacement. Many others have found durable solutions within Bosnia, the other republics of the former-Yugoslavia, and as refugees in countries outside of the region. At the end of the conflict, roughly 412,000 housing units had been damaged or destroyed, accounting for roughly thirty-two percent of the housing stock, according to the Office of the High Representative. Numerous other properties became occupied by individuals other than their owners. Not only were properties occupied by other displaced persons and refugees, but in many cases, especially in the larger cities, properties were occupied by domicile 'upgraders' - individuals who moved to larger and better-situated properties, normally through political connections.

During the conflict each of the ethnic groups - Bosniaks, Serbs and Croats - established their own administrations that among other things, administered 'abandoned' property.<sup>5</sup> Legislation was enacted in all areas of BiH that deprived individuals of their property and allocated such property to other individuals on either a temporary or permanent basis. Property was supposed to be allocated to individuals with humanitarian needs, but often was not done so. In the Republic of Bosnia and Herzegovina, both the Law on Temporary Abandoned Real Property Owned by Citizens<sup>6</sup> and the Law on Abandoned Apartments<sup>7</sup> provided authorities with the ability to allocate property declared abandoned. In the Republic of Herceg-Bosna the Decree on the Use of Abandoned Apartments<sup>8</sup> was enacted. The authorities of the Republika Srpska adopted the Law on the Use of Abandoned Property of the Republika Srpska<sup>9</sup> only in 1996; prior to this property had been allocated by municipal authorities.

In addition to use of laws governing abandoned property, local authorities used discriminatory enforcement of other laws, in particular the Law on Housing Relations<sup>10</sup>, to confiscate property. Such measures legalized the allocation of property along ethnic lines<sup>11</sup>, which consolidated ethnic cleansing and provided a major obstacle to the repossession of property following the conflict. The result was that at the end of the conflict, Bosnia was composed of three mostly mono-ethnic areas in the two entities that comprise Bosnia: the Federation of Bosnia and Herzegovina and the Republika Srpska. While the wartime legislation set specific criteria for the allocation of abandoned property, in practice the competent authorities allocated property at will. Additionally, there was no recourse to seek return of properties, particularly in the Republika Srpska where the courts were ordered to refuse claims for repossession of property.<sup>12</sup>

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<sup>5</sup> During the conflict, the Bosniaks established the Republic of Bosnia and Herzegovina, the Serbs the Republika Srpska and the Croats the Republic of Herceg-Bosna.

<sup>6</sup> RBH *Official Gazette* No. 11/13.

<sup>7</sup> RBH *Official Gazette* Nos. 6/92; 8/92; 16/92; 13/94; 9/95; 3/95.

<sup>8</sup> *Official Gazette of the Croatian Herceg-Bosna*, No. 13/93, § 249, Article 1 (1993).

<sup>9</sup> *Official Gazette of the Republika Srpska*, No. 3/96, § 47 (1996).

<sup>10</sup> Under the Law on Housing Relations, individuals would lose occupancy rights (rights to usage of socially-owned property) to the property if they were absent for more than six months. Local officials used this provision primarily against refugees and displaced persons, refusing to acknowledge war activities as a justification for prolonged absence from the property.

<sup>11</sup> Lynn Hastings, "Implementation of the Property Legislation in Bosnia Herzegovina", 37 *Stan. J. Int'l L.* 221 (2001), at 226.

<sup>12</sup> *Id.*, at 228.

## II.A Establishment of the Right

### ***Prior to the End of the Conflict***

During the course of the conflict a number of UN Security Council resolutions were adopted concerning BiH. Of importance to repossession of property are Resolutions 752 (1992) and 820 (1993).<sup>13</sup> In Resolution 752, the Security Council expressed full support for all efforts to assist in the return of displaced persons to their homes. It also called upon all parties concerned to ensure the cessation of forcible expulsions. Resolution 820 expressed Security Council insistence that displaced persons be allowed to return to their former homes, and reaffirmed that any commitments made under duress regarding land and property were null and void.

In March of 1994, the Confederation Agreement between the Bosnian Government and Bosnian Croats was signed in Washington, D.C. This agreement effectively stopped the conflict between two of the warring parties, and provided for the establishment of one of the BiH entities. This agreement contained a number of provisions regarding the form and function of the Federation, and included specific language on the rights of refugees and displaced persons. In particular, it provided that all refugees and displaced persons had the right to return to their homes of origin, and to repossess, or be compensated for, property lost during the conflict. It also provided that all commitments made under duress regarding property were made null and void. This language set the precedent for the rights included in the final peace agreement.

### ***General Framework Agreement for Peace (Dayton Peace Agreement)***<sup>14</sup>

The rights of refugees and displaced persons are established under Annex 7 to the Dayton Peace Agreement (DPA). The rights established are individual rights, in that each refugee and displaced person is free to exercise any of the rights guaranteed in Annex 7. These rights are provided in the first paragraph of the Annex, which states:

*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.*<sup>15</sup>

Not only does Annex 7 establish rights, but also includes obligations on the Parties to ensure the return of refugees and displaced persons.<sup>16</sup> Article I(1) states that "the early return of refugees and displaced persons is an important objective of the settlement of the conflict" and obliges the Parties to accept the return of such persons. In subsequent paragraphs the Parties undertake to ensure that refugees and displaced persons can return without risk of discrimination<sup>17</sup> and provide not to interfere with choice of destination.<sup>18</sup> Article I(3) obliges the Parties to, among other things, take the necessary steps to prevent any activities which would impede safe return of refugees and displaced persons. Most importantly for the right to repossess lost property, this article specifically obliges the Parties to undertake "the repeal of domestic legislation and administrative practices with discriminatory intent or effect."<sup>19</sup> This provision was used as a basis to adopt post-conflict legislation that annulled legislation used to deprive refugees and displaced persons of their property during the conflict.

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<sup>13</sup> UN Security Council Resolution 752 (15 May 1992) and S/Res/820 (1993).

<sup>14</sup> Available at the Peace Agreements Digital Collection of the United States Institute of Peace: [www.usip.org](http://www.usip.org).

<sup>15</sup> Chapter One, Article I(1) of Annex 7.

<sup>16</sup> The Parties to Annex 7 are the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska.

<sup>17</sup> Chapter One, Article I(2) of Annex 7.

<sup>18</sup> *Id.*, Article I(4)

<sup>19</sup> *Id.*, Article I(3)(a).

The right to repossession of property is also guaranteed in the Constitution of Bosnia and Herzegovina, which is included in the DPA as Annex 4. Article II of the Constitution contains provisions relating to human rights and fundamental freedoms. This article elevates the rights to return and repossess property to constitutional rights by providing:

*All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 of the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.*<sup>20</sup>

Additionally, the Constitution, along with Annex 6 of the DPA (Agreement on Human Rights)<sup>21</sup>, obliges the state of Bosnia and Herzegovina and both entities to "ensure the highest level of internationally recognized human rights and fundamental freedoms" and creates a Human Rights Commission to ensure compliance.<sup>22</sup> It also established the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights - ECHR) and its Protocols as the highest law of BiH<sup>23</sup>, and includes an annex of human rights treaties that are directly applicable in BiH.<sup>24</sup> The ECHR includes the right to home and family life, as well as a guarantee of peaceful enjoyment of possessions. In addition, both the Constitution and Annex 6 include non-discrimination clauses.<sup>25</sup>

Under Annex 7 of the DPA, the parties to the agreement were obligated to revoke domestic legislation that denied displaced persons the right to repossess their property. However, despite continued promises of cooperation, local authorities were unwilling to adopt adequate legislation despite having been provided draft legislation by the International Community in May of 1997.<sup>26</sup> Early legislation adopted by officials of BiH contained inadequate deadlines for filing claims and failed to establish effective implementation mechanisms. Following this the PIC requested the appropriate legislation be adopted and recommended that international assistance for reconstruction of housing be conditioned on the necessary changes being made.<sup>27</sup>

Only after extensive negotiations with the International Community did the Federation in April 1998 adopt property legislation geared towards returning property lost during the conflict. Three laws were enacted: the Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, the Law on Cessation of Application of the Law on Abandoned

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<sup>20</sup> Annex 4 of the DPA, Article II(5).

<sup>21</sup> Annex 6 of the DPA, Article I.

<sup>22</sup> *Id.*, Article II(1).

<sup>23</sup> *Id.*, Article II(2).

<sup>24</sup> Annex I to Annex 4. These additional international human rights treaties include: Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination Against Women; 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; and the 1994 Framework Convention for the Protection of National Minorities.

<sup>25</sup> See Article II (4) Constitution and Article I(14) of Annex 6. Both include non-discrimination clauses that protect against discrimination on the grounds of sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>26</sup> Hastings, *supra* note 11, at 228.

<sup>27</sup> Ministerial Meeting of the Steering Board of the PIC, Sintra, 30 May 1997. Available at the website of the Office of the High Representative: [www.ohr.int](http://www.ohr.int).

