Robert Schuman Centre

# Repatriation

## Legal and Policy Issues Concerning Refugees from the Former Yugoslavia

WORKING GROUP ON REFUGEES
(RSC)

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WG on Refugees: *Repatriation. Legal and Policy Issues Concerning Refugees from the Former Yugoslavia*

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**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

ROBERT SCHUMAN CENTRE

# Repatriation
## Legal and Policy Issues Concerning Refugees from the Former Yugoslavia

Proceedings of a Roundtable Discussion,
organised by the Working Group on Refugees and the RSC,
held at the EUI the 7 June 1996

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## Introduction

The signing on 14 December 1995 of the *General Framework Agreement for Peace in Bosnia and Herzegovina*, by Presidents Izetbegovic, Tudgman and Milosevic of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia respectively, formally concluded a three and half year conflict which had taken the lives of over 250,000 persons; in which atrocities were committed which shocked people the world over and which led to the coining of the phrase 'ethnic cleansing'; and in which approximately two million people were forced into flight and became displaced either internally or externally as refugees in states ranging from Europe to North America and even Australia. Not least amongst the issues facing the states of the former Yugoslavia as of December 1995 was (and still is) that concerning the future of the two million displaced persons who had fled the conflict.

According to the peace agreement, all refugees and displaced persons are assured of their right to return home - their right to be repatriated[1]. Certainly as regards refugee situations *per se*, repatriation is, at least in the voluntary sense, considered the primary durable situation. As the United Nations High Commissioner for Refugees (UNHCR) has succinctly stated, '...voluntary repatriation, whenever feasible, is of course the most desirable solution to refugee problems'[2]. However, in a world which is witnessing a disturbing increase in the population of refugees[3], those states hosting refugees are not always disposed to the voluntary nature of repatriation. Once the war in former Yugoslavia had at least formally ended, it was to be expected that for many host states there was no reason why its refugees from the region should not return home.

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[1] Article 2(5) of Annex 4 of the peace agreement - *Constitution of Bosnia and Herzegovina* and Article 1(1) of Annex 7 - *Agreement on Refugees and Displaced Persons*.

[2] UNHCR, *Note on International Protection*. EC/SCP/13 (1980), at 1.

[3] It is estimated that there are some 27 million persons who are refugees or 'other people of concern to UNHCR'. UNHCR, *State of the World's Refugees. In Search of Solutions*. Oxford: Oxford University Press (1995), at 20.

In light of this the *Working Group on Refugees* of the Robert Schuman Centre hosted a Roundtable entitled '*Repatriation. Legal and Policy Issues Concerning Refugees from the Former Yugoslavia*' at the European University Institute on 7 June 1996. The meeting, which brought together academics, representatives of non-governmental and inter-governmental organisations, as well as representatives of certain host states provided as a forum for the discussion of the relevant legal, political, human rights and logistical issues which were likely to be raised by the repatriation of refugees to the former Yugoslavia with a view to promoting the imperative that any repatriation of refugees occur in such a way that both respects and protects the human rights, safety, welfare and dignity of the refugees concerned.

The Roundtable was divided into two sessions, the first concerning legal issues and second relating to implementation issues. In terms of the former, the discussions that took place were based on papers presented by Professor James Hathaway of Osgoode Hall Law School and Director of the Refugee Law Research Unit of the Centre for Refugee Studies, York University, Toronto; and Professor Guy Goodwin-Gill of the University of Amsterdam and Editor-in-Chief of the *International Journal of Refugee Law*. As regards implementation issues, the discussions were based on presentations by Jens Vedsted-Hansen from the Danish Centre for Human Rights; Dario Carminati of the UNHCR's Special Operation for former Yugoslavia (SOFY); and Richard Lewartowski of the European Community Humanitarian Office (ECHO). The Roundtable was chaired by Professor Philip Alston of the European University Institute.

Thanks to the participants' lively interest and expert knowledge, the discussions, which were conducted in an informal and relaxed atmosphere, were extremely informative and fruitful. The *Working Group* wishes to thank all the participants for accepting the invitation to the Roundtable and for contributing actively to its success.

Three of the papers presented at the Roundtable, namely those of Professors Hathaway and Goodwin-Gill and Jens Vedsted-Hansen are published in this Working Paper.

**Programme of the Roundtable**

**09.30 - 10.00 Opening Addresses**

*Welcome address by* ***Dr. Patrick Masterson****, President of the European University Institute.*

*Address by* ***Simon Bagshaw****, Working Group on Refugees.*

*Address by* ***Prof. Philip Alston****, Chairperson of the Roundtable, European University Institute.*

**10.00 - 13.00 Morning Session - Legal Issues**

1. The Meaning of Repatriation.
   ***Prof. James Hathaway****, Refugees Studies Centre, Osgoode Hall Law School, York University, Canada.*

2. Repatriation and International Law - The Legal Safeguards.
   ***Prof. Guy Goodwin-Gill****, University of Amsterdam, Editor-in-Chief, International Journal of Refugee Law.*

**14.15 - 17.30 Afternoon Session - Implementation Issues**

1. An Analysis of the Requirements for Repatriation.
   ***Jens Vedsted-Hansen****, Danish Centre for Human Rights, Copenhagen.*

2. Implementing Durable Solutions - The Road Ahead.
   ***Dario Carminati****, Head of Desk, Special Operations for Former Yugoslavia, United Nations High Commissioner for Refugees, Geneva.*

3. Facilitating Return, but not Forgetting the Survivors.
   ***Richard Lewartowski****, European Community Humanitarian Office, Brussels.*

# The Meaning of Repatriation

**James C. Hathaway***

Refugee status is a situation-specific trump on the usual prerogative of states to decide who may enter their territories. As conceived by its drafters, the 1951 Refugee Convention does not require that refugees be granted *asylum* in the sense of permanent admission to a new political community. Refugees are instead entitled to benefit from dignified and rights-regarding protection *until and unless* conditions in the state of origin permit repatriation without the risk of persecution.

Because refugee status is explicitly conditioned on the continuation of a risk for refugees in the state of origin, it may legitimately be revoked when there has been a sufficient change of circumstances in that country to undercut the need for protection.[4] Once a receiving state determines that protection in the country of origin is viable, it is entitled to withdraw refugee status. Former refugees are thereupon subject to the usual rules of immigration control, and may generally be required to return to their state of origin. This provision of the Refugee Convention was intended to allow receiving states to divest themselves of the responsibility to afford protection when the government of the home country is judged to have become an appropriate guardian of the rights of its involuntary expatriates.[5]

The absence of a duty to grant permanent residence to refugees was critical to the successful negotiation of the Refugee Convention. Though willing to protect refugees against return to persecution, states demanded the right ultimately to decide which, if any, refugees would be allowed to resettle in their territories. While the refugee flows of post-War Europe were felt to be logistically and politically

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[4] "This 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, continue to refuse to avail himself of the protection of the country of his nationality...": Convention relating to the Status of Refugees, 189 UNTS 137, entered into force April 22, 1954 ("Refugee Convention"), at Art. 1(C)(5).

[5] See e.g. the declaration of the French representative to the Conference of Plenipotentiaries, Mr. Rochefort, U.N. Doc. A/CONF.2/SR.28, at 12-14, July 19, 1951: "[France] was quite prepared to continue to assist such refugees so long as assistance was necessary. But if their country reverted to a democratic tradition, the obligation to assist them should not fall perforce upon the French Government... France had merely said that she did not wish to be under an obligation to continue to provide assistance to refugees who could seek the protection of their country of origin."

impossible to stop, the formal distinction between refugee status and permanent residence reassured states that their sovereign authority over immigration was not diminished.

Until quite recently, however, governments of the developed world rarely elected to repatriate former refugees. Despite the legal prerogative to admit refugees only as temporary residents, the refugee policies of many developed states were conceived in the immediate post-War era, when cultural, economic, and strategic considerations argued for granting permanent resident status to refugees. Even those governments of the North with no official commitment to the granting of permanent asylum to refugees were rarely motivated to allocate the resources needed to remove former refugees from their territories. Formally or informally, most refugees were therefore allowed to stay permanently in the state in which they had received protection. Because of an interest-convergence between refugees and the governments of industrialised states, there was little incentive to develop an understanding of the place of repatriation in the international refugee protection regime. The formal distinction between refugee status and permanent asylum remained intact, but the right to revoke status due to change of circumstances fell into disuse.

