

HAS EL DORADO CRUMBLLED SO SOON AFTER ITS CORNERSTONE WAS LAID?: THE STATE OF INTERNATIONAL REFUGEE LAW AND THE REPATRIATION OF BOSNIANS IN GERMANY

*"Remember. Refugees are not a threat. They are threatened. They are not a burden on society. They carry society's burden."*¹

I. INTRODUCTION

Refugee protection affects everyone, and the fate of displaced peoples is intimately, albeit seemingly indirectly, linked to our own well-being. As the number of refugees in the world continues to rise² and the need to protect them is greater than ever,³ the plight of refugees and other displaced persons remains a paramount international concern "not only because of its humanitarian significance, but also because of its impact on peace, security[,] and stability, [without which the] world cannot reach a new order . . ."⁴

Although refugee crises in the world abound,⁵ perhaps the most vivid contemporary illustration embedded in the Western consciousness of the tragedy and complexity involved in dealing with those driven from their homelands lies in the aftermath of the most recent civil war in the former Yugoslavia.⁶ The mass displacement of Bosnians produced by this conflict,

1. JEAN TRIER, ORGANIZATIONS THAT HELP THE WORLD: UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 55 (1994) (quoting a United Nations High Commissioner for Refugees publication).

2. In 1970 there were 2.5 million refugees in the world. The number rose to around 11 million in the early 1980s and had increased to an estimated 18.2 million by 1993. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES 1993, at iii [hereinafter STATE OF THE WORLD'S REFUGEES 1993]. The U.S. Committee for Refugees recently reported that although refugees and asylum seekers worldwide had decreased from 15.3 million in 1995 to 14.5 million in 1996, there were also an estimated additional 19 million displaced persons in 1996. Wendy Koch, *Flow of Refugees Hits Lowest Level in Seven Years, One Reason Is Fewer Countries Are Willing to Take Them, Group Says*, S.F. EXAMINER, May 20, 1997, at A13.

3. STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at iii (citing the regularity and pervasiveness of persecution, human rights violations, and armed conflict as causes for current refugee crises).

4. *Id.* (quoting the United Nations High Commissioner for Refugees, Ms. Sadako Ogata).

5. *See generally*, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, WHEN REFUGEES GO HOME (Tim Allen & Hubert Morsink eds., 1994) (examining the numerous refugee movements within Africa).

6. As hostilities in this region escalated and peace talks ensued, the issue of how to deal with the numerous people forced from their homes came to overshadow the negotiations between the warring parties. Ulrike Davy, *Refugees from Bosnia and Herzegovina: Are They Genuine?*, 18 SUFFOLK TRANSNAT'L L. REV. 53, 61 (1995).

Europe's first refugee crisis of substantial proportions since World War II,⁷ presented a formidable burden to the central and western European nations, most notably Germany.⁸

Responding to the outbreak of civil war in Yugoslavia in 1991, Germany absorbed approximately 350,000 of the 380,000 Bosnian refugees who arrived in western Europe.⁹ Instead of processing this mass of people through traditional asylum procedure—an act that would have received considerable opposition from the German people—the German government secured public support for the measure by offering *Duldung*,¹⁰ or “temporary protection status” (TPS),¹¹ a humanitarian initiative providing “temporary refuge due to

In fact, the very nature of the conflict entailed taking the offensive against civilian population centers. The Serbs employed this approach not only to minimize military casualties, but more importantly to achieve ethnic cleansing by driving non-Serb ethnic groups from the area so that only Serbs remained. See WAYNE BERT, *THE RELUCTANT SUPERPOWER: UNITED STATES' POLICY IN BOSNIA, 1991-95*, at 50-52 (1997).

It should be noted that the Serbs were not the only faction alleged to have committed atrocities toward civilians during the fighting. See *id.* at 50.

7. BERT, *supra* note 6, at 155; Davy, *supra* note 6, at 61; see also STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 31 (stating that of the some 1.2 million who fled the conflict in the former Yugoslavia, at least 600,000 sought refuge “outside of the immediately affected region.”).

8. The war in the former Yugoslavia generated a “mass outflow” from the region of some one million persons, representing about 5% of the country's population, who were seeking “at least temporary protection in Central and Western Europe.” Judith Kumin, *Asylum in Europe: Sharing or Shifting the Burden?*, in WORLD REFUGEE SURVEY 1995, at 28, 31 (U.S. Committee for Refugees ed., 1995). See also William Drozdiak, *Germany Escalates Drive to Repatriate Bosnians; U.N. Says Refugees' Return Could Imperil Peace*, WASH. POST, Apr. 3, 1997, at A28 (stating that Germany hosts more Bosnian refugees than all European nations combined, with four times as many Bosnian refugees as the next most accommodating host country, Austria); *Germany Should Not Repatriate Bosnians Who Can't Go Home, U.S. Says*, DEUTSCHE PRESSE-AGENTUR, May 21, 1997, available in 1997 WL DCHPA 15:37:00 (noting that Germany admitted some 350,000 Bosnians since 1992, far more than any other country); *U.S. Backs German Decision to Return Bosnian Refugees*, DEUTSCHE PRESSE-AGENTUR, Sept. 20, 1996, available in 1996 WL DCHPA 15:30:00 (quoting a U.S. state department official who acknowledged the massive burden that Germany undertook in accepting the Bosnian refugees).

9. Colleen V. Thouez, *New Directions in Refugee Protection*, 22 FLETCHER F. WORLD AFF. 89, 98 (1998).

10. In terms of Germany's refugee and asylum policies, the term is loosely translated as “toleration.” AMNESTY INTERNATIONAL, *BOSNIA-HERZEGOVINA ALL THE WAY HOME: SAFE “MINORITY RETURNS” AS A JUST REMEDY AND FOR A SECURE FUTURE* 25-26 (1998) [hereinafter AMNESTY].

11. Thouez, *supra* note 9; see also STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 40-41 (providing an overview of the concept of temporary protection, its increased acceptance by Western governments in addressing refugee dilemmas, particularly in response to the need to provide asylum for the large numbers of people fleeing from the most recent Yugoslav war).

extraordinary circumstances,"¹² such as war. Thus, although TPS falls short of "full refugee status"¹³ and the attendant benefits¹⁴ that such status confers upon refugees and asylum seekers,¹⁵ it stands as a contemporary response to changing refugee needs that is consonant with the developing international refugee law principle of repatriation¹⁶ as the preferred solution to refugee situations.¹⁷

12. Thouez, *supra* note 9, at 98. The principle of temporary protection status, being significantly less generous than an outright offer of asylum, fit well into the "heightened restrictionism" that had begun to define European asylum policy in the 1980s. *Id.*

13. TPS permits those "who might not qualify for refugee status to remain at the discretion of the authorities until it is deemed safe for them to return home." STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 41.

14. The significant difference between refugees and asylum seekers, i.e., those desirous of refugee status, should be noted:

Formally recognized refugees enjoy full civil, social and political rights with the exception of the right to vote. The situation of asylum-seekers and "de facto" refugees is marked by restrictive socio-economic measures, such as limitations on freedom of movement, reduced social aid given in kind [and] not in cash, medical and dental treatment only in cases of acute illness or pain, housing in collective accommodation centers and only limited access to the labour market.

UNHCR Country Profiles—Germany (visited Sept. 15, 1998) <<http://www.unhcr.ch/world/euro/germany.htm>>.

15. A refugee is defined as "[s]omeone who has fled his or her country because he [or] she fears persecution based on race, religion, nationality, social group, or political opinion. The definition is sometimes expanded to include people fleeing war or other armed conflict." U.S. Committee for Refugees, *Worldwide Refugee Information: Glossary of Terms* [hereinafter *Glossary*] (visited Sept. 17, 1998) <<http://www.refugees.org/world/glossary.htm>>.

An asylum seeker, on the other hand, is "[s]omeone who claims to be a refugee. Often, an asylum seeker must undergo a legal procedure in which the host country decides if he [or] she qualifies for refugee status. International law recognizes the right to seek asylum, but does not oblige states to provide it." *Id.*

For the purposes of this Note, the terms "refugee" and "asylum seeker" may at times be used interchangeably, despite their technically different meanings, unless specified otherwise by the context.

16. TPS recognizes the limited opportunities for masses of asylum seekers to integrate completely into the countries that have received them and stands for the notion that "[p]ermanent exile is neither necessary nor desirable for most people [who are driven from their homelands]." STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 40.

In lieu of a right to permanent residence in the host country, TPS affords these displaced people the necessary assistance and protection "for the duration of the violence and disorder that displaced them, followed by assistance to reintegrate in their own societies when conditions permit them to return." *Id.* Thus, not only does TPS attempt to return migrants to the lives they knew prior to being uprooted, but it preserves "the idea of return in order to avoid collaborating, however unwillingly, in the crime of 'ethnic cleansing.'" *Id.* at 41. As such, TPS is sensitive to refugees' immediate and long-term needs.

17. See Hiram A. Ruiz, *Repatriation: Tackling Protection and Assistance Concerns*; in WORLD REFUGEE SURVEY 1993, at 20, 20 (U.S. Committee for Refugees ed., 1993) (quoting the U.N. High Commissioner for Refugees, Ms. Sadako Ogata, as proclaiming "the 1990s as the 'decade of repatriation.'"). In this manner, TPS, because of its ultimate goal of repatriation, signals a reaffirmation of the world's commitment to refugees because "voluntary repatriation

However, Germany's attempts to repatriate those Bosnians whose three-year protected status period expired in October of 1996 encountered fierce resistance by opposition groups who protested these repatriations as violative of *non-refoulement* principles.¹⁸ As a result, hundreds of thousands of Bosnian refugees remain in Germany to date, their futures uncertain. Now that over two years have passed since the German government officially terminated TPS for the Bosnian refugees, the German people are increasingly viewing TPS as merely another means of permanent future asylum for foreigners.¹⁹ It is not surprising that the German government is receiving harsh criticism on this sensitive issue, regardless of whether it tries to appease the refugees or the social and economic concerns of the German plebs.²⁰

As Germany addresses this refugee dilemma, it must decide the proper scope for maintaining its migration control policies while affording adequate protection to those Bosnian refugees who still need it.²¹ There are some indications that Germany's highly-vaunted commitment to human rights²² is being undermined by the idea that "domestic law and order,"²³ not refugee protection, is the direction in which the country is moving.

Germany's answer to this dilemma is critical, as it will likely dictate in large part the manner in which other European Union nations deal with similar

has been presented as the best way to resolve the global refugees problem, and good intentions have been voiced about the need to assist returnees for some time after arrival in their countries of origin in order to ensure that they attain viable livelihoods." WHEN REFUGEES GO HOME, *supra* note 5, at 1. Surprisingly, "very little information has been available about what has happened to those refugees who went home in the past." *Id.*

18. Although Germany has monitored TPS to ensure that it remains temporary, "the German government has faced mounting pressure to respect the international principles of *non-refoulement* and to not involuntarily repatriate Bosnian refugees [until conditions in their homeland are conducive to their return]." Thouez, *supra* note 9, at 100; *see also infra* Part IV. for a discussion of the numerous difficulties that are dissuading Bosnians from returning home.

19. *See* Thouez, *supra* note 9, at 90. There exists a general view that "temporary asylum in the past leads to permanent settlement in the future." *Id.*

20. *See* Yojana Sharma, *Refugees-Germany: Bosnians Caught in Germany's Election Crossfire*, INTER PRESS SERV., Sept. 8, 1998, available in 1998 WL 5989163 (observing that Germany has been criticized by U.S. Secretary of State Madeleine Albright for tightening its refugee policy prior to the September 1998 elections but also noting the significant percentages of Germans polled who responded that they "would vote for far-right parties which lead off on anti-foreigner policies.").

21. The manner in which the rights of the state are balanced against the rights of refugees bears upon the future of the principle of asylum itself. *See* James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 117-18 (1997).

22. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES 1995, at 202 [hereinafter STATE OF THE WORLD'S REFUGEES 1995].

23. TONY CZUCZKA, *Europe Pulls in the Welcome Mat*, SEATTLE TIMES, Jan. 16, 1998, at A10.

refugee crises in the future.²⁴ Regrettably, it appears as if the international community is already receptive to shifting the focus of refugee law away from the migrants and more toward state interests.²⁵

This Note stands for the proposition that, although Germany has been an invaluable sanctuary for displaced peoples since the end of World War II, its current policies toward repatriating Bosnian refugees should be tempered by a more liberal view of temporary protection as a long-term, but not indefinite, approach to the extremely complex repatriation situation in Bosnia Herzegovina. To help Germany effectuate a more effective repatriation scheme for these people, the international community, in the spirit of the *Convention Relating to the Status of Refugees*²⁶ that so prominently defines international refugee law, must shoulder more of Germany's burden in accommodating refugees and must be more aggressive in rectifying the situations that initially uprooted the Bosnian refugees.

Part II of this Note discusses the history of asylum law and its relation to Germany's refugee policies in a modern context. Part III assesses the current social, political, and economic climate in Germany and its effect on the Bosnian refugees and other foreigners still living there. This Part will also examine Germany's citizenship laws and their potential effects on foreigners and Bosnians in Germany. Part IV evaluates the current situation in Bosnia and Bosnia's ability to absorb the repatriation of Bosnian refugees from abroad. Finally, Part V explores some of the repatriation programs for Bosnian refugees from Germany and suggests other multilateral approaches to provide for the special needs of these refugees upon return to their war-torn homeland.

24. See Sam Blay & Andreas Zimmermann, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INT'L L. 361, 377 (1994) (predicting "the beginning of the end of liberal asylum laws in Europe" by noting that "the German situation appears indicative of emerging trends in refugee law in Western Europe generally."); Davy, *supra* note 6, at 62 (observing that after Germany and Switzerland imposed visa requirements for Bosnian refugees in 1992, several other Western European nations adopted the same policy).

See also Richard A. C. Cort, *Resettlement of Refugees: National or International Duty?*, 32 TEX. INT'L L.J. 307, 324-25 (1997) (noting the contagious nature of "compassion fatigue" among nations toward refugees and how countries such as Canada, France, and the United Kingdom, following Germany's lead, have enacted "restrictions that limit the ability of asylum-seekers to gain access to these countries.").

25. See Cort, *supra* note 24, at 327 (citing a decreased "spirit of cooperation [within the international community] that dominated the refugee climate in the years following World War II" and evidence that refugee protection "is not operating in the best interests of the people who are least able to protect themselves—the refugees.").

26. See *infra* notes 42-44 and accompanying text.

II. THE EVOLUTION OF INTERNATIONAL REFUGEE LAW

A. *From Early Origins to Widespread Acceptance*

History is replete with instances of migrants fleeing their homes and homelands for fear of their lives and safety.²⁷ Indeed, "[t]he right to seek sanctuary is one of civilization's oldest principles,"²⁸ dating back some 3500 years in a multitude of forms and among various ancient cultures.²⁹ Ironically, notwithstanding the tragic and pervasive presence of refugee movements throughout human history, it was not until the twentieth century that the international community, prompted largely by two world wars that displaced millions,³⁰ undertook coordinated measures toward improving the plight of refugees.³¹

In spite of the tremendous progress that has occurred in international refugee law,³² however, the precise focus of asylum in safeguarding refugees remains uncertain among the competing interests of the state and those seeking protection.³³ Prior to and including the beginning of the twentieth

27. TRIER, *supra* note 1, at 14; *see also* COVEY T. OLIVER ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 825 (4th ed. 1995) ("So long as the level of human rights protections varies among the states of the world, the individual will continue the age-old human practice of leaving a state where he is oppressed to live in another state where, he believes, his rights will be protected.").

28. TRIER, *supra* note 1, at 14-15.

29. STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 33.

30. *See* TRIER, *supra* note 1, at 15-16; *see also* Cort, *supra* note 24, at 311-12 (noting that the early years of the twentieth century "opened a new episode in refugee affairs" marked by "massive refugee movement and resettlement.").

31. TRIER, *supra* note 1, at 15.

32. Since the end of World War II, the international community has contributed substantially to improving the plight of refugees. This is a praiseworthy accomplishment considering that

[t]he effort to assist refugees to stay alive through their initial peril, to return to their homes if circumstances permit, to resettle in new lands if only that way is open and to avoid a squandering of human energy while their fates are determined reflects large-scale organized, transnational activity.

Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L.Q. 833, 836 n.17 (1993).

33. "[R]efugees are considered to possess a right to seek asylum in other countries . . . [and] receiving states are under no legal obligation, other than for purely humanitarian reasons, to accept refugees and to provide them with a place of permanent sanctuary." Cort, *supra* note 24, at 311. These conflicting principles lead to tension between the rights of asylum seekers and those of host countries. *See id.*

Despite the polarity in the rights of these parties, refugee law attempts to accommodate both. "The critical right of at-risk people to seek asylum will survive only if the mechanisms of international refugee protection can be reconceived to minimize conflict with the legitimate migration control objectives of states, and dependably and equitably to share responsibilities and burdens." Hathaway *supra* note 21, at 117-18. *See also* OLIVER ET AL., *supra* note 27, at 826 (doubting the willingness of the international community to grant asylum

century, the concept of asylum deferred to state interests over an individual's right to protection.³⁴ Yet even as humanitarian concerns for refugees have become increasingly important,³⁵ an absolute right to asylum has not been established,³⁶ even under the *Universal Declaration of Human Rights* (UDHR),³⁷ and it appears as if modern refugee law in many respects resembles the original framework for dealing with displaced peoples.³⁸

But even if the turn of the twentieth century did not mark the establishment of a new and novel approach to refugee law, the impact of an international and multilateral approach to these traditional principles cannot be overstated.³⁹ The international community's commitment to refugee protection was memorialized in the early and middle portions of the twentieth century through the establishment of various refugee organizations⁴⁰ that

unconditionally but recognizing its commitment to humanitarian objectives).

34. See STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 33.

35. See *infra* notes 37-41 and accompanying text for a discussion of the international instruments that embody this humanitarian emphasis. See also Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 253 (1996) (commenting on the vitality of the 1951 Convention "in moderating the impulse of States to focus too narrowly on their own material or security needs at the expense of their essential humanitarian obligations to forced migrants.").

36. See OLIVER ET AL., *supra* note 27, at 825. See also Cort, *supra* note 24, at 309 (noting the absence of a fundamental governmental duty to accept refugees and the state's power, constrained only by international custom, to treat refugees as it pleases).

37. G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

Pertaining to the asylum principle, Article 14(1) of the UDHR states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." *Id.* art. 14, para. 1. Article 14(2) adds that "[t]his right may not be invoked in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations." *Id.* art. 14, para. 2.

38. Scholars in the fifteenth and sixteenth centuries were already "considering the implications of the movement of individuals across national boundaries." Cort, *supra* note 24, at 311. Hugo Grotius contended that "[a] permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary to avoid strifes." *Id.*

Scholars further developed this reasoning in the eighteenth century. In 1758, the writer Emerich de Vattel stated that "no Nation may, without good reason, refuse even a perpetual residence to a man who has been driven from his country," but qualified this asserted right of the individual asylum seeker in that "every Nation has the right to refuse to admit an alien into its territory when to do so would expose it to evident danger or cause it serious trouble." *Id.*

39. See *supra* note 32 and accompanying text.

40. The first international body dedicated to refugee affairs was created in 1921 when the League of Nations appointed Fridtjof Nansen as its first High Commissioner for Refugees. See TRIER, *supra* note 1, at 16. Nansen had directed relief operations for the International Committee of the Red Cross in Russia in response to the mass starvation created by the Russian Revolution in 1917. See *id.*; see also Kathleen Marie Whitney, *Does the European Convention on Human Rights Protect Refugees from "Safe" Countries?*, 26 GA. J. INT'L & COMP. L. 375, 378 (1997) (discussing how forced migration "became an issue" in 1917 as millions fled the Russian Revolution and in 1922 upon the "collapse of the Ottoman [E]mpire").

eventually culminated in the United Nations High Commissioner for Refugees (UNHCR) in 1950.⁴¹ The following year, the UNHCR adopted the *Convention Dealing with the Status of Refugees* (1951 Convention),⁴² and in 1967 the UNHCR ratified the *Protocol Relating to the Status of Refugees* (1967 Protocol)⁴³ to expand certain refugee rights under the 1951 Convention. These documents stand as the “cornerstone” of refugee protection,⁴⁴ particularly through the 1951 Refugee Convention’s promulgation in Article 33⁴⁵ of the most fundamental principle of refugee protection—*non-refoulement*.⁴⁶

While this international solidarity has significantly advanced refugee causes around the globe,⁴⁷ refugee law in recent years has changed dramatically since it was envisioned and “consolidated” in the earlier parts of

“From 1922 to 1933, the League of Nations dealt with refugees from Russia, Armenia, and a number of other countries,” but it recognized a need for a more permanent system of refugee protection when the Nazis expelled large numbers of Germans in 1933. *Id.* The newly-formed United Nations created the International Refugee Organization (IRO), which operated from 1946 to 1950. *See id.*

Interestingly, a strong correlation exists between the persecution of the Bosnian Muslims and the expulsion of Jews from Germany in 1933. As noted by Ignatz Bubis, chairman of the central council of Jews in Germany, “[t]he expulsion terror practices in Bosnia today is quite comparable to what happened from the beginning of the Third Reich to the outbreak of the war[,]” though he “limited his comparison of the Bosnian plight to that of the Jews before the ‘systematic annihilation of the Jewish people.’” Jewish Telegraphic Agency, *Bosnian Muslims Suffering like Jews Under Nazis, Official Says* (visited Sept. 15, 1998) <<http://www.shamash.org/jb/bk950728/imuslims.htm>>. Thus, the impetus for forming a permanent system of international refugee protection in 1933 has found renewed relevance in modern-day Bosnia.

41. In 1950 the U.N. General Assembly replaced the IRO with the United Nations High Commissioner for Refugees. *See Whitney, supra* note 40, at 380.

42. *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention or 1951 Convention].

43. *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

44. The Executive Committee of the Programme of the UNHCR recently declared the 1951 Convention and its 1967 Protocol “as the ‘cornerstone’ and the ‘centre of the international legal framework for the protection of refugees.’” Fitzpatrick, *supra* note 35, at 229. *See also* Newmark, *supra* note 32, at 834 & n.4 (noting that the 1951 Convention and 1967 Protocol are the “principal instruments benefiting refugees.”).

45. This article prohibits “refoulement” as follows: “No [c]ontracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” 1951 Refugee Convention, *supra* note 42, art. 33.

46. *See* Newmark, *supra* note 32, at 834. “The principle of non-refoulement is the foundation stone of international protection” *Id.* at 834 n.5 “This principle [of non-refoulement] . . . can be regarded as the cornerstone of refugee law.” *Id.*

47. *See supra* note 32 and accompanying text.

this century.⁴⁸ Regrettably, the increased difficulty presented by modern refugee crises has prompted numerous countries, many formerly bastions of refugee protection, to limit their willingness to provide asylum.⁴⁹ This course of action threatens not only the refugees' lives and safety, but also the concept of asylum itself.⁵⁰

History suggests that countries were more receptive to providing asylum as long as they were not required to incur an overly onerous burden in accommodating displaced persons. Now that a growing number of desperate refugee situations are occurring regularly,⁵¹ such as the fallout from the civil strife in Bosnia Herzegovina, the international community's commitment to protecting displaced peoples stands at a crossroads. Germany, as a Western power traditionally sympathetic to refugee causes,⁵² now has the opportunity unequivocally to reaffirm the world's responsibility to refugees by positively influencing its neighbors⁵³ that the correct course of action in repatriating the Bosnian refugees may not be the most immediately expedient and economical one.⁵⁴

48. At the end of World War II and at the outset of the Cold War, "the causes of the [then] contemporary refugee problems did not seem excessively complicated. The governments of the countries that produced refugees were assumed not to be susceptible to international pressure concerning the treatment of their citizens." STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 14. In contrast, the "refugee problems of the 1990s are characterized by their complexity . . . and cannot be treated in isolation from the conditions that give rise to them—nor can those conditions be isolated from refugee concerns." *Id.* at 13.

