

Robert Schuman Centre

Benchmarks or Deutschmarks?
Determining the Criteria for the
Repatriation of Refugees to
Bosnia and Herzegovina

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RSC No. 97/23

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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BADIA FIESOLANA, SAN DOMENICO (FI)

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Printed in Italy in April 1997
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy**

Introduction*

The signing on 14 December 1995 of the *General Framework Agreement for Peace in Bosnia and Herzegovina*¹ brought to a formal end a three and a half year war which took the lives of over 250,000 persons; in which atrocities were committed which shocked people the world over; and which caused the displacement, both internally and externally, of approximately two million people.

Although generally not considered as 'refugees' in the sense of the 1951 Convention Relating to the Status of Refugees² and its 1967 Protocol³, those who found themselves outside the territory of Bosnia and Herzegovina (BiH) became, for the most part, beneficiaries of 'temporary protection', the duration, or lifting of which being recommended only on the fulfilment of certain 'benchmarks' as contained in the '*Repatriation Plan*'⁴ of the United Nations High Commissioner for Refugees (UNHCR) - the agency charged under Annex 7 of the *Framework Agreement* - the *Agreement on Refugees and Displaced Persons* - with organising the early, peaceful, orderly and phased return or repatriation of refugees and displaced persons⁵ in consultation with the Parties to Annex 7 and with host countries.

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¹ *General Framework Agreement for Peace in Bosnia and Herzegovina*. 35 ILM 75 (1996). Hereinafter, *Framework Agreement*. The peace agreements signed in Paris on 14 December technically consist of the *Framework Agreement*, signed by the Republic of BiH, the Federal Republic of Yugoslavia (FRY) and Croatia and its twelve annexes, signed by the Republic of BiH and the two entities, the Federation of BiH and the Republika Srpska but with the exception of Annex 1-B and Annex 10 which were also signed by the FRY and Croatia. Within the context of this paper, the term *Framework Agreement* is used to refer to the *Framework Agreement* and the annexes, unless otherwise specified.

For an account of the events surrounding the signing of the *Framework Agreement* see Silber. L. and Little. R., '*Pax Americana*', in '*The Death of Yugoslavia*'. London: Penguin/BBC (1996).

² Concluded: 28 July 1951; entered into force: 22 April 1954. 189 UNTS 2545. Hereinafter, 1951 Convention.

³ Concluded: 31 January 1967; entered into force: 4 October 1967. 606 UNTS 8791

⁴ See High Level Meeting on Implementation of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina. *Operational Plan for Durable Solutions within the Framework of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina and Related Regional Return and Repatriation Movements* (hereinafter, '*Repatriation Plan*'). Oslo, 8 March 1996. HLWM/1996/1 (27 February 1996).

⁵ In accordance with Article 1(5), Annex 7 - *Agreement on Refugees and Displaced Persons* - of the *Framework Agreement*.

Repatriation, at least in the voluntary sense, has been occurring since the cessation of hostilities⁶. More recently however, repatriation of a less voluntary nature has started to take place, beginning with the mandatory return of Bosnian refugees from Germany in October 1996⁷. The question is, to what extent has such repatriation commenced in accordance with the fulfilment of the 'benchmarks' and consequent lifting of temporary protection? And to what extent therefore, have those displaced by the conflict in BiH been able to exercise their right, as contained in Annex 7 to return 'freely' to their homes of origin⁸ and to do so in safety, without risk of harassment, intimidation, persecution or discrimination⁹?

In the following text I will examine the concept of temporary protection as applied to refugees from BiH and in particular the grounds for its lifting as outlined in the UNHCR's *Repatriation Plan*, namely in terms of the 'benchmarks'. This will then be followed by a discussion of the extent to which the benchmarks have been fulfilled and the consequent 'legitimacy' of mandatory repatriations to BiH.

1. Temporary Protection of Bosnian Refugees

According to UNHCR there are 1,319,250 Bosnian refugees in Europe¹⁰. Of these 450,000 are in the Federal Republic of Yugoslavia (FRY); 170,000 are in Croatia; 16,500 are in Slovenia; and 6,500 in Macedonia, all of which are states of the former Yugoslavia. In terms of other European countries, Germany has the largest Bosnian refugee population of 320,000, followed by Sweden with 122,000 and with Portugal giving refuge to the smallest number of 60 persons¹¹.

Rather than going through the determination of refugee status in accordance with the provisions laid down in the 1951 Convention which requires an assessment of each individual's application for asylum on the grounds that he/she has a well-founded fear of persecution on account of their race, religion, nationality,

⁶ As at 4-5 December 1996, it was estimated that some 250,000 persons had returned to BiH. Figures, Peace Implementation Conference. *Bosnia and Herzegovina 1997: Making Peace Work*. London, 4-5 December 1996, at 10.

⁷ New York Times, 'Bavaria Expels Bosnian War Refugees'. 10 October 1996.

⁸ Article 1(1), Annex 7.

⁹ Article 1(2), Annex 7.

¹⁰ Figures as at June 1996. United Nations High Commissioner for Refugees (UNHCR), cited in *The Economist*, 'Doors Slam'. 28 September 1996.

¹¹ Figures, *ibid*.

membership of a particular social group or political opinion¹², refugees from Bosnia have generally been accorded 'temporary protection'. The invocation of temporary protection followed a request by the UN High Commissioner for Refugees in July 1992 for governments to give such protection to persons in flight from the conflict and its associated human rights violations¹³. The basic elements of temporary protection¹⁴ are admission to safety in the country of refuge; respect for basic human rights, with treatment in accordance with internationally recognised humanitarian standards and protection against *refoulement*¹⁵; and finally, repatriation when conditions in the country of origin allow.

Temporary protection was considered advantageous for a number of reasons. Firstly, it effectively provided immediate security in that refugees from BiH were generally not required to go through the usual asylum procedures. Secondly, and consequently, Bosnian refugees were saved the anxiety of waiting to hear if their claims for refugee status had been successful. Thirdly, persons whose claims for actual refugee status might otherwise have been unsuccessful were able to receive protection¹⁶. On the domestic level, avoiding the normal asylum procedures meant that such procedures were not over-burdened and the temporary as opposed to the possibly permanent (or at least often perceived as such) nature of the protection cushioned the blow for governments having to contend with

¹² Article 1(A)(2) 1951 Convention

¹³ See *International Meeting on Humanitarian Aid for Victims of the Conflict in Former Yugoslavia*. Geneva, 29 July 1992. HCR/IMFY/1992/2 (24 July 1992). For an overview of the temporary protection regime as applied to refugees from the former Yugoslavia see Humanitarian Issues Working Group, 'Survey on the Implementation of Temporary Protection', 8 March 1995. Alternatively see, Inter-governmental Consultations, 'Report on Temporary Protection in States in Europe, North America and Australia'. Geneva: Inter-governmental Consultations (August 1995); and Kjaerum, 'Temporary Protection in Europe in the 1990s'. 6 IJRL 444-456 (1994).

¹⁴ See *Note on International Protection*, 45th Session of the Executive Committee of the High Commissioner's Programme. UN Doc. A/AC.96/830 (1994).

¹⁵ The elements of which are outlined in Conclusion No. 22 (XXXII) of the Executive Committee of the UNHCR, 'Protection of Asylum Seekers in Situations of Large-Scale Influx'.

¹⁶ 'Temporary protection was conceived as a flexible, pragmatic tool in the interest of all those seeking safety across borders and of states receiving them. The concept was meant to ensure immediate protection to broad categories of people in need of it, i.e. to the many refugees in the sense of the [1951 Convention] as well as to persons who, fleeing from situations of generalised violence, might not be found to qualify for normal refugee status under these instruments'. UNHCR. *Post Conflict Solutions. UNHCR Programme in Bosnia and Herzegovina and other Countries in the Region*. HIWG/96/2 (10 January 1996), at para.3, Annex 2.

domestic political debate, aggravated by uncertain economic times, and who have a propensity to consider themselves already 'overwhelmed' with refugees¹⁷.

2. Conditions for the Lifting of Temporary Protection and Mandatory Repatriation

One of the crucial issues involved in the provision of temporary protection is that of just how temporary it is? At what point should states accept that persons receiving temporary protection need to be offered greater certainty about their future? That is to say, after what period of time should the beneficiaries of temporary protection be able to enjoy a standard of treatment and range of rights and benefits which allows them to get on with their lives but which may make them less likely to want to return should conditions in their country of origin eventually permit return?

More importantly, at least with regard to this analysis, at which point should temporary protection be lifted? The notion inherent in the term temporary protection is that it is not a permanent status but that at some point the protection will be lifted and its beneficiaries will either have their status regularised in the host country or will be expected to return¹⁸, presenting the possibility of what some may consider as the spectre of mandatory repatriation. Indeed, as UNHCR concedes, '[f]ollowing the lifting of temporary protection, persons who do not require international protection may be returned, unless their status in the host country has been regularised'¹⁹.

However, as James Hathaway points out in his paper *'The Meaning of Repatriation'*, it is not necessarily correct to perceive repatriation only in a voluntary sense²⁰. In what is a major critique of traditional thinking concerning

¹⁷ European governments have shown an unfortunate propensity to characterise the refugee and asylum issue in terms of 'floods' or 'tidal waves' of often allegedly bogus refugees seeking asylum. Such a characterisation, apart from being factually incorrect, is used as a means of justifying tighter asylum and immigration policies in order to fend off the challenges posed by increasingly right wing and racist political debate. See for example, The Independent, *'Europe's High Tide of Hysteria: Tony Barber on the Politics of Prejudice and the Mirage of an Immigration Flood'*. 27 October 1991, or *'Why Crack Down on Refugees Who Are Not Coming? Home Office Figures Belie Warning of Asylum Cheats'*. 29 May 1992.

¹⁸ 'States and UNHCR have always underlined that among the various aspects of temporary protection there is clearly a focus on return as the most appropriate solution'. UNHCR, n16 above, at para. 7, Annex 2.

¹⁹ *Repatriation Plan*, n4 above, at para. 11.

²⁰ Hathaway's views should be seen in the wider context of the Refugee Law Research Unit's research project, *'Toward a Reformulation of International Refugee Law'*, as conceived by

repatriation - that the only legally tenable type of repatriation is voluntary repatriation²¹ - Hathaway observes how refugees (in the 1951 Convention sense) are entitled to international protection in a country of asylum *until* and *unless* conditions in the country of origin permit repatriation without the risk of persecution, as provided for in the 1951 Convention²². Repatriation should therefore, be considered as a logical part of the continuum of refugee protection, with refugee protection considered not as an immigration path but as a mechanism of human rights protection. For Hathaway the insistence that all repatriation be voluntary '...undercuts the logic of refugee status as a situation-specific trump on immigration control'²³. If refugees are to be assured of

Hathaway. The project seeks to provide a basis for enhanced international cooperation in protecting refugees which would ensure that individuals are able to flee to a place of safety when their basic human rights are violated, and which would also facilitate a more equitable distribution amongst states of the burdens and responsibilities of providing protection. See Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' 4 Journal of Refugee Studies 113 (1991) and also Refugee Law Research Unit, 'Common but Differentiated Responsibility. A Model for Enhanced International Refugee Protection Within Interest Convergence Groups. Centre for Refugees Studies, York University, 25 March 1996.