Apartments and the Law on Taking Over the Law on Housing Relations.<sup>28</sup> The Republika Srpska (RS) followed by enacting the Law on Cessation of Application of the Law on Use of Abandoned Property in December of 1998.<sup>29</sup> The RS legislation was particularly problematic in that it included provisions that would slow the entire process of repossession. In particular, there was no mechanism provided for forcible evictions, appeals of decisions granting repossession could delay implementation of the decisions and prewar owners could repossess property only if the current occupant residing in the property was able to repossess their property at the same time.<sup>30</sup>

Given the reluctance of BiH officials to adopt adequate legislation, the High Representative was forced in 1999 to impose the appropriate legislation in each of the two entities<sup>31</sup>, pursuant to his powers granted by the PIC in Bonn. This imposition established the legal framework for ensuring the right to repossess property. The property legislation in both the Republika Srpska and Federation of BiH establishes the procedure for individuals to file a claim for the repossession of property, as well as the procedures for the local authorities in accepting, issuing decisions on and implementing claims. Additionally, the laws govern the rights of individuals currently using the property. To receive the claims, Bosnian authorities established housing offices in every municipality in BiH. The claims process follows an administrative, rather than a judicial process. An administrative process provided several advantages over judicial proceedings. A large number of claims for repossession of property would have overwhelmed BiH's judicial system, and claimants would be forced to wait for years for resolution of their cases. In addition, the BiH court system at the end of the conflict was viewed as ethnically biased, in particular as some refugees and displaced persons had been deprived of their property through court proceedings. In all, the local housing offices have received roughly 260,000 claims for the repossession of property.

## II.B The Right to Claim Property

Under both the BiH Constitution and Annex 7 of the DPA, all refugees and displaced persons were given the right to repossess property they were deprived of during the conflict.<sup>32</sup> However, a number of problems arose with defining refugee and displaced persons status, creating the need for further clarification in the property laws. A new provision was enacted that provided that any individual who left their property during the conflict would be considered a refugee or displaced person under Annex 7.<sup>33</sup> Such a provision was necessary because housing offices routinely rejected claims on the grounds the claimants had left the property on a voluntary basis and thus were not refugees or displaced persons, and there was little way to prove otherwise. This policy could have been used by local officials to create a major obstacle to the repossession of property.

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<sup>28</sup> Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens (Official Gazette of the Federation of BiH, Nos. 11/98, 29/98, 27/99, 43/99, 37/01 and 56/01), the Law on Cessation of Application of the Law on Abandoned Apartments property (Official Gazette of the Federation of BiH, Nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99 and 56/01), and the Law on Taking Over the Law on Housing Relations (Official Gazette No. 11/98, § 78).

<sup>29</sup> Official Gazette of the Republika Srpska Nos. 38/98, 12/99, 31/99 and 65/01.

<sup>30</sup> Hastings, *supra* note 11, at 230.

<sup>31</sup> In October 1999, the High Representative imposed the Law on the Cessation of Application of the Law on Use of Abandoned Property in the Republika Srpska, and imposed amendments to the Law on the Cessation of the Application of the Law on Abandoned Apartments and the Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens in the Federation of BiH.

<sup>32</sup> Prior to the war there were two types of property in BiH : private property and socially-owned property. Socially-owned property consisted primarily of apartments owned by companies or governmental bodies that allocated such apartments to their workers through the issuance of "occupancy rights". While such property did share some aspects of private property, there were certain restrictions on its use, including prohibitions on renting or prolonged absences from the property, and the limited ability to transfer the apartments.

<sup>33</sup> This definition of refugees and displaced persons became *lex specialis* in regards to repossession of property. The dates in the respective entity laws differ slightly. In the Federation legislation, the effective date is 30 April 1991 through 4 April 1998. The date in the RS legislation is 30 April 1991 through 19 December 1998. The different dates correspond to the periods of time in each entity when housing was being declared abandoned and re-allocated.

Pursuant to the legislation in effect in each entity any owner, or person in unconditional possession of the property at the time it was declared abandoned, can file a claim for repossession of the property.<sup>34</sup> The status of owner is further defined as a person who, according to legislation in effect at the time, was the owner at the time the property was declared abandoned.<sup>35</sup> The owner can authorize a proxy to submit a claim. In addition, legal heirs may submit a claim as well in cases where the previous owner is now deceased. There is no deadline for submitting claims for private property.<sup>36</sup>

## II.C The Claims Procedure

As mentioned above, the claims procedure in BiH is an administrative, rather than judicial, procedure.<sup>37</sup> An owner, or lawful possessor, of the property declared abandoned<sup>38</sup> has the right to submit a claim to the competent municipal or cantonal administrative authority for property affairs. Claims are supposed to be submitted in writing, with all relevant documents on ownership attached. Upon receipt of the claim, the administrative body is under an obligation to issue a decision within thirty days.<sup>39</sup> However, in practice decisions were rarely issued within thirty days, due to a combination of political obstruction and lack of resources allocated to the housing offices. Claims are supposed to be resolved in chronological order based on the date the claim was filed.

Each decision addresses the rights of the prewar owner and the rights of the current occupant. The decision includes the following information: a decision on the ownership rights of the claimant; a decision terminating the right of the current user; a time limit for the current user to vacate the property; a decision whether the current user is entitled to other accommodation; a decision on termination of the municipal administration of the property as of the date of reinstatement; and an explicit warning against looting of the property.<sup>40</sup> The current user is entitled to remain in the property under the applicable legal conditions until a decision has been issued in favor of the claimant. Decisions can be appealed to the competent second instance body within fifteen days by either the claimant or current user. However, appeals do not suspend the implementation of the

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<sup>34</sup> See Article 4 of the Federation of BiH Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, *supra* note 28. Only this law deals exclusively with private property, and for this reason only this law will be cited in this article. The RS Law on the Cessation of the Application of the Law on Use of Abandoned Property includes provisions dealing with private property and socially-owned property. *Supra* note 29. The sections covering the return of private property are basically similar to those of the Federation of BiH Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens. The Federation of BiH Law on Cessation of the Application of the Law on Abandoned Apartments deals exclusively with socially-owned property, *supra* note 28.

<sup>35</sup> *Id.*, Article 5.

<sup>36</sup> There was, however, a deadline for filing claims for socially-owned property that expired roughly eighteen months after passage of the full set of property laws.

<sup>37</sup> Prior to the adoption of the relevant property laws, property owners could file claims for repossession of property with municipal courts. However, once the property laws went into effect claims had to be filed with the administrative body responsible for housing issues in the respective municipality or canton. Owners who had filed claims with the courts prior to the passage of the property laws could proceed with the judicial proceedings. However, court decisions on repossession of property covered only the right of the owners to be reinstated. Court decisions did not address the rights of the current users, which created problems when evictions were ordered based on judicial decisions and the current users were in need of, but not provided with, alternative accommodation. See Article 17 of the Federation of BiH Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, *supra* note 28.

<sup>38</sup> Owners of property never legally declared abandoned, who lost control of such property during the conflict, also have the right to file claims for repossession so long as they left the property prior to the cessation of the conflict. *Id.*, Article 17a.

<sup>39</sup> Article 12 of the Federation of BiH Law on Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, *supra* note 28.

<sup>40</sup> *Id.* Looting of the property by the current user became a serious problem, such that the damage caused by the looting made the property uninhabitable in many cases.

decision.<sup>41</sup> Either party can also appeal from the second instance body to the competent local court, and then through the rest of the judicial system. The deadline for the current user to vacate the property depends on his/her housing needs. The deadline is fifteen days in cases where the housing needs of the current user are otherwise met. If the housing needs of the current user are not otherwise met, a decision is given with a ninety period to vacate the property.<sup>42</sup>

If a current user does not vacate the property within the specified deadline, the claimant must request enforcement of the decision. At this time, the local housing office must schedule a forcible eviction and secure participation by the local police office.<sup>43</sup> In the case of fifteen-day decisions, housing officials are responsible for scheduling an eviction at the expiry of the time period and do not have to wait for a request from the claimant to enforce the decision.

Since there were concerns as to the ability of local officials to fully implement the right to repossession of property, an international body was created to assist. Chapter II, Article VII, Annex 7 also established the Commission for Displaced Persons and Refugees (Commission). This Commission was created as the Commission for Real Property Claims (CRPC). The mandate of CRPC is to receive and decide claims for real property, whether the claim is for return of the property or for compensation.<sup>44</sup> CRPC is composed of three international and six national commissioners, and its decisions are final and binding. Only CRPC can alter its decisions upon a request for reconsideration of the decision by either the claimant or the current occupant.

CRPC issues decisions solely on the right of the claimant. It makes no determination as to the subsequent rights of the current user. Its decisions confirm whether the claimant was the owner or occupancy right holder as of April 1992 - the start of the conflict. CRPC investigates claims primarily through access to official land records. There are no public hearings. After investigating individual claims, decisions are adopted en masse by the Commissioners at regular plenary sessions. However, CRPC has no internal enforcement mechanism. A claimant in possession of a CRPC decision must file a request for enforcement with local housing officials. Once this request is made, local housing officials will only assess the rights of the current user. A CRPC decision can only be reviewed by CRPC under a request for reconsideration. However, a CRPC decision can be appealed to the local judiciary on the grounds the property was legally transferred after April 1992.