While not part of the traditional protection system of developed states, repatriation has figured prominently in the protection practices of the less developed world. In contrast to governments of the industrialised world, Southern states have rarely been in a position to finance or administer the kind of autonomous refugee protection system contemplated by the Refugee Convention. Confronted by refugee flows of a magnitude unknown in the North, the governments of poor countries have been effectively compelled to allow the United Nations High Commissioner for Refugees (UNHCR) to take over status assessment, protection, and material assistance work within their borders. Protection in the South has therefore been less influenced by the Refugee Convention than by the institutional protection practices of UNHCR, the Statute of which authorises the agency to assist governments with repatriation only if it is "voluntary," or if the repatriation is sanctioned by the General Assembly. Specifically, Article 8(c) of the UNHCR Statute speaks of "[a]ssisting governmental and private efforts to promote *voluntary* repatriation...", while Article 9 authorises UNHCR to engage in "... such additional activities, including repatriation... as the General Assembly may determine, within the limits of the resources placed at his disposal."[6]

[6] Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), Dec. 14, 1950 ("UNHCR Statute"), at Arts. 8(c) and 9.

In the result, to the extent that there can truly be said to be a traditional understanding of repatriation, it is largely an understanding born outside the framework of the Refugee Convention. Because there was no significant Northern practice of repatriation, and because Southern practice evolved within the framework of the UNHCR Statute rather than within the parameters of the Refugee Convention, repatriation has come to be understood as a necessarily *voluntary* return to the state of origin. Scholars such as B.S. Chimni invoke that Southern practice in asserting that only a truly voluntary process ought to be countenanced as legally valid.[7] While clearly of humanitarian inspiration, this optic cannot be reconciled to the authority granted states to repatriate former refugees by virtue of the Refugee Convention's change of circumstances cessation clause.[8] There are solid practical reasons to be concerned about the proclivity of some governments to withdraw refugee status prematurely, but it is wishful legal thinking to suggest that a voluntariness requirement can be superimposed on the text of the Refugee Convention.

## New Interest in Temporary Protection

The reasons that induced the historical openness of developed states to the arrival of refugees have largely withered away. Most refugees who seek entry to industrialised countries today are from the poorer countries of the South. Their "different" racial and social profile is seen to challenge the cultural cohesion of many developed states. The economies of industrialised states no longer require substantial and indiscriminate infusions of labour. Nor is there ideological or strategic value in the admission of most refugees. The demise of the post-War interest-convergence between many states and refugees has generated a combination of *non-entrée* tactics and confinement of refugees in their own countries.[9] Even when the arrival of refugees is logistically or politically impossible to avoid, most developed states today see little reason to grant refugees more than the bare minimum entitlements required by law. There has therefore been a resurgence of interest among Northern

[7] "It is my view that to replace the principle of voluntary repatriation by safe return, and to substitute the judgement of States and institutions for that of the refugees, is to create space for repatriation under duress, and may be tantamount to *refoulement*": B.S. Chimni, "The Meaning of Words and the Role of UNHCR in Voluntary Repatriation," (1993) 5(3) Intl. J. Refugee L. 442, at 454.

[8] It also seems generally to be overlooked that UNHCR is not constrained by a voluntariness requirement, since Article 9 of its Statute authorises engagement in any kind of repatriation work authorised by the General Assembly.

[9] See generally J. Hathaway, "New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection," (1995) 8(3) Journal of Refugee Studies 288-294.

governments in the Convention's paradigm of temporary protection, including the right to repatriate when refugee status comes to an end.

This shift away from the tradition of granting permanent residence to refugees has produced two kinds of problem. First, many Northern governments have failed to recognise that even temporarily protected refugees are entitled to the catalogue of rights set by the Refugee Convention and international human rights law. They have mistakenly felt free to impose sometimes sweeping restrictions on freedom of movement, access to employment, and other protected interests. Second, and of greater relevance to the present discussion, states have been left largely to their own devices in deciding how repatriation of former refugees should be structured. The international community has yet to develop a holistic understanding of how to reconcile *mandated repatriation* to basic human rights values.

Advocates and UNHCR have usually evaded this issue, preferring to speak about how best to facilitate *voluntary* repatriation.[10] The failure to grapple with an understanding of *mandated* repatriation that "works" in the developed world, while perhaps in the short-term interest of the minority of refugees that manages somehow to reach us, is ultimately counterproductive. Simply put, if governments perceive repatriation to be legally or practically untenable (because it must be "voluntary"), yet the interest-convergence that supported the grant of more than temporary protection in the past has disappeared, the obvious answer for governments is to intensify their efforts to prevent the arrival of refugees in the first place, whether this be by *non-entrée* practices, the "final solution" of confinement of would-be refugees to face continued danger in their country of origin, or both. Insistence that all repatriations be voluntary undercuts the logic of refugee status as a situation-specific trump on immigration control. If refugees are to be guaranteed access to meaningful protection until and unless it is safe to go home, it cannot legitimately be asserted that they should routinely be entitled to stay in the host 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 painfully clear. Governments in

[10] See e.g. Lawyers Committee for Human Rights, "General Principles Relating to the Promotion of Refugee Repatriation," May 1992, at 5: "A refugee can be returned only if his or her return is voluntary. The logic is straightforward: presumably a refugee would genuinely volunteer to return if he or she would not face persecution after returning. It is thus essential that refugees are able to exercise their free and unconstrained will." UNHCR similarly avoids discussion of the repatriation of persons who have ceased to be refugees, preferring to emphasise the uncontroversial point that genuine refugees may not be returned against their will. See e.g. UNHCR, "Voluntary Repatriation: International Protection, UNHCR Handbook, Division of International Protection" 10-11 (1996).

industrialised countries are well aware that economic and other considerations irrelevant to the need for protection dissuade many former refugees from freely opting to return to even objectively safe home states. If any refugee admitted to protection must be allowed to stay in the host state unless he or she agrees voluntarily to return home, governments that are financially and logistically able to prevent the arrival of asylum-seekers in the first place will likely choose that option.

The fundamental imperative of preserving access to basic refugee protection therefore requires acceptance of the right to repatriate when the need for protection comes to an end. The task of responsible scholars and advocates ought not to be to deny the place of repatriation in the continuum of refugee protection, but should instead be to bring the requirements of both refugee law and general human rights law to bear on the definition of the moment and mechanisms of repatriation. Insistence on *voluntariness* as the oniy acceptable guarantee that return does not amount to *refoulement* is likely simply to fortify the resolve of the North to avoid contact with refugees altogether.

## A Contemporary Understanding of Repatriation

The acceptability of repatriation follows logically from an understanding of refugee law as a mechanism of human rights protection, rather than an immigration path. Because refugee status is a situation-dependent trump on the usual rules of immigration control, there is no reason in principle to deny the right of states to enforce immigration laws when the human rights of former refugees are no longer at risk in their own countries. Until and unless international law recognises the right of individuals to live wherever they wish, the cessation of refugee status revives the *status quo ante*, namely an international legal system based on the assignment of people to particular states, usually on the basis of nationality.[11]

Since mandated repatriation is both legally valid and practically necessary to avoid the intensification of *non-entrée* policies, we need to move beyond sterile insistence that all repatriations be voluntary. By accepting repatriation as a logical part of the continuum of refugee protection, we can promote an understanding of mandated repatriation that is as much human rights-based as it is practical. For example, a real commitment to dignified repatriation means taking steps to ensure that the refugees

[11] Some will no doubt argue against acceptance of mandated repatriation on the grounds that it reinforces the prerogative of states to assign human beings to geopolitical spaces. While acknowledging the moral force of this "open borders" view, care should be taken to assert the general claim for freedom of international movement in a strategically astute way. In my view, refugee law is an unwise site for this struggle, as defeat would entail critical risks to the most important exception to sovereign authority over borders presently accepted by states.

families and collective social structures are preserved and helped to flourish in the asylum state. It means ensuring the refugees are allowed to maintain and develop their skills while in receipt of temporary protection, not relegated to hand-outs and enforced isolation. It means minimising the harshness of return when conditions at home are safe, including both the ability to repatriate externally acquired assets and to benefit from programs that will offset, at least to a reasonable degree, the costs of re-establishment in the home state.