²¹ According to B.S. Chimni for example, '...to replace the principle of voluntary repatriation by safe return, and to substitute the judgement of states and institutions for that of refugees, is to create space for repatriation under duress, and may be tantamount to *refoulement*'. Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation'. 5 IJRL 442 (1993), at 454. Cited in Hathaway, 'The Meaning of Repatriation', Proceedings of a Roundtable Discussion, Working Paper 97/22, Robert Schuman Centre, EUI.

Also, Article 5(1) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, concerning 'voluntary' repatriation, states categorically that the '...essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will'. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Concluded: 10 September 1969; entered into force: 20 June 1974. 14 UNTS 691.

The UNHCR Executive Committee for its part has adopted two conclusions on voluntary repatriation, both of which stress the voluntary nature of repatriation. In the words of the second (1985) conclusion, the Executive Committee held that '[t]he repatriation of refugees should only take place at their freely expressed wish; the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected'. See Executive Committee Conclusion No. 40 (1985), *Report of the 36th Session*. UN Doc. A/AC.96/673, para. 115(5) and also Executive Committee Conclusion No. 18 (1980), *Report of the 31st Session*. UN Doc. A/AC.96/588, para. 48(3).

See also Chimni, 'Perspectives on Voluntary Repatriation: A Critical Note'. 3 IJRL 541-546 (1991); Frelick, 'The Right to Return', 2 IJRL 442-447 (1990); Goodwin-Gill. G., 'Voluntary Repatriation. Legal and Policy Issues', and Cuny, F and Stein. B., 'Prospects for and Promotion of Spontaneous Repatriation' in Loescher. G and Monahan. L., (Eds.) *Refugees and International Relations*. Oxford: Oxford University Press (1989);

²² As provided for in the 'cessation clauses' contained in Article 1(C), 1951 Convention.

²³ Hathaway, n21 above.

meaningful protection until and unless it is safe to return, it cannot legitimately be asserted that they should routinely be entitled to stay in the asylum state once the harm in their own country has been brought to an end. 'If instead the admission of refugees amounts to a back-door route to permanent immigration, the logic of *non-entrée* policies is perfectly clear'²⁴.

Hathaway argues therefore, that if we are to maintain access to basic refugee protection, we must accept the right of states to repatriate when the need for protection has ended. Consequently, it is not a question of denying the place of repatriation in the refugee protection continuum, but rather one of ensuring that the requirements of refugee law and human rights law are brought to bear '...on the definition of the moment and mechanisms of repatriation'²⁵.

And herein lies the problem. Under refugee law the conditions for cessation of refugee status are governed by legal rules contained in the 1951 Convention. In particular, Article 1 (C) (5) states that the Convention shall cease to apply to any person if '[h]e can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist [i.e. there is no longer a well-founded fear of persecution in relation to the specific individual], continue to refuse to avail himself of the protection of the country of his nationality...'. With regard to temporary protection however, the legal conditions, or safeguards, which must be met before it can be lifted and refugees repatriated are less clear due to the absence of any specific legal rules such as those contained in the 1951 Convention. Consequently, who defines the 'moment and mechanisms of repatriation' for Bosnian refugees? Who decides when it is safe for refugees to return, and therefore for temporary protection to be lifted and on what grounds do they make such a decision?

The notion of 'safe return' has come to play an important role in the regard to repatriation. As Guy Goodwin-Gill notes in his paper '*Repatriation and International Law - The Legal Safeguards*', the notion has come to occupy '...an interim position between the refugee deciding voluntarily to go back home and any other non-national who, having no claim to international protection, faces deportation or is otherwise required to leave'²⁶. According to Goodwin-Gill, although states implementing safe return are bound by such provisions as to prohibit torture or cruel or inhuman treatment, no rule of international law appears

²⁴ Ibid. Regarding *non-entrée* policies, see Hathaway, '*The Emerging Politics of Non-Entrée*'. 91 Refugees 40 (1992) and '*Harmonising for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*'. 26 Cornell Int. Law Journal 719 (1993).

²⁵ Ibid.

²⁶ Goodwin-Gill, '*Repatriation and International Law - The Legal Safeguards*'. Proceedings of a Roundtable Discussion, Working Paper 97/22, Robert Schuman Centre, EUI.

to formally require that such states act with regard to both 'legal' safety and safety in fact, such as the absence of conflict, de-mining and a working police and justice system. Furthermore, it may well be that on a formal level there has, for example, been a cessation of hostilities and the signing of a peace agreement in a specific country but this does not necessarily preclude the possibility of sporadic or on-going violence as a consequence or continuation of the original conflict in certain regions of the country. The existence of such situations should surely have some bearing on the possibilities for safe return and subsequent mandatory repatriation of refugees.

In the present context however, to the extent that it is possible to discern anything resembling legal rules or guidelines concerning the lifting of temporary protection, these are to be found within Annex 7 of the *Framework Agreement* and the UNHCR *Repatriation Plan* arising therefrom.

2.1 Annex 7 - Agreement on Refugees and Displaced Persons

Annex 7 is composed of two 'chapters', the first concerning 'protection' and the second concerning the establishment of the 'Commission for Displaced Persons and Refugees'²⁷. According to Article 1(1) of Annex 7, all refugees and displaced persons '...have the right freely to return to their homes of origin...' ²⁸. They have the right to have restored to them property which they lost during the course of the conflict and to receive compensation for any property which cannot be so restored²⁹. Furthermore, Article 1(1) envisages the '...early return of refugees and displaced persons [as] an important objective of the settlement of the conflict...' ³⁰. Consequently, the Parties are '...to ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion' ³¹. Moreover, the Parties are to take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons³².

²⁷ According to Article 11, Chapter 2 of Annex 7, the Commission is charged with dealing with claims for the return of property in BiH, or for just compensation in lieu of return and in accordance with the provisions laid down in Article 1(1) of Annex 7.

²⁸ Article 1(1) Annex 7. As also provided for in Article 2(5) of Annex 4 - *Constitution*.

²⁹ Ibid.

³⁰ Ibid.

³¹ Article 1(2) Annex 7.

³² Article 1(3) Annex 7.

Article 2 concerns the creation of suitable political, economic and social conditions for the voluntary return of refugees and displaced persons³³ and Article 3 contains provisions relating to cooperation with international organisations and international monitoring. In particular, Article 3(1) refers to the role of UNHCR as coordinator of all the agencies assisting with the repatriation and relief of refugees and displaced persons. The role of UNHCR is in fact central in relation to the repatriation of refugees, the organisation being called upon in Article 1(5),

‘...to develop in close consultation with asylum countries and the Parties a repatriation plan that will allow for an early, peaceful, orderly and phased return of refugees and displaced persons. The Parties agree to implement such a plan and to conform their international agreements and internal laws to it. They accordingly call upon States that have accepted refugees to promote the early return of refugees consistent with international law’³⁴.

2.2 The UNHCR Repatriation Plan

Given the absence of specific rules as to who decides when and under what conditions temporary protection should be lifted and refugees returned, the *Repatriation Plan*, which was finalised in March 1996³⁵, identifies three ‘minimum conditions’³⁶ or ‘benchmarks’ which will play ‘...a critical role in the lifting of temporary protection’³⁷. According to UNHCR their fulfilment ‘...will confirm that there is no longer a presumption that persons from BiH require international protection’³⁸, and therefore, that temporary protection can be lifted. The benchmarks are the implementation of the military provisions of the *Framework Agreement* (Annex 1-A); the proclamation of an amnesty for crimes other than serious violations of international humanitarian law as defined in the Statute of the International Criminal Tribunal for the former Yugoslavia and other

³³ Article 2(1) Annex 7.

³⁴ Article 1(5) Annex 7.

³⁵ The plan, then entitled, ‘*Post Conflict Solutions. UNHCR Programme in Bosnia and Herzegovina and Other Countries in the Region*’ (see n16 above), was first presented to the January 16, 1996 meeting of the Humanitarian Issues Working Group (HIWG) of the International Conference on Former Yugoslavia (ICFY). This document contained the initial strategic planning for the repatriation of refugees to BiH, formulated in consultation with the Parties to the *Framework Agreement* and which examined the phasing out of temporary protection in the context of the implementation of the *Framework Agreement*. It was finalised at the High Level Meeting on Implementation of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina, on 8 March 1996.

³⁶ See ‘*Statement by Mrs Sadako Ogata, United Nations High Commissioner for Refugees at the Humanitarian Issues Working Group of the International Conference on Former Yugoslavia*’. Geneva, 16 January 1996.

³⁷ *Repatriation Plan*, n4 above, at para. 6.

³⁸ *Ibid.*, para. 7.

common crimes unrelated to the conflict; and the establishment and functioning of mechanisms for the protection of human rights³⁹.

3. Fulfilment of the Conditions for Lifting Temporary Protection and Repatriation

The lifting of temporary protection then, and the subsequent mandatory repatriation of Bosnian refugees is effectively conditioned by provisions in both Annex 7 and the *Repatriation Plan*. In terms of the former, the overriding emphasis is on 'safe return' - refugees should be able to return in safety, without risk of harassment, intimidation, persecution or discrimination; in an environment where their safe and voluntary return is not impeded; and under suitable political, economic and social conditions. Under the *Repatriation Plan*, the lifting of temporary protection and return of Bosnian refugees should be expected only on the fulfilment of the benchmarks. Given that the benchmarks reflect, by and large, the criteria contained in Annex 7 - i.e. conditions conducive to safe return - and if anything give those criteria more substance, this paper will now examine the extent to which the benchmarks have been fulfilled.

3.1 Implementation of the Military Provisions of the *Framework Agreement*

In terms of the implementation of Annex 1-A, that is to say the cessation of hostilities, withdrawal of foreign forces, redeployment of forces, deployment of the NATO led 'Implementation Force' (IFOR), and prisoner exchange⁴⁰, the general consensus on the part of the international community is that this benchmark has been met. In May 1996, the UN High Commissioner for Refugees herself noted the 'considerable progress' that had been achieved in the implementation of this benchmark⁴¹. One month later at the Florence Mid-Year Review Conference on the progress in implementing the *Framework Agreement*, the High Representative⁴², Carl Bildt, noted how '...thanks to the diligent efforts of IFOR, as well as the cooperation of the Parties, compliance with [the military]

³⁹ Ibid., para. 12.