The primary shortfall of CRPC is that its decisions are not immediately enforceable. In attempt to remedy this situation, the High Representative imposed legislation on implementation of CRPC decisions.<sup>45</sup> An individual who receives a CRPC decision in their favor must submit the decision to the housing office in the municipality where the property is located and file a request for enforcement with BiH authorities. However, the housing office must first issue a decision on the rights of the current user of the property. Since most problems in the process stemmed from the rights of the current occupant, CRPC certificates were not viewed as adding considerable benefit to the process. In practice, officials in housing offices rarely implemented the CRPC decisions, and instead issued their own decisions that were later implemented. In this respect CRPC served as a parallel mechanism to the system of housing offices, especially since many individuals filed claims with both.

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<sup>41</sup> *Id.*, Article 13. Such a provision was necessary as second instance administrative bodies would delay decisions on appeals in order to stall repossession. Article 13 provides that if an appeal against a positive decision is not resolved within the time period specified in the relevant laws governing administrative procedures the decision of the first instance body, and thus the right of the claimant to the property, is deemed confirmed.

<sup>42</sup> *Id.*, Article 12a.

<sup>43</sup> *Id.*, Article 16.

<sup>44</sup> Annex 7 of the DPA, Article XI.

<sup>45</sup> See the Law on Implementation of the Decisions of the Commission for Real Property Claims of Refugees and Displaced Persons, *Official Gazette of the Federation of Bosnia and Herzegovina* 43/99 and 51/00, and the *Official Gazette of the Republika Srpska* 31/99, 2/00 and 39/00.

## II.D Enforcement Mechanisms

A number of enforcement mechanisms are contained in the DPA. In order to facilitate and coordinate the activities under the DPA, the parties agreed under Annex 10 to the designation of a High Representative to be appointed by the Peace Implementation Council (PIC) and endorsed by the United Nations Security Council. The primary responsibilities of the High Representative are to coordinate the activities of civilian organizations and agencies in BiH, and to facilitate as necessary the resolution of any difficulties arising from implementation of the civilian aspects of the DPA. As such, the High Representative is designated as the final authority in BiH regarding interpretation of the civilian aspects of the DPA. In order to provide adequate staff to these issues, the Office of the High Representative (OHR) was established. Since implementation of this mandate proved more difficult than envisioned, the High Representative was accorded increased authority, including the right to impose legislation and dismiss elected and appointed officials.<sup>46</sup> This power has been key to the enactment of adequate legislation concerning the right to repossess property, as once the DPA had been signed, none of the Parties were willing nor capable to enact legislation ensuring the right of return and repossession of property. In addition, the High Representative has dismissed a number of officials due to the failure to adequately implement property legislation.

Under Annex 6 the Commission on Human Rights, consisting of the Human Rights Chamber and the Office of the Ombudsmen, was established to assist the Parties in guaranteeing these rights.<sup>47</sup> Both bodies have issued a number of decisions reinforcing property rights. The office of the Ombudsman is empowered to investigate, on its own initiative or upon request by any Party or person, claims of alleged violations of human rights.<sup>48</sup> The Human Rights Chamber can receive claims referred by the Ombudsman, or on behalf of any Party or person claiming to be the victim of a human rights violation by a Party or acting on behalf of alleged victims who are missing or deceased.<sup>49</sup> While decisions issued by the offices of the Ombudsman institution are advisory in nature, decisions of the Human Rights Chamber are final and binding. Both of these bodies have acted as monitors of the domestic legislature, judiciary and administration.

Any individual can submit applications to either body in regards to alleged violations of the rights covered by the European Convention for the Protection of Human Rights and Fundamental Freedoms and subsequent protocols, as well as alleged discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status regarding the rights provided for in the other human rights agreements annexed to the DPA. The Ombudsman issues reports and recommendations to government bodies, and can forward such reports to the Human Rights Chamber for further action. The Human Rights Chamber issues decisions on whether the parties have breached their obligations under the DPA and what steps must be taken by the party to remedy such a breach, including orders to cease and desist, monetary relief and provisional measures.

In addition, a number of international organizations have been strongly involved in property issues. These include the Organization for Security and Cooperation in Europe (OSCE), the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Mission in

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<sup>46</sup> Bonn Peace Implementation Conference 1997: Bosnia and Herzegovina 1998:Self-Sustaining Structures (December 10, 1997), Article XI. The PIC welcomed the High Representative's intention to use his final authority regarding implementation of the civilian aspects of the DPA. In particular, the High Representative received support for adopting interim measures when the Parties to the DPA were unable to do so, and to take actions against officials deemed by the High Representative to be in violation of the DPA or the terms of its implementation. Officials who are dismissed by the High Representative are prohibited from holding appointed or elected positions in the future.

<sup>47</sup> Annex 6 of the DPA, Article II(1).

<sup>48</sup> *Id.*, Article V(2).

<sup>49</sup> *Id.*, Article VII(1).

BiH. Together with OHR, these organizations adopted the Property Law Implementation Plan (PLIP). This plan adopts a rule of law strategy for full implementation of the property laws, as opposed to progress via political agreements.<sup>50</sup> This approach best fit with the individual rights enshrined in the DPA. Pursuant to this plan, one staff member from one of the organizations was assigned as a focal point in each municipality in BiH. Their job is to monitor implementation of the property laws, and comprehensive statistics for all of BiH are produced on a monthly basis for each municipality. One lesson from the PLIP project is that the process became truly effective when it moved from a political process driven by political forces to a rule of law process based on individual rights. Additionally, entity criminal laws include provisions creating offenses where return is obstructed.<sup>51</sup> Several such cases against BiH officials have been launched.

## II.E Rights of Current Occupants

At the start of the process considerable thought was given to the rights of current occupants, many of whom were displaced persons themselves. In fact, some early legislative provisions allowed for the weighing of interests between the prewar and current occupant in cases involving socially-owned property. However, later legislation ensured the rights of the prewar owners or occupants remained paramount.<sup>52</sup> Housing offices must first make a determination as to whether the current occupant has a valid legal basis for occupying the property. The property must have been declared abandoned and allocated to current user pursuant to wartime legislation in effect at the time. However, if the current user is a registered refugee or displaced person, they may be entitled to a form of emergency accommodation under the relevant legislation on refugees and displaced persons. The deadline for current user to vacate the property depends on the housing needs of the current user. The deadline is fifteen days in cases where the housing needs of the current user are otherwise met. Criteria in evaluating whether housing needs are met include whether the current user: has access to their prewar housing, which is sufficiently intact; has sold or otherwise transferred their prewar housing; has refused the provision of alternative accommodation; has sufficient disposable income to provide for adequate accommodation; or is a refugee or displaced person and has not filed a claim for repossession of his/her property.<sup>53</sup> Current users without any legal right to occupy the property are considered illegal occupants, and must vacate the property within fifteen days with no rights to alternative accommodation.<sup>54</sup>

If the housing needs of the current user are not otherwise met, a decision is given with a ninety-day period to vacate the property.<sup>55</sup> In such cases the current user is entitled to alternative accommodation to be provided by housing authorities, but the burden of proof of demonstrating eligibility is on the current user. Alternative accommodation is meant as a temporary housing solution - it is not a

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<sup>50</sup> In the years following the signing of the DPA a number of political agreements were made regarding refugee return, including the Sarajevo Declaration, the New York Agreement and the Tri-Presidency Initiative, each of which achieved few results. For example, on 3 February 1998 Sarajevo Canton adopted the Sarajevo Declaration. Its adoption was an attempt by Canton officials to demonstrate their commitment to a multiethnic Sarajevo by returning at least 20,000 minorities to the Canton by the end of the year. Further international assistance was conditioned on success towards implementation of the Declaration. On several occasions funding was withheld by donors when Canton officials failed to execute their responsibilities, which did have a large effect on forcing them back into compliance. See Hastings, *supra* note 11, at 229.

<sup>51</sup> See the Criminal Code of the Federation of Bosnia and Herzegovina (Articles 324, 358 and 366) and the Criminal Code of the Republika Srpska (Articles 187, 226 and 234 (1)). Both codes contain provision covering abuse of office and failure to report offenses - both of which can be used to prosecute individuals for obstructing return.

<sup>52</sup> For cases involving socially-owned property, the Council of Europe issued an opinion that due to the special circumstances around the displacement in BiH a presumption in favor of the prewar occupant was required under Article 8, Article 1 of Protocol 1 and Article 14 of the ECHR in order to prevent discrimination against a particularly vulnerable group. See Hastings, *supra* note 28, at 237.

<sup>53</sup> For a complete listing of criteria, see Articles 12a, 16 and 16a of the Federation of BiH Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, *supra* note 28 .

<sup>54</sup> *Id.*, Article 7.

<sup>55</sup> *Id.*, Article 12a.

durable solution. In that sense the right to alternative accommodation is reviewed on a regular basis. It was created only for vulnerable categories of current users. It is not supposed to be housing of comparable size and quality as the property being vacated. Alternative accommodation is only meant to provide shelter from adverse weather conditions and afford five square meters per person.<sup>56</sup> Possible sources of alternative accommodation include unclaimed housing, and state-owned hotels, schools and army barracks. However, failure of housing authorities to secure alternative accommodation for the current user does not prevent the eviction from taking place at the end of the ninety-day period. Such a provision was necessary as housing authorities did little to provide alternative accommodation in hopes that doing so would slow or halt the process of repossession.