Nor can repatriation, particularly from North to South, simply be something that we hope will happen; it must rather be made feasible. In particular, we cannot assume, as the Refugee Convention does, that states of origin will be happy to receive back persons whose refugee status has come to an end. We need instead to offset the costs to the communities that will receive refugees back, particularly at the local level, and to provide positive incentives to promote the meaningful reintegration of returning refugees in the communities they left behind. Money alone will not always be sufficient, but it will usually be required.

Because a commitment to dignified and rights-regarding repatriation entails significant costs, it should be institutionalised as part of a more collectivised protection system based on responsibility and burden sharing. The pure bilateralism of repatriation as conceived by the Refugee Convention imposes unfair expectations on the countries that provide asylum to refugees. A case in point is the understandable reluctance of Germany to pay the DM10,000 demanded by local authority leaders in government-controlled parts of Bosnia to receive back each of the 325,000 Bosnian refugees who found asylum in Germany.[12] My point is not that there should be no payments to local authorities. To the contrary, fairly determined and effectively applied funds for receiving communities are, as previously observed, likely to be required. It makes no sense, however, that the burden to finance these readjustment programs should fall solely or even substantially on the shoulders of those governments that have already taken on a disproportionate share of the responsibility to provide asylum.

**Repatriation as Part of the Protection Paradigm**

While an enhanced commitment to repatriation will help to regenerate a commitment to receive refugees, it is not a panacea. In an era when most refugees are the casualties of civil war and other aspects of the struggle to constitute and reconstitute states, it is unrealistic to expect that all refugees will eventually be able to go back to

[12] I. Traynor, "Balkans Refugee 'Tax' Angers Germany," *Manchester Guardian Weekly*, May 12, 1996, at 4.

the place from which they came.[13] For example, as many as 70% of the 320,000 Bosnian refugees in Germany are Muslim victims of Serb ethnic cleansing, drummed out of their lands in areas now under Serb control. This means that most will be unable to return to their native areas, and will need to be accommodated elsewhere in the Muslim-Croat Federation. As might be expected, that plan is drawing fierce Croat resistance.[14] Repatriation is of questionable practicality where, as in Bosnia, there has yet to be a fundamental political restructuring sufficient to defuse the forces of ethnic nationalism.[15]

A decision simply to graft a commitment to repatriation onto the prevailing structures of refugee protection in the North is therefore unlikely to be enough to end reliance on policies of *non-entrée* and confinement of desperate people in their countries of origin. If repatriation is to be a solution for more than a minority of the contemporary refugee population, governments will have to follow through on their rhetorical commitment to "root causes" intervention by dependably acting to eradicate the harms that force refugees to escape. More fundamentally, a mechanism needs urgently to be devised to respond to the phenomenon of the failed state,[16] perhaps by reform of the mandate of the United Nations Trusteeship Council. In the context of a world actively engaged in a serious effort to respond to human rights abuse and crumbling structures of governance, repatriation could readily become the primary solution to refugeehood.

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[13] Warner takes this argument farther, arguing that "... repatriation means return to home, not merely return to the country of origin": D. Warner, "Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics," (1994) 7(2-3) J. Refugee Studies 160, at 162. He opposes repatriation that does not restore a meaningful sense of community to refugees, and convincingly demonstrates that the simple ability to return refugees to their state of origin may not meet this goal. In my view, Warner overstates the purpose of refugee protection. It is not the case that all persons denied a meaningful, sociologically defined community in their country of citizenship are *ipso facto* entitled to Convention refugee status. Refugee status is instead the right of a more limited class, namely those whose civil or political status puts their basic human rights at risk in their own state. It is therefore logically the eradication of the risk to basic human rights that defines the necessary conditions for repatriation, whether or not the country of origin constitutes an ideal "home" in sociological terms.

[14] Supra note 9.

[15] See generally M. Ignatieff, Blood and Belonging: Journeys Into the New Nationalism (1993), at 185: "The only reliable antidote to ethnic nationalism turns out to be civic nationalism, because the only guarantee that ethnic groups will live side by side in peace is shared loyalty to a state, strong enough, fair enough, equitable enough, to command their obedience."

[16] See e.g. A. Mazrui, "The African State as a Political Refugee: Institutional Collapse and Human Displacement," (July 1995) Intl. J. Refugee L. 21, at 32.

Yet there is reason to advocate careful resort to repatriation even under present conditions. At least a significant minority of the contemporary refugee population has fled phenomena likely to be transitory. If temporary protection is made an empowering and solution-oriented experience for these refugees, enabling their successful repatriation, states will have reason to consider alternatives to the simple avoidance of responsibility toward refugees. As industrialised governments evolve a policy and operational framework for rights-regarding and dignified repatriation, they will gain confidence in their ability to protect national interests without simply avoiding responsibility toward refugees.

A move in this direction should have the short-term effect of relieving some pressure on the asylum system. In the medium-term, a positive experience with temporary protection and repatriation of even a minority of the refugee population ought moreover to galvanise the resolve of governments to pursue sustained "root causes" intervention, as the re-establishment of good governance and respect for human rights abroad will have a direct spin-off benefit in terms of the ability of states legitimately to repatriate former refugees.

In a fundamental sense, then, a responsibly defined commitment to repatriation may be the linchpin to the evolution of international refugee law as a critical mechanism of human rights protection. A protection policy specifically designed to facilitate dignified and rights-regarding repatriation is a powerful counterweight to the arguments of those who oppose asylum on the grounds that it is no more than a thinly disguised, unregulated immigration mechanism. Temporary protection, leading in most cases to repatriation, makes clear that refugee law is concerned to safeguard human dignity only until and unless the home state is able effectively to resume its primary duty of protection. And because the prospect of repatriation makes palpable the self-interest of states in committing themselves to a more global vision of justice, it should drive governments to take concrete measures to combat human rights abuse in other countries. For both these reasons, repatriation must come to be understood as an integral part of the refugee protection process, as a logical ending to the unfortunate need to seek protection away from one's home.

# Repatriation and International Law - The Legal Safeguards

**Guy S. Goodwin-Gill***

The return of refugees to their country of origin is rightly considered to involve both legal and policy issues, themselves operating in an international and political context in which States of refuge and origin have their interests, but individuals also have their value as individuals. The challenge for international lawyers is to fill the gaps in an otherwise incomplete regime with rules and standards that go as far as possible in protecting individuals, groups and communities against the excessive application of State interest; and one way precisely is to pay sufficient and appropriate regard to the element of choice. This is not to say that involuntary return or alternative solutions must be ruled out in every case, but is intended merely to recall what human rights instruments themselves imply when they flag individual integrity, dignity and worth for attention.

The title of this paper, however, is Repatriation and International Law, not Voluntary Repatriation and International Law, and it will therefore attempt to bridge at least some of the gaps between the often contradictory elements involved in change of circumstances, cessation of refugee status, voluntary repatriation, and return.

## 1. Voluntary repatriation - Legal safeguards

Anyone examining the legal context, particularly the international legal context, in which return movements of refugees take place, should regularly seek out a reality-check. What is happening on the ground cannot be ignored in assessing the protection needs of those poised to return, or being returned, but neither can one postulate that the right sorts of legal questions will always find the right sorts of legal answers.

One reason is the inescapable fact that return movements and those who make up the return movement often fall within the many grey areas of international law. Thus, they may be refugees with a present or recent well-founded fear of persecution; or refugees in one or more regional senses, having fled from conflict

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or breakdown of law and order that still persists; or having once fled for their lives, their country of origin may now have reverted
to peace and democracy, and any claim to international protection have disappeared with the change of circumstances.