⁴⁰ Articles 2, 3, 4, 6 and 9, Annex 1-A.

⁴¹ See *Statement by Mrs Sadako Ogata, United Nations High Commissioner for Refugees at the Humanitarian Issues Working Group of the Peace Implementation Conference*. Geneva, 13 May 1996.

⁴² Appointed in accordance with Article 1 of Annex 10 of the *Framework Agreement - Agreement on Civilian Implementation of the Peace Settlement* - the High Representative is charged with coordinating the activities of the organisations and agencies involved in the civilian aspects of the *Framework Agreement* and with monitoring its implementation.

provisions of the [Framework Agreement] was accomplished with relative ease⁴³.

There is however, evidence to suggest that this is not the case. Mines and unexploded ordnance still pose a serious threat throughout BiH in spite of the provisions in Annex 1-A pertaining to their removal, dismantling or destruction⁴⁴. The presence of mines renders vast amounts of land unusable and prevents people from carrying on normal lives, as they have to cope with the ever present fear and danger of mines. Mine clearance is, of course, a slow, costly and dangerous process and could reasonably be considered as taking place for the foreseeable future⁴⁵, thereby making it an inappropriate yardstick by which to measure the implementation of Annex 1-A. However, the presence of mines as well as vicious

⁴³ *Speech of the High Representative. Report to the Florence Mid-Year Review Conference.* Florence, 13 June 1996.

⁴⁴ See Article 4 of Annex 1-A. It is estimated that there are between one to three million mines in the country, in addition to unknown quantities of unexploded ordnance. Figures, UNHCR, Special Operation for Former Yugoslavia (SOFY). *General Repatriation Information Report, September/October 1996.*

But it is not just mines that are at issue in terms of the implementation of Annex 1-A. The High Representative acknowledges the possibility that '...an unknown number of persons continue to be held in "hidden" detention...'. Any authority holding prisoners detained during the conflict is committing a 'substantial breach of its obligations under Annex 1-A...and...the speculation that large numbers of persons remain in hidden detention undermines the resolution of missing persons questions and the peace process more generally'. High Representative, *Report of the High Representative for the Implementation of the Bosnian Peace Agreement to the Secretary-General of the United Nations.* 10 December 1996, at para.66. According to ICRC about 16,000 persons are still unaccounted for in BiH. The Times, 'Missing 16,000 Blight Hopes of Lasting Peace in Bosnia'. 5 December 1996. Also see Nowak, 'Opinion: Monitoring Disappearances - The Difficult Path from Clarifying Past Causes to Effectively Preventing Future Ones', for an account of the task which faces the UN Special Process in investigating the fate of the 30,000 people still missing from the former Yugoslavia, in 10 European Human Rights Law Review 348-361 (1996).

The International Crisis Group (ICG) has also questioned the extent to which Annex 1-A has been implemented. In its own six-month review of the implementation of the *Framework Agreement*, ICG noted how in relation to Article 2 of Annex 1-A, although the cease-fire has held in compliance with this article the Parties have failed to '...provide a safe and secure environment for all persons in their jurisdictions...' as also called for under Article 2. The ICG further charges that the failure of the Parties in this respect constitutes '...the single greatest impediment to full freedom of movement'. ICG, *The Dayton Peace Accords: A Six Month Review.* ICG Bosnia Project (13 June 1996), at 2.

⁴⁵ As envisaged in the *Chairman's Conclusions of the Peace Implementation Council.* Florence, 13-14 June 1996, at para.10. Hereinafter, *Chairman's Conclusions.* Only about half of the minefields have been located and mine clearance has been performed on only a small scale and is a costly and time consuming operation - the cost of mine clearance in BiH is between US\$3 to US\$6 per square metre of land. In one year, 2,000 deminers can clear only 10,000,000 square metres of land. SOFY, n44 above.

booby-traps is likely to deter, if not prevent, a number of refugees from returning to their homes of origin⁴⁶ which, under the *Framework Agreement*, they have the right to do⁴⁷.

3.2 Proclamation of an Amnesty

Regarding the second benchmark, the Parties to Annex 7 agreed to grant amnesties to returning refugees and displaced persons for crimes related to the conflict, '...other than a serious violation of international humanitarian law as defined in the statute of the International Criminal Tribunal for the former Yugoslavia since 1 January 1991 or a common crime unrelated to the conflict'⁴⁸. Although the central authorities of BiH and both the entities, i.e. the Federation of BiH and Republika Srpska have all passed separate amnesty laws⁴⁹, UNHCR and others⁵⁰ believe there are a number of points of concern which question the extent to which this benchmark has been achieved. After all, the adoption of amnesty laws *per se* is not enough. It is the substance of those laws that counts.

And it would seem that there is cause for concern. Although both the National and Federal amnesty laws provide for an amnesty for the criminal act of evading conscription and avoiding military service through self-incapacitation, deceit or

⁴⁶ In some parts of Republika Srpska the homes of Bosnian Muslims and Croats have been deliberately mined in an express attempt to prevent the return of refugees and displaced persons to their homes of origin. See ICG, n44 above, at 14.

And as UNHCR notes in the *Repatriation Plan*, the presence of mines represents a 'formidable constraint' to the success of the plan, observing that while many of the war-affected and displaced persons may have had the opportunity to familiarise themselves with the locations of mines, '...refugees repatriating from farther afield will need to be aware of the risks and need to receive information on mine awareness'. Consequently, UNHCR recommends that the international community encourage the Parties and experienced agencies to expand de-mining activities within in BiH, particularly in areas where '...threats to life and safety could diminish the momentum of return'. UNHCR, *Repatriation Plan*, n4 above, at para. 21.

⁴⁷ The High Representative also appears to be contradicting himself, as six months on from stating that the military provisions of the *Framework Agreement* have been fulfilled, he notes that IFOR were required to take a firm line in compelling the Parties to put more effort into using their military forces to clear and mark minefields. He also acknowledges that '[p]rogress in actually clearing mines to the agreed standard has been limited and winter weather will further limit achievement in this area. Continued pressure from the follow-on [Stabilisation Force] is likely to be required *if progress is to improve*' - and the agreed standard be attained. High Representative, n44 above, at para.78. Emphasis added.

⁴⁸ Article 6, Annex 7.

⁴⁹ Amnesty laws entered into force on 24 February, 1 July and 4 July 1996 for BiH, the Federation of BiH and Republika Srpska, respectively.

⁵⁰ See for example, Amnesty International Country Report. *Bosnia - The International Community's Responsibility to Ensure Human Rights*. EUR 63/14/96, June 1996.

desertion, the law of Republika Srpska specifically excludes this crime from its amnesty. As well as being in direct contravention of Annex 7 - desertion and avoiding military service are, by their very nature, crimes related to the conflict - there are serious implications for returning refugees and displaced persons who may have deserted from the army in order to flee the country or who may not have even been present in the country at the time of their conscription and may not even be aware that they had been called-up. Refugees falling into either of these categories are hardly likely to want to return, and nor should they be expected to do so given that the punishment for such crimes can range from one years imprisonment to the death sentence⁵¹.

Despite the flaws, UNHCR notes that thousands of persons have been released under the laws, or that proceedings against them have been stopped. However, there are reports of persons being charged with new offences, after the original charge was dropped, in order to keep them detained⁵². It is also reported that all three laws are being circumvented by the authorities by accusing persons of war crimes which are of course exempt from the amnesty. Throughout the conflict it is alleged that thousands of persons were charged with these crimes but that such charges were largely unsubstantiated and brought against large groups of persons at once, i.e. one charge may list the names of 400 people accused of the same offence. This is a clear violation of Article 6 of Annex 7 which states that '[i]n no case shall charges for crimes be imposed for political or other inappropriate reasons or to circumvent the application of the amnesty'. According to UNHCR, these 'lists' are not made public and thus generate fear among the general population, acting as a deterrent to freedom of movement⁵³ - and surely as a deterrent to returning refugees.

3.3 Functioning Mechanisms for the Protection of Human Rights

Given the scale and nature of the atrocities committed during the conflict in BiH, it is no surprise that the protection of human rights figures as a fairly substantial component of the *Framework Agreement*⁵⁴ and that it should constitute one of the

⁵¹ See SOFY, n44 above.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ The term 'human rights' appears in the *Framework Agreement* no fewer than 70 times. Specifically, human rights are dealt with in terms of Annex 3 - *Agreement on Elections*; Annex 4 - *Constitution*; Annex 6 - *Agreement on Human Rights*; and Annex 7 - *Agreement on Refugees and Displaced Persons*. See Sloan, 'The Dayton Peace Agreement: Human Rights Guarantees and their Implementation'. 7 EJIL 207-225 (1996). See also Nowak, 'Beyond "Bookkeeping": Bringing Human Rights to Bosnia'. 52 The World Today 102-105 (April 1996); and Szasz, 'Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals'. 25 Cal. Western Int. Law Journal 237 (1995) and 'The Protection

benchmarks. Although a strict interpretation of the third benchmark would suggest that the existence of human rights protection mechanisms and their mere functioning would constitute its fulfilment⁵⁵, this is perhaps too simplistic. In the final analysis it is not simply a matter of the existence of functioning mechanisms, but rather of mechanisms that function effectively.

In his paper '*An Analysis of the Requirements for Repatriation*', Jens Vedsted-Hansen makes the point that '...the effectiveness of the protection mechanisms is a crucial element of any repatriation programme...should it be truly in accordance with basic human rights principles'⁵⁶. Although international monitoring and control are foreseen by the *Framework Agreement*, Vedsted-Hansen notes how certain essential questions are still left open, such as the exhaustion of domestic remedies as a precondition for bringing cases under the European Convention on Human Rights. '[At a] first glance it is quite difficult to determine the impact of this general requirement in the context of the [*Framework Agreement*] and its human rights mechanisms, not to mention the practical effects and the political sensitivity potential following from delayed procedures of the monitoring bodies'⁵⁷.

of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia'. 90 AJIL 301 (1996).

⁵⁵ The third benchmark also makes reference to the national elections in BiH which, '...while not a benchmark for return, are obviously of direct relevance to it through the establishment of democratic political institutions. The fulfilment of commitments associated with free and fair elections will demonstrate progress towards democratic processes and respect for human rights'. *Repatriation Plan*, n4 above, at para.16.