In addition, officials in both entities undertook resettlement programs to benefit refugees and displaced persons choosing not to return. In many ways such programs were initiated in attempts to keep an ethnic majority in a certain area. Settlements were often built on agricultural property of refugees and displaced persons to undermine sustainable return, or in locations that would intimidate returnees. Such programs usually included the provision of land and building materials. However, there was no legal entitlement of such assistance for current users, and the lack of resettlement assistance did not prevent or postpone their evictions. Eventually the shortage of land and financial resources limited these programs.

## **II.F Compensation**

Under the BiH Constitution, refugees and displaced persons have the right to be compensated for any property of which they were deprived in the course of hostilities that cannot be restored to them. Compensation was also addressed in Annex 7, again providing for compensation in cases where property cannot be restored<sup>58</sup>, and providing for the establishment of the Refugees and Displaced Persons Fund to settle claims for compensation.<sup>59</sup> This Fund was to be established in the Central Bank of Bosnia and administered by CRPC. Resources for the Fund were to be provided through the purchase, sale, lease and mortgage of real property that had been claimed before CRPC.<sup>60</sup> Funds could also be provided through direct payments by the Parties or from contributions from international donors.

While both the right to, and a mechanism for, compensation were established under the DPA, in practice compensation did not materialize as envisioned. The Fund was never established because no resources were made available. CRPC never undertook any activities regarding purchase, sale, lease and mortgage of property. Instead, it focused its activities on issuing decisions on claims for repossession of properties - even in cases where applicants had stated a preference for compensation. In addition, no part of the BiH government made any resources available. International donors were more interested in funding reconstruction of housing and infrastructure than compensation. Another complication is determining the rate of compensation, especially as regards destroyed or damaged properties.

In practice, it could be argued that the right to compensation has been partially fulfilled by allowing refugees and displaced persons to repossess and subsequently sell their property. In such cases the property owners probably received a fairer price, and more quickly, than they would through a compensation scheme. However, individuals whose property was destroyed would be disadvantaged as no consideration would be made for the destruction to their property.

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<sup>56</sup> *Id.*, Article 8.

<sup>57</sup> Constitution of Bosnia and Herzegovina, Article II(5).

<sup>58</sup> Annex 7 of the DPA, Article I(1).

<sup>59</sup> *Id.*, Article XIV(1).

<sup>60</sup> *Id.*

## II.I Progress

Return in Bosnia began mostly with refugees and displaced persons returning to destroyed housing that had been reconstructed by the international community. However, return to property occupied by others was initially slow, primarily because the status of the temporary occupants of the property had not yet been established. In most cases local authorities were reluctant to evict temporary occupants, most of whom comprised the same ethnicity, to return properties to minorities. At the start of the process for return of property many obstructions were thrown in the way of claimants. The primary obstructions were political. These included rejecting submission of claims and charging illegal fees for filing claims. In many municipalities officials refused to allocate adequate resources to the housing offices, with some not even having electricity, computers or telephones.<sup>61</sup>

Throughout the process implementation of decisions proved the most difficult task, primarily because in many instances, especially at the start of the process, implementation was dependent on initiation of a forcible eviction of the current occupant. No member of the international community was interested in carrying out evictions, so the responsibility remained with local officials, particularly the local police. At first local police resisted, and local interest groups, primarily composed of displaced persons or war veterans associations, often staged protests. Local officials attempted to enact legislation preventing evictions during winter, holidays or the school year. But as the process matured forcible evictions became routine. The international community forced non-compliance reports to be written for police officers that failed to implement eviction orders. Once the local communities realized eviction orders would be enforced, many current occupants began to voluntarily vacate property before eviction orders were issued.

In addition, there were some unclear provisions in earlier versions of the laws. In particular, the laws lacked clear mechanisms for forcible evictions. The definition of refugee was often deliberately misinterpreted with claims being rejected because the claimants allegedly left their property for reasons unrelated to the war, for example, to start a new job or visit relatives. In most instances local officials were hoping considerable delays in the process would force individuals to give up on claims and instead resettle in ethnically homogenous areas. Also of concern was the fact that implementation of the property legislation varied widely throughout the country, with hard-line areas preventing almost all repossessions when the laws first came into effect. This problem of non-uniform implementation has lasted throughout the entire process. During the early stages of the process, local officials would allow the return of property in rural areas while preventing repossession of property in city centers in an attempt to keep minority populations marginalized. At this time the rate of implementation of the property laws was so slow that it was estimated that full resolution of all claims would have taken at least 30 years, a time period unacceptable to the international community.

Establishing mechanisms to ensure realization of the right to repossession of property takes considerable time - it is not a short-term possibility if it is to be done properly.<sup>62</sup> In BiH the mixture of international and domestic bodies and a comprehensive set of safeguards has allowed for strong progress in a relatively short period of time. The success of the right to repossess property depends on two factors: the provision of adequate legal regulations governing the right and process for repossession and political support to ensure the regulations are enforced. The DPA clearly established that refugees and displaced persons had the right to return and repossess property. However, local officials were unwilling to enact adequate legislation to ensure the right to repossess

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<sup>61</sup> To counteract such practice in the Republika Srpska (RS), the US Government donated over \$1.5 million to assist the RS Ministry for Refugees and Displaced Persons to hire additional staff and provide adequate resources to the municipal housing offices.

<sup>62</sup> For a thorough discussion of the early years of the implementation of property legislation in Bosnia, see Hastings, *supra* note 11.

property, despite having agreed to do so under the DPA. Therefore it was necessary for the High Representative to have the power to impose adequate legislation.

But the provision of adequate legislation was only the first step. Implementation of the relevant laws has been problematic, although it has improved with time. From the start, there was little effort on the part of local officials to implement property laws. Obstruction ranged from outright harassment, such as refusing to accept claims and issue decisions, to more passive obstruction, such as failing to provide funds for the adequate staffing of housing offices. In addition, implementation throughout BiH has remained imbalanced, with strong progress in some areas contrasted by completely inadequate progress in others.

To correct this imbalance, the international community has attempted to use certain pressures, both financial and political. OHR has worked with donors to ensure, to the extent possible, that development/reconstruction assistance is conditioned on cooperation by the local authorities on implementation of property laws. In addition to direct financial incentives, there are also political leverages. Implementation of property laws, has been made a precondition for BiH's entry into the Council of Europe and the European Community.

Since the full property laws have come into effect, nearly eighty-two percent of all of the claims for repossession of property have been implemented.<sup>63</sup> Since the start of the process the rate of repossession has steadily grown faster, even in the more obstructive areas. While this is an accomplishment, the rate of repossession remains slow. Given the current pace of repossession, full implementation of the property laws should be achieved within the next couple of years.

### **III. Recommendations**

In establishing a mechanism for refugees and displaced persons to return and repossess their property, a number of considerations need to be addressed. These include:

***Final Peace Agreement*** - Agreements should be as detailed as possible. The DPA set out in general the rights of refugees and displaced persons and the obligations of the signatories. In this respect it establishes the rights to return and repossess property as individual rights - each refugee and displaced person has the choice regarding return and property. Although Annex 7 did provide for the repeal of discriminatory legislation, the DPA had no enforcement mechanism, and the Parties were left to their goodwill in implementing provisions of the agreement. Only the elaborated powers of the High Representative were able to ensure the provision of adequate legislation. The DPA also did not contain a specific mechanism for return. However, the DPA did provide for adequate monitoring and participation by the international community, which did allow for enforcement. In similar situations, if there is not a strong presence of the international community, it becomes more important for the peace agreement to be as detailed as possible.

***Legislation*** - A comprehensive framework of legislation is necessary to ensure refugees and displaced persons can exercise their full rights. It is best if such legislation is grounded in international human rights law, in particular providing for some type of regional complaints mechanism. In BiH legislation established administrative rather than judicial procedures to more effectively implement the right to repossess property. It is also necessary to provide adequate review mechanisms to ensure the laws are complied with by local officials. In BiH, the Ombudsman and Human Rights Chamber were mandated with this responsibility, and BiH is now subject to the European Court of Human Rights.

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<sup>63</sup> See Statistics of the Property Law Implementation Plan available at: [www.unhcr.ba](http://www.unhcr.ba).

**Compensation** - Repossession of property can provide a more efficient and fairer mechanism for compensation. Under both Annex 7 and the BiH Constitution, refugees and displaced persons were given the right to compensation in cases where they chose not to, or could not, repossess property. In particular, a Refugees and Displaced Persons Fund was to be established in the Central Bank of BiH and funded by direct payments by the Parties and through the purchase, sale and lease of properties by CRPC. However, such a fund was never established. The Parties did not have the resources, and CRPC never undertook to purchase, sell or lease properties. In addition, no international donors were willing to fund compensation. Instead, individuals who did not wish to return could simply repossess their property and sell it. In many instances they likely received a fairer price and were able to do so in a quicker manner than through a pure compensation mechanism. However, this may not be so for individuals with destroyed property or property in undesirable locations.