49. See generally Koch, *supra* note 2 (noting that the principle of asylum is coming under attack by Westerners who are increasingly cynical that refugees are primarily seeking better employment opportunities); Stephen S. Rosenfeld, *Wise Asylum Policy Is in American Interest*, HOUSTON CHRON., May 29, 1997, available in 1997 WL 6560011 (citing the end of the Cold War, compassion fatigue, social and economic tension, and other political pressures to explain why certain countries are seeking to expel refugees within their borders or to prevent their entry altogether); *Study Faults Protection for Refugees*, DEUTSCHE PRESSE-AGENTUR, May 19, 1997, available in 1998 WL DCHPA 20:16:00 (observing "a continuing deterioration in the quality of protection and assistance countries are willing to offer to those fleeing persecution and violence" and criticizing Germany's plans to force Bosnian refugees to repatriate).

See also Hathaway, *supra* note 21, at 117 (noting that governments are hesitant to offer significant refugee protection because they view it as an "uncontrolled 'back door' route to permanent immigration" and that both the duty to admit refugees and the costs associated with their arrival are unequally distributed among governments).

50. See USCR's *World Refugee Survey Shows Asylum Eroding in More Countries*, U.S. NEWSPAPER, May 20, 1997, available in 1997 WL 5712935.

51. See, e.g., WHEN REFUGEES GO HOME, *supra* note 5.

52. See *infra* Part II.B.

53. See *supra* note 24 and accompanying text. See also Thouez, *supra* note 9, at 89 (describing Germany as a "regional hegemon" and a preferred destination for refugees).

54. Sharma, *supra* note 20 (quoting the Archbishop of Berlin's spokesperson who stated that German politicians need "the courage and honesty" to concede that the Bosnian refugees may need "long term" protection in Germany because of the inhospitable conditions in the former Yugoslavia). Further, forced, uncoordinated deportations and involuntary repatriations "send refugees to the wrong places and 'play into the hands of the hard-liners' who want to halt

B. Germany's Generous Role in International Refugee Law: Atoning for the Sins of a Nazi Past and Building with Foreign Labor

Germany does not treat the concept of asylum lightly.⁵⁵ In responding to the refugee tragedies created by the Third Reich, Germany adopted some of the world's most liberal asylum policies,⁵⁶ embodied originally in Article 16 of the German Constitution, the *Grundgesetz* (Basic Law).⁵⁷ While the purpose of article 16 was to protect the politically persecuted, German courts repeatedly demonstrated a propensity to interpret this constitutional provision broadly, ensuring asylum seekers with at least a lengthy respite in Germany before their asylum requests were finally decided.⁵⁸ This accommodating asylum application procedure quickly made Germany the choice destination for refugees in Europe.⁵⁹

'the creation of a truly single Bosnia with two truly multi-ethnic entities.'" *Id.* (citing the U.S. State Department).

55. "Political asylum remains an extremely sensitive subject in Germany, which is burdened with the legacy of its Nazi past." *German Social Democrats May Support Refugee Curb*, WALL ST. J. EUR., Mar. 13, 1992, available in 1992 WL WSJE 2040861.

56. "West Germany adopted its liberal political asylum rules after World War II, as an atonement for the refugees driven abroad by the Third Reich." *Id.*; see also Blay, *supra* note 24, at 362 n.7 (stating that Germany's former constitutional grant of the right to asylum resulted from "Germany's experience with the political persecution that accompanied Nazism and the fact that many German emigrants in those days had severe difficulties finding a safe haven from persecution."); *Germany's Flawed Response*, WALL ST. J. EUR., June 1, 1993, available in 1993 WL WSJE 2038408 (citing Germany's adoption of the world's most liberal asylum laws as a penitential response to its racist and xenophobic Nazi past).

57. Grundgesetz [Constitution] [GG] art. 16 (F.R.G). Immediately following the Second World War and until its recent amendment in December 1992, the German Constitution provided that "persons persecuted on political grounds shall enjoy the right of asylum." *Id.* art. 16, para. 2.

58. Because the German courts interpreted article 16(2) liberally, a lengthy and complex process ensued whereby the applicant's claim was evaluated; during this period, the German government fed and housed the applicant at a substantial cost. See Blay *supra* note 24, at 362. Thus, as only a small percentage of applicants were eventually granted refugee status, the problem with Article 16(2) arose from permitting applicants, who were years later denied refugee status, "to stay pending consideration of their application[s]." *Id.* In effect, these monies primarily supported those deemed ineligible for asylum in Germany.

59. Although Germany's advanced economy attracts certain asylum seekers, Germany is hardly the only such economy in Western Europe. See *id.* at 377. As such, while "the economic situation in itself does not explain the country's attraction for asylum seekers," Germany's particularly long "preamendment procedure for asylum applications and determinations" has been credited with drawing "economic refugees" to Germany for years of state-subsidized living. *Id.*

See also WORLD REFUGEE SURVEY 1998, at 4 tbl. 3 (U.S. Committee for Refugees ed., 1998) (highlighting the disproportionately large number of asylum applicants that Germany has received in the past decade compared with other countries); *Fewer Refugees Seek Asylum in EU States*, AGENCE FRANCE-PRESSE, Mar. 23, 1998, available in 1998 WL 2246638 (noting that Germany has been the choice destination for asylum seekers from Turkey, the former Yugoslavia, and Iraq for the past four years); *Immigrants Are Genetically Tested to Prove*

Nearly half a century after adopting these generous asylum procedures, however, Germany's asylum policies began to collapse under their own largesse. Mass migrations into Germany further compromised the country's unstable economic foundation that was burdened with additional economic and social issues brought about by the reunification of East and West Germany.⁶⁰ Such economic and political pressures prompted the German government to take the controversial step of amending Article 16 of its Basic Law in 1993⁶¹ to stem the "uncontrolled flood" of refugees pouring into Germany.⁶² Moreover, aside from the administrative costs of processing these foreigners, the Germans were also continuing to subsidize their lengthy stays in Germany,⁶³ not to mention the additional hidden costs associated with

Claims of Kin in Germany, CHICAGO TRIB., Jan. 24, 1998, available in 1998 WL 2817997 (crediting Germany's liberal asylum policies and generous welfare benefits with making it Europe's choice destination among refugees); Elizabeth Neuffer, *Europe Slow to Respond as Refugee Woes Mount*, BOSTON GLOBE, Feb. 5, 1998, at A1 (noting that since 1993 Germany has received half of all asylum requests in Europe).

60. Panikos Panayi, *Racial Exclusionism in the New Germany*, in *GERMANY SINCE REUNIFICATION: THE DOMESTIC AND EXTERNAL CONSEQUENCES* 129, 134-39 (Klaus Larres ed., 1998). Amidst the rising costs of reunification, the German public questioned the cost of examining so many asylum requests, which amounted to DM 8 billion (approximately \$5 billion) in 1993 alone. See *STATE OF THE WORLD'S REFUGEES* 1995, *supra* note 22, at 202.

61. "Politically persecuted enjoy the right to asylum." This simple sentence, part of Article 16 of the German constitution, has been the focus of one of the longest and most heated debates in the Federal Republic's history." *STATE OF THE WORLD'S REFUGEES* 1995, *supra* note 22, at 202. Following a lengthy debate about the moral, political, and legal ramifications of amending the Basic Law, the German legislature amended Article 16 "to deny asylum in Germany to anyone who enters the country having passed through another country considered to be 'safe.'" Kumin, *supra* note 8, at 30. Safe countries were defined "as those where the 1951 Refugee Convention and the European Human Rights Convention are applied." *Id.* This amendment provided Germany a large degree of insulation against asylum seekers as all nine nations that share a land border with Germany are classified as "safe," including Poland and the Czech Republic, whose asylum programs and policies are still in their nascent stages. See *id.*

See also Blay, *supra* note 24, at 363 (describing the replacement of Article 16(2) with Article 16(a), which broadened the authority to deny asylum applications from applicants who had entered Germany from a country deemed by Germany to have adequate refugee protection capacity).

62. Panayi, *supra* note 60, at 143. See also Kumin, *supra* note 8, at 29 ("The asylum system was overwhelmed, xenophobic acts multiplied, and with no prospect of a European burden-sharing arrangement in sight, Germany amended its Constitution, which previously had guaranteed that 'politically persecuted enjoy the right to asylum.'").

63. Most asylum seekers in Germany survive from welfare programs until their application is eventually considered, a lengthy process that "often takes years." Czuczka, *supra* note 23. Such applicants are entitled to housing and a \$900 monthly stipend which, when "[m]ultiplied by 1.6 million refugees, . . . cost the increasingly resentful German taxpayer up to \$8.2 billion a year." *Id.* See also *supra* note 58 and accompanying text for a discussion of the lengthy asylum application process in Germany.

foreigners that were borne by German society.⁶⁴ Thus, the burgeoning costs of supporting asylum seekers, combined with Germany's own economic and social difficulties, proved to be more of a burden than the German people were willing to undertake, as evidenced by the 1993 constitutional amendment restricting the right of asylum.⁶⁵

But Germany's substantial support and favorable treatment of asylum seekers and refugees was not purely altruistic; Germany has also benefitted tremendously from the fruits of foreign labor.⁶⁶ Not only were outside labor sources integral in rebuilding Germany after the Second World War, but foreign workers have also been willing to accept low-paying jobs that most Germans find unattractive and are thus unwilling to accept.⁶⁷

Yet despite Germany's constitutional tightening of its asylum policies,⁶⁸ its stance toward refugee protection nonetheless remains liberal.⁶⁹ In order to appreciate the particular difficulties that Germany is currently facing with the Bosnian refugees within its borders, an examination of the country's unique economic and political situation following reunification, as well as its singularly troubling and stigmatizing Nazi past, is instructive.

III. THE SOCIAL, POLITICAL, AND ECONOMIC CLIMATE IN GERMANY: REUNIFIED GERMAN SOIL AS INFERTILE GROUND FOR REFUGEE SYMPATHY

A. *Economic Woes: Bad Economy, Bad for Foreigners*

While the fall of the Berlin Wall in 1987 heralded another triumph for

64. See *Migration News: Europe* (visited Sept. 15, 1998) <http://migration.ucdavis.edu/By-Month/MN-Vol-3-96/mn_dec_96.html>. An estimated 500,000 illegal jobs—unauthorized foreigners and Germans working for unreported wages—cost the country \$65 million in lost income and payroll taxes. See *id.* Furthermore, employers spent a total of DM 117 billion (\$76 billion) on unemployment insurance, early retirement benefits, and other jobless programs for the unemployed in Germany in 1995. See *id.*

65. See *supra* notes 60–62 and accompanying text.

66. See Panayi, *supra* note 60, at 130–31. At the end of the nineteenth century, Germany had transformed from a net exporter to a net importer of labor. See *id.* Labor importation continued in Germany in various forms to supplement domestic labor shortages, from the “exploitative” forced labor system established by the Nazis in World War II to the ethnic Germans who returned to their homeland soon after the massive disruption of the war. *Id.* As this source of ethnic German labor became increasingly unavailable due to the construction of the Berlin Wall, Germany looked to countries such as Spain, Greece, Turkey, Portugal, and Yugoslavia for workers. See *id.*

67. “The overwhelming majority of migrant workers were employed in unskilled and low-skilled jobs, involving heavy, dirty, and dangerous work . . .” *Id.* at 130; see also *Germany's Flawed Response*, *supra* note 56 (stating that foreigners come to Germany prepared to work hard for nominal wages at jobs that Germany's skilled and well-paid work force is unwilling to accept).