The extent to which the elections held in BiH in September 1996 can be considered as demonstrating progress towards democratic processes and human rights is open to debate. The staging, conduct and certification of the elections was motivated more by the foreign and domestic policy concerns of some of the members of the international community than by the fulfilment of commitments associated with free and fair elections. (See International Herald Tribune, '*Swiss Resists Pressure by US for Bosnia Vote*'. 10 June 1996.) Indeed, the conditions for free and fair elections, as specified in Article 1 of Annex 3 of the *Framework Agreement*, '...remained largely unfulfilled at the time of the elections. In particular, the requirements for a politically neutral environment, for freedom of expression and association and for freedom of movement had not been met'. Electoral Reform International Services. *Bosnia and Herzegovina: Elections 14 September 1996. Short-Term Election Observation Report to the Foreign and Commonwealth Office*. London: ERS (1 October 1996), at para. 2.1.2. See also ICG. *Why the Bosnian Elections Must be Postponed*. ICG Bosnia Project, Report No. 14, 14 August 1996 and *Elections in Bosnia*. ICG Bosnia Project, 22 September 1996.

⁵⁶ Vedsted-Hansen, '*An Analysis of the Requirements for Repatriation*'. Proceedings of a Roundtable Discussion, Working Paper 97/22, Robert Schuman Centre, EUI.

⁵⁷ Ibid.

As well as the existence of functioning and *effective* mechanisms for the protection of human rights an important consideration in the context of the third benchmark is the existence of an environment in which human rights are respected and protected. As Vedsted-Hansen notes, '[t]he general human rights situation in the country of origin, i.e. effective respect for and protection of human rights of the returnees, is indeed a *sine qua non* to repatriation'⁵⁸. Such a statement needs qualifying however. What exactly constitutes 'effective' respect for, and protection of, human rights? What is the level or standard to be achieved in regard to 'respect for', and 'protection of', human rights? For UNHCR, the standard can be measured in the sense that '[r]eturnees must...enjoy *adequate safety*, and they *should not be targeted* for harassment, intimidation, punishment, violence, or denial of fair access to public institutions or services, or discriminated against in the enjoyment of any basic rights'⁵⁹. But again some sort of qualification is needed. What constitutes 'adequate safety'? And is it not the case that it is not always possible to tell whether specific individuals or returnees are being deliberately targeted for harassment etc. or whether it is a more general policy? Alternatively, should the level of effective respect for and protection of human rights be measured in comparison to, for example, other countries that are emerging from ethnic conflict; or in comparison to other states parties to the European Convention on Human Rights to which BiH is a party?

Without wanting to detract from the importance of this issue, at the present point of time it suffices to say that unless one equates effective respect for and protection of human rights with the absence of gross and systematic violations of human rights, there is evidence to suggest that the general human rights situation in BiH is one which does not exhibit effective respect for, and protection of human rights. Rather, it would seem that inadequate safety, harassment, intimidation, punishment, violence, and the denial of fair access to public institutions or services and discrimination in the enjoyment of basic rights are the order of day in both entities, especially for minorities, and are potential and very real problems for returning refugees, a number of whom may return to minority areas.

Indeed, in spite of the existence of functioning mechanisms for the protection of human rights, such as the Commission on Human Rights and its two component parts, the Office of the Ombudsman and the Human Rights Chamber⁶⁰, as well as

⁵⁸ Ibid.

⁵⁹ *Repatriation Plan*, n4 above, at para. 15. Emphasis added.

⁶⁰ Established in accordance with Article 2(1) of Annex 6, to assist the Parties in honouring their obligations under the *Framework Agreement*. The mandate of the Commission is to consider alleged or apparent violations by the Parties of the rights set out in the European Convention on Human Rights and the Protocols thereto, on prohibited grounds such as

the Commission for Displaced Persons and Refugees⁶¹, and the High Representative's Human Rights Task Force⁶² and Human Rights Coordination Centre⁶³, the human rights provisions of the *Framework Agreement* have proved to be a major stumbling block. In fact it is one area in which non-governmental, governmental and inter-governmental actors are in consensus - that the Parties have not yet taken adequate steps to protect and respect the rights and freedoms set forth in the European Convention on Human Rights and the Protocols thereto, to which they have bound themselves⁶⁴. Notwithstanding the requirement in Annex 6 - *Agreement on Human Rights* - that the authorities secure to all persons within their jurisdiction the highest level of internationally recognised human rights⁶⁵, one year later, this obligation remains, according to the High Representative, 'substantially unmet':

'A precarious human rights situation characterised by frequent arbitrary arrests, widespread abuse of ethnic minorities and obstruction of the right to return, continues to reign...Harassment of ethnic minorities, including mandatory evictions and intimidation, continues, and the responsible authorities have failed to act decisively to address this problem in both entities. The destruction of hundreds of minority owned homes...which began in late October [1996] and has continued, presents not only a grave challenge to the right to return, but also a threat to remaining minority residents. Widespread discrimination against ethnic minorities

ethnicity, religion, political opinion etc. (Article 2). Allegations are normally directed to the Ombudsperson who investigates them and makes a report (Article 5). Based on the investigation, the Ombudsperson can pass a report to the Chamber for resolution or a decision regarding the alleged violation (Articles 5, 9 and 11). The Ombudsperson's office began receiving complaints in March 1996 and as of October 1996, ten cases had been brought before it. The Chamber also began functioning in March 1996. It meets every month for a four day plenary session. Figures, SOFY, n44 above.

⁶¹ As provided for in Chapter 2 of Annex 7.

⁶² Established by the High Representative to bring together the various organisations involved in implementing the human rights provisions of the *Framework Agreement*.

⁶³ Established following the first meeting of the HRTF to act as a central point for the collection of human rights information and day-to-day coordination of human rights activities. The HRCC includes participants from inter-governmental organisations and agencies and works to ensure coordinated, effective responses to human rights situations of particular concern.

⁶⁴ Pursuant to Article 1 of Annex 6 - *Agreement on Human Rights*. The opinion presented is that of the Chairman of the June 1996 Peace Implementation Council, Italian Foreign Minister, Lamberto Dini. It is based on the report on the state of human rights in BiH from the Office of the High Representative; and on statements from the UN Special Representative of the Secretary-General, the President of the International Criminal Tribunal for the former Yugoslavia and the heads of other relevant agencies. See *Chairman's Conclusions*, n45 above, at para. 32. This opinion is shared by for example, ICG, n44 above; Amnesty International, n50 above; and Human Rights Watch, '*Bosnia and Herzegovina: The Continuing Influence of Bosnia's Warlords*'. Washington: Human Rights Watch (December 1996).

⁶⁵ Pursuant to Article 1, Annex 6.

in the fields of employment, education and access to government services, also contributes to the trend toward ethnic separation'⁶⁶.

4. Non-Fulfilment and Mandatory Repatriation

Leaving aside the rhetoric of the international community in relation to the first benchmark, the fulfilment of all three of the benchmarks remains, to varying degrees, a distant prospect. Consequently, and pursuant to the *Repatriation Plan*, it would be inappropriate to assume that persons from BiH no longer require international protection and that temporary protection should be lifted. Moreover, it would be inhumane for host countries to begin mandatory repatriations. However, mandatory repatriations is precisely what has begun, with Germany setting the precedent.

On 19 September 1996 (five days after the allegedly 'successful' elections in BiH⁶⁷) Germany's Regional and Federal interior ministers agreed to accept 1 October 1996 as the starting date for the mandatory repatriation of Bosnian refugees, although each of the 16 Länder would itself decide on when it would order Bosnian refugees to leave. It was envisaged that the first to leave would be single persons and childless couples, followed by families⁶⁸. As of 1 October,

⁶⁶ High Representative, n44 above, at paras. 60-61.

⁶⁷ Regarding the staging of 'successful' elections, see n55 above.

⁶⁸ Migration News Sheet, '*Repatriation of Bosnians to Begin on 1 October*'. October 1996 at 7. Germany's decision was greeted with consternation by UNHCR who believed that the time was far from suitable for the beginning of a policy of mandatory returns, especially given the lack of adequate accommodation in BiH. UNHCR expressed concern over the use of the family situation of the refugee as the decisive criteria for return, stressing that more importance should be given to the refugees ethnic identity and his/her region of origin. Ibid., at 8. Concern was also voiced over the possibility that its list of 22 'target areas' - which are the subject of housing and infrastructure rehabilitation projects, in an effort to encourage the *voluntary* return of refugees and displaced persons to their original homes - might be considered as 'safe areas' to which refugees can be expelled. Ibid., at 8.

Although they are not 'safe areas' and should not be used as a pretext for lifting temporary protection, it would appear that UNHCR's fears have foundation. A number of the Länder are indeed, invoking 'target areas' as a pretext for lifting temporary protection. For example, in Baden-Württemberg, all refugees not accompanied by minor children and whose last place of residence was in a UNHCR target area located in the Federation must leave, regardless of ethnic origin. The same applies in for example, Bavaria, which allows for the possibility of return for those who cannot even return to the target area from which they originated; and also Berlin and Hamburg. The Länder of Mecklenburg-Vorpommern also considers UNHCR's target areas as 'suitable areas for return'. *Summary of Instructions Issued by the German Federal States (Länder) in Implementation of the Decision of the 19 September 1996 Conference of German Interior Ministers*. UNHCR, Bonn. 14 January 1997. Hereinafter, *Summary of Instructions*.

Baden-Württemberger gave approximately 2,000 Bosnian refugees until the end of the month to return to their home region of Bihać⁶⁹ and on 9 October Bavaria announced the first mandatory repatriation to BiH, involving a 29 year-old Bosnian man who had violated the penal code⁷⁰. Also in October, Berlin announced that mandatory repatriations would commence as of 1 November⁷¹, affecting some 1,500 persons⁷². By the end of November Bavaria had carried out a further ten mandatory repatriations⁷³ and on 4 December, the Bavarian authorities forcibly repatriated 24 Bosnian refugees on the grounds that '...it was necessary to send an unmistakable signal to all Bosnians who have been provided [temporary protection] in Germany that the time had come for them to return home'⁷⁴. As of February 1997, UNHCR estimate that around 100 persons have been forcibly returned from Germany but that this figure will increase after 1 April 1997⁷⁵.

UNHCR point out though that mandatory repatriations are not necessarily the main issue, since the capacity to forcibly repatriate persons is limited in logistical, financial, legal and political terms. Thus, attention should also be paid to the high number of 'voluntary-compulsory' departures. That is to say, persons are served with notice to leave and then do so, apparently on their own initiative, but in order to avoid the stigma of being taken away by the police in handcuffs. Such

⁶⁹ Migration News Sheet, '*Bosnians Receive Notice to Leave*'. November 1996, at 9.

⁷⁰ See n7 above. The 9 October also saw the authorities in Saxony-Anhalt revert from their decision to repatriate 31 Bosnian orphans to Sarajevo on 10 October after it became public knowledge. *Ibid.*, at 9.