**Political Support** - Political backing needs to be mobilized. In BiH, the PIC has provided strong political support to the process of return and repossession of property. Without strong and united backing by such players, particularly the United States and the European Union, the process most likely would not have worked.

**De-Politicization of Rights** - Return and repossession of property should be grounded in the rule of law. In the early phases of return, numerous political agreements were made setting out specific arrangements for numbers of returns to certain areas. However, such agreements resulted in little progress. It was only when the international community encouraged a system for return and repossession grounded in the rule of law, and not subject to political agreements, did serious progress ensue. The DPA does, after all, provide individual rights.

**Conditionality** - Financial assistance and membership in regional organizations should be conditioned on cooperation with laws regarding the repossession of property. BiH is heavily dependant on international assistance, which provided strong leverage to the international community. BiH's future is also heavily dependent on membership in the Council of Europe and the European Union, providing even further leverage.

**Resources** - There should be a clear delineation of tasks to avoid the inefficient use of resources. The international community has spent considerable resources on implementation of the right to return and repossess property in BiH. In particular, a large number of personnel have been active in monitoring implementation. The presence of international organizations has both forced progress by local officials and created a more neutral environment of trust and security within the local population. However, attention should be paid to avoiding unnecessary duplication of efforts by different bodies involved in the process, including that of international organizations.

## IV. The Repossession of Property under International Law

### IV.A Human Rights Law

Property rights have never been categorized as falling exclusively within the realm of civil, economic or social rights. Most often property rights are grouped with economic and social rights because they are tied closely to economic and social policies of states. In post-conflict settings, political considerations may create additional reluctance in states to honor property rights. Many of the major human rights treaties contain provisions that protect the right to property or home. However, these rights are often not absolute, as the provisions allow for interference under certain criteria. Provisions in such treaties include both rights to property as well as guarantees against interference with already established property rights. In general, because of the language used in most provisions, property rights are open to interpretation by supervisory organs, which must define property and determine when interference is justifiable.

The Universal Declaration of Human Rights (UDHR) covers both the right to property as well as protection of property rights. Article 17 guarantees the right to own property and protection against arbitrary deprivation of property.<sup>64</sup> But these rights are not absolute, as the language would allow for interference if conducted in a non-arbitrary manner. While not specifically guaranteeing the right to property, the International Covenant on Civil and Political Rights (ICCPR) provides protection from arbitrary or unlawful interference with a home under Article 17(1).<sup>65</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right to housing under Article 11(1).<sup>66</sup>

Apart from provisions specifically covering property rights, provisions on non-discrimination can also be utilized to ensure protection of property. The UDHR anti-discrimination clause provides protection of the rights guaranteed under UDHR to all individuals "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The same language is included in provisions of the ICCPR and ICESCR. But the ICCPR goes a step further in obliging parties to adopt legislative or other measures to ensure protection of the rights elaborated in the ICCPR, in particular providing for, and implementation of, effective remedies.<sup>67</sup>

In addition, individuals are protected against discrimination by guarantees of equal protection before the law under Article 7 the UDHR. Article 26 of the ICCPR provides for equality before the law and to equal protection by the law. Such measures allow for protection from discrimination

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<sup>64</sup> Universal Declaration of Human Rights (UDHR), G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). Article 17 provides "1. Everyone has the right to own property alone as well as in the association with others. 2. No one shall be arbitrarily deprived of his property."

<sup>65</sup> International Convention on Civil and Political Rights (ICCPR), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), adopted Dec. 19, 1966, entered into force Mar. 23, 1976. Article 17(1) provides "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

<sup>66</sup> Article 11(1). International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), adopted Dec. 19, 1966, entered into force Jan. 3, 1976.

<sup>67</sup> *Id.*, Article 17(2) and 17(3): "2. Where not already provided for by existing legislation or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted."

in the enjoyment of all rights, even such rights that are not contained in the convention. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), protecting property as a civil right, guarantees the right to own property without distinction as to "race, colour, or national or ethnic origin".<sup>68</sup>

Property rights are also included in the Convention on the Elimination of All Forms of Discrimination against Women<sup>69</sup>, the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons.<sup>70</sup> The Conventions relating to the Status of Refugees and Stateless Persons include guarantees under which protected individuals are afforded treatment at least equal to aliens as regards property rights and protection from discrimination in enjoyment of their rights, while the Convention on Elimination of Discrimination against Women includes a prohibition against discrimination before the law under Article 15(1).

More recently, human rights treaty bodies have further interpreted the rights of refugees and displaced persons to restitution under CERD and ICESCR. In 1993, the Commission on Human Rights issued a study on the rights of victims of gross violations of human rights to reparations.<sup>71</sup> The study concluded that under international law victims of violations of human rights, particularly gross violations<sup>72</sup>, have the right to reparations. It also concluded that reparation should be adequate to the needs and wishes of the victims. Possible reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Victims include not only the direct victim, but in certain circumstances immediate family, dependents or others in a special relationship. In subsequent resolutions the Commission called upon the international community to give attention to the right to restitution, compensation and rehabilitation for victims of grave violations of human rights.<sup>73</sup>

The Committee on the Elimination of Racial Discrimination addressed the rights of refugees and displaced persons under Article 5 of CERD at its Forty-Ninth Session in 1996.<sup>74</sup> Here the Committee stated that all refugees and displaced persons have the right to restitution of property or compensation

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<sup>68</sup> International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, opened for signature Mar. 7, 1966, entered into force Jan. 4, 1969, Article 5(e)(iii).

<sup>69</sup> Article 15(2): "States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."; and Article 16(1)(h): "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."

<sup>70</sup> The Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons both provide: Article 13: "The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to relating to movable and immovable property."; and Article 3: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

<sup>71</sup> *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Final report submitted by Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993.

<sup>72</sup> *Id.* The list of possible gross violations includes deportation or forceable transfer of population, and systematic discrimination, in particular based on race or gender. Either of these may be applicable in situations involving displaced persons and refugees seeking return of property. The Commission on Human Rights, in Resolution 1993/77, affirmed the practice of forced evictions constitutes a gross violation of human rights, and recommended "that all Governments provide immediate restitution, compensation and/or appropriate sufficient alternative accommodation or land, consistent with their wishes and needs, to persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups."

<sup>73</sup> See Commission on Human Rights resolutions 1999/33 and 2000/41.

<sup>74</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XXII, (A/51/18) (24 August 1996).

where restitution is not possible, and are free of any commitments concerning such property made under duress. The Committee went on to observe at its Fiftieth Session in 1997<sup>75</sup> that the magnitude of this issue required further study pursuant to international law and human rights instruments and reiterated its position from the Forty-Ninth Session.<sup>76</sup>

At the recommendation of the Committee on the Elimination of Racial Discrimination, the Sub-Commission on the Promotion and Protection of Human Rights of the Economic and Social Council issued a working paper in June of 2002 that further elaborated on the right of refugees and displaced persons to repossess property.<sup>77</sup> Prior to this, in resolution 1994/24, the Sub-Commission had affirmed the right of refugees and displaced persons to return to their place of origin or choice of destination. In resolution 1998/26, the Sub-Commission reaffirmed this right, and urged governments to ensure the free exercise of this right by developing expeditious procedures and effective mechanisms to resolve property issues. The working paper concludes that the right to restitution of property is a necessary element of the right to return, but is itself a free-standing, autonomous right, as the principle of housing and property restitution is "enshrined in international and national law, reaffirmed by the international community and recognized by independent United Nations expert bodies."<sup>78</sup> It also states that the obligation to assist in the return of refugees implies the provision of restitution. Compensation should only be accepted where restitution is factually not possible or the owner voluntarily requests it.

#### IV.A.1 Regional Conventions

Many regional human rights treaties also include provisions on property rights. But like universal treaties these provisions are open to interpretation by supervisory organs.<sup>79</sup> Since the rights to property are not absolute, the scope of property must be defined and determinations must be made as to when interference is justifiable. Some form of property rights are included in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights - ECHR)<sup>80</sup>, the American Convention on Human Rights (ACHR)<sup>81</sup>, the African Charter on Human and People's Rights (AfCHPR)<sup>82</sup> and the Arab Charter on Human Rights.<sup>83</sup> In most regional conventions, property rights are individual rights. Often, property rights are more enforceable under regional human rights agreements. Within the regional context, property

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<sup>75</sup> Committee on the Elimination of Racial Discrimination, CERD/C/SR.1189 (8 March 1997).

<sup>76</sup> *Id.* "The flight of hundreds of thousands of refugees or displaced persons who leave their homes and properties empty, as a result of an armed conflict, frequently results in such property being occupied by non-authorized people. Such is at present the case in the Great Lakes region, Bosnia and Herzegovina, Cyprus and elsewhere. After their return to their homes of origin all such refugees and displaced persons have the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated for any such property that cannot be restored. Furthermore, any commitments or statements relating to such property made under duress should be null and void." Note the similarity of this language to that of Article 1 of Annex 7 of the General Framework Agreement for Peace (Dayton Peace Agreement).

<sup>77</sup> Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Forty-Fourth Session, *The return of refugees' or displaced persons' property*, Working paper submitted by Mr. Paulo Sergio Pinheiro pursuant to Sub-Commission decision 2001/122, E/CN.4/Sub.2/2002/17, 12 June 2002. After review of the Working Paper the Sub-Commission should decide, at its fifty-fourth session, on the feasibility of a comprehensive study of the subject matter.