Secondly, the provision of legal safeguards, even the comfortable discourse of legal safeguards, may presuppose the existence of institutional mechanisms that may not exist, may be impractical, or inadequate to the purposes of protection.

Thirdly, and this is by no means unique or exclusive to the elusive rights and responsibilities of those involved in the repatriation process, the application of rules to uncertain situations of fact necessarily brings in questions of appreciation, that is, of subjective assessments which, even in the best of all possible worlds, may find reasonable people arriving at different conclusions.

A reality check thus requires initiators, observers, critics and participants, in varying degrees, to appreciate not only the situation of the refugees themselves, but also the interests and attitudes of State of origin and State of refuge, and the policies, practices, resources and capabilities of international agencies and non-governmental organisations.

Voluntary repatriation has institutional and human rights dimensions[17]. For example, the UNHCR Statute calls upon the High Commissioner for Refugees to facilitate and to promote voluntary repatriation[18], and in recent years, States have repeatedly and insistently called on UNHCR to do more to promote this solution[19]. At the same time, the right to return to one's own country locates such efforts squarely in a human rights context[20]. To ignore this dimension and the

[17] The following sections draw extensively on relevant passages in Goodwin-Gill, G.S., *The Refugee in International Law*, (2nd ed., 1996).

[18] Statute, paras. 1, 8(c); UNGA res. 428(V), para. 2(d); Executive Committee Conclusion No. 65 (1991), para. (j).

[19] See Report of the 34th Session of the Executive Committee (1983): UN doc. A/AC.96/631, paras. 31-2; also the views of Australia: UN doc. A/AC.96/SR.354, paras. 36, 42; the United Kingdom: ibid., SR.356, para. 63 (suggesting UNHCR adopt the image of goad, rather than catalyst); *Report* of the 35th Session (1984): UN doc. A/AC.96/651, paras. 35, 79; A/AC.96/INF.173 (12 Oct. 1984), Morocco's appeal for the voluntary repatriation of persons from ex-Spanish Sahara in the Tindouf region; also the views of the Netherlands: UN doc. A/AC.96/SR.369, para. 57; Belgium, ibid., SR.370, para. 39; Algeria, ibid., SR.371, para. 58; Morocco, ibid., SR.372, para. 9. Algeria and Morocco have exchanged claim and counterclaim repeatedly in later sessions of the Executive Committee.

[20] See arts. 9, 13(2), 1948 Universal Declaration of Human Rights; art. 5, 1965 Convention on the Elimination of All Forms of Racial Discrimination; art. 12, 1966 Covenant on Civil and Political Rights; Executive Committee General Conclusion on International Protection, *Report*

legal implications and implicit legal safeguards arising from the concept of nationality would be to condone exile at the expense of human rights. The return of those once displaced involves a dimension of responsibility, namely, the responsibility of the international community to find solutions without institutionalising exile to such a degree that it disregards the interests of individuals and communities.

One of the unresolved theoretical paradoxes of UNHCR's institutional responsibilities is the extent to which its duty to provide international protection pervades the field of cessation of refugee status and voluntary return. Formal categories frequently provide inadequate descriptions of refugee realities, and in practice it is often difficult to be certain whether circumstances have changed to such a degree as to warrant formal termination of refugee status, even supposing that it was ever formally recognised. The assessment of change involves subjective elements of appreciation, in a continuum where the fact of repatriation may be the sufficient and necessary condition, bringing the situation or status of refugee to an end. Moreover, in the uncertain and fluid dynamics which characterise mass exodus, this fact of return can itself be an element in the change of circumstances, contributing to the re-emergence or consolidation of stability and to national reconciliation[21].

A particular legal context for protection in repatriation is provided by article V of 1969 OAU Convention (see Annex below), which stresses its essentially voluntary character, the importance of country of origin and country of refuge collaboration, of amnesties and non-penalisation, as well as assistance to those returning.

A potentially active UNHCR role is anticipated in Executive Committee Conclusions adopted in 1980 and 1985 (see Annex below), the first of which, closely modelled on the OAU Convention, looks towards facilitation, rather than

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of the 45th Session (1994): UN doc. A/AC.96/839; para. 19(v); UNGA res. 49/169, 23 Dec. 1994, para. 9.

[21] Goodwin-Gill, G.S. 'Voluntary Repatriation: Legal and Policy Issues', in Loescher, G. & Monahan, L., *Refugees and International Relations*, (1989), 255; Cuny, F.C., Stein, B.N. & Reed, P., eds., *Repatriation during Conflict in Africa and Asia*, (1992); Stein, B.N., Cuny, F.C. & Reed, P. eds., *Refugee Repatriation during Conflict*, (1995); Larkin, M.A., Cuny, F.C., & Stein, B.N., *Repatriation under Conflict in Central America*, (1991); Chimni, B.S., 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation', 5 *IJRL* 442 (1993); Chimni, B.S., 'Perspectives on Voluntary Repatriation: A Critical Note', 3 *IJRL* 541 (1991); Hofmann, R., 'Voluntary Repatriation and UNHCR', 44 *ZaöRV* 327 (1984). Also, para. 21, CIREFCA Plan of Action; text in 1 *IJRL* 582 (1989).

the promotion of return movement[22]. These conclusions recognise that voluntary repatriation is generally the most appropriate solution, while stressing the necessity for arrangements to establish voluntariness, in both individual and large-scale movements. Visits to the country of origin by refugees or refugee representatives for the purpose of informing themselves of the situation are seen as useful, and formal guarantees for the safety of returnees are also called for, together with mechanisms to ensure the dissemination of relevant information[23]. The Executive Committee considered that UNHCR could appropriately be called upon with the agreement of the parties concerned to monitor the situation of returning refugees.

The Executive Committee looked again at voluntary repatriation in 1985[24]. The right of the individual to return was accepted as a fundamental premise, but linked to the principle of the free, voluntary and individual nature of all repatriation movements. UNHCR's mandate was considered broad enough to enable it to take initiatives, including those which might promote favourable conditions. Some, indeed, considered that UNHCR had a responsibility to begin the dialogue, although others cautioned against its becoming entangled in political issues. In brief, Executive Committee Conclusion No. 40 (1985), also stresses the voluntary and individual character of repatriation and the necessity for it to be carried out in conditions of safety, preferably to the refugee's former place of residence, emphasises the inseparability of causes and solutions, the primary responsibility of States to create conditions conducive to return, and that the UNHCR mandate is broad enough to allow it to promote dialogue, act as intermediary, facilitate communication, and actively pursue return in appropriate circumstances. UNHCR involvement with returnees was recognised as a legitimate concern, particularly where return takes place under amnesty or similar guarantee, although legal difficulties might arise with the government of the country of origin.

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[22] See Executive Committee Conclusion No. 18 (1980); UNHCR, Note on Voluntary Repatriation: UN doc. EC/SCP/13, 27 Aug. 1980; *Report* of the Sub-Committee: UN doc. A/AC.96/586, 8 Oct. 1980, paras. 17-29.

[23] *Report* of the Sub-Committee: UN doc. A/AC.96/586, paras. 23-4.

[24] See Executive Committee Conclusion No. 40 (1985); UNHCR, Voluntary Repatriation: UN doc. EC/SCP/41, 1 Aug. 1985; *Report* of the Sub-Committee: UN doc. A/AC.96/671, 9 Oct. 1985; Report of the Executive Committee: UN doc. A/AC.96/673, 22 Oct. 1985, paras. 100-106; and for the summary records of debate: UN docs. A/AC.96/SR.385-400.

### *Facilitating and promoting*

Some of the difficulties inherent in reading in devising legal safeguards are readily apparent in reviewing the operational aspects of facilitating and promoting return.