⁷¹ *Ibid.*, at 9. Migration News Sheet also reports the suicide on 4 November of a Muslim refugee in a reception centre in Berlin who was apparently 'too scared to return'. Migration News Sheet, '*Suicide of a Bosnian Too Scared to Return*'. December 1996, at 11. Two months earlier the Sunday Times reported the attempted and actual suicide of three Bosnian refugees in Germany. A teenage girl and a man in his seventies both attempted suicide within days of the announcement of the intention to begin repatriation as of 1 October. A third, middle-aged man, '...appalled by the prospect of having to return home...' was however, successful. The Sunday Times. '*Bosnians Prefer Suicide as Bonn Sends Them Home*'. 29 September 1996.

⁷² Migration News Sheet, n68 above, at 7.

⁷³ Migration News Sheet, '*Readmission Agreement with Bosnia*'. December 1996, at 11. Also during the month of November, the Federal Interior Minister and the Bosnian Minister for Refugees and Emigration concluded an agreement on the return of refugees, under which single adults and married couples without children would be the first to return. The agreement does however exclude people in a traumatic situation resulting from the war; elderly persons whose relatives are not in BiH but are legally residing in Germany; witnesses to testify before the International Criminal Tribunal for the former Yugoslavia; and youths who will be authorised to stay in order to complete training courses. *Ibid.*, at 11.

⁷⁴ Migration News Sheet, '*First Group of Bosnians Forcibly Repatriated by a Chartered Plane*'. January 1997, at 9.

⁷⁵ Statement of UNHCR in Bonn in reply to enquiries by the author, 4 February 1996.

persons do not necessarily have somewhere to go. UNHCR believes that some 20,000-30,000 Bosnians have left Germany 'voluntarily'.⁷⁶

Although other European states do not appear to have followed suit, the potential for them to do so certainly exists. Indeed, in the Netherlands, Sweden and Switzerland recent developments suggest that repatriation, mandatory or otherwise, is very much an option for the governments of these three countries⁷⁷. However, given that the benchmarks have not been fulfilled and that therefore, the 'minimum conditions' for the lifting of temporary protection, at least as UNHCR see them, have not been met, to what extent can such mandatory repatriations be considered as 'legitimate'?

⁷⁶ Ibid.

⁷⁷ In a judgement of November 7 the Dutch Aliens Court overturned the decision of the Secretary of State of the Justice Department who as of 1 December 1995 suspended the processing of asylum applications from Bosnians as their country was considered 'safe' after the signing of the *Framework Agreement*. Asylum seekers with a temporary residence permit who cannot be returned to their home country due to the *unsafe* situation there are entitled to a permanent residence permit after three years. However, Bosnians who had applied for a permanent residence permit and had resided in the Netherlands for over three years before 1 December 1995, but whose asylum applications were still pending have been excluded from receiving a permanent residence permit. The Court requested the Secretary of State to reconsider all suspended applications. Migration News Sheet. '*Some 3,000 Bosnians May be Allowed to Stay*'. December 1996, at 12.

The situation in BiH is still far from 'safe'. However, the authorities are possibly of the conviction that it is preferable to consider it as such (the hostilities have ended after all!) on the grounds that it is considerably easier to return those with temporary as opposed to permanent residence, the latter status dependent, of course, on an 'unsafe' situation in the country of origin.

Similarly, the Swedish Government announced in November 1996 guideline decisions concerning asylum applications by 1,900 Bosnians submitted after the signing of the *Framework Agreement* and of 2,500 persons with both Bosnian and Croatian nationality. According to the decisions, Bosnians who applied for asylum after the cessation of hostilities and who originate from areas where their own ethnic group is in a majority can return within six months of the decision. Those with both Bosnian and Croatian nationality were given three months in which to return to Croatia in that both the Croatian Government and the UNHCR had confirmed that they could live their in safety, as could those refugees with only Croatian nationality. However, those originating from areas where they would now be in a minority would be allowed to remain in Sweden as refugees as it was unlikely that they would be able to return in safety. Migration News Sheet, '*Only Bosnians Originating from Bosnian Serb Controlled Areas May Remain in Sweden*'. December 1996, at 13.

As regards Switzerland, the Federal Office of Refugees is running an apparently successful aid programme to returning Bosnian refugees, in an effort to encourage voluntary repatriation. However, the Swiss authorities have not ruled out the possibility of forced repatriation if necessary. Migration News Sheet, '*Programme of Aid to Returning Bosnians Appears Successful*'. October 1996, at 11.

5. The Legitimacy of Mandatory Repatriations

In order to discuss the extent to which mandatory repatriations can be considered 'legitimate', it is necessary to determine the standards by which such actions can be judged as either acceptable or unacceptable. Can the legitimacy of mandatory repatriations be judged against formally binding rules provided for in international law⁷⁸, or, at the other extreme can it be judged with reference to non-binding standards which are no more than general policy principles? Or is there an intermediate benchmark which is more appropriate?

For Vedsted-Hansen, a mixed approach is the most valid: 'It is not necessarily decisive whether the norms relating to repatriation are legally binding or not; soft law norms and policy principles also have to be taken into account when designing and implementing repatriation programmes'⁷⁹. This is a particularly important point considering that the rules concerning the lifting of temporary protection and subsequent mandatory repatriation are not formally binding rules and thus resort must be made to alternative standards by which to judge the legitimacy of mandatory repatriations. The *Repatriation Plan* is not an international treaty. Although it originates from an international treaty - Annex 7 - unlike Annex 7 it does not in itself constitute a treaty, and thus the benchmarks cannot *per se* be characterised as imposing binding obligations on the host states. Consequently states are not formally legally bound to either take into account, or follow the assessment of UNHCR as to when the time is suitable for the lifting of temporary protection and for the mandatory return of refugees. Although it is hoped that they would do so, states are, nonetheless, perfectly within their powers to make their own assessment of the suitability of conditions in BiH for mandatory repatriation.

Having said that however, the lifting of temporary protection and invocation of mandatory repatriation are still effectively conditioned by international law in terms of the extent to which certain provisions of refugee law and provisions contained in Annex 7 may be applicable. Furthermore, notwithstanding the

⁷⁸ Thomas Franck observes that 'legitimacy' in international law is to be discerned from the extent of voluntary compliance with a rule. 'In international law, where police enforcement of the rules is still exceptional, the capacity of a rule to exert pull to compliance is extremely important'. In the present analysis however, Franck's rationale is not wholly appropriate given the absence of legal rules concerning the lifting of temporary protection, although it is of relevance, by analogy, in relation to questions arising from differences in attitude amongst host states towards the lifting of temporary protection. See n120 below. Franck, T. 'Fairness in the International Legal and Institutional System'. Academy of International Law. *Collected Courses of the Academy of International Law 1993 III. Tome 240*. Dordrecht: Martinus Nijhoff (1994), at 41.

⁷⁹ Vedsted-Hansen, n56 above.

possibility of invoking provisions of refugee law and provisions of Annex 7, it is also possible to take into account the broader international legal framework, which includes a range of standards and principles, as a means by which to judge the legitimacy of mandatory repatriation. For example, endorsement of the aims of the *Framework Agreement*, Annex 7 and the *Repatriation Plan* would suggest the acceptance of certain principles as providing the framework within which temporary protection is to be lifted and mandatory repatriation implemented, especially given the absence of a formal or binding legal framework.

5.1 Refugee Law

Although the temporary protection system was regarded as a useful means of avoiding normal asylum procedures and guaranteeing instant protection in the case of mass refugee flows, it does not however, preclude those opposed to mandatory repatriation, once that temporary protection is lifted, from applying for refugee status⁸⁰. As such and until their applications have been either granted or rejected following their consideration on a case-by-case basis through the normal adjudication procedures, including the right to remain in the country of refuge pending an appeal against a negative decision⁸¹, such persons are protected from mandatory repatriation by the principle of *non-refoulement*. Also in this regard it should be considered that even in circumstances of general change towards peace, democracy and reconciliation, '...there may still be vulnerable cases calling for attention to the existence of a risk of continued persecution...[for example]...mixed marriage families originating from certain areas or communities'⁸².

⁸⁰ Having said that however, this may not be the case in Germany. In January 1996 the German Federal Interior Minister, Manfred Kanther reportedly advised refugees not to apply for asylum on the lifting of temporary protection, as they would "...with great probability" be rejected quickly'. Migration News Sheet, '*Bosnian Refugees: Repatriation to Begin on 1 July*'. February 1996, at 8. This advice has effectively been borne out by the judgement of 6 August 1996 of the German Federal Administrative Court, who claimed that there was no right to asylum for Muslims from BiH, who although they may not be able to return to their former homes in Republika Srpska can still obtain protection from the state of BiH in other parts of that state. *Pressemitteilung Nr. 29/1996 vom. 6. August 1996*.

⁸¹ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*. Geneva: UNHCR (1992), at 42.

⁸² Vedsted-Hansen, n56 above. In this regard note should be made of the instructions issued by the Bavarian authorities regarding the implementation of mandatory repatriation. Bavaria has ordered all Bosnians not accompanied by children to leave if they have been convicted of a crime; or are between 18 and 55 years old and receive social aid; or come from a UNHCR 'target area', even if they cannot return to that area. Alarmingly, mixed marriages are explicitly included in the order with the words, '[t]his instruction is also valid for mixed marriages'. *Summary of Instructions*, n68 above.

Furthermore, some of those who have been recognised as refugees, or whose applications are still pending, are further protected from mandatory repatriation in the sense that, as Vedsted-Hansen argues, they cannot be forced to return until and unless the criteria for cessation of refugee status are fulfilled. In this regard, consideration should be given to Article 1 C (6) of the 1951 Convention from which is derived the legal principle of upholding the status of such refugees who have personally been victimised by the atrocities of the past⁸³.

5.2 Annex 7

Annex 7 contains a number of provisions pertaining to repatriation, the emphasis being on the right of refugees to return freely to their homes of origin and under conditions of safety which the Parties are to ensure. Given the lack of fulfilment of the benchmarks it seems that the Parties are not yet in a position to guarantee 'safe return' as required under Annex 7, let alone safe return to the refugees homes of origin⁸⁴.

It is possible that host states may claim that refugees can find safety in other parts of BiH⁸⁵. However, Article 1(1) of Annex 7 explicitly states that '[a]ll refugees and displaced persons have the right freely to return to their *homes of origin*'. The reference to 'homes' of origin raises the question of what exactly the phrase means. Is it a reference only to the refugee's city, town, village or region or is it actually a reference to the refugee's former place of residence, their former accommodation. The latter interpretation is justified to a certain extent in terms of the emphasis placed in Article 1(1) on the restoration of property of which refugees were deprived during the course of hostilities or compensation in lieu of return. This would suggest that 'homes of origin' is precisely that, 'homes' of origin, a refugee's former property, accommodation, former house or apartment

⁸³ Ibid.