68. See *supra* note 61 and accompanying text.

69. See Czuczka, *supra* note 23.

freedom and democracy, Germany continues to struggle with several perplexing issues associated with its reunification.⁷⁰ The fiscal consequences of melding a market with a command economy will present substantial obstacles to Germany's economic prospects for many years.⁷¹ Perhaps the most pressing domestic issue exacerbated by German reunification is unemployment,⁷² which continues to plague the country, despite recently falling under four million.⁷³ Yet in spite of this glimmer of success in the labor market, many scholars remain concerned that Germany's economic troubles will persist well into the next century, negating most speculation that reunified Germany will transform into an economic "superpower."⁷⁴

Mass migrations of refugees and asylum seekers into Germany have further compromised the country's unstable economic foundation.⁷⁵ As these foreigners stay in Germany, Germans suffering under the current economic uncertainty are fearful and resentful that outsiders are usurping much needed housing and welfare benefits provided by the state.⁷⁶ Unfortunately, Germany's bleak economic prognosis for the next several years, or possibly decades,⁷⁷ has aroused an alarming degree of anti-foreigner sentiment in the country.

B. "Demons" from the Past:⁷⁸ *The Permanent Specter of Nazism and Xenophobia in Contemporary Germany*

Racism, neo-Nazism, and xenophobic attitudes are not unique to Germany⁷⁹ and are arguably stronger and more widespread in other

70. See Panayi, *supra* note 60, at 1.

71. See *id.* at 63.

72. See *id.* at 134.

73. Recent data indicate that unemployment in Germany has fallen below the politically-significant four million mark. NPR NEWS BROADCAST, Oct. 6, 1998. Joblessness in western Germany is around 10.3% and near 16.7% in the eastern part of the country. See *id.* The excessively high unemployment in eastern Germany is credited as a significant factor in removing Chancellor Helmut Kohl and his political party, the Christian Democratic Union, from their long-standing majority in German government. See *id.*

74. Panayi, *supra* note 60, at 1.

75. See *id.* at 134-35.

76. See Czuczka, *supra* note 23.

77. See Panayi, *supra* note 60, at 1-2.

78. "[O]ne must question whether the 'memory' of Nazism can ever be eradicated from German national consciousness." *Id.* at 133-34. The unification crisis that arose in 1989 is credited with awaking the "demons of the Nazi past to make another appearance . . ." *Id.*

79. "Racial exclusionism has guided the history of Germany in the same way as it has done in all other nation states. It has always been a core ideology." *Id.* See also Ralph Atkins, *Bonn Offers Good Home to Watchdog*, FIN. TIMES, Apr. 14, 1997, at 13 (stating that "it would be wrong to conclude Germany is witnessing a worrying outbreak of xenophobia" and that "Germany has no particular hostility towards outsiders.").

countries.⁸⁰ In fact, Germans have demonstrated a firm commitment to human rights pertaining to refugee-related issues.⁸¹ Germany, however, with its recent inundation of outsiders, has once again demonstrated that it is far from immune to anti-foreigner sentiment.⁸²

It is Germany's guilt-ridden Nazi legacy that is directing a large portion of its reaction to accommodating refugees. Germany is not only concerned with the burdens and costs of subsidizing refugees, but also with the possibility of violence against foreigners and the inevitable stigmatization of Nazism that would accompany such violence.⁸³ Foreign Minister Klaus Kinkel has described this phenomenon "as a threat to the nation's 'inner balance'—code words for the fear that more refugees mean more anti-foreigner attacks by rightist radicals."⁸⁴

Tragically, this substantial threat has materialized into lethal altercations

80. See generally Atkins, *supra* note 79 (asserting that Jean-Marie Le Pen's National Front in France is far stronger than any ultra-right movements in Germany); *Law: EC Ministers Reject Appeal to Share Refugee Burden*, WALL ST. J. EUR., Dec. 1, 1992, available in 1992 WL WSJE 2023990 (citing Britain's extremely restrictive immigration and asylum laws as evidence of rising "anti-foreigner sentiment and racial tension" in Western Europe); Alan Travis & Ian Traynor, *Asylum: Britain's Little Refugee Problem*, THE GUARDIAN, Oct. 22, 1997, available in 1997 WL 14736605 (discussing the hatred expressed in Britain toward Czech and Slovak gypsies, "with even young schoolchildren talking about them as 'bogus, welfare scroungers, beggars, dirty and disgusting.'").

81. In 1992, Dr. Richard von Weizsäcker, the Federal President of Germany, was awarded the Nansen Medal for his "outstanding services to the cause of refugees." STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 171. This honor was bestowed upon Dr. von Weizsäcker in recognition of his "campaign against violent attacks on asylum-seekers and xenophobia." *Id.*; see also *supra* note 22 and accompanying text (noting Germany's post-World War II observance of human rights).

For a brief discussion of Fridtjof Nansen, the first High Commissioner for Refugees whose legacy this award commemorates, see *supra* note 35 and accompanying text.

82. See PETER KÖPF, STICHWORT: AUSLÄNDERFEINDLICHKEIT [Keyword: Xenophobia] 61 (1996). In a 1993 study conducted by the University of Potsdam of youth in Brandenburg, the young Germans interviewed either completely or partially agreed with the following as reasons for their xenophobia toward asylum seekers: because they want to live comfortably at Germany's expense (85.8%); they resort quickly to violence and crime (77.5%); most asylum seekers are lazy (77.6%); they are dirty and generally unkempt (75.8%); they have irritated Germans on several occasions (47.3%); they take away jobs from Germans (73.5%); they aggravate the housing shortage (85.1%); they are inferior in comparison to Germans (83%). *Id.* (translation by author).

The original text reads: "Als Gründe für ihre Feindlichkeit gegen Asylbewerber stimmten die Jugendlichen "völlig" oder "teilweise" folgenden Aussagen zu: weil Asylbewerber auf Kosten Deutschlands gut leben wollen (85,8 Prozent); schnell zu Gewalt und Kriminalität neigen (76,5 Prozent); meistens faul sind (77,6 Prozent); dreckig und körperlich ungepflegt sind (75,8 Prozent); mich schon mehrmals belästigt haben (47,3 Prozent); uns die Arbeitsplätze wegnehmen (73,5 Prozent); die Wohnsituation weiter verschärfen (85,1 Prozent); im Vergleich zu uns Deutschen minderwertig sind (83 Prozent)." *Id.*

83. See Czuczka, *supra* note 23.

84. *Id.*

at times between German extremist groups and foreigners living in Germany.⁸⁵ As such, although Germany is not a particularly egregious xenophobe,⁸⁶ and may in fact be more hospitable to refugees and foreigners in general than many other countries, it remains impossible for Germany to sever its ties to the horrors committed by the Third Reich. This indelible guilt continues to pressure politicians to adopt more restrictive asylum policies, exemplified by their willingness to repatriate, and even forcefully deport, Bosnian refugees as quickly as possible.⁸⁷

C. Political Considerations: Asylum Policy as a Divisive Issue

In addition to inducing the German government to respond to ugly and dangerous acts of xenophobia, refugee and foreigner issues are also eliciting purely political responses to gains made by far-right German political parties.⁸⁸ Many of these groups operate on the fringes of legality in that they propound ideas exceedingly close to the moratorium that has been placed on

85. See Timothy Aepfel, *Violence Against Foreigners: Germany's Efforts to Tighten Asylum Law May be Hurt by Violent Attack on Refugees*, WALL ST. J. EUR., Aug. 26, 1992, available in 1992 WL WSJE 2027810 [hereinafter Aepfel, *Violence Against Foreigners*]. Indeed, the very presence of foreigners in Germany is inciting some Germans to violence. See *id.* The Rostock incident cited in this article was considered to be "by far the most serious attack on foreigners in Germany since unification" and was analogized to another particularly violent episode in the eastern German town of Hoyerswerda. *Id.* See also Panayi, *supra* note 60, at 135-39 (detailing the racist violence that occurred in Hoyerswerda and Rostock).

86. See *supra* notes 80-81 and accompanying text.

87. See Sharma, *supra* note 20.

88. Timothy Aepfel, *Kohl Bloc Supports Changes to Tighten Refugee Policy*, WALL ST. J. EUR., Oct. 16, 1992, available in 1992 WL WSJE 2026932 [hereinafter Aepfel, *Kohl Bloc*]. See also Panayi, *supra* note 60, at 95 (commenting on the significant gains made by the far-right Republican Party as a result of the large influx of refugees).

The controversial amendment to Article 16 of the Basic Law did curb the flow of foreigners into Germany, which resulted in fewer acts of violence perpetrated against them. See *id.* at 3. This political maneuvering by the majority Christian Democratic Union (CDU) and other conservative political parties appeared to persuade many nationalistic voters to reintegrate into the party shortly before the 1994 general election.

Recent polls have suggested that 13% of Germans would vote for rightist parties that tout anti-foreigner policies. See Sharma, *supra* note 20. The percentage is higher in eastern Germany, with 17% of those polled stating they would vote for the far-right, compared to 13% in western Germany. See *id.*

It is therefore not surprising that both of Germany's major political parties, the Christian Democratic Union (CDU) and Social Democratic Party (SDP) are taking a tough stance on the asylum issue. Since the amendment of Article 16 of the German Constitution, neo-Nazi attacks have precipitously declined, as has support for the far-right groups "which have lost their biggest vote-grabbing issue." *German High Court Upholds Strict Asylum Law*, DEUTSCHE PRESSE-AGENTUR, May 14, 1996, available in 1996 WL DCHPA 05:12:00.

overtly Nazi practices in Germany.⁸⁹ While these organizations are technically political in nature, their underlying ideologies approximate the beliefs of those engaged in violent attacks on foreigners in Germany.⁹⁰

Fortunately for the Bosnian refugees, they do not appear to be the targets of violent foreigner attacks.⁹¹ They have, however, become political scapegoats in the 1998 election year in Germany, similar to other foreigners in previous election years.⁹² Moreover, increased support for rightist groups, attested to both by voting trends⁹³ and implicit participation in attacks on foreigners,⁹⁴ demonstrates the imminent potential for rapid dissemination of xenophobia in modern-day Germany.

While this foreseeable xenophobic trend has yet to assume statistically-noteworthy proportions, now would be an opportune time to address the causes of such anti-foreigner tendencies. Because Germany is settling into a period of post-election calm in which the political atmosphere has been somewhat diffused and optimism is emerging,⁹⁵ the opportunity is ripe for attempting to cure the xenophobia that threatens to poison the country.

If Germany fails to address the underlying causes of anti-foreigner sentiment, especially as it is manifested toward the Bosnians enjoying temporary protection status, it could tacitly be acceding to the demands of those in Bosnia Herzegovina who oppose integration of those displaced by the war.⁹⁶ As such, the refugees are being victimized twice, both at home and abroad, with no real options available to them.

89. See Panayi, *supra* note 60, at 141. These organizations, namely the "old-established NPD [National Democratic Party]," the DVU [*Deutsche Volkunion*, or German People's Union], and the Republican Party [*Republikaner*], have not adopted an overtly neo-Nazi ideology in order to avoid banishment, but they remain far more nationalistic than any of the other mainstream German political parties. See *id.* Some of the more controversial positions adopted by these groups include supporting the collective over the individual and calling for more radical measures in dealing with foreigners, including "deportation and further tightening of the right of asylum, guaranteed under the federal constitution." *Id.*

In addition to blaming immigrants for Germany's unemployment, social problems, and national identity crisis, these groups also hold that Germany should take pride in its past and shed the guilt associated with Nazism. See *id.*

90. See *id.*

91. See Aepfel, *Violence Against Foreigners*, *supra* note 85.

92. See Sharma, *supra* note 20.

93. See *id.*

94. The anti-foreigner attacks and violence in Rostock and Hoyerswerda were characterized by masses of onlookers who watched silently or even cheered the attackers. See Aepfel, *Violence Against Foreigners*, *supra* note 85. This passivity may disturbingly reflect underlying support of xenophobic activity. See *id.*

95. See NPR, *supra* note 73 and accompanying text.

96. See Sharma, *supra* note 20 (noting that uncoordinated repatriation schemes solidify plans for ethnic cleansing by impeding "the creation of a truly single Bosnia with two truly multi-ethnic entities.").