<sup>78</sup> *Id.*, page 9.

<sup>79</sup> For example, the European Court of Human Rights in Strasbourg makes final determinations regarding violations of the European Convention on Human Rights. The Inter-American Commission on Human Rights hears cases of alleged violations of the American Convention on Human Rights, while the African Commission on Human and Peoples' Rights receives claims regarding the African Convention on Human Rights. There is not yet an established body to rule on alleged violations of the Arab Charter on Human Rights.

<sup>80</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms 213 U.N.T.S. 222 (3 September 1953).

<sup>81</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, 1948, OEA/Ser. L./V/I.4 Rev. (1965).

<sup>82</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1981).

<sup>83</sup> Arab Charter on Human Rights, adopted by the League of Arab States, reprinted in 18 Hum. Rts. L.J. 151 (1997).

rights are more secure under certain regional bodies than others. The ECHR provides the most extensive protection of property rights of any convention or treaty, while the jurisprudence under the ACHR and AfCHPR is much less developed than under the ECHR. The Arab Charter on Human Rights has not yet been ratified. For these reasons the following section will focus primarily on the role of the European Court of Human Rights in protecting property rights.

### (a) European Convention on Human Rights (ECHR)

The ECHR was signed in 1950 and entered into force in 1953. Under the ECHR, the first international complaints procedure and the first international court for human rights were established. The ECHR provides the European Court of Human Rights jurisdiction over both individual complaints and inter-state complaints, and has developed the most comprehensive jurisprudence of any regional system, particularly as regards property rights. Most importantly, state parties comply with and implement the decisions of the European Court. In particular, individual claims brought by nationals against their states have proven highly effective.<sup>84</sup>

Although there is no explicit reference to property rights in the ECHR, Article 1 of Protocol 1, adopted in 1965, covers peaceful enjoyment of possessions. The European Court of Human Rights has held that the right to peaceful enjoyment of possessions is basically equivalent to the right to property.<sup>85</sup> Article 1 of Protocol 1 does not guarantee the absolute right to one's property, nor does it completely prohibit the deprivation of property by the state. It does provide protection to both natural and legal persons, but does not protect instances where property is occupied without a legal right. The definition of 'possessions' under Article 1 to Protocol 1 has been interpreted widely to include many types of property/possessions.<sup>86</sup>

Originally property rights were not included in the Convention, only the right to home under Article 8. The inclusion of Article 1 of Protocol 1 was somewhat controversial as several governments were concerned this right might limit their abilities to initiate nationalization programs of certain industries or because other social or economic rights, such as the right to work or the right to an adequate standard of living, were not included.<sup>87</sup> According to Article 1:

*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 by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of the 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.*

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<sup>84</sup> For a more thorough examination of this issue, see Helfer, Laurence and Slaughter, Anne-Marie, *Toward a Theory of Effective Supranational Litigation*, 107 Yale L.J. 273 (1997).

<sup>85</sup> See *Marckx v. Belgium*, 1979, European Court of Human Rights, Series A. No. 31, para. 63 states, in relevant part: "By recognizing that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property". . . ; the "travaux préparatoires", for their part, confirm this unequivocally: the drafters continually spoke of the "right of property" or "right to property" to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1 (P1-1). Indeed, the right to dispose of one's property constitutes a traditional and fundamental aspect of the right to property (cf. the Handyside judgment of 7 December 1976, Series A no.24, at 29, para. 62)." For a complete analysis of Article 1 to Protocol 1, see Carss-Frisk, Monica, "The Right to Property: A Guide to the Implementation of Article 1 of Protocol 1 to the European Convention on Human Rights", *Human Rights Handbooks*, No.4, Directorate General of Human Rights, Council of Europe.

<sup>86</sup> See Carss-Frisk, *id.*, at 6. For example, the European Court has found the following types of property to constitute a possession under Article 1 of Protocol 1: movable or immovable property, tangible or intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord's entitlement to rent, the economic interests connected with the running of a business, the right to exercise a profession, a legitimate expectation that a certain state of affairs will apply, a legal claim, and the clientele of a cinema. However, for the purposes of this article the focus will be on residential real property. A wide interpretation of property can be beneficial in post-conflict situations as property, other than real property, such as pensions and business materials, may also be protected.

<sup>87</sup> *Id.*, at 5.

Thus Article 1 of Protocol 1 contains three rules.<sup>88</sup> The first rule contains the principle of the protected right to the peaceful enjoyment of property. The second rule establishes the requirement that any deprivation of property be in the public interest and pursuant to requirements set in both domestic and international law. Under the third rule it is established that states may control the use of property subject to the general interest and domestic law. Both the second and third rules are connected to the first in that they set limits on the scope of its application, thus setting the criteria for justifiable interference.

In determining a breach of Article 1 of Protocol 1, three considerations must be made. The first consideration to be made is whether the subject of the claim can be considered a possession under the first sentence of Article 1 of Protocol 1. The next consideration is whether there has been an interference with the possession. The type of interference - whether a deprivation or control on use of property - will determine which of the three rules should be applied. The third and final consideration is whether the interference with the possession is justifiable. Once interference has been found, the respondent party will have to justify the interference. The burden of proof is on the respondent party, and if the interference can be justified there will be no violation of Article 1 of Protocol 1. In order for the interference to be justified, it must serve a legitimate aim in the public, or general, interest.<sup>89</sup> But not only must the interference serve a legitimate aim, it must also be proportionate, thus striking a fair balance between the demands of the general interests of the community and the protection of the individual's fundamental rights.<sup>90</sup>

Inherent in determining whether the interference or deprivation is "in the public interest" is a determination as to whether there is a fair balance between the demands of the general interest and the protection of individuals rights - thus a requirement for proportionality between the means employed and the aims sought.<sup>91</sup> Violations of Article 1 of Protocol 1 will be found where the applicant is made to bear "an excessive burden."<sup>92</sup> The European Court of Human Rights has allowed states wide deference in ascertaining "public interest"<sup>93</sup> since it is the role of national authorities to make initial assessments of political, economic and social considerations warranting deprivation of property and to develop the necessary action to be taken. In particular, states have

<sup>88</sup> *Spjörung and Lonroth v. Sweden*, 1982, European Court of Human Rights, Series A. No. 52. See para. 61, which states in relevant part: " That Article (P1-1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."

<sup>89</sup> *James v. the United Kingdom*, 1986, Series A No. 98, para. 46.

<sup>90</sup> *Spjörung and Lonroth v. Sweden*, para. 69.

<sup>91</sup> *Pressos Compania Naviera SA v. Belgium*, para. 38, *Spjörung and Lonroth v. Sweden* para. 73, *Hentrich v. France*, 1994, Series A No. 296-A, para. 49.

<sup>92</sup> *Spjörung and Lonroth v. Sweden*, paras. 70-73.

<sup>93</sup> *James v. U.K.* para. 46, *Mellacher v. Austria*, 1989, Series A No. 169, para. 45. Of interest in cases regarding refugees and displaced persons is the case of *Loizidou v. Turkey*, 1996, European Court of Human Rights, Reports 1996-VI, which involves the deprivation of property of a Greek Cypriot by authorities of the Turkish Republic of Northern Cyprus (TRNC). In this case the Court found that it had not been explained how the aim of the TRNC to re-house displaced Turkish Cypriot refugees following the Turkish intervention in the island in 1974 could justify the complete negation of the property rights of the applicant in this case "in the form of a total and continuous denial of access and purported expropriation without compensation", nor could it be justified under the ECHR on the grounds property rights were the subject of inter-communal talks between Turkish and Greek communities in Cyprus. The Human Rights Chamber of Bosnia and Herzegovina (BiH), which is mandated with the enforcement of the ECHR within BiH, has concluded in several cases that the aim of housing war veterans who may have lost their homes is a legitimate one, but that the Federation of BiH Government had never provided any evidence that expropriated property had been used for such purposes. See *Miholic and others v. Bosnia and Herzegovina and the Federation of BiH* (CH/97/60 (7 December 2001)) and *Kurtisaj and M.K against v. the Federation of BiH* (CH/98/1311 (6 September 2002)).

been granted wide latitude concerning housing issues.<sup>94</sup> Thus the Court has intervened only in cases where state actions are manifestly without reasonable foundation. However, the Court has found itself bound to review any contested measures under Article 1 of Protocol 1, including making inquiries into the facts with regard to which the national authorities acted<sup>95</sup>, and in many cases has concluded states have exceeded their discretion to serve the public interest.<sup>96</sup> In light of case law, there appears to be no real difference between "public interest" and "general interest."