⁸⁴ As the High Representative has observed, '[d]espite statements by the political leaders in Bosnia and Herzegovina about the importance of implementing Annex 7..., negative political linkages and reciprocity demands, coupled with insufficient efforts to ensure the political, economic and social conditions necessary for voluntary and safe return, are still the norm. The decision not to return is all too often conditioned by the lack of effective options. Possibilities for people to return to their homes of origin are limited not only by concerns about the security environment, but also by the lack of available housing, employment and social services, as well as the level of infrastructure and communications'. High Representative, n44 above, at paras. 50-51.

⁸⁵ Citing the recently endorsed non-binding joint position adopted by the member states of the European Union concerning the interpretation of the 1951 Convention, Andersen notes that a refugee's inability or unwillingness to return to his/her home of origin would not necessarily preclude his return to BiH. Andersen, '*Promoting Safe and Peaceful Repatriation Under the Dayton Agreements*'. 7 EJIL 193-206 (1996), at 205.

or whatever. However, given that for example, a considerable quantity of housing was destroyed during the conflict and simply does not exist anymore⁸⁶, it is perhaps prudent not to take the phrase too literally as in many instances refugees will not be able to return to their actual homes of origin⁸⁷.

Just as it is important not to take the phrase 'homes of origin' too literally, it is equally important not to interpret it too loosely either. Thus, a less literal though reasonable interpretation of the phrase is one that would indicate that when the return of refugees is to an area or region which is not that of their origin then their right under Article 1(1) is being violated⁸⁸. There is nothing in Article 1(1) to the

⁸⁶ It is estimated that during the course of the conflict in BiH, some two-thirds of housing stock had been destroyed. UNHCR/International Peace Academy. *Healing the Wounds. Refugees, Reconstruction and Reconciliation. Report of the Second Conference, 30 June - 1 July 1996*. Geneva/New York: UNHCR/IPA (1996), at 12.

⁸⁷ SOFY appear to concur with the interpretation of homes of origin as being that of the actual property of the refugees, stating that '...in principle, everyone should have the possibility of returning to the property which he or she left during the war'. In practice however, SOFY notes that in spite of the fact that the right to return supersedes any national or entity legislation which is inconsistent with it, '...the war-time legislation on Abandoned Apartments (BiH) and on Abandoned Property (Republika Srpska) pose a serious obstacle for refugees and displaced persons to return to their original homes'. SOFY, n44 above. Also according to Article 1 of the 'Procedure for Return and Reconstruction in the Zone of Separation', established by the OHR, UNHCR, IFOR, the International Police Task Force (IPTF), and the office of the European Commission and in consultation with officials from BiH and the Entities, property owners '...have the right to reconstruct their houses and re-inhabit them. This right derives from the right to property (annex 6 of the [Framework Agreement]) and from the right to freely return to homes of origin'. Cited in *Situation of human rights in the territory of the former Yugoslavia. Periodic report submitted by Ms Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 45 of Commission resolution 1996/71*. UN Doc. E/CN.4/1997/9 (1996), at para. 19. Emphasis added. Furthermore, it is reported that UNHCR's efforts to get people back to their original homes are often sabotaged. In one example, UNHCR officials designated houses in the Serb-held Prijedor area to be repaired in preparation for a small-scale but symbolically important repatriation of Muslims. Bosnian Serbs blew up the 92 homes overnight. The Sunday Times, 'Germans Send Bosnians Back to Land of Fear'. 29 December 1996.

⁸⁸ And there are grounds for believing that the right to return to homes of origin has indeed been violated and to the extent that there has been either no real effort to assist some forcibly repatriated refugees in returning to their homes of origin or no concern as to where they end up. According to a report in the Sunday Times in December 1996, for example, a Bosnian Muslim refugee was deported after five German police raided his flat and gave him five minutes to pack and say goodbye to his wife and two small children before being put on board a flight to Sarajevo under police guard. 'In the Bosnian capital a few hours later, [UNHCR officials] found him wandering around the freezing central bus station. He had little money and felt completely lost'. The same article also profiles the case of a young Muslim couple from Srebrenica who were seized and handcuffed by police, put in prison and later deported. 'In Bosnia they have no idea where to live. Even if they wanted to they could not return to their

effect that refugees and displaced persons have the right freely to return to their homes of origin *or anywhere else in the country if they cannot return there*. Furthermore with reference to Article 1(1), mandatory repatriation does not exactly correspond to the exercise of one's right to 'freely' return.

The above arguments are further underscored when one considers the importance of the emphasis on return to homes of origin. The whole point of the *Framework Agreement* is to restore peace and stability to the region through, *inter alia*, reversing the effects of ethnic cleansing⁸⁹. However, by forcing the return of refugees at a time when it is not yet possible for them to freely and safely return to their homes of origin, host states are more likely to consolidate the ethnic carve-up of BiH than reverse it, thereby undermining the *raison d'être* of the *Framework Agreement*.

5.3 Annex 7 and Host States

From the foregoing it appears that the Parties to Annex 7 are in violation of their obligations in terms of failing to ensure conditions that allow for the safe return of refugees to their homes of origin. In spite of this though, host states, or at least Germany for the time being, are prepared to contemplate or start mandatory repatriations which are likely to further highlight and increase the problems that

home town which has been occupied by Bosnian Serbs since being overrun in the summer of 1995'. The Sunday Times, *ibid*.

It is interesting to note how two days before the first mandatory return took place, the UN High Commissioner for Refugees observed that '[a]s conditions in Bosnia improve further - and the forthcoming municipal elections [of 23-24 November] should be an important indicator - the time will come for the lifting of temporary protection. *Those unable to return to their home areas should, however, not be pushed back*, as long as they will not have a decent roof over their head and a decent alternative solution in sight'. *Opening Statement by the UN High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme at its Forty-Seventh Session. Monday, 7 October 1996. In Report of the United Nations High Commissioner for Refugees. Addendum. Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of its Forty-Seventh Session. UN Doc. A/51/12/Add.1 (1996)*. On 22 October, the head of the OSCE Mission to BiH announced that the municipal elections were to be postponed for the second time. They had originally been scheduled for the summer of 1996. According to Ambassador Frowick, a new time frame was being considered for the municipal elections, somewhere between the months of April and June 1997. Weekly Bulletin of the Office of the High Representative, No. 22, 24 October 1996.

⁸⁹ See for example, the 'Introductory Note' by Paul Szasz to the *Framework Agreement* in ILM. According to Szasz, Annex 7 provides for '...the implementation of the very cursory constitutional provisions on the reversal of ethnic cleansing'. *'Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes'*. 35 ILM 75 (1996). See also Szasz (1996), n54 above, at 312.

the Parties are experiencing in relation to creating suitable conditions for return⁹⁰. This state of affairs clearly raises a number of issues. In the first place it questions the extent to which mandatory repatriation can be justified on humanitarian grounds alone. As the High Commissioner for Refugees has stressed, '...the lifting of temporary protection, like the granting of it, must be humanitarian both in its objectives and in its implementation'⁹¹. It is difficult to consider as 'humanitarian', the lifting of temporary protection and subsequent mandatory repatriations under conditions in which the safety and welfare of the returnees cannot be guaranteed. Secondly, it raises the concern that the presence of refugees who may not necessarily be able to return to their homes of origin or who may attempt to do so regardless of the dangers involved, could quite possibly destabilise an already fragile peace⁹². And if their return before the attainment of suitable conditions does indeed destabilise the peace process, are host states prepared for the possible consequence of having to contend with another mass outflow of refugees?

More importantly however, forced return prior to the attainment of suitable conditions also raises questions relating to the legal status of Annex 7 in relation to those states hosting Bosnian refugees. For example, although the Parties to Annex 7 confirm that they will accept the return of refugees and displaced persons⁹³, should they be expected to do so when they cannot guarantee safe return at all, let alone to the refugees homes of origin? And as they cannot guarantee the appropriate conditions should states be returning refugees on anything other than a voluntary basis in the first place?

In order to answer these questions it is necessary to consider the legal status of the *Framework Agreement* and the annexes. The *Framework Agreement* itself is an international treaty signed by three of the five successor states to the Socialist Federal Republic of Yugoslavia (SFRY), namely BiH, Croatia and the FRY. The *Framework Agreement* obliges the Parties to 'respect and promote fulfilment' of the twelve annexes, each of which constitutes an international treaty concluded however, between BiH, the Federation of BiH and Republika Srpska⁹⁴. As well

⁹⁰ It should be borne in mind that the commitment of the Parties to creating the suitable conditions for return is somewhat suspect. See High Representative, n84 above.

⁹¹ Sadako Ogata, United Nations High Commissioner for Refugees, n36 above.

⁹² As the High Commissioner for Refugees has observed, '[l]et us make sure that the promise of peace signed in Paris is becoming a reality on the ground before we take a step that will effect the lives of hundreds of thousands of people, who have already endured enormous hardship in the past. This will allow some time for critical reconstruction activities to get underway, and would avoid a destabilising effect on the peace process'. Ibid.

⁹³ Article 1(1), Annex 7.

⁹⁴ With the exception of Annex 1-B and Annex 10 to which Croatia and the Federal Republic of Yugoslavia are also parties.

as various side-letters to the *Framework Agreement*, there is an *Agreement on Initialling*, Article 2 of which states that the initialling of each signature block of the *Framework Agreement* and the annexes expresses the consent of the Parties, and the entities that they represent, to be bound by such agreements. Article IV of this Agreement as well as the annexes provide for automatic entry into force upon signature. As such then, the *Framework Agreement* and each of the annexes represents an international treaty establishing rules and obligations expressly recognised by the consenting states but which consequently impose no direct obligations on those states hosting Bosnian refugees as they are not signatories to them and have thus not expressed their consent to be bound by their provisions.

However, Annex 7 does provide some scope for arguing that host states should not return refugees to BiH on a mandatory basis for want of not acting inconsistently with international law. Under Article 1(5) of Annex 7, the Parties call upon UNHCR to develop a repatriation plan which they agree to implement and accordingly call upon host states ‘...to promote the early return of refugees *consistent with international law*’. One interpretation of the clause ‘consistent with international law’ is that it is a reference to the requirement that host states do not act in contravention of the principle of *non-refoulement*. However, given that the principle of *non-refoulement* is widely held to constitute a norm of customary law⁹⁵, and therefore binding on all states, it goes without saying that states should not act inconsistently with this principle. Consequently, a second interpretation of ‘consistent with international law’ could be that under international law, i.e. under the terms of Annex 7, the Parties are to ensure suitable conditions for safe return to homes of origin and are to implement the *Repatriation Plan*. As the situation stands at the moment, the Parties have failed in both these respects and are therefore acting inconsistently with *their* obligations under international law. Consequently, any mandatory repatriations, although implemented by states who are not parties to Annex 7, would nevertheless be inconsistent with international law *as it applies to the Parties to Annex 7*. Therefore, to the extent that such repatriations are inconsistent with international law, they should not be implemented until such a time as the Parties are in conformity with Annex 7 and have implemented the *Repatriation Plan* i.e. have achieved fulfilment of the benchmarks.