The duty to provide international protection justifies a cautious distinction between *facilitation* and *promotion*[25]. The former presupposes an informed and voluntary decision by an individual, while the latter anticipates varying degrees of encouragement by outside bodies. For example, voluntary repatriation may be promoted by decreasing assistance on one side of the border, while raising it on the other; whether this is a legitimate tactic will necessarily depend on a host of other questions, relating in particular to security. For UNHCR, the principal consideration in a promotion context ought to be the interest of the refugee, and the protection of his or her rights, security and welfare[26]. The individual's right to return will not always prevail over other acquired rights, in the sense of becoming a duty to leave, and a danger in agency-sponsored repatriation operations is that protection ultimately may be compromised. Some critics have challenged UNHCR's role and activities, so far as they appear to support State-inspired policies of 'containment', or promote 'preventive protection' oriented more to reducing admissions and costs, than to the interests of refugees. The promotion of (voluntary) repatriation by governments is seen as suspect, particularly when presented in the context of 'safe return', rather than on the basis of the voluntary choice of the individual[27].

UNHCR's protection responsibilities require it to obtain the best available information regarding conditions in the country of origin, and an accurate analysis of the extent to which the causes of flows have modified or ceased. Such information must in turn be shared with refugees and governmental and non-governmental agencies involved, including repatriation commissions and implementing partners. UNHCR's duty to provide international protection clearly obliges the Office to refrain from *promotion* where circumstances have not

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[25] Cf. Executive Committee General Conclusion on International Protection: *Report* of the 45th Session (1994): UN doc. A/AC.96/839, para. 19(y), underscoring UNHCR's role in 'promoting, facilitating and coordinating voluntary repatriation..., including ensuring that international protection continues to be extended to those in need until such time as they can return in safety and dignity...'

[26] Ibid., para. 19(ii), endorsing the High Commissioner's efforts with respect to reducing or eliminating the threat of landmines.

[27] On 'safe return' see further below section 2.

changed, or where instability and insecurity continue[28]. But what is the legal safeguard, if UNHCR chooses to disregard the weight of the information?

Equally, UNHCR ought to oversee the application of guarantees or assurances that are integral to the process of return (by being there, by close contact with returnees and implementing agencies, and by activating regional political and human rights mechanisms); and also to contribute materially to successful re-integration in the national community[29]. Again, while these objectives are easily stated, UNHCR alone will not necessarily be best placed to provide protection, or indeed to assume the generally long-term level of activity often required for successful re-establishment.

Country of origin and country of asylum may themselves co-operate to facilitate the return of refugees, either with or without UNHCR involvement. For example, although largely overtaken by persistent conflict, a 1988 agreement between Afghanistan and Pakistan recognised that all refugees should have the opportunity to return in freedom, free choice of domicile and freedom of movement, the right to work and to participate in civic affairs, and the same rights and privileges as other citizens. Pakistan, in turn, agreed to facilitate 'voluntary orderly and peaceful repatriation', and mixed commissions were also to be established[30].

Although it can provoke logistical demands often difficult to meet, recognising the *primacy of the refugee's own decision* generally makes good sense, even to the extent of *facilitating* repatriation in circumstances which, objectively

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[28] The issue of coercion and pressure to return calls for close monitoring, and was central to the controversy which surrounded the second phase of repatriation from Djibouti to Ethiopia in 1986 and 1987; see Goodwin-Gill, 'Voluntary Repatriation', 255, 277-80. See also with respect to Bangladesh and Myanmar, Medecins sans Frontieres/Artsen zonder Grenzen, 'Awareness Survey: Rohingya Refugee Camps, Cox's Bazar District, Bangladesh, 15 March 1995', The Netherlands, 1995; and for States' comments: UN doc. A/AC.96/SR.473 (1992), para. 32 (Australia); SR.476, paras. 45-51 (Bangladesh); SR.477, paras. 12-15 (Myanmar).

[29] Cf. Executive Committee General Conclusion on International Protection: *Report* of the 42nd Session (1991): UN doc. A/AC.96/783, para. 21(j), urging States, among others, to allow their citizens to return 'in safety and dignity to their homes without harassment, arbitrary detention or physical threats...'

[30] See Bilateral Agreement between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Voluntary Return of Refugees 27 *ILM* 585 (1988); also Afghanistan-Pakistan-Union of Soviet Republics-United States: Accords on the Peaceful Resolution of the Situation in Afghanistan, Geneva, 14 Apr. 1988: ibid., 577. Cf. US Committee for Refugees, 'Left out in the Cold: The perilous homecoming of Afghan refugees', Dec. 1992. For other examples of agreements touching on the repatriation of refugees, see India-Sri Lanka: Agreement to Establish Peace and Normalcy in Sri Lanka, Colombo, 29 July 1987: 26 *ILM* 1175 (1987); South Africa-UNHCR, Memorandum of Understanding on the Voluntary Repatriation and Reintegration of South African Returnees: 31 *ILM* 522 (1992).

considered, may be far from ideal[31]. It often does not matter what UNHCR, NGOs, or even States want; if refugees themselves choose to return, so they will, even to situations that outsiders consider highly insecure and undesirable. The virtue of voluntariness lies in the fact that it is an inherent safeguard against *forced* return, while being one manifestation of the 'right to return', to be exercised within a human rights framework, and whether or not Convention refugees in the strict sense are involved. Put another way, voluntariness (the choice of the individual) is justified because in the absence of formal cessation, the refugee is the best judge of when and whether to go back; because it allows for the particular experiences of the individual, such as severe persecution and trauma, to receive due weight; and finally because there is a value in individual choice. The voluntary character of repatriation is the necessary correlative to the subjective fear which gave rise to flight; willingness to return negatives that fear, but it requires equal verification[32].

In the classic case, therefore, choice is equivalent to protection. But how is that value choice to be effectively safeguarded? In individual cases? In situations of mass movement? And by what standards are the conditions for *safe* return to be judged?

## 2. Safe return

From having been a description of the preferred consequence or effect of repatriation, the notion of 'safe return' 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. In 1994, the Executive Committee linked temporary protection (admission to safety, respect for basic human rights, protection against *refoulement*) to 'safe return when conditions permit'[33]. This reflects a significant body of State practice that recognises the existence of an intermediate category in need of protection, but raises questions as to both the obligation to protect and

[31] See Executive Committee Conclusion No. 40 (1985), para. (h), recognising the importance of 'spontaneous return'.

[32] See Goodwin-Gill, G.S., 'Voluntary Repatriation: Legal and Policy Issues', in Loescher, G. & Monahan, L., *Refugees in International Relations*, (1989), 255, where these ideas are developed more fully, with illustrations from a number of repatriation programmes. From a practical perspective, establishing the views of large numbers of refugees can pose problems of logistics and principle, touching issues of information and representative (or not) decision-making.

[33] Executive Committee General Conclusion on International Protection (1994): *Report* of the 45th Session: UN doc. A/AC.96/839, paras. 19(r), (u).

the modalities governing termination of protection. Although the State remains bound by such provisions as prohibit torture or cruel and inhuman treatment, no rule of international law appears formally to require that a State proposing to implement returns take into account and act on assessments of both 'legal' safety and safety in fact, including basic issues like absence of conflict, de-mining, and a working police and justice system.

A central issue in the distinction between voluntary repatriation and safe return is, Who decides? International law provides no clear answers to situations involving large movements of people in flight from complex situations of risk. If the conditions that caused flight have fundamentally changed, the 'refugee' is no longer a 'refugee' and, all things being equal, can be required to return home like any other foreign national. That a 'refugee' may voluntarily repatriate seems to imply a decision to return while the conditions for a well-founded fear of persecution continue to exist. Where choice as protection is absent, what will be the safeguard. State proponents of 'safe return' effectively substitute 'objective' (change of) circumstances for the refugee's subjective assessment, thereby crossing the refugee/non-refugee line. Here, it seems, is an emerging international law in which the only safeguards at present are essentially political.

So far as safe return *may* have a role to play in the construction of policy, its minimum conditions include a transparent process based on credible information, which involves States, UNHCR as the agent of the interest of the international community[34], and a representative element from among the refugees or displaced themselves. These or equivalent means seem most likely to ensure that the element of risk is properly appreciated, so reducing the chance of States acting in breach of their protection obligations.