The requirement that deprivation and control of property be done pursuant to requirements set in law, as included in the second and third tests<sup>97</sup>, refers not only to a determination of whether the action was legal under the relevant legislation at the time, but also that the quality of the law be assessed, in particular for conformity with the ECHR. Any such law must be compatible with the rule of law, and should involve a fair and proper procedure. In particular, any measure should be executed by a competent authority and should not be done in an arbitrary manner.<sup>98</sup> In the second rule there is an additional requirement that such measures must also be compliant with international law. However this provision has not been elaborated in-depth. Yet the European Court for Human Rights has concluded that the general principles of international law are not necessarily applicable to a taking by state of a national's property, but would apply in connection to takings of non-nationals since they do not necessarily enjoy the same domestic protections as nationals of a state.<sup>99</sup>

A deprivation of property usually includes a formal transfer of ownership, but in some cases a de facto deprivation has been found to invoke Article 1 of Protocol 1. The European Court has found a violation of Article 1 of Protocol 1 where the applicant was unable to use property, nor could he "sell, bequeath, mortgage or make a gift of it" because the Greek Navy had taken control and possession of the property.<sup>100</sup> Such a finding can be of benefit in post-conflict situations where property may not have been legally expropriated but is nonetheless occupied by other individuals, who in some cases may be refugees or displaced persons themselves, or governmental bodies. The Court has also recognized in some cases that an interference represents a continuing violation, which is most relevant in countries where the initial interference occurred prior to accession to the ECHR.<sup>101</sup>

While there is no express right to compensation included in Article 1 of Protocol 1, whether or not compensation has been paid, as well as the level of compensation, provides a significant factor in

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<sup>94</sup> In the case of *Scollo v. Italy*, 1995, European Court of Human Rights, Series A No. 315-C, the Court noted that housing shortages are an almost universal problem of modern society, and that regulations controlling the use of property are therefore common in the field of housing. In this case, the Italian Government passed legislation preventing evictions of tenants as Italy was at the time facing a severe housing shortage. While the Court found such regulations did serve a legitimate aim in the public interest, it went on to issue a ruling against the Italian Government on the grounds that it did not adequately apply provisions that would have allowed the claimant in this case to repossess his apartment pursuant to the regulations in effect because of the special circumstances of the claimant.

<sup>95</sup> *James v. U.K.*, para. 46.

<sup>96</sup> See Carss-Frisk, *supra* note 86, at 6.

<sup>97</sup> In order for a deprivation or control on use of property to be justified, the taking of the property must have been done pursuant to domestic legislation.

<sup>98</sup> *Winterwerp v. Netherlands*, 1979, European Court of Human Rights, Series A No. 33, para. 45.

<sup>99</sup> See *Lithgow v. U.K.*, 1986, European Court of Human Rights, Series A No. 102, paras. 111-119.

<sup>100</sup> *Papamichalopoulos and Others v. Greece*, 1993, European Court Human Rights, Series A No. 260-B, para. 45: "The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions."

<sup>101</sup> See *Papamichalopoulos v. Greece and Loizidou v. Turkey*.

assessing whether an interference strikes a fair balance.<sup>102</sup> Determination of compensation is often controversial. Compensation does not need to be for the full value of the property, but must be reasonably related to the value. Unless the payment of compensation is reasonably related to the value of the property the interference would likely be found disproportionate. As a general rule, the greater the public interest served the greater the burden the owner can be expected to endure. Thus, in general an owner should be compensated for any deprivation of property. In exceptional cases the state will be excused from paying any compensation. Since control of use of the property is less of an interference there may be less of an obligation to provide compensation. In certain cases, compensation standards may vary as regards nationals versus non-nationals.<sup>103</sup> Practice varies as to compensation amounts, and when compensation must be paid.

The European Court of Human Rights has also ruled in some cases on the issue of discrimination in enjoyment of property rights under Article 1 of Protocol 1. In terms of claims related to interferences under Article 1 of Protocol 1 and Article 14<sup>104</sup> of the Convention, the Court has ruled that differences of treatment of certain categories of owners do not constitute discrimination if they have an "objective and reasonable justification."<sup>105</sup> Any differential treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means and realization of the aim.

In several cases, the European Court of Human Rights has dealt with the issue of destruction of housing in conflict situations. In one case brought by Kurdish citizens against the Turkish Government, the European Court of Human Rights concluded the deliberate burning of the applicant's homes and contents constituted a serious interference with the right to family life and home under Article 8 as well as the peaceful enjoyment of possessions under Article 1 of Protocol 1.<sup>106</sup> The Court also found a violation of Article 25(1) because the Turkish authorities had questioned the applicants regarding their claims to the Court.

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<sup>102</sup> See *James and Others v. UK*. Para. 54 states in relevant part: "The first question that arises is whether the availability and amount of compensation are material considerations under the second sentence of the first paragraph of Article 1 (P1-1), the text of the provision being silent on the point. The Commission, with whom both the Government and the applicants agreed, read Article 1 (P1-1) as in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State.

Like the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 (P1-1) is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on applicants (*Sporrong and Lonnroth v. Sweden* paragraphs 69 and 73).

The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (P1-1). Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain."

<sup>103</sup> In the cases of *James v. U.K. and Lithgow v. U.K.*, the Court found there may be grounds for differentiating between nationals and non-nationals as regards compensation for takings concerning social reform, for the reasons that non-nationals are more vulnerable to domestic legislation since they likely had no input in its adoption and in certain cases it may be legitimate to require nationals to bear a greater burden in that they are more likely to enjoy the benefits of the social reform.

<sup>104</sup> Article 14 states: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

<sup>105</sup> *James v. UK*, para. 63.

<sup>106</sup> *Akdivar and others v. Turkey*, European Court of Human Rights (Reports 1996 IV (16 September 1996)).

In a similar case brought against the Turkish Government, the Court made similar findings regarding Article 8 and Article 1 of Protocol.<sup>107</sup> It also found the burning of houses constituted inhuman treatment and thus a violation of Article 3. The Court also concluded the applicants were relieved from the obligation of exhausting domestic remedies because of the special circumstances surrounding the case. These circumstances included: the emergency situation existing in southeastern Turkey at the time; the fact that despite a number of villages having been burned no compensation had been offered; the general reluctance of Turkish authorities to admit such practice carried out by security forces; no prosecutions brought against security forces; and the fact the applicants were in a state of upheaval and insecurity following the destruction of their homes. The Court also found a violation of Article 13 because the state did not carry out a thorough and effective investigation of the house burnings. The Court also awarded pecuniary and non-pecuniary damages to compensate for destruction to property, loss of income and reimbursement for alternative accommodation. The Court also ruled that where a breach is found a state is obligated to end the breach and make reparations in such a way as to restore the situation existing before the breach (restitution *in integrum*).

In a case brought by the Government of Cyprus against the Turkish Government (*Cyprus v. Turkey*), the Court held that the respondent party violated Article 8 and Article 1 of Protocol 1 by refusing to allow the return of Greek-Cypriot displaced persons to their homes in northern Cyprus, which effectively denied them use and enjoyment of their property for which no compensation was paid.<sup>108</sup> There was also found a violation of Article 13 in that the respondent failed to provide any remedies to contest interferences with their rights under Article 8 and Article 1 of Protocol 1 to Greek-Cypriots residing outside of northern Cyprus.

#### **(b) American Convention on Human Rights (ACHR)**

The ACHR was adopted in 1969 and entered into force in 1978. It includes primarily civil and political rights. The right to property is established in Article 21, which provides the following:

*1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.*

Article 21 closely resembles the right under the ECHR, with the primary exception that it protects only natural persons. All natural persons have the right to use and enjoyment of their property. While it establishes the right to use and enjoy property, much like the ECHR, such rights can be subordinated to the interest of society and pursuant to established law. Deprivation of property is allowed "for reasons of public utility or social interest" pursuant to established law, and only upon payment of compensation. It differs from Article 1 of Protocol 1 of the ECHR in that it provides expressly for the payment of compensation.

The Inter-American Commission on Human Rights, created in 1959, has spent most of its time documenting gross violations of human rights by states party to the Convention, rather than investigating single violations. The recommendations and conclusions of the Commission are not legally binding. And while the Inter-American Court of Human Rights does have jurisdiction to receive individual complaints and can issue legally binding decisions, the Court's case law, including issues concerning property rights, is much less developed than that of the European Court. However, it has at times referred to decisions of the European Court. As regards particular issues,

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<sup>107</sup> *Selcuk and Asker v. Turkey*, European Court of Human Rights, Reports 1998-II (24 April 1998).

<sup>108</sup> *Cyprus v. Turkey*, European Court of Human Rights, Application No. 25781/94, 10 May 2001, paras. 175 and 184.

the Inter-American Court has held that property includes both tangible and intangible property<sup>109</sup> and that deprivations must be clearly arbitrary to constitute a violation.<sup>110</sup>

### (c) African Charter on Human and People's Rights (AfCHR)

The Charter, which was adopted in 1981 and entered into force in 1986, is a broad mix of civil, political, economic, social and cultural rights. The right to property is included in Article 14, which states:

*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*

Article 14 is much less comprehensive than either the ECHR or ACHR, but does guarantee a right to property that can be interfered with only in the interest of public need or in the general interest of the community, in accordance with the relevant laws. It does not distinguish between different forms of interference. While there is no express guarantee of compensation in Article 14, Article 21 (2) allows for recovery of property and adequate compensation in cases where individuals are deprived of their property. In terms of enforcement of property rights, neither the African Commission on Human and Peoples' Rights nor the African Court on Human and Peoples' Rights have undertaken much action. The Commission itself has few real powers. The fact that the ability to file individual complaints to the Court is dependent on a special declaration by the state and the discretion of the court<sup>111</sup> makes the Court much less accessible to individual victims than either the European or American Courts.