D. *Changing German Attitudes: A Long-Term Approach to a More Integrated and Tolerant German State*

1. *Minor Economic Considerations: A Small but Logical Starting Point*

Altering existing German attitudes toward foreigners who live in Germany and who benefit from its wealth in the midst of high unemployment and significant reunification costs cannot reasonably be expected to occur quickly and on a large scale. Nonetheless, Germany's current political climate is ready⁹⁷ to start the process whereby foreigners may begin to receive increased acceptance in Germany, to the benefit of both the foreigners and the German people.

Similar to the inertia of German attitudes toward foreigners, the economic situation in Germany most likely will not improve dramatically anytime soon.⁹⁸ But this dismal economic forecast should not succeed as an excuse to exclude foreigners generally and Bosnians specifically from helping cure Germany's fiscal troubles. By including foreigners in the country's labor efforts at a minimal detriment to German workers,⁹⁹ Germany not only maximizes its overall labor efficiency, but also takes the first steps toward assimilating these people into German society. Although implementing these measures may be limited in scope, Germany can nevertheless do so with relative ease. Moreover, the symbolic significance of such measures lies in the fact that they can serve as a starting point for changing underlying resentment among Germans toward foreigners.

First of all, German labor efficiency could be bolstered by permitting asylum seekers, such as Bosnians under temporary protection status, to work in positions that Germans are unwilling to assume.¹⁰⁰ Second, the German federal government should assist the *Länder* (states) in reapportioning Bosnian refugees based on specific labor needs of the particular states.¹⁰¹ Finally, in conjunction with the second suggestion, states eager to deport or forcibly repatriate Bosnian refugees, such as the conservative state of Bavaria,¹⁰² should be given the option of transferring them instead to another *Land* (state) within Germany that is willing and able to accept the additional

97. See NPR, *supra* note 73.

98. See *supra* text accompanying note 74.

99. See *supra* note 67 and accompanying text.

100. See *supra* note 67 and accompanying text.

101. When the federal government originally shifted responsibility for the Bosnian refugees among the several states, it did so without accounting for differences in labor demands in these states. See Sharma, *supra* note 20. As such, the federal government sought to distribute the burden of these refugees equally to the states, but not necessarily in the most effective manner. See *id.*

102. *Bavaria First State to Begin Deporting Bosnian Refugees*, SAN DIEGO DAILY TRANSCRIPT, Oct. 10, 1996.

refugee burden. Such a transfer could serve the multifaceted purpose of removing the Bosnians from potentially hostile environs, of demonstrating to the expelling state that it retains some autonomy in regulating refugees and asylum seekers within its borders,¹⁰³ and of redistributing laborers to another area where they are more welcome and productive.¹⁰⁴

2. *Integration as a Means of Addressing the Causes of the Problem*

While the aforementioned suggestions on ameliorating xenophobic attitudes toward the Bosnian refugees may provide some short-term relief to the refugees themselves and the burdened German states,¹⁰⁵ more permanent, and perhaps more controversial¹⁰⁶ and meaningful steps must be taken to diminish the anti-foreigner and anti-refugee sentiment of which Germany is particularly fearful.¹⁰⁷ One effective measure Germany could adopt to provide a more durable solution to xenophobic concerns would be to relax the citizenship requirements for foreigners who have lived in Germany for a substantial amount of time and have demonstrated a desire to assimilate into and contribute to German society and culture.

In their current form, Germany's citizenship laws, in contrast to its refugee laws,¹⁰⁸ are the most restrictive in the European Union, based on the

103. Naturally, the expelling state would be expected to bear the costs of transporting these refugees to the accepting state, and would most likely be expected to share some of the costs of relocating and providing for their continued support as well. In spite of this lingering financial burden, the expelling state may still be willing to pay this price in order to quell xenophobic tensions among its local citizenry. While this financial obligation undoubtedly decreases the expelling state's autonomy, it does so only minimally when the possibility of repatriating the refugees to their homeland would constitute *refoulement* and thus be in derogation of well-established principles of refugee law. See 1951 Refugee Convention, *supra* note 42, art. 33; see also *supra* note 46 and accompanying text for a discussion of *non-refoulement* as the focus of international refugee law.

Moreover, by creating this transfer option, states averse to the idea of accommodating refugees and asylum seekers for a protracted period of time may be more willing to assist in extenuating refugee crises in the future, knowing that they can later shift this refugee burden to another state at a minimal cost.

104. See *supra* note 67 and accompanying text.

105. See *supra* Part III.A.

106. *German Citizenship*, THE IRISH TIMES, April 23, 1997, available in 1997 WL 7388046 ("Citizenship and nationality laws are among the most difficult and intractable constitutional issues in contemporary political communities.")

107. See *supra* notes 55-56 and accompanying text.

108. "A Germany which has been so generous in playing host to migrant workers and refugees[—]a natural role for Europe's strongest economy and emerging predominant power[—] must find a way to develop the means to accommodate those who have contributed so much to its own development." *German Citizenship*, *supra* note 106. But see *supra* Part III.A. for a discussion of Germany's uncertain economic foundation. While Germany may presently have one of Europe's strongest economies, it is by no means positioned to support unqualified masses of foreigners.

archaic concept of *jus sanguinis*.¹⁰⁹ Adherence to this principle may be adduced in large part to a prevalent attitude in Germany that the country is not one of immigrants,¹¹⁰ notwithstanding the numerous ways in which foreigners have accessed and continue to enter the country.¹¹¹ Even though non-Germans have devised various means to get into Germany, less than ten percent of Germany's population is comprised of such non-Germans.¹¹² Ironically, Germany's citizenship structure renders it virtually impossible for those who are not ethnic Germans to attain citizenship status.¹¹³ This irony of the country's citizenship procedures is manifested in the fact that *Aussiedler*¹¹⁴—"individuals and families of German origin"—are virtually entitled to instant citizenship, while other foreigners can live and work in Germany "for decades without gaining that status."¹¹⁵ While the desire of many *Aussiedler* to return to their origins is understandable, most, if not all, have contributed far less to Germany's prosperity over the past decades than the numerous foreigners living in Germany.¹¹⁶

At first glance, it appears that liberalizing German citizenship laws will have little direct impact on the Bosnians currently residing in Germany.

109. Germany's imperial citizenship laws date from 1913 and are based on the European tradition of *jus sanguinis*, or nationality by blood or ancestral descent. *See German Citizenship, supra* note 106. This policy has ensured that only a small number of foreigners who come to Germany can attain citizenship. *See id.*

110. *See* Thomas P. Spieker, *Despite Seven Million Aliens, Germany Says it Has No Immigrants*, DEUTSCHE PRESSE-AGENTUR, Sept. 29, 1996, available in 1996 WL DCHPA 21:06:00. Official German policy provides generous provisions to foreigners temporarily in Germany, but it does not offer the option of settlement. *See id.* The prevailing attitude among conservative German politicians is that "Germany is not a country of immigration," corroborated by the fact that "[n]one of the foreigners currently living in Germany is legally defined as an immigrant," a word that remains extremely controversial for the German leadership. *Id.*

It should be noted that even the more liberal German political parties want a quota system imposed so that the influx does not run unchecked. *See id.*

111. *See id.* (noting that "[l]arge-scale planned migration" has been occurring in Germany in a variety of forms for over 40 years).

112. *See id.*

113. *See* Aepfel, *Kohl Bloc, supra* note 88.

114. *Aussiedler* are Germans who have lived outside of Germany for many generations in places such as the former Soviet Union, Poland, and Romania. *See* STATE OF THE WORLD'S REFUGEES 1995, *supra* note 22, at 202. *Aussiedler* are practically guaranteed German citizenship upon their return to Germany, despite the fact that many of these people have retained little of their German heritage, including the ability to speak German. *See id.*

115. Aepfel, *Kohl Bloc, supra* note 88.

116. Volkmar Schultz, a member of the Social Democratic Party (SDP) in Germany's lower parliamentary house (*Bundestag*) likened the current immigrant dilemma in Germany to the rallying cry of the American Revolution: "No taxation without representation." Foreign workers who have consistently paid their taxes over the years, but who are not entitled to the same rights and privileges as German citizens, such as voting, have voiced similar grievances as the American colonists. Volkmar Schultz, Address to the Indianapolis-Cologne Sister Cities Committee (Oct. 6, 1998) [hereinafter Schultz].

Concededly, the Bosnian refugees do not stand, or even wish,¹¹⁷ to benefit firsthand from a more accommodating citizenship framework in Germany. However, as it is becoming increasingly apparent that the Bosnians will be staying in Germany longer than was initially anticipated,¹¹⁸ they do stand to benefit from a German public more tolerant of foreigners, as do other nationalities presently living in Germany. This tolerance can be developed through changing the country's prohibitive citizenship laws which, in addition to helping the country cope with its pending refugee and foreigner dilemmas, will also make Germany more adept and sensitive to dealing with future refugee crises. This long-term approach toward refugee protection is especially critical as the international community's commitment to asylum principles has been exhibiting signs of erosion.¹¹⁹

Some would still argue that the prospect of loosening German citizenship requirements poses the substantial risk of encouraging waves of indigent "economic immigrants"¹²⁰ to flock to Germany and of inciting racial tensions as outsiders move into Germany and compete for limited jobs and other social welfare benefits.¹²¹ But Germany's 1993 amendment to Article 16 of its Basic Law has been extremely effective in reducing the overall number of asylum applications in Germany,¹²² thus debunking speculation that the country will be inundated by more refugees and asylum seekers than in previous years. Furthermore, even the more liberal German politicians are in agreement with their conservative counterparts that flexible safeguards should be incorporated into changes of Germany's citizenship laws to prevent the excesses cited by those opposed to more liberal grants of citizenship to foreigners in Germany.¹²³

Contrary to political rhetoric, although Germany may not be a traditional

117. Most of these uprooted people want to return to Bosnia and this is generally deemed the best course of action for these people in this, the "decade of repatriation." See *supra* note 17 and accompanying text; see also *Bosnia's Homeless*, *infra* note 145 (citing fear of persecution as the only impediment to the Bosnians' general desire to return home).

118. See *infra* Part IV.

119. See *supra* notes 24-25 and accompanying text.

120. See Blay, *supra* note 24, at 377 (noting the resentment toward "economic refugees" and their precarious status in refugee law).

121. See Spieker, *supra* note 110; see also Aeppel, *Kohl Bloc*, *supra* note 88 (noting that average Germans, particularly in the "economically depressed" former East Germany, perceive foreigners "as competition for scarce social benefits and apartments.").

122. See *supra* note 61 and accompanying text; see also *Number of Asylum-Seekers 60% Down in Germany*, AGENCE FRANCE-PRESSE, Jan. 6, 1995, available in 1995 WL 7738826 (citing the effectiveness of Germany's recent constitutional amendment in restricting the right to asylum).