## 3. Voluntary repatriation, safe return and former Yugoslavia

The recognised refugee is protected against return until refugee status has ceased, either through voluntary act of the individual or change of circumstances; and that protection is premised on legal status and a process by which to claim rights. By definition, *voluntary* repatriation of *refugees* presupposes a choice to return *before* circumstances have changed; the protected status as refugee, however, means that the individual should be free from pressure to return, while always able (in an ideal world) to make an informed choice about whether to go back. To

[34] Executive Committee General Conclusion on International Protection (1994), above note 149, para. 19(u) calls on UNHCR, amongst other matters, to provide guidance on the implementation of temporary protection, 'including advice...on safe return once the need for international protection has ceased'.

the extent that return movements are being organised 'externally' (for example, by governments, UNHCR or other agencies) in less than ideal conditions, and where no clear and substantial change of circumstances has occurred, the internationally protected status of the refugee would seem to require that steps also be taken to ensure the voluntariness of the decision to return.

Equally, where the return of refugees is promoted, the minimum conditions of safety and dignity engage a recognisable 'rights context', so that the life and liberty of those returning ought to be guaranteed, along with other relevant rights, such as non-discrimination and family life. From an operational perspective, this may require responsible agencies and States to establish the appropriate conditions, whether in the way of de-mining, establishment of a working judicial and police system, re-building community infrastructure, and so forth. In addition, short-term protection mechanisms may need to be created and institutionalised, for example, with an international component, international presence, and effective monitoring and recourse procedures[35].

The question of returns to former Yugoslavia raises questions in each of the above domains. This complex situation involves the internally displaced and their entitlement to return to their communities of origin, often across new ethnic boundaries; the status of recognised Convention refugees in other countries, and whether their claim to be considered as refugees continues in present circumstances; and the situation of those enjoying the many varieties of temporary protection. The last-mentioned, in particular, involving the termination or suspension of temporary protection and the ensuring 'requirement' to return by States of refuge, presents a number of acute issues, in which few if any clear legal safeguards can be distinguished.

The circumstances prevailing in former Yugoslavia illustrate the extent to which the solution of safe return is dependent on a variety of other actors, including those responsible for creating the necessary conditions, and for implementing the peace agreement[36]. For this reason, and so far as individual choice is not factored

[35] It may be enough that such safeguards operate at the 'community' level, rather than that recourse necessarily entail lengthy or cumbersome individual proceedings, at least during certain initial stages of a process of return and re-establishment.

[36] See, among others, Bosnia and Herzegovina, Croatia, Yugoslavia, General Framework Agreement for Peace in Bosnia and Herzegovina, particularly Annexes 6 (Human Rights) and 7 (Refugees and Displaced Persons): 35 *ILM* 75 (1996); UNHCR, Information Notes, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia, the Former Yugoslav Republic of Macedonia and Slovenia, No. 3-4/96, March/April 1996; 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): 8 *IJRL* No. 3 (1996).

into the process, a number of so-called benchmarks have been proposed as alternative safeguards in the absence of rules. These would include, for example, achievement of the military goals set out in the Dayton agreement, the enactment of amnesty laws, the establishment of human rights protection mechanisms, and progress towards local rehabilitation and reconstruction. Clearly, a key element for policy-makers (and those concerned by the prospect of premature returns) is *information*, particularly given the emphasis on involuntary return. Up-to-date, accurate and coherent analyses of conditions prevailing in different parts of former Yugoslavia is essential, however, not only for those who will decide when temporary protection regimes shall be brought to a close, but also for refugees and displaced themselves. Annex 7 of the Dayton Agreement, for example, provides,

> Choice of destination shall be up to the individual or family, and the principle of the unity of the family shall be preserved. The Parties shall not interfere with the returnees' choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life. The Parties shall facilitate the flow of information necessary for refugees and displaced persons to make informed judgements about local conditions for return[37].

To this end, UNHCR has begun the compilation and publication of a series of repatriation information reports, detailing the security, political, economic and social situation in relevant municipalities[38].

## 4. Concluding remarks

In the past, in Western Europe and North America in particular, the question of the return of refugees to their country of origin received little attention. Those recognised as Convention refugees generally were accepted for permanent residence, and the treatment accorded to those falling within the associated humanitarian categories was often no different. In its early years, the Indochinese refugee crisis was also closely and almost automatically linked to third country resettlement, and only later did a more restrictive approach to refugee status lead to a concentration on return. Even in these circumstances, States considered that returns should be integrated into a programme of co-operation which included the

[37] General Framework Agreement for Peace in Bosnia and Herzegovina, above note 20, Annex 7, art. I.4.

[38] Available in English and German, these reports can also be accessed through UNHCR's Web site: http://unicc.org/unhcr/country/sofy. This site and UNHCR's CD-ROM, *Refworld/Refmonde*, provides a wealth of information on country conditions, as relevant to return as to the determination of refugee status.

country of origin and which facilitated a moderate form of monitoring of conditions.

The example of former Yugoslavia has revealed many of the deficiencies of a refugee regime insufficiently linked to remedies, in the sense of removing or mitigating the causes of flight. It has shown, too, the present limits to States' willingness to accept refugees indefinitely, including refugees from conflict, and the lack of formal safeguards when it comes to the promotion of voluntary and involuntary return. For these reasons, the emerging practice of States and international organisations requires particularly close scrutiny if returns are to be carried out or to take place in conditions of safety and dignity.

**Annex**

## 1969 OAU Convention on Refugee Problems in Africa
## Article V
## Voluntary Repatriation

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalised for having left for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organisations, to facilitate their return.

## UNHCR Executive Committee
## Conclusions
## No. 18 (XXXI)1980: Voluntary Repatriation[39]

The Executive Committee,

(a) Recognised that voluntary repatriation constitutes generally, and in particular when a country accedes to independence, the most appropriate solution for refugee problems;

(b) Stressed that the essentially voluntary character of repatriation should always be respected;

(c) Recognised the desirability of appropriate arrangements to establish the voluntary character of repatriation, both as regards the repatriation of individual refugees and in the case of large-scale repatriation movements, and for UNHCR, whenever necessary, to be associated with such arrangements;

(d) Considered that when refugees express the wish to repatriate, both the government of their country of origin and the government of their country of asylum should, within the framework of their national legislation and, whenever necessary, in co-operation with UNHCR take all requisite steps to assist them to do so;

(e) Recognised the importance of refugees being provided with the necessary information regarding conditions in their country of origin in order to facilitate their decision to repatriate; recognised further that visits by individual refugees or refugee representatives to their country of origin to inform themselves of the situation there without such visits automatically involving loss of refugee status could also be of assistance in this regard;

(f) Called upon governments of countries of origin to provide formal guarantees for the safety of returning refugees and stressed the importance of such guarantees being fully respected and of returning refugees not being penalised for having left their country of origin for reasons giving rise to refugee situations;

(g) Recommended that arrangements be adopted in countries of asylum for ensuring that the terms of guarantees provided by countries of origin and relevant information regarding conditions prevailing there are duly communicated to refugees, that such arrangements could be facilitated by the authorities of countries of asylum and that UNHCR should as appropriate be associated with such arrangements;

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[39] *Report* of the 31st Session: UN doc. A/AC.96/588, para. 48(3).

(h) Considered that UNHCR could appropriately be called upon with the agreement of the parties concerned to monitor the situation of returning refugees with particular regard to any guarantees provided by the governments of countries of origin;

(i) Called upon the governments concerned to provide repatriating refugees with the necessary travel documents, visas, entry permits and transportation facilities and, if refugees have lost their nationality, to arrange for such nationality to be restored in accordance with national legislation;

(j) Recognised that it may be necessary in certain situations to make appropriate arrangements in co-operation with UNHCR for the reception of returning refugees and/or to establish projects for their reintegration in their country of origin.