Although not grounded in irrefutable ‘block letter’ treaty provisions, the ‘consistency’ argument raises important questions regarding the legitimacy of

⁹⁵ As Goodwin-Gill observes, ‘[t]here is substantial, if not conclusive authority that the principle [of *non-refoulement*] is binding on all States, independently of specific assent...State practice...is persuasive evidence of the concretisation of a customary rule, even in the absence of any formal judicial pronouncement’. Goodwin-Gill, G. *The Refugee in International Law*. Oxford: Clarendon Press (1996), at 167.

mandatory repatriations when judged in terms of the overall international regime governing the treatment of refugees.

5.4 Endorsement of the Framework Agreement and the Right of Refugees to Return to Homes of Origin

Although host states are not *per se* signatories to the *Framework Agreement* and have not therefore, assumed any obligations arising therefrom, three European states, namely Germany, France and the United Kingdom (UK), did sign it in the capacity as witnesses to its conclusion and entry into force⁹⁶. According to Gaeta, as these states did not assume any obligations to ensure compliance by the Parties with the *Framework Agreement* '...it would seem that signature by these States has only *political* relevance'⁹⁷. But exactly what political relevance? Political relevance in the sense of being seen by their populations and the outside world to be associated with the formal conclusion of Europe's greatest tragedy since World War Two? Or, could witnessing the agreement be considered as an endorsement of its aims?

Both interpretations seem equally valid, though the latter is particularly relevant in the current analysis. Indeed, it would seem perfectly reasonable to assume, especially in the absence of statements to the contrary, that the act of witnessing the conclusion and entry into force of the *Framework Agreement* by Germany, France and the UK was an endorsement of the aims of that agreement, included in which is, of course, the right of refugees to freely and safely return to their homes of origin.

This assumption is further substantiated when one considers the role played by these three, and other hosts states for that matter, in attempts to settle the conflict⁹⁸, starting with their involvement in the European Community Peace Conference on Yugoslavia, first convened in 1991, and including the International Conference on the Former Yugoslavia (ICFY), established in 1992 and the so-called 'Contact Group', informally established in May 1994 in association with

⁹⁶ As did also, the United States, the Russian Federation and the European Union's Special Negotiator.

⁹⁷ See Gaeta, 'The Dayton Agreements and International Law'. 7 EJIL 147-163 (1996), at 154.

⁹⁸ See generally, Lucarelli, S. *The International Community and the Yugoslav Crisis: A Chronology of Events*. EUI Working Papers of the Robert Schuman Centre. Florence: European University Institute (1995); and 'The European Response to the Yugoslav Crisis: Story of a Two Level Constraint'. EUI Working Papers of the Robert Schuman Centre. Florence: European University Institute (1995).

the ICFY⁹⁹ and consisting of Germany, France, and the UK, as well as the United States and the Russian Federation. In fact the 'Bosnia Proximity Peace Talks' of 21 November 1995 at which the *Framework Agreement* was concluded, were held under the auspices of the Contact Group¹⁰⁰ and thus common sense alone dictates that the *Framework Agreement* has the endorsement of the German, French and UK Governments, as does consequently the right of refugees to return in safety to their homes of origin and for that matter the *Repatriation Plan* in that it specifically arises out Annex 7.

The endorsement by Germany *et al* of the right to return to homes of origin in safety is further borne out when one considers that the Contact Group - which, it is important to note, acts only by consensus¹⁰¹ - produced, *inter alia*, a draft constitution which '...was converted into a fully articulated Constitution of [BiH]...' ¹⁰² as contained in Annex 4 of the *Framework Agreement*. This draft constitution provided for, *inter alia*, the right of refugees and displaced persons to return to their former homes¹⁰³ as now articulated in Article 2(5) of Annex 4.

Germany's endorsement of the *Framework Agreement* puts that state in a somewhat contradictory position. On the one hand the German Government is providing for and endorsing the right of refugees to freely return to their homes of origin whilst on the other hand denying those for whom the right was intended, the opportunity to indeed exercise that right by insisting on mandatory repatriations at a time when it is not possible for refugees to realise their right to safely return to their homes of origin.

It may be argued however, that Germany has not accepted the right of safe return to homes of origin or rather that it has effectively denounced any previous endorsement of this right. As the Head of Germany's delegation to the Humanitarian Issues Working Group (HIWG) stated in December 1996, the decision to commence mandatory repatriation as of 1 October 1996 '...also covers persons who presently cannot return to their areas of origin in [BiH]'¹⁰⁴. As noted however, the emphasis on return to homes of origin is vitally important

⁹⁹ See Szasz (1996), n54 above, at 301-303.

¹⁰⁰ The Bosnia Proximity Peace Talks were however, effectively under the management of the United States State Department. See Szasz, 'The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia'. 19 Fordham Int. Law J. 363-407 (1995), at 374-375.

¹⁰¹ Ibid., at 373.

¹⁰² Szasz (1996), n54 above, at 303.

¹⁰³ Szasz, n100 above, at 404.

¹⁰⁴ *Statement by Dr. Olaf Reermann, Head of Delegation. Director General, Federal Ministry of the Interior. Geneva, 16 December 1996. Hereinafter, Reermann statement.*

in respect to reversing the effects of ethnic cleansing which is one of the fundamental aims of the *Framework Agreement*. Thus Germany's implicit denunciation of the right to return contradicts their apparent endorsement of the *Framework Agreement* and of one its most important aims.

5.5 Relevance of the Repatriation Plan

As noted above, it may also be possible to argue that Germany, through its endorsement of the *Framework Agreement* has also implicitly accepted the *Repatriation Plan*. Although this is harder to substantiate, it is however, an important issue in general terms (i.e. with reference to host states *per se*) in the sense of questioning the legitimacy that can be ascribed to mandatory repatriations that take place contrary to the advice of UNHCR and which do not correspond to the criteria for the lifting of temporary protection as contained in the *Repatriation Plan* which host states have apparently endorsed¹⁰⁵.

Certainly it could be argued that Germany has not 'fully' endorsed the *Repatriation Plan*, and that it has, therefore, no obligations, legal or otherwise, in respect of the *Plan*. The statement to the December 1996 meeting of the HIWG notes that the German position regarding the lifting of temporary protection and mandatory return is based on the understanding that Bosnian refugees would leave Germany once the war had ended, and that now the war has ended (at least formally) they can be expected to return. Thus, it allows for the possibility of mandatory repatriation, as of 1 October 1996, and including, as noted, persons who presently cannot return to their areas of origin¹⁰⁶. In some respects the attitude of Germany is not surprising. Of all European states, Germany has borne by far the largest number of Bosnian refugees (more than the rest of the European Union member states combined¹⁰⁷) and at an estimated cost of 17 billion Deutschmarks¹⁰⁸, although this by no means justifies mandatory repatriations before the attainment of suitable conditions in BiH.

¹⁰⁵ The initial strategic planning document (see n16 above) which specified the benchmarks as they appear in the *Repatriation Plan*, was '...widely endorsed by all participants at the [January 1996] HIWG meeting' - at which Germany was present. *Repatriation Plan*, n4 above, at para. 2. Emphasis added. Moreover, the High Commissioner notes how the *Repatriation Plan* itself '...received strong and unanimous support' at the High Level Working Meeting on Implementation of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina. UN High Commissioner for Refugees, n41 above. Emphasis added.

¹⁰⁶ *Reermann statement*, n104 above.

¹⁰⁷ The Guardian, 'Germans to Deport Bosnian Refugees'. 20 September 1996.

¹⁰⁸ The Times, 'Wary Bonn Issues Refugees with Notice to Quit'. 2 October 1996.

Notwithstanding the foregoing however, the statement to the HIWG does not explicitly reject the *Repatriation Plan* and aside from the possible, albeit debatable, endorsement of the *Repatriation Plan* in the sense of Germany's endorsement of the *Framework Agreement*¹⁰⁹, the statement includes certain provisions which could be interpreted as actually endorsing the *Repatriation Plan*. In the first place, the statement notes how '...the concept presented by UNHCR of peaceful, orderly and phased returns complies fully with the mandate laid down in the [*Framework Agreement*] (Annex 7, No. 5) and has the backing of the Federal Government'. Though it is not explicitly stated as such, it would seem justified to interpret the phrase 'the concept presented by UNHCR' as meaning the *Repatriation Plan*, especially given the reference to 'Annex 7, No. 5' which presumably means Article 1(5) of Annex 7¹¹⁰ - the provision which calls upon the UNHCR to develop the *Repatriation Plan* that will allow for peaceful, orderly and phased returns. Thus to this end, it could be argued that the German Government is indeed endorsing, or 'backing' the *Repatriation Plan*. In the second place, the statement notes that although mandatory repatriation is to take place as of 1 October 1996, '[t]his return is to take place in phases, after consultation and close cooperation with all those involved in the repatriation process and taking into account actual developments in [BiH]'. Surely such 'consultation and close cooperation' includes consultation with UNHCR, who, one assumes would stress the importance of the *Repatriation Plan*, as well as for that matter the refugees themselves seeing as they are the main concern in the repatriation process? And if Germany is to take into account 'actual developments in BiH', then surely they have cause to refer to the benchmarks which provide the most accurate indication of developments in BiH pertaining to the suitability of conditions for the lifting of temporary protection and mandatory repatriation?

Furthermore, although the *Repatriation Plan* is not *per se* binding on any of the host states this does not make it irrelevant. Germany is entitled to make its own assessment of when conditions are suitable for the lifting of temporary protection and for mandatory repatriation to commence but the standards against which it makes that assessment are unlikely to be very different from those used by UNHCR, i.e. those contained in the benchmarks. Thus, the onus is placed on the German Government to show that either the standards which it is applying are different, or that UNHCR's assessment of the situation on the ground is invalid or inaccurate.

¹⁰⁹ As well as Germany's possible endorsement in the sense of n104 above.

¹¹⁰ Article 5 of Annex 7 actually refers to 'Persons Unaccounted For' and the role of the ICRC in tracing such persons.