123. See Spieker, *supra* note 110. One of the precautionary measures would impose immigration quotas, favored even by "those approving of immigration . . ." *Id.* Others include preserving a "legal means" to curtail immigration in times of high unemployment and housing shortages. *Id.* In addition, those parties most sympathetic to citizenship law reform would take into account the foreigner's ability to speak German. See *id.*

destination of immigration for refugees seeking permanent resettlement,¹²⁴ its ties to immigration are not as tenuous as some top German officials would suggest.¹²⁵ When the first three hundred modern immigrants arrived in post-war Germany from northern Italy in the mid-1950s, they worked low-paying farm jobs.¹²⁶ As the country's *Wirtschaftswunder* (Economic Miracle) gained momentum, Germany recruited more foreign labor from abroad, but harbored no intentions of integrating these guest workers under the assumption that they would voluntarily return to their home countries.¹²⁷ Contrary to this expectation, however, these men's families began to join them in their newly-adopted country, prompting Germany to ban foreign recruitment in 1973.¹²⁸ Irrespective of these attempts to exclude foreigners, Germany, consistent with its heavy use of foreign labor throughout the century,¹²⁹ had already, albeit perhaps unwittingly, made these foreigners an integral part of Germany itself, not unlike the United States had done with African slaves.¹³⁰

While the situation of the Bosnian refugees and foreigners in Germany is distinct from the African-American experience in the United States, integration nevertheless remains a viable option for changing German attitudes toward outsiders and for reestablishing Germany as Europe's El Dorado¹³¹ for migrants who genuinely need protection.¹³² Now that Germany has elected a new government that is markedly more receptive to the idea of broadening the country's citizenship laws, the "political leadership" is aptly situated to

124. The United States, Canada, Australia, and New Zealand are considered traditional countries of resettlement for refugees. See *UNHCR Says Exiled Myanmar Students Will Cooperate with Resettlement*, AGENCE FRANCE-PRESSE, Oct. 28, 1999, available in 1999 WL 25133225 (contrasting the willingness of the United States, Canada, Australia, and New Zealand to resettle refugees with the traditional unwillingness of some European countries to such refugee resettlement). Of the 43,000 resettlement places requested by the UNHCR each year, 60% are provided by the United States. See Karin Landgren, *Reconciliation: Forgiveness in the Time of Repatriation*, in WORLD REFUGEE SURVEY 1998, *supra* note 59, at 20, 20.

125. See Spieker, *supra* note 110 and accompanying text.

126. See *id.*

127. See *id.*

128. See *id.*

129. See *supra* note 66 and accompanying text.

130. Cf. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("The destinies of the [black and white] races, in [the United States], are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.").

131. "El Dorado" is defined as "a fabulously rich region; a golden opportunity." THE NEW AMERICAN WEBSTER HANDY COLLEGE DICTIONARY 225 (3d ed. 1995). This term is common parlance in refugee law, symbolizing a secure and enduring sanctuary for refugees. See, e.g., Daniel Benjamin, *Huddled Masses: New Prosperity and Freedom Are Drawing Refugees to the Countries of the Former East Bloc*, WALL ST. J. EUR., Oct. 3, 1994, at R14 (observing the significant role that Germany's constitutional amendment to Article 16(a) of its Basic Law has had in shutting the "golden door to El Dorado" of Western Europe).

132. See BERT, *supra* note 6, at 98-99.

effectuate these controversial, but ultimately necessary and beneficial changes.¹³³ Such reform is capable of realigning the international community down the humanitarian path originally conceived for the protection of displaced peoples.

IV. THE CURRENT SITUATION IN BOSNIA HERZEGOVINA AND ITS ABILITY TO ABSORB BOSNIAN RETURNEES FROM GERMANY

A. *The 1992-1995 Yugoslav War: Complex Origins and Troublesome Aftermath*

The war in the former Yugoslavia that caused the lingering refugee crisis in Germany began on March 1, 1992, when Bosnian Croats and Bosnian Muslims voted overwhelmingly for independence and sovereignty, contrary to the Bosnian Serbs who refused to participate in the vote.¹³⁴ Shortly thereafter in April, the Bosnian Serbs seized large areas of land in and around Bosnia Herzegovina in response to the international community's formal recognition of Bosnia Herzegovina as an independent state.¹³⁵ It took the Bosnian Serbs only days to exert control over more than sixty percent of this territory.¹³⁶ Although the hostilities that began in 1992 formally ended with the signing of the Dayton Peace Accords (DPA) in 1995,¹³⁷ the issue of displaced peoples, both inside and outside of Bosnia Herzegovina, has been a major concern surrounding the conflict.¹³⁸

To comprehend more completely the difficulties that refugees are encountering upon their return to Bosnia Herzegovina, it is useful to acknowledge some of the typical problems generally facing refugees who repatriate to their war-torn homelands.¹³⁹ In the case of the Bosnian refugees, however, there exists an additional degree of difficulty injected into the repatriation scenario, born out of centuries of political conquest and strife.¹⁴⁰ Thus, while the precise causes of the ethnic hatred and ethnic cleansing in Bosnia Herzegovina remain somewhat unclear,¹⁴¹ the most recent "Yugoslav conflict [nonetheless] introduced a degree of complexity that is unusual even

133. *Id.*

134. *See Davy, supra* note 6, at 53.

135. *See id.* at 55.

136. *See id.*

137. General Framework for the Dayton Peace Agreement, Annex 7, signed in Dayton, Ohio, United States of America on November 21, 1995, 35 I.L.M. 89.

138. *See Davy, supra* note 6, at 61.

139. *See, e.g., WHEN REFUGEES GO HOME, supra* note 5, at 34-46; *see also infra* Part IV.C-D. for a more detailed discussion of obstacles confronting refugees repatriating to areas devastated by combat, genocide, and ethnic cleansing.

140. *See BERT, supra* note 6, at 23-43.

141. *See id.* at 98-106.

in religiously and culturally pluralistic societies riven with conflict and strife.”¹⁴²

It is this complexity, carried over into the post-war period, that is so greatly impeding the return of the Bosnian refugees to their homes.

B. *An Extended Commitment by the International Community*

When Germany agreed to provide temporary protection status (TPS) for the Bosnian refugees in 1992, there was an explicit understanding between the Bosnian and German governments that Germany's acceptance of and responsibility for these people would be temporary.¹⁴³ This stipulation was consistent with both modern asylum trends¹⁴⁴ as well as the overwhelming desire by the Bosnian refugees to return home as soon as conditions permitted.¹⁴⁵

Many assumed that repatriation could occur soon after the hostilities had ceased and the DPA had been signed.¹⁴⁶ In fact, the “express purpose” of the DPA was “to restore Bosnia as a multiethnic state and guarantee the right of return for all Bosnians”¹⁴⁷ For Germany's benefit, the timely repatriation of the Bosnian refugees would begin to ease Germany's substantial subsidization of these people and assuage anti-foreigner sentiment and violence.¹⁴⁸ As further justification for quickly repatriating the Bosnians, Germany cited the altruistic motive of preparing for a flood of refugees from the impending crisis in Kosovo, although there was little evidence at the time that such a wave of people was imminent.¹⁴⁹

142. *Id.* at 93.

143. See Thouez, *supra* note 9, at 98.

144. See Landgren, *supra* note 124, at 20-21. “As the total number of refugees continues to grow, temporary protection followed by voluntary repatriation is now seen as the most practical and, in the majority of cases, the most satisfactory means of protecting many of today's refugees, the great majority of whom are fleeing from armed conflict.” *Id.* (footnote omitted).

See also *supra* note 17 and accompanying text for a discussion of repatriation as the desired outcome of refugee situations.

145. See *Bosnia's Homeless*, WALL ST. J. EUR., Oct. 14, 1996, available in 1996 WL WSJE 10752418 (acknowledging that the majority of Bosnians in Germany would prefer to return to their homeland than remain in asylum, but remain apprehensive that they will be subjected to persecution upon return).

146. See *supra* text accompanying note 137.

147. *Bosnia's Homeless*, *supra* note 145.

148. See *supra* Part III.A-B.

149. “For the time being the actual flow [of refugees from Kosovo] into western Europe is really not that great, although . . . certainly there is a constant trickle” Michael Thurston, *Europe Braces for Kosovo Refugee Wave*, AGENCE FRANCE-PRESSE, Aug. 6, 1998, available in 1998 WL 16573486 (quoting Maki Shinohara of the UNHCR). Authorities are not predicting a repeat of the mass exodus of people that accompanied the Yugoslav war in 1992, but the situation in Kosovo is nonetheless being closely monitored “after a surge in asylum requests by people fleeing the troubled Serbian province [of Kosovo].” *Id.*

Likewise, the Bosnian government, at least initially, desired a timely repatriation of the Bosnian refugees, but for different reasons, namely to aid in rebuilding the country's devastated infrastructure and "brain drain"¹⁵⁰ and to reestablish some overall sense of normalcy.¹⁵¹

Even the United States, at least near the time of the ratification of the DPA, was supportive of Germany's efforts to relieve itself of the tremendous sacrifices it had made in coping with the Bosnian refugees.¹⁵² Had the United States not initially supported Germany's efforts to repatriate the Bosnian refugees, American diplomacy would have been admitting that the Agreement had failed "in its most basic promise that Bosnia's refugees would be able to return safely to their homelands."¹⁵³ American confidence in a speedy and efficient return of refugees from abroad was evidenced further by the Clinton administration's limited commitment of NATO troops in the region.¹⁵⁴

But the shortcomings of the DPA and snares to repatriation soon demonstrated that returning the Bosnian refugees to their former homes and lives would take considerably longer than was originally contemplated.¹⁵⁵ Despite this concession and entreaties from the Bosnian government for a return scheme more attuned to the area's limited capability to handle the returning refugees,¹⁵⁶ Germany continued to repatriate these people.¹⁵⁷

The Bosnian refugees themselves were also reluctant to repatriate, notwithstanding their general wish to return home as soon as possible.¹⁵⁸ Haunted by unspeakable atrocities from the war,¹⁵⁹ as well as reports of being

See also Clive Freeman, *Many Bosnian Refugees Still Hesitant About Returning Home*, DEUTSCHE PRESSE-AGENTUR, May 20, 1998, available in 1998 WL 20:07:00 (citing a German official who was disheartened by the fact that temporary protection may not be available for Kosovo refugees because the instrument of TPS is continually being abused).

150. "A country like Bosnia Herzegovina with two-and-a-half million people cannot exist if 600,000 refugees remain outside the country. People who have qualifications and have had a good schooling are needed there . . . in order to stabilise the area." Freeman, *supra* note 149 (quoting Barbara John, Berlin's Commissioner for Foreigners' Affairs and a member of the liberal wing of the Christian Democratic Union (CDU)).

151. One of the highest profile groups that Germany returned to Bosnia was 31 "hollow-eyed 'orphan' children." Ralph Atkins, *Bonn Offers Good Home to Watchdog*, FIN. TIMES, Apr. 14, 1997, available in 1997 WL 3786386. Although news images of these children prompted criticism of German repatriation policies, "[t]heir return was in fact eagerly sought by authorities in their homeland where their original rescue was seen in some quarters as amounting to a kidnap. Most of them are not strictly orphans; rather their parents were unable to look after them." *Id.*

152. *See Bosnia's Homeless, supra* note 145.

153. *Id.*

154. *See id.*

155. *See infra* Part IV.C-D.

156. *See* Sharma, *supra* note 20.

157. *See id.*

158. *See Bosnia's Homeless, supra* note 145.