### (d) Arab Charter on Human Rights

The Arab Charter on Human Rights<sup>112</sup> was adopted in 1994 but has not yet entered into force. It includes a right to property under Article 25, which states:

*Every citizen has a guaranteed right to own property. No citizen shall under any circumstances be divested of all or any part of his property in an arbitrary or unlawful manner.*

In terms of the other regional conventions, the Arab Charter would appear to create the weakest protection of property rights. Although it does guarantee the right to own property, it allows for deprivation of property so long as it is not arbitrary and is done according to law. There is no requirement that a deprivation be pursuant to any public or general interest, thus leaving state parties a freer reign in enacting measures to expropriate property in that there appears no need to justify such measures. At this time there is no mechanism for enforcement.

## IV.B International Humanitarian Law

International humanitarian law does not explicitly include the right to repossession of property. It does, however, include certain protections of property. Article 46 of the Hague Regulations provides that private property "must be respected" and "cannot be confiscated."<sup>113</sup> Article 55

<sup>109</sup> *Baruch Ivcher Bronstein vs. Peru*, Inter-American Court of Human Rights.

<sup>110</sup> See Carlos Garcia Saccone Case 11.671, Report No. 8/98, IACHR 1997 Annual Report 193,199 (March 2 1998) Argentina 37 and Edo Margoli and Josefina Ghiringhelli de Margradi Case 11.400, Report No. 104/99 Argentina IACHR 1999 Annual Report 99,108 pages 48-49 (May 4, 1999)

<sup>111</sup> See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, in 20 *Hum. Rts. L.J.* 269 (1999), Articles 5(3) and 34(6).

<sup>112</sup> Arab Charter on Human Rights, adopted by the League of Arab States on 15 September 1994, in 18 *Hum. Rts.L.J.* 151 (1997)

<sup>113</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (Hague Regulations), Article 46.

states that an occupier is regarded only as an administrator and user of "public buildings, real estate, forests, and agricultural estates belonging to the hostile State and situated in the occupied country" and therefore "must safeguard the capital of these properties."<sup>114</sup> Article 53 of the Fourth Geneva Convention prohibits the destruction of real or personal property except where "absolutely necessary by military operations."<sup>115</sup> Additionally, Article 146 of the Fourth Geneva Convention includes "extensive destruction and appropriation of property, not justified by military necessity and undertaken unlawfully and wantonly" as a "grave breach" of the Convention, liable to penal sanctions.<sup>116</sup> The fact these provisions protect against unnecessary destruction and provide the occupying power control of the property only as administrator infers the property should be returned to owners after the end of hostilities.

#### IV.C United Nations Resolutions

A number of UN resolutions have dealt with the issue of return of property in post-conflict situations. The General Assembly adopted resolution 35/124 in 1980, which reaffirmed refugees and displaced persons have the right "to return to their homes in the homelands."<sup>117</sup> The General Assembly has adopted resolutions furthering this right regarding Algeria<sup>118</sup>, Cyprus<sup>119</sup>, Palestine/Israel<sup>120</sup> and Rwanda.<sup>121</sup> The resolutions regarding Algeria and Cyprus recognize the right to return, however, the other resolutions offer more concrete language on the rights of those displaced. Resolution 51/126 (Palestine/Israel) reaffirms the rights of those displaced by hostilities commencing in June 1967 and afterwards to return to their homes or former places of residence. Resolution 194 (III) (Palestine) provides that refugees wishing to return to their homes should be permitted to do so at the earliest possible date, and compensation should be paid for those choosing not to return and for damage to property. This resolution goes further to create a body, the Conciliation Commission, to facilitate return and compensation. Resolution 51/114 (Rwanda) invited all involved parties to support the Government of Rwanda in reintegrating refugees and addressing competing claims to housing and property.

Similar language has been included in a number of Security Council resolutions regarding the situations in Abkhazia and the Republic of Georgia<sup>122</sup>, Azerbaijan<sup>123</sup>, Bosnia and Herzegovina<sup>124</sup>, Cambodia<sup>125</sup>, Croatia<sup>126</sup>, Cyprus<sup>127</sup>, Kosovo<sup>128</sup>, Kuwait<sup>129</sup>, Namibia<sup>130</sup> and Tajikistan<sup>131</sup>. Each of these resolutions reaffirms the rights of refugees and displaced persons to return to their homes. Resolution 820 (Bosnia and Herzegovina) provides that all commitments as regards land and property made under duress are null and void. A similar provision was included in the Constitution of BiH, as during the conflict many refugees and displaced persons were forced to sign documents transferring their property to local officials or other individuals. Resolution 687 (Kuwait) requested the Secretary General to report to the Security Council the steps taken to ensure the return of Kuwaiti property seized by Iraq, including lists of non-returned or damaged property.

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<sup>114</sup> Hague Regulations, Article 55.

<sup>115</sup> Convention (IV) relating to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (Fourth Geneva Convention), Article 53.

<sup>116</sup> Fourth Geneva Convention, Article 146.

<sup>117</sup> UN Doc.A/RES/35/124 (1980).

<sup>118</sup> General Assembly resolution 1672 (XVI), UN Doc. A/RES/1672 (XVI) (1961).

<sup>119</sup> General Assembly resolution 3212 (XXIX), UN Doc. A/RES/3212 (XXIX) (1974).

<sup>120</sup> General Assembly resolutions 51/126, UN Doc. A/RES/51/126 and 194 (III), UN Doc. A/RES/194 (III) (1948).

<sup>121</sup> General Assembly resolution 51/114, UN Doc. A/RES/51/114 (1996).

<sup>122</sup> Security Council resolutions 1287 (2000), 1036 (1996), 971 (1995) and 876 (1993).

<sup>123</sup> Security Council resolution 853 (1993).

<sup>124</sup> Security Council resolution 752 (1992).

<sup>125</sup> Security Council resolution 745 (1992).

<sup>126</sup> Security Council resolution 1009 (1995).

<sup>127</sup> Security Council resolution 361 (1974).

<sup>128</sup> Security Council resolutions 1244 (1999) and 1199 (1998).

<sup>129</sup> Security Council resolution 687 (1991).

<sup>130</sup> Security Council resolution 385 (1976).

<sup>131</sup> Security Council resolution 999 (1995).

## IV.D Peace Agreements

In recent years, a number of peace agreements have been signed that contain provisions regarding the rights of refugees and displaced persons to return to their homes. The most comprehensive is perhaps the General Framework Agreement for Peace in Bosnia-Herzegovina, otherwise known as the Dayton Peace Agreement, which was signed in December of 1995. It contains specific provisions providing rights to repossess property lost during the conflict and compensation. It also forms the basis for the establishment of a comprehensive mechanism for exercising these rights.

Apart from the Dayton Peace Agreement, a number of other agreements have established similar rights. The Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, signed in October 1991 provides that efforts should be made to create the necessary conditions for voluntary return and integration, and offers protection for the right to property.<sup>132</sup> It also sets out that the rights included in the Universal Declaration of Human Rights and other relevant international human rights instruments are guaranteed to all persons in Cambodia, including refugees and displaced persons.

The series of agreements that ended the conflict in Guatemala in 1994 contain provisions regarding both return and resettlement. Displaced persons are provided the right to return or resettle in the place of their choice.<sup>133</sup> In addition, the government is obliged to revise legal provisions to ensure prior abandonment of property is not considered voluntary, and ensure the inalienable nature of land ownership rights. In this respect it is obliged to promote the return of land to original owners and/or seek adequate compensation.

The Arusha Peace Agreement that ended the conflict in Rwanda, contains a provision that prevents the repossession of property by refugees who fled the country more than ten years prior to the agreement if the property is currently occupied. Instead, the Government is obliged to compensate them with other land and resettlement assistance.<sup>134</sup> Agreements regarding peace settlements in Mozambique and Somalia provide stronger rights to property. In Mozambique, refugees and displaced persons are guaranteed restitution of property in cases where in the property remains in existence, and are entitled to initiate legal proceedings against the current possessors.<sup>135</sup> Somali refugees and displaced persons are entitled to return of all properties that were illegally confiscated, robbed, stolen, seized, embezzled or taken by other fraudulent means.<sup>136</sup>

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<sup>132</sup> Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991. See Part V: Refugees and Displaced Persons, Articles 19 and 20, and Annex 4: Repatriation of Cambodian Refugees and Displaced Persons.

<sup>133</sup> Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict (Guatemala), 17 June 1994, UN Doc. A/48/954-S/1994/751 (1994).

<sup>134</sup> Arusha Peace Agreement, 4 August 1993, Article 4.

<sup>135</sup> General Peace Agreement for Mozambique, Protocol III (IV. Return of Mozambican Refugees and Displaced Persons and Their Social Reintegration), March 1992.

<sup>136</sup> Addis Ababa Agreement concluded at the first session of the Conference on National Reconciliation in Somalia: III. Restoration of property and settlement of disputes, 27 March 1993.