## No. 40 (XXXVI)1985: Voluntary Repatriation[40]

The Executive Committee,

Reaffirming the significance of its 1980 conclusion on voluntary repatriation as reflecting basic principles of international law and practice, adopted the following further conclusions on this matter:

(a) The basic rights of persons to return voluntarily to the country of origin is reaffirmed and it is urged that international co-operation be aimed at achieving this solution and should be further developed;

(b) The 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;

(c) The aspect of causes is critical to the issue of solution and international efforts should also be directed to the removal of the causes of refugee movements. Further attention should be given to the causes and prevention of such movements, including the co-ordination of efforts currently being pursued by the international community and in particular within the United Nations. An essential condition for the prevention of refugee flows is sufficient political will by the States directly concerned to address the causes which are at the origin of refugee movements;

(d) The responsibilities of States towards their nationals and the obligations of other States to promote voluntary repatriation must be upheld by the international community. International action in favour of voluntary repatriation, whether at the universal or regional level, should receive the full support and co-operation of all States directly concerned. Promotion of voluntary repatriation as a solution to refugee problems similarly requires the political will of States directly concerned to create conditions conducive to this solution. This is the primary responsibility of States;

(e) The existing mandate of the High Commissioner is sufficient to allow him to promote voluntary repatriation by taking initiatives to this end, promoting dialogue between all the main parties, facilitating communication between them, and by acting as an intermediary or channel of communication. It is important that he establishes, whenever possible, contact with all the main parties and acquaints

[40] *Report* of the 36th Session: UN doc. A/AC.96/673, para. 115(5).

himself with their points of view. From the outset of a refugee situation, the High Commissioner should at all times keep the possibility of voluntary repatriation for all or for part of a group under active review and the High Commissioner, whenever he deems that the prevailing circumstances are appropriate, should actively pursue the promotion of this solution;

(f) The humanitarian concerns of the High Commissioner should be recognised and respected by all parties and he should receive full support in his efforts to carry out his humanitarian mandate in providing international protection to refugees and in seeking a solution to refugee problems;

(g) On all occasions the High Commissioner should be fully involved from the outset in assessing the feasibility and, thereafter, in both the planning and implementation stages of repatriation;

(h) The importance of spontaneous return to the country of origin is recognised and it is considered that action to promote organised voluntary repatriation should not create obstacles to the spontaneous return of refugees. Interested States should make all efforts, including the provision of assistance in the country of origin, to encourage this movement whenever it is deemed to be in the interests of the refugees concerned;

(i) When, in the opinion of the High Commissioner, a serious problem exists in the promotion of voluntary repatriation of a particular refugee group, he may consider for that particular problem the establishment of an informal ad hoc consultative group which would be appointed by him in consultation with the Chairman and the other members of the Bureau of his Executive Committee. Such a group may, if necessary, include States which are not members of the Executive Committee and should in principle include the countries directly concerned. The High Commissioner may also consider invoking the assistance of other competent United Nations organs;

(j) The practice of establishing tripartite commissions is well adapted to facilitate voluntary repatriation. The tripartite commission, which should consist of the countries of origin and of asylum and UNHCR, could concern itself with both the joint planning and the implementation of a repatriation programme. It is also an effective means of securing consultations between the main parties concerned on any problems that might subsequently arise;

(k) International action to promote voluntary repatriation requires consideration of the situation within the country of origin as well as within the receiving country. Assistance for the reintegration of returnees provided by the international community in the country of origin is recognised as an important factor in promoting repatriation. To this end, UNHCR and other United Nations agencies as appropriate, should have funds readily available to assist returnees in the various stages of their integration and rehabilitation in their country of origin;

(l) The High Commissioner should be recognised as having a legitimate concern for the consequences of return, particularly where such return has been

brought about as a result of an amnesty or other form of guarantee. The High Commissioner must be regarded as entitled to insist on his legitimate concern over the outcome of any return that he has assisted. Within the framework of close consultations with the State concerned, he should be given direct and unhindered access to returnees so that he is in a position to monitor fulfilment of the amnesties, guarantees or assurances on the basis of which the refugees have returned. This should be considered as inherent in his mandate;

(m) Consideration should be given to the further elaboration of an instrument reflecting all existing principles and guidelines relating to voluntary repatriation for acceptance by the international community as a whole.

# Repatriation of Refugees from the Former Yugoslavia
# An Analysis of the Requirements for Repatriation

**Jens Vedsted-Hansen***

## The Legal Framework of the Implementation of Repatriation

Even though repatriation programmes for refugees may appear to be predominantly a matter of political will, financial resources, and logistical skills, they cannot be carried out in a legal vacuum. While the overall legal concepts and safeguards pertinent to the implementation of repatriation have been analysed in depth in Hathaway's and Goodwin-Gill's papers[41], this paper will constrain itself to identifying such elements of the legal framework that may have some bearing on the *feasibility* of repatriation programmes.

For this purpose, the notion of 'legal framework' must be understood in its wider sense. 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. Further, we cannot limit ourselves to considering the norms and principles of international refugee protection. The general human rights situation in the country of origin, i.e. effective respect for and protection of the human rights of the returnees, is indeed a *sine qua non* to repatriation. This follows already from the norms of refugee law, and it is even more relevant within the implementation perspective. The specific conflict resolution (peace agreement and similar instruments) must therefore include norms and mechanisms securing human rights as an essential part of the peace and reconciliation process. Again, the broader humanitarian commitments, be they legally binding, soft law, or policy principles and mechanisms, should be regarded as inseparable elements of the overall legal and policy framework of the implementation of repatriation.

## Repatriation Versus Mandatory Return

When discussing repatriation of refugees, the most crucial question is probably that of *voluntariness*. Should refugees only repatriate on the basis of their own

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[41] See Hathaway, '*The Meaning of Repatriation*' and Goodwin-Gill, '*Repatriation and International Law - The Legal Safeguards*', published in this working paper.

totally voluntary decision, or could - and, if so, should - they be compelled to return to the country of origin once the circumstances there have changed? The discussion of this complex issue falls beyond the scope of this paper; however, on the basis of other papers[42] and with a view to the political realities following the Dayton Peace Agreement[43], it is relevant to point at the legal implications of the distinction between voluntary and mandatory return.

First of all, the case of former Yugoslavia proves the necessity to clarify the legal impact of the statuses and categories applied to the persons displaced from the conflict areas. While there may have been good reasons, and indeed strong political incentives, not to formalise the legal categories of those granted temporary protection, a certain degree of clarification nonetheless becomes necessary once such protection is going to end. This seems quite clear from the terminology presently used by UNHCR in describing programmes of return to former Yugoslavia: The term *repatriation* is restricted to describing voluntary return from locations of asylum in other countries, and *return* as such refers to internally displaced persons; the mandatory return or repatriation of externally displaced persons from their (temporary) asylum countries is thus referred to as the '*lifting* of temporary protection'. This is not really a well defined concept of refugee law, neither has it been applied regularly hitherto. Correspondingly, the prerequisites for such 'lifting' or 'phasing out', as well as its human or political consequences, may seem rather unclear.

To the extent voluntary repatriation is replaced by mandatory return from a country of (temporary) asylum, the traditional criteria and safeguards under international refugee law will have to be part of the legal framework of implementation. Accordingly, those protected persons who have been *recognised as refugees*, as well as those whose claim for refugee status has not been determined yet - hence they must be *presumed* to have such status - cannot be forced to return to their country of origin until and unless the criteria for *cessation of refugee status* are fulfilled. Among the cessation clauses of the Geneva Convention[44], Article 1 C(5) and (6) seem to be the most relevant; it is important to note the second paragraph of these provisions, setting out what has evolved from the more specific *Holocaust exemption* into a general principle, providing for the upheld status of such refugees who have personally been victimised by the atrocities of the past.

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[42] See Hathaway, n1 above.

[43] *General Framework Agreement for Peace in Bosnia and Herzegovina.* 35 ILM 75 (1996).

[44] Convention relating to the Status of Refugees. Concluded: 28 July 1951; entered into force: 22 April 1954. 189 UNTS 2545.