159. *See* BERT, *supra* note 6, at 50-57.

met with violence and intimidation upon return through existing repatriation programs,¹⁶⁰ many Bosnian refugees wanted assurances that they would be unimpeded when they decided to return.¹⁶¹ One deportee even took the extreme measure of hijacking his flight home to ensure that he would not be subjected to some of the horrors that he perceived awaited him in Bosnia Herzegovina, preferring instead to be incarcerated in Germany than to live in "freedom" in his homeland.¹⁶²

C. *Traditional Obstacles Inherent in the Aftermath of Armed Conflict*

Like most refugees and displaced peoples, the Bosnians in Germany and within Bosnia Herzegovina's internal borders have been uprooted by armed conflict.¹⁶³ Similarly, although the repatriation movement in Bosnia Herzegovina is unique, it shares some common characteristics with other repatriations that are responding to the aftermath of war.¹⁶⁴ Most significantly, repatriation often occurs in the midst of conflict, or "at least in a context of continuing instability or insecurity."¹⁶⁵ Against this imperfect backdrop, formidable problems arise concerning the protection of the Bosnian refugees returning to their homes.¹⁶⁶

But protecting refugees from acts of violence and aggression stands as only one of the numerous obstacles that refugees, like the Bosnians, encounter when they return. Perhaps the most pressing issue upon return for refugees in Bosnia Herzegovina is the quality of housing.¹⁶⁷ Unfortunately, however, accommodating the returning refugees and displaced persons appears to be one of the most significant difficulties faced by the Bosnian government due to the massive damage inflicted upon the nation's infrastructure during the

160. "The treatment of about 4,000 Muslims still living in Republika Srpska in 1997 became the barometer refugees and displaced persons used to measure the feasibility of their return. Most evidence pointed to discrimination and harassment aimed at forcing minorities out of their homes, especially the elderly." WORLD REFUGEE SURVEY 1998, *supra* note 59, at 166.

161. See Freeman, *supra* note 149.

162. See *Bosnian Deportee Hijacks Plane*, AGENCE FRANCE-PRESSE, Jan 7, 1997, available in 1997 WL 2036049.

163. See STATE OF THE WORLD'S REFUGEES 1993, *supra* note 2, at 67.

164. See *id.* at 103.

165. *Id.*

166. See *id.*

167. See AMNESTY, *supra* note 10, at 24 n.30. "Among factors important for return, quality of housing received the highest rating, with 97[%] of respondents indicating it as an important factor" *Id.*

war,¹⁶⁸ particularly the housing.¹⁶⁹

Yet despite the notable success that the United Nations High Commissioner for Refugees (UNHCR) has had in rebuilding the "habitable accommodation" in Bosnia Herzegovina,¹⁷⁰ other aspects inherent to post-war conditions in the country are exacerbating the housing shortage. For one, the progress of the UNHCR's "shelter project" simply cannot compensate for the massive reconstruction projects necessary to absorb those large numbers of Bosnian refugees and displaced persons who have not yet returned home.¹⁷¹ These reconstruction efforts are complicated further by the fact that Bosnia Herzegovina's population is drastically smaller and weaker than before the war,¹⁷² and ethnic groups within Bosnia Herzegovina are even deliberately destroying housing in order to prevent returns by other ethnic groups, usually minorities.¹⁷³

In addition, even if Bosnian refugees are able to find adequate housing when they return, there exists the constant threat that they are merely occupying the home of another ethnic group, subjecting the occupying family to future uncertainties of displacement.¹⁷⁴ This unsettled scenario of doubt in accommodation falls far short of international refugee law's aim of providing returnees with a "durable solution" through repatriation.¹⁷⁵

Finally, although Bosnia Herzegovina represents a repatriation situation more complex than many post-war return schemes,¹⁷⁶ in addition to the safety and housing concerns of returnees, there exist other "traditional," yet significant barriers to repatriation in Bosnia Herzegovina. These obstacles

168. See UNHCR, *The State of the World's Refugees 1997-98: A Humanitarian Agenda* (visited Sept. 15, 1998) <http://www.unhcr.ch/sowr97/box4_4.htm> [hereinafter *Humanitarian Agenda*]. "While it is impossible to estimate the total amount of war damage in Bosnia, it is clear that the cost of reconstruction will run into many billions of dollars." *Id.*

169. "A major obstacle to the return of displaced Bosnians has been the shortage of habitable accommodation throughout much of the country. It is estimated that 60[%] of Bosnia's housing was either damaged or destroyed during the war." *Id.*

170. See *id.*

171. *Id.*

172. See *id.*

173. See AMNESTY, *supra* note 10, at 16-17. In this regard, the fear of personal safety and desire to secure housing are closely related. See *id.* To this end, it should be noted that such wanton destruction of housing has "sent a clear message to those thinking of returning to their homes that their efforts to reconstruct them can be thwarted in a single act of violence." *Id.*

174. See generally *id.* at 7-21, 24 (noting the additional difficulties posed by repatriating refugees from abroad "in respect of . . . relocation gridlock . . . [which in part can be described as] refugees repatriating from abroad who cannot return to their own homes [who] have been sheltered in housing belonging to people who are themselves displaced or refugees."). *Id.*

175. See *Glossary, supra* note 15. A "durable solution" is defined as one that will provide the returnee with permanent, safe, and livable conditions upon return. *Id.*

176. See *infra* Part IV.D.

include unemployment,¹⁷⁷ “war taxes,”¹⁷⁸ depletion of intellectual and physical labor resources,¹⁷⁹ landmines,¹⁸⁰ and overburdened urban populations.¹⁸¹

All of these factors, especially when considered cumulatively, present an extremely intricate and complicated backdrop against which the international community, and Germany in particular,¹⁸² is attempting to repatriate the Bosnian refugees. This already desperate situation assumes an even bleaker outlook when the unique and ghastly aspect of ethnic cleansing and attempted genocide is added to Bosnia Herzegovina’s existing “traditional” obstacles to repatriation.

D. Genocide and Ethnic Cleansing as Obstacles to Repatriation

Following the Holocaust in the 1940s, the international community

177. See AMNESTY, *supra* note 10, at 24 n.30 (citing employment opportunities as receiving a high rating (81 %) among factors important to Bosnian refugees); see also *Humanitarian Agenda*, *supra* note 168 (“[U]nemployment is estimated at between 65 and 75 [%].”).

178. See WORLD REFUGEE SURVEY 1998, *supra* note 59, at 168. Some local authorities in Bosnia Herzegovina have implemented a “war tax,” typically disproportionately on minorities, “as a retroactive contribution for the war effort.” *Id.* For example, local Bosnian Croat authorities demanded a tax from returning Muslims as “an alternative for service in the Croat militia[,]” and the tax in Republika Srpska “was calculated at 100 Deutsche Marks for each month during the war that the person was outside Republika Srpska.” *Id.*

179. See *Humanitarian Agenda*, *supra* note 168 (acknowledging not only the smaller and physically weaker population in post-war Yugoslavia, but also the “[l]arge numbers of highly qualified people [who] have left, and are perhaps the refugees who are least likely to return.”).

180. The Dayton Peace Agreement mandates that the former warring factions, not international military forces, are responsible for mine clearance. See WORLD REFUGEE SURVEY 1998, *supra* note 59, at 169. Unfortunately, “[d]espite enormous pressure from the international community, Bosnia’s former warring factions have been extremely slow to address this issue.” *Humanitarian Agenda*, *supra* note 168.

Landmines in Bosnia, estimated by some at up to six million, are responsible not only for human casualties and injuries that appear to be directly proportional to the rate at which refugees are attempting to return, but the mines are also substantially hindering reconstruction and development projects. See WORLD REFUGEE SURVEY 1998, *supra* note 59, at 169. The inability to clear mines in the area is attributable to “lack of local expertise in this area, the absence of accurate mine field records[,] and the country’s severe winters, when much of the ground is frozen and covered with snow.” *Humanitarian Agenda*, *supra* note 168. Furthermore, international efforts to help alleviate this problem have been stalled by limited funding, thereby restricting mine clearance to currently populated areas and not those of potential refugee return. See WORLD REFUGEE SURVEY 1998, *supra* note 59, at 169.

181. Bosnia’s substantial landmine problem will likely render the country’s agricultural sector, upon which it is heavily reliant, “an economically stagnant wasteland.” *Humanitarian Agenda*, *supra* note 168. This in turn will leave rural regions inaccessible, forcing masses of people to urban areas already plagued with unemployment and thus “exacerbating the country’s existing social and political tensions.” *Id.*

182. See AMNESTY, *supra* note 10, at 25 (citing UNHCR estimates that 95,000 of the 110,000 refugees returning to Bosnia Herzegovina in 1997 came from Germany).

vowed "never again" to stand by idly when the threat of genocide emerged, but recent conflicts around the globe suggest that ours is an "increasingly genocide-prone" world.¹⁸³ Indeed, the fact that genocide is still occurring over half a century since the end of the Nazi atrocities in World War II indicates "that there is no reason to believe the 'never again' rhetoric."¹⁸⁴

At least in part, the recurrence of genocide in our modern world can be attributed to the international community's reluctance to intervene against other countries that decide to commit such human rights abuses against their own people and within their own borders.¹⁸⁵ Such reluctance to interfere with another nation's sovereignty is understandable, but it may not always be justifiable when severe human rights violations, such as genocide and ethnic cleansing, are at stake.¹⁸⁶

The perpetration or attempted perpetration of genocide and ethnic cleansing are reprehensible standing alone, but they unfortunately extend their destructive power and effects into repatriation efforts, thus further complicating the process of successfully returning those who have observed and been victimized by these practices.¹⁸⁷ Ethnic cleansing and genocide frustrate the expectations of host countries that are focused on the timely return of refugees who have witnessed these unfathomable horrors.¹⁸⁸ One writer on the subject has even commented that reconciliation in divided societies, such as Bosnia Herzegovina, will require much time, assuming that reconciliation is even possible at some future date.¹⁸⁹ This notion stands in opposition to the Western preference of repatriating refugees on some type of predictable and quantifiable basis.¹⁹⁰

In contrast, however, such an expectation by the West is neither realistic¹⁹¹ nor beneficial to any of the parties involved.¹⁹² The "psychological

183. Roger P. Winter, *The Year in Review*, in WORLD REFUGEE SURVEY 1998, *supra* note 59, at 14, 19.

184. *Id.*

185. *See id.*

186. *See* BERT, *supra* note 6, at 14. Intervention of another country's sovereignty "will continue to be made on a case-by-case basis, the kind of analysis that will allow consideration of the numerous variables, and the varying weight and priority that will have to be assigned to them depending on the circumstances of each unique case." *Id.* The author also suggests that in the particular case of Bosnia Herzegovina, U.S. and European policy at the outset of the 1992 war in Yugoslavia was flawed in that it should have adopted a more militant and proactive approach to the situation much earlier than it finally did in 1995. *See id.* at xxi.

187. *See* Landgren, *supra* note 124, at 24.

188. *See id.*

189. *See id.* (quoting Fergal Keane, who, having observed factional killing in Ireland, wrote that "[i]t is difficult to accept such a thesis [that reconciliation is not forthcoming] because it suggests that the West must be prepared for a long and frequently unprofitable engagement with these divided societies.").

190. *See id.*

191. *See id.*

192. *See id.*

and emotional framework” for reconciliation in areas like Bosnia provides compelling evidence that eradicating the causes that forced the refugees to flee in the first place will take far longer than anticipated.¹⁹³ Nevertheless, ensuring a durable solution will ultimately be the most effective and humane manner in which refugees can reestablish relationships with their homelands and in which the international community can help itself and the former refugees avert such a crisis in the future.¹⁹⁴

Considering the current situation in Bosnia Herzegovina and the monumental obstacles impeding repatriation there, the international community, especially Germany, should reconsider its eagerness to repatriate the Bosnian refugees. Instead, Germany and the international community need to remove the time element from this complicated repatriation dilemma in order to ensure more durable solutions for the Bosnian refugees.

V. RESPONSES TO THE BOSNIAN REFUGEE CRISIS

A. *German Adherence to International Refugee Law Precepts: Complying in Letter, but with Shortsighted Spirit*

In many regards, Germany’s human rights record concerning refugees and asylum seekers has been progressive, compassionate, and commendable.¹⁹⁵ Similarly, Germany, by offering temporary protection status (TPS), has more or less provided generously for the Bosnians who sought refuge within its borders,¹⁹⁶ despite allegations to the contrary.¹⁹⁷ Now that the Bosnians’ TPS has officially expired in Germany,¹⁹⁸ the focus must shift to the appropriate repatriation scheme for these people.