5.6 Differing Views on Lifting Temporary Protection

In connection with this last point, it is important to note the differing views as to when to lift temporary protection and commence mandatory repatriations¹¹¹. Among the German Länder there are differences of opinion regarding the conditions in BiH and their suitability for lifting temporary protection and carrying out mandatory repatriation. For the Interior Minister of Schleswig-Holstein, as long as life and living conditions could not be guaranteed Bosnian refugees should benefit from a general right to remain in Germany¹¹². Many of the Länder governed by the opposition Social Democrats (SPD) have stated their intention not to carry out any forced repatriations before April 1997¹¹³. SPD governed Lower Saxony even called upon other Länder not to participate in mandatory repatriations on the grounds that there were regions where safe return could not be guaranteed, citing a list of 19 regions considered by UNHCR as dangerous for returning refugees¹¹⁴. The Land of Bremen also considered that mandatory repatriation in October would have been irresponsible claiming that the living conditions in reception camps for returning displaced persons and refugees '...are below the minimum level of existence'¹¹⁵.

At the European level, Germany is, at the time of writing, apparently the only state to have embarked upon forced repatriations, whereas Norway has effectively ruled out the possibility of forced repatriations, with the Justice Minister claiming that repatriation would only occur on a voluntary basis¹¹⁶. Austria also intends to repatriate only on a voluntary basis¹¹⁷ and Sweden, although accepting the possibility of mandatory repatriation, has stated that those Bosnians originating from areas where they would now be in a minority would be able to remain in Sweden as refugees as the *Framework Agreement* has not resulted in circumstances which would be conducive to their safe return¹¹⁸. Finally, Switzerland, is not expected to begin mandatory repatriation until 30

¹¹¹ The UN High Commissioner for Refugees has requested states not to adopt a unilateral approach to repatriation by 'encouraging' states '...to remain committed to a multi-lateral approach that will allow all concerned to bring to a dignified conclusion a tragic chapter in human history. Any precipitated return or action, taken in isolation, might jeopardise the still fragile peace agreement'. UNHCR, n16 above, at para. 3.

¹¹² Migration News Sheet, n68 above, at 8.

¹¹³ Migration News Sheet, *'No Postponement of Date of Repatriation of Bosnians, but Implementation will be Flexible'*. September 1996, at 8.

¹¹⁴ Ibid., at 8.

¹¹⁵ Ibid., at 9.

¹¹⁶ Migration News Sheet, *'Forced Repatriation of Bosnians Virtually Ruled Out'*. December 1996, at 13.

¹¹⁷ Migration News Sheet, *'Bosnian Refugees: Forced Return Ruled Out'*. March 1996.

¹¹⁸ Migration News Sheet, n77 above, at 13.

April 1997, and couples with children have been given until 31 August 1997¹¹⁹ to remain in the country.

Certainly it may be asking too much to expect some sort of consensus on this issue, especially given the quite diverse numbers of Bosnian refugees receiving temporary protection in the numerous asylum states as well as the domestic political and financial considerations of those states. Nonetheless, there are a number of implications inherent in the differing views amongst states. In the first place, that there appears to be a quite overwhelming lack of consensus on the issue of lifting temporary protection, this would, and following on from the previous argument, place a more substantial burden of proof on the German Government to justify mandatory repatriation¹²⁰.

In the second place, it seems that a refugee's chances of being forcibly repatriated are dependent on whichever state (or Länder) they have been receiving temporary protection in, which in itself constitutes a far from satisfactory position. The duration of temporary protection should not, for those involved, be dependent on their 'pot-luck' choice of place of refuge - although for many it was not necessarily a question of choice but one of desperation or family unity. Rather, the lifting of temporary protection should be based on the fulfilment of objective criteria which take into account at the highest level the safety and dignity of the refugees.

Therefore, in the third place and given the absence of any pan-European (or even pan-German) consensus on when conditions are appropriate for the lifting of temporary protection and the facilitation of safe return, clearly resort should be made to the recommendations of UNHCR - the lead agency on the ground in BiH and the best placed to implement a 'reality-check'¹²¹ - and not only until such a time as UNHCR's recommendations no longer correspond to the political and financial as opposed to humanitarian considerations of host states. Indeed, such an approach must surely have been the intention of the *Framework Agreement* with its provision in Annex 7 for the UNHCR *Repatriation Plan*, to be drafted in

¹¹⁹ Migration News Sheet, n77 above, at 11.

¹²⁰ The lack of consensus amongst states on this issue would also question the legitimacy of mandatory repatriation in the sense that the term is used by Thomas Franck (see n78 above). Granted, Franck's definition of legitimacy is confined to rules of international law, and in the current context we are not talking specifically of a rule of international law obliging states to repatriate Bosnian refugees. Nonetheless, Franck's definition is a useful analogy with which to question the legitimacy of mandatory repatriation given that there does not appear to be any 'pull towards voluntary compliance' on the part of all host states.

¹²¹ As advocated by Goodwin-Gill: 'What is happening on the ground cannot be ignored in assessing the protection needs of those poised to return, or being returned...'. Goodwin-Gill, n26 above.

'close consultation' with the Parties and *also the host countries* and with the purpose of allowing for an early, peaceful, orderly and phased return¹²². Why else contemplate a repatriation plan? That it has not resulted in early return is unfortunate but does not justify its abandonment. Mandatory repatriation may well achieve the aim of early(ish) return but it is far less likely to result in peaceful or orderly return.

Finally, differences of opinion over the duration of temporary protection also opens up the possibility that in the present case, Bosnian refugees in Germany who are to be forcibly repatriated may attempt to seek refuge in other European states¹²³. This not only presents the possibility of Bosnian refugees who have been given notice to leave one European state passing around Europe in the uncertain hope of finding protection in another European state. It also raises the possibility that faced with such a prospect other European states may decide to jump on the repatriation bandwagon, with all the possible destabilising consequences that this may hold for the future of BiH not to mention the safety and welfare of the refugees concerned¹²⁴.

¹²² Article 1(5) Annex 7.

¹²³ The Belgian Commissioner General for Refugees and Stateless Persons believes that some Bosnian refugees who fear mandatory repatriation from Germany may have entered Belgium in order to apply for asylum. However, such applications will be rejected on the basis of provisions in the Schengen Convention and a national rule under which an application presented by any person having spent at least three months in another country of reception will be considered as inadmissible. Migration News Sheet, '*Bosnians Required to Leave Germany May go to Belgium*'. October 1996, at 6-7.

¹²⁴ As UNHCR observe, '[I]ack of coordination and premature decisions would risk destabilising the peace process and would render sound planning most difficult. They could moreover result in an avalanche of asylum requests, which the concept of temporary protection was intended to render unnecessary, and in secondary movements of Bosnians in Europe and elsewhere'. UNHCR, n16 above, at para. 15.

Conclusion

The decision of Germany to commence mandatory repatriation effectively signals the end of temporary protection in that country. It may also signal the beginning of the end of temporary protection in other states, as some European states, anxious at the prospect of receiving a proportion of Germany's Bosnian refugees may follow Germany's lead. Others may follow with a view simply to relieving themselves and their treasuries of the political and economic burden posed by the presence of Bosnian refugees within their territories.

Mandatory repatriations are however, suspect to say the least. Technically they may not be illegal, though this is open to question in terms of a possible violation of the refugees' right to freely and safely return to their homes of origin and questions over the consistency of mandatory repatriations with international law. They are also questionable with reference to the broader framework of refugee law which, in the absence of specific treaty rules governing the lifting of temporary protection, constitutes the appropriate framework within which to judge the acceptability or otherwise of forced returns. The endorsement by Germany of the *Framework Agreement*, thereby accepting certain rights and guarantees provided for returning refugees, and then acting in a way as to limit the enjoyment or realisation of those same rights and guarantees is a contradictory position and one that calls into question the fundamental purpose of the *Framework Agreement* as an instrument with which to reverse, or certainly halt, the effects of ethnic cleansing. Finally, mandatory repatriations are also questionable on moral and humanitarian grounds given the current circumstances in BiH. The lack of suitable conditions for safe return and the lack of a consensus amongst host states as to what exactly constitutes suitable conditions (though seemingly not those advocated by UNHCR) seriously calls into doubt the acceptability of mandatory repatriation.

From a political point of view however, it may be argued that mandatory repatriations are almost inevitable. The lack on the part of European states of 'international solidarity and burden-sharing'¹²⁵, that has been apparent in the granting of temporary protection to refugees from BiH¹²⁶, coupled with the slow

¹²⁵ 'By urging all governments to provide [temporary protection] without discrimination, UNHCR has sought...to ensure the spirit of international solidarity and burden-sharing which underlies international action on behalf of refugees'. UNHCR, n13 above, at para.12.

¹²⁶ And exemplified by the attempts of some states to actively discourage, if not prevent, the arrival of Bosnian refugees in their territories. In the UK for example, despite earlier pronouncements that '[u]nlike other European countries the UK has no visa requirement for nationals of former Yugoslavia and we have no plans to impose one', on 5 November 1992 i.e. a matter of months after the appeal of the High Commissioner for Refugees for states to

progress in implementing the *Framework Agreement*, has virtually precluded the possibility of a coordinated, multilateral approach to the lifting of temporary protection. Furthermore, it has precluded an approach that fully respects the benchmarks contained in the *Repatriation Plan* - as endorsed by the host states - and which acknowledges the dangers that a unilateral and misguided attitude to repatriation poses to the success of the *Framework Agreement* and consequently to the peace and stability of BiH and the future of its peoples. And if the peace and stability of BiH and the future of its peoples are indeed jeopardised, and Europe is confronted with another mass outflow of refugees it will once again reveal the urgent need for governments to address the question of burden-sharing¹²⁷. Their failure to have done so this time could well result in their fundamental need to do so next time should there be, and one seriously hopes that there is not, a next time. That is to say, another conflict with all the tragedies and horrors that this implies.

provide temporary protection, the UK Government imposed visa requirements. On the one hand the Government argued that their decision to do so was based precisely on the fact that other European states impose visa requirements on those fleeing the conflict in BiH. On the other hand however, the imposition of visa requirements effectively ruled out the possibility for Bosnian refugees to legally enter the UK. Bosnians could not apply for a visa in BiH because there were no British embassies or consulates there. If they had left to get a visa from the British Embassy in Vienna, for example, Britain would have refused them admission on the grounds that they must claim asylum in Austria. The Home Office's 'third country' rule states that refugees can have their cases considered only in the first safe country they reach. The Independent, '*Government's Pretence on Asylum Exposed*'. 18 November 1992.

¹²⁷ As the preamble to the 1951 Convention notes, '...the grant of asylum may place unduly heavy burdens on certain countries, and...a satisfactory solution of a problem which the United Nations has recognised the international scope and nature cannot therefore be achieved without international cooperation'.



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