Further, and possibly more immediate, protection against forced return follows from the principle of *non-refoulement* laid down in Article 33 of the Geneva Convention; in the application of this principle, it should not be forgotten that even in circumstances of general change towards peace, democracy and reconciliation, there may still be particularly vulnerable cases calling for attention to the existence of a risk of continued persecution. In the context of former Yugoslavia, an example might be mixed-marriage families originating from certain areas or communities within the country of origin.

A third principle under international refugee law which may have some implications for repatriation programmes, is the so-called '*safety and dignity*' requirement. Even though the requirement as such is generally recognised and frequently referred to in relation to the return of refugees and asylum seekers, the precise legal status and impact of this principle may seem difficult to establish. While the requirement of safety and dignity has evolved in UNHCR documents prepared for, and later adopted by, the Executive Committee, and in resolutions from the UN General Assembly, primarily with a view to *voluntary* repatriation, recent years have shown a significant tendency towards invoking or applying the principle in situations of *forced return* as well.

These have often included the forcible return of rejected asylum seekers to their country of origin. More recently the principle of safe return has also been referred to in the context of bringing temporary protection of refugees and displaced persons to an end, i.e. the possibility of mandatory return of those protected so far. Thus, the 1994 UNHCR Note on International Protection[45] anticipates temporary protection to be 'phased out' - 'ideally through voluntary repatriation' - if conditions in the country of origin have changed sufficiently to allow for 'return in safety and dignity'; likewise, the Conclusions of the Executive Committee seems to consider voluntary repatriation as one thing, and 'safe return' once the need for international protection has ceased as something different. Even while the 'safety' requirement may appear sympathetic as such, it is at risk of distracting attention from the norms of and criteria of *cessation* and *non-refoulement* traditionally applied in situations of this nature.

[45] Note on International Protection, 45th Session of the Executive Committee of the High Commissioner's Programme. A/AC.96/830 (1994).

## Forced Return as a Barrier to Voluntary Repatriation?

The policy distinction between voluntary repatriation and mandatory return results in some delicate balances and potential conflicts to be taken into account when designing programmes of both integration and repatriation of refugees. First of all, the process of integration into the host society is inevitably influenced by the long-term life perspective of those human beings undergoing the process. Is integration seen as a preparation for permanent settlement, or should it rather be designed and implemented so as to involve a high degree of empowerment for the repatriation and the subsequent contribution to the reconstruction of the country of origin? For instance, while having chosen different models of temporary protection of the Bosnian refugees, the Nordic countries now endeavour to settle this complex issue, trying to come to terms with the consequences of the models once chosen.

A second issue influenced by the dichotomy of voluntary versus forced return, is more closely connected to the stages of potential repatriation. If and when repatriation is being promoted on a *voluntary* basis, such a policy objective may often be incompatible with parallel policies of *forced return*. A clear-cut example of this inherent conflict of policy aims is the 'look-and-see' arrangements presently taking place in the case of Bosnia and Herzegovina, on the premise that refugees should maintain their status in the country of asylum while paying short visits to the country and region of origin. In so far as they may simultaneously be (or feel being) at risk of losing their status by way of cessation practices and forced return, they may logically refrain from the possibility of preparing for the voluntary solution.

Hence, pursuing the latter option effectively should not be accompanied by a cessation or forced return policy based on the very fact of the individual refugee's preparation for voluntary repatriation. In order to avoid such contradictory policies, there would seem to be a need for applying purely *objective criteria*, e.g. time limits, to the application of cessation clauses. A clear and reliable distinction between the voluntary return preparation and any programme of forced return should be maintained. At least, the mere possibility of forcible return should be explicitly suspended in favour of the voluntary repatriation, if and when this is practised as the principal solution.

## Specific Implementation Issues Relating to former Yugoslavia

Obviously, the Dayton Peace Agreement serves other, and even more important, objectives than the repatriation or return of refugees and displaced persons. If, however, the Agreement and its Annexes are considered as facilitators of repatriation, the scope of human rights and the means of protecting them seem to be rather narrowly delineated in these instruments. While the human rights provisions in the Constitution, as contained in Annex 4 to the General Framework Agreement, and in the Annex 6 'Agreement on Human Rights', as well as the international human rights agreements referred to in both Annexes, include a wide range of civil, political, economic, social and cultural protections and entitlements, the peace instrument of particular relevance to the situation of *returnees* has focused predominantly on certain key civil rights. Given the operational mechanism set up by the Annex 7 'Agreement on Refugees and Displaced Persons', there is even within this protective scope a particularly strong emphasis on the return of real estate property, or alternatively compensation of such property to its previous possessors[46]. This is not altogether irrelevant to the feasibility of repatriation, yet it is likely to appear absolutely insufficient in order to promote voluntary return as the preferable option to individual refugees.

Furthermore, the effectiveness of the *protection mechanisms* is a crucial element of any repatriation programme, whether based on voluntariness or involving forced return, should it be truly in accordance with basic human rights principles. Even though international monitoring and control has been foreseen by the Dayton Peace Agreement, this still leaves essential questions open to future clarification. As a possibly technical, but not purely theoretical, example of this one could mention the problems of exhaustion of *national remedies* as a pre-condition 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 Peace Agreement and its human rights mechanisms, not to mention the practical effects and the potential for political sensitivity following from delayed procedures of the monitoring bodies.

Against this background it is evident that flexible political monitoring mechanisms can have an important role in addition to the formally binding control procedures under the UN and Council of Europe conventions on human rights. In the former Yugoslavia such mechanisms have already proved valuable during the period of open conflict, where the then Conference on Security and Cooperation in Europe's (CSCE) *ad hoc* missions were established with a primary view to

[46] See Article 1(1) and Chapter 2 of Annex 7.

monitoring or investigating 'human dimension' issues (as long as they were allowed to). With the CSCE, or rather the Organisation for Security and Cooperation in Europe (OSCE) as it is now, having a key position in the process of democratisation and human rights protection in Bosnia and Herzegovina, this organisation can already carry out some sort of monitoring which may have an impact on repatriation programmes. More generally, the various procedures under the Vienna and in particular the Moscow mechanism might be restored in case of need for an international political intervention into abusive human rights developments in a country in which such programmes are being implemented.

Last, but certainly not least, the essential functions of the *civil society* must be mentioned. When promoting human rights as an element of the process towards democracy and reconciliation, the involvement of activities and practices among citizens in their everyday life is probably the most constructive approach to prevent such situations arising where formal protection procedures will have to be activated. Again, the basic legal provisions set out in the Dayton Peace Agreement[47] have established a formal framework for such non-governmental organisations; but much more is needed to operationalise this commitment, both on the legal and political level, and indeed also in the form of financial resources, capacity building etc.

## Repatriation Versus Protection of Refugees and Returnees

To end this paper by going back to more general issues pertinent to repatriation programmes, it would seem relevant to point at a certain risk to human rights and refugee protection linked to the return of refugees. In at least two different ways such risk is potentially inherent in the repatriation of refugees to a given country of origin.

First, the fact of people returning home can be detrimental to new arrivals of individuals seeking protection from human rights violations taking place in the very same country or sub-district. We have seen this type of effect being the actual result of returns, e.g. following the Indo-Sri Lankan peace agreement in 1987, and in connection with returns to particular areas of Afghanistan in recent years. To prevent such inadequate side-effects is most of all a matter of the decision-makers' access to correct information about returns taking place, and their ability to draw the right conclusions and avoid mis-interpretations of that information. To this end, the role and statements of UNHCR *vis-à-vis* the concrete repatriations is of major impact.

[47] cf. Annex 6, Agreement on Human Rights, Article 13.

Second, and maybe more importantly, in some situations repatriation of refugees - and return of internally displaced persons alike - can in itself jeopardise stability and conflict resolution in the country of origin. The concrete risk will depend on the specific circumstances of the conflict and the persecutions which have taken place. As such, the risk may occur just as evidently as its underlying reasons are difficult to handle. Hence, this observation may be suitable for demonstrating the complexity and inter-dependence of the various elements that must be taken into account in establishing the overall preconditions for a sustainable repatriation programme. This indeed goes beyond the scope and limits of traditional refugee law.

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