Repatriation has recently been adopted over more traditional measures as the preferred solution to refugee dilemmas,¹⁹⁹ signifying a shift from “exilic bias” to a “proactive, homeland-oriented, and holistic approach.”²⁰⁰

193. *Id.*

194. *See id.*

195. *See supra* Part II.B.

196. *See supra* text accompanying notes 9-12.

197. *See Bonn Rejects U.S. Attack on Refugee Repatriation*, XINHUA ENGLISH NEWSWIRE, May 22, 1997, available in 1997 WL 3763395. German Interior Minister Manfred Kanther noted that of the 30,000 Bosnian refugees who had left Germany, only 191 had been expelled. *See id.*

198. *See supra* note 18 and accompanying text.

199. *See Landgren, supra* note 124, at 20. “Traditional solutions for refugees are threefold: local integration in the country to which they have fled; resettlement in a third country; or voluntary repatriation to their own country.” *Id.* (footnote omitted). Although voluntary repatriation has not exclusively replaced the other traditional solutions, governments are systematically refusing to offer local integration, and only 10 governments worldwide offer resettlement to refugees. *See id.*

200. *Id.*

Therefore, it would appear that because Germany is utilizing the recognized international refugee law principle of voluntary repatriation, it is assisting the returning Bosnians in the most efficient and humane manner possible. It should be noted, however, that while repatriation has received considerable praise in resolving refugee crises,²⁰¹ the concept has only recently gained credibility²⁰² and even today its consequences are not fully understood.²⁰³ As such, Germany should not establish the dangerous precedent of fostering an unquestioning reliance on repatriation;²⁰⁴ rather, Germany should endeavor to implement this concept in a meaningful and enduring manner, without imposing inflexible deadlines on the process.²⁰⁵

B. *Creative Problem Solving at the Local Level: A Potential Prototype?*

While many uncertainties and difficulties surround the question of how Germany will conduct the repatriation of the Bosnian refugees, it remains clear that answers will likely be provided at a local level.²⁰⁶ There also exists evidence that local approaches to repatriation have enjoyed a high level of

201. See *supra* note 17 and accompanying text.

202. Refugee scholars have effectively demonstrated that "most refugee movements have tended to result in permanent exile." *WHEN REFUGEES GO HOME*, *supra* note 5, at 21. Simpson, who conducted studies of Europe's refugees during the inter-war years, asserted that "repatriation was so unlikely an occurrence as to be almost insignificant as 'a practical instrument of solution.'" *Id.* As late as 1969, Norwood corroborated these findings in his research on religious refugees throughout history. See *id.* This conclusion has been given further credence by the fact that since the Second World War, few of the major refugee movements have led to subsequent repatriations. See *id.*

203. Repatriation is premised on the assumption that because it is the most desirable of the traditional solutions, it must necessarily be the least problematic. See *id.* Not surprisingly, repatriation remains the least researched of these solutions by far, but the extant research about repatriation demonstrates that it "is anything but problem-free" and that "there is a dire need for a much better understanding of the conditions under which refugees return . . . and how their rehabilitation and reintegration can be more effectively facilitated." *Id.*

204. See *supra* note 24 and accompanying text.

205. Although rapid repatriation is not inherently bad, its success is largely determined by the "nature, duration, and legacy of the conflict." Landgren, *supra* note 124, at 21. In light of the "fundamental tension between speed and sustainability" in most repatriation schemes, "[t]he hallmarks of current conflicts militate against rapid repatriation . . ." *Id.*

In addition to having reasonable expectations about the time frame in which repatriation can occur, donor governments must also treat repatriation as a long-term investment by covering the up-front costs necessary for a successful return of the refugees. See Winter, *supra* note 183, at 18.

206. Bosnian refugees have cost German municipalities approximately \$1.67 billion annually. See Neil King, Jr., *Movable East: German Mayor Finds an Unusual Solution to Bosnian Refugees*, WALL ST. J. EUR., Apr. 22, 1998, available in 1998 WL WSJE 3515331.

success in other parts of the world.²⁰⁷ One town in Germany has already unleashed a promising and “novel repatriation program” that has attracted attention both from around the country and the world.²⁰⁸

In Düren, Germany, Mayor Josef Vosen, unlike most other German local politicians,²⁰⁹ has opted for a proactive approach to the local Bosnian refugee dilemma.²¹⁰ Like most of the Bosnian refugees in Germany, those in Düren are attempting to return to areas in which they will be ethnic minorities.²¹¹ But despite the unique difficulties posed by minority returns, Mayor Vosen negotiated a compromise whereby the Bosnian Muslims in his town would begin to move back to areas near their home town of Modrica that is presently occupied by Serbs.²¹² These Bosnian Muslims will eventually return to their original homes when the Serbs living there are reasonably able to return to their homes.²¹³ In this manner, Mayor Vosen has observed basic tenets of international refugee law and the DPA so as to provide these refugees with the hope of a durable solution.²¹⁴

Admittedly, the example of one German mayor’s plan for the Bosnian refugees in his town may not work for all German municipalities, but his thorough approach and dedication to a durable solution at least provide a basis for an ultimately successful repatriation.²¹⁵

207. See Landgren, *supra* note 124, at 22 (crediting “the use of small-scale, quick-impact projects in Nicaragua . . . with ‘reconciling and reintegrating groups of people with different interests and political allegiances.’”) (footnote omitted).

208. See King, *supra* note 206.

209. To persuade Bosnian refugees to return home, German cities have typically relied on monetary perks and threats of expulsion, but with limited success. See *id.*

210. See *id.*

211. See AMNESTY, *supra* note 10, at 21. The UNHCR estimates that of the approximately 600,000 Bosnian refugees, the vast “majority of prospective returnees originate from areas where they would form part of the minority population upon return.” *Id.* In Düren’s case, the refugees are Muslims attempting to return to a Serb-held area, although the same problems exist for Serb and Croat minority returnees. See King, *supra* note 206.

212. See King, *supra* note 206.

213. See *id.*; see also *supra* note 174 for a discussion of the problems associated with ethnic groups occupying the home of other ethnic groups.

214. See King, *supra* note 206. More specifically, Mayor Vosen personally inspected the town of Modrica, as well as the area where he proposed to build housing for Düren’s Bosnian refugees. See *id.* He also enabled some of the refugees to make the same observations for themselves. See *id.* As a result, the refugees were able to make the informed decisions necessary for truly voluntary repatriation, which is essential to the concept of *non-refoulement*. See Thouez, *supra* note 9, at 100; see also *infra* Part IV. for a discussion of the numerous obstacles facing the Bosnian refugees upon return to their homes in Bosnia Herzegovina.

Additionally, Mayor Vosen complied with the Dayton Peace Agreement by building movable houses, thereby reducing the potential that ethnic divisions wrought by the war would be reestablished. See King, *supra* note 206; *Bosnia’s Homeless*, *supra* note 145.

215. See King, *supra* note 206.

C. *The International Community: Overlooking Reconciliation?*

International organizations, most notably the UNHCR, have played a vital role in assisting the return of the Bosnian refugees.²¹⁶ Programs such as the "Open Cities" initiative²¹⁷ and cross-entity bus lines²¹⁸ are facilitating movements linked to return.²¹⁹ While such activities are positive influences that provide essential support, "they are not guaranteed to beget civic culture or to compel reconciliation."²²⁰

The importance of mechanisms that support reconciliation in societies that have been devastated by genocide and ethnic cleansing lies in the fact that they can begin the lengthy process of structuring the "psychological and emotional framework" for reconciliation and forgiveness.²²¹ Such programs are often anathema to donor governments, not only because of the time and expense involved with them, but also because they do not produce measurable results, making their efficacy more difficult to assess.²²²

In spite of their alleged shortcomings, reconciliation support mechanisms stand as the logical starting point for successful repatriation of the Bosnian refugees and ultimately for new stability and order in the region.²²³ Because reconciliation is closely related to individual and cultural factors,²²⁴ these mechanisms become particularly relevant considering that they are the most realistic means through which a desire for healing and

216. See Landgren, *supra* note 124, at 22.

217. "Under UNHCR's 'Open Cities' initiative, cities where reconciliation between ethnic communities is possible openly declare themselves as such. Towns where this commitment is confirmed through the return and reintegration of minorities receive international assistance, particularly for reconstruction." *Id.*

218. See UNHCR: *Funding and Donor Relations* (visited Sept. 15, 1998) <<http://www.unhcr.ch/fdrs/midyear/yug.htm>>.

219. Other programs have focused on ensuring citizenship to minorities, fair property laws, mine clearance, monitoring the safety of returnees, supervising reconstruction, and equal participation in political life. See Landgren, *supra* note 124, at 22.

220. *Id.*

221. *Id.* at 25. International criminal tribunals, truth commissions, and peace education have been the primary reconciliation mechanisms employed in areas that have experienced war and abuse. See *id.* at 23. For perspective, however, it should be noted that reconciliation can sometimes "occur only over the span of generations, if at all." *Id.* at 25. This appears to be the case in the former Yugoslavia, where Sarejevo residents told a visiting President Clinton that the most important thing that the United States could do for Bosnia was to "[s]tay . . . [f]or at least fifty years." *Id.* at 22.

222. See *id.* at 24.

223. Truth commissions, one of the reconciliation support mechanisms, foster not only reconciliation among groups, but also help create a "moral framework for a different kind of society." *Id.* (footnote omitted).

224. See *id.*

forgiveness can be instilled.²²⁵

Finally, at least one of the reconciliation mechanisms, peace education, "can begin in countries of asylum, and even before conflict abates."²²⁶ Unlike teaching refugees necessary practical skills,²²⁷ however, host countries that address the threshold issue of peace education take the first step toward providing repatriates a durable solution. Moreover, such countries of asylum seek to minimize the likelihood of future refugee tragedies by eradicating the underlying causes of the present refugee dilemma.²²⁸

VI. CONCLUSION

The current status of international refugee law remains uncertain. As countries are beginning to view migrants as an ever-increasing burden, the focus of refugee law appears to be shifting more toward state than humanitarian interests. Although it is axiomatic that states must retain some autonomy over their immigration and asylum policies, the world cannot afford to ignore the age-old and recurring plight of refugees.

Germany, now home to hundreds of thousands of Bosnian refugees, has the opportunity to lead the international community back in the direction of focusing on the needs of displaced peoples. By liberalizing its citizenship laws and attempting to integrate foreigners into its society, Germany can begin the process of dispelling anti-foreigner sentiment. While this may not be an immediate process, the current political climate in Germany is conducive for such change.

For the time being, however, Germany, with the aid of the international community, should accept that the repatriation of the Bosnian refugees will not be conducted as readily as was initially envisioned. The conditions in Bosnia Herzegovina are simply too unstable for successful repatriation to occur without *refoulement*. With some patience and funding, however, Germany and the international community can devise creative, perhaps local, approaches to ensure durable solutions for Bosnian refugees upon their return home.

Not only is such an approach in the best interests of the Bosnian refugees, but it also accommodates the needs of Germany and the rest of the world by providing for a more stable future in Bosnia and the Balkans.

225. It is simply "impossible for people and societies that have experienced ethnic cleansing and genocide to respond to expectations of host states, donor countries, and international agencies that they get over it, go home, and move on." *Id.* at 24.

226. *Id.*

227. See Beverlee Bruce, *Preparing for Repatriation: The Case for Skills Training in Refugee Camps* (visited Sept. 17, 1998) <http://www.refugees.org/world/articles/repatriation_wor_sum97.htm>.

228. See Landgren, *supra* note 124, at 24.

Perhaps more significantly, this approach could signal an unequivocal reaffirmation of commitment to the world's refugees, thereby creating an atmosphere in which the international community can rebuild El Dorado to its former greatness.

*Jon C. Graf**

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