

An offprint from
International Journal of
Refugee Law

VOLUME 9 1997

OXFORD UNIVERSITY PRESS

The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection

SAUL TAKAHASHI*

1. Introduction

Traditionally, the three solutions¹ to refugee crises have been held to be integration of the refugee into the asylum country, resettlement to a third country, and voluntary repatriation to the country of origin. The emphasis on which solutions was ideal has changed numerous times throughout history, depending on the practicalities of particular situations as well as the prevailing geo-political circumstances. For much of the post-war period, resettlement was generally thought to be the most, indeed, the only viable option for refugees. Now mainstream thought has changed, and since the late 1980s voluntary repatriation has been highlighted as the best of durable solutions. However, the theoretical framework for voluntary repatriation remains relatively undeveloped, compared to other aspects of the refugee issue.

In this context, the position of the UN High Commissioner for Refugees (UNHCR), the international agency charged specifically with providing international protection to refugees, supervising the 1951 Convention

* Refugee Officer, International Secretariat, Amnesty International. The opinions expressed in this article are those of the author alone and do not necessarily represent the views of Amnesty International.

¹ As one commentator has remarked, 'In the discussion of the refugee problem, the terminology relating to solution has differed from time to time. The term "solution" has either been unqualified or it has been qualified by different adjectives, such as "radical", "final", "permanent", and "durable".' Coles, G.J.L., 'Solutions to the Problem of Refugees and the Protection of Refugees', Background Study prepared for the Round Table on Durable Solutions and the Protection of Refugees, 1989, at 2 (hereafter, Coles 1989).

relating to the Status of Refugees² (1951 Convention), and monitoring and promoting the welfare of refugees worldwide, is of particular importance. This is especially true with regard to voluntary repatriation, for here, compared to other aspects of refugee protection, standards remain relatively undeveloped. UNHCR, the UN agency with a field presence and the most comprehensive involvement with refugee situations, is in a crucial position to establish standards in an underdeveloped field.

Refugees are now acknowledged as a human rights issue. People abandon their homes and families and flee their countries because they fear that their human rights will be violated. The link between the refugee issue and human rights is therefore inseparable, and while the central concept of 'persecution' in the refugee definition is not defined in the 1951 Convention, the analogy with human rights standards is obvious.³

Human rights standards therefore have a central role to play in creating any kind of framework for repatriation and in determining when repatriation can rightly be encouraged. The principle of *non-refoulement*, a principle of general international law, obliges all states not to return refugees to danger *in any manner whatsoever*.⁴ Complying with this obligation implies that the relevant actors should not only refrain from forcibly returning refugees to a situation of danger, but should also ensure that conditions in a refugee's country of origin are indeed sufficiently safe before encouraging refugees to repatriate.

The thesis of this paper is that there must be an objective and impartial assessment of the human rights situation in the country of origin, and an authoritative decision that conditions are safe; only *after* this has been done can the return of refugees be promoted and encouraged. The theoretical framework for repatriation must be based soundly on principles of human rights law, with the protection of refugees paramount in all circumstances.

Sadly, this is presently not the case. The few standards governing voluntary repatriation owe little to human rights law, and the few references are of questionable value. UNHCR, in particular, has played a disappointing role, giving undue emphasis to repatriation as *the* goal to be achieved. The primary organisational function of the UNHCR is the

² See art. 35, 1951 Convention, 'Co-operation of the national authorities with the United Nations', which reads: '(1) The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.'

³ See, for example, Hathaway, J., *The Law of Refugee Status*, Butterworths, 1991, (hereafter Hathaway 1991), 108: 'The dominant view . . . is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.'

⁴ See, for example, Goodwin-Gill, G.S., *The Refugee in International Law*, Clarendon Press, Oxford, 2nd ed., 1996, (hereafter Goodwin-Gill 1996), 167: 'There is substantial, if not conclusive, authority that the principle is binding on all States, independently of specific assent'; also Hathaway 1991, 26.

protection of refugees. Yet an examination of the organisation's positions would seem to indicate that repatriation is paramount; to be pursued and implemented at as early a stage as possible, even if at times that may mean taking insufficient regard of protection principles. Instead of protection being the main goal and repatriation a secondary consideration, protection is taking a back seat to return, a situation with potentially dire consequences for the protection of refugees worldwide.

Indeed, UNHCR's role in the recent repatriation of more than 500,000 Rwandese refugees from Tanzania has been sharply criticised on this point, in particular by Amnesty International. UNHCR issued a joint statement with the Tanzanian government in early December 1996, stating that the situation in Rwanda was safe for refugees to return and that 'all Rwandese refugees in Tanzania [were] expected to return home by 31 December 1996'.⁵ Amnesty International, which had documented alarming levels of human rights abuse in Rwanda, declared that the UNHCR 'played down' the reports and 'condoned the mass *refoulement*' of refugees.⁶

The High Commissioner set the tone definitively in her statement to the Executive Committee in 1991, where she declared one of the organisation's primary goals, 'to pursue every opportunity for voluntary repatriation. In a world where most refugees are confined to overcrowded, makeshift camps in conditions as dismal — if not more dismal — than the situation they have fled, the right to return to one's homeland must be given as much recognition as the right to seek asylum abroad.'⁷ Instead of focusing on trying to improve the 'dismal' state of protection under which refugees were suffering, refugees were to be encouraged to return home. The 1992 UNHCR *Note on International Protection* is even more startling in its candour, stating that the UNHCR must explore:

Criteria for promotion and organisation of large scale repatriation must balance the protection needs of refugees against the political imperative towards resolving refugee problems . . . the realisation of a solution in a growing number of refugee

⁵ See 'Message to all Rwandese refugees in Tanzania from the Government of the United Republic of Tanzania and the Office of the UNHCR': '... given the conditions prevailing in Rwanda, the Government of [Tanzania] has decided that all Rwandese refugees can now return to their country in safety.' For text, see 9 *IJRL* 328 (1997).

⁶ Amnesty International, 'Rwanda; Human Rights Overlooked in Mass Repatriation', Amnesty International, London, 1997, 14. Amnesty International asked in a later report: 'Was [the refugees] return voluntary? Were conditions in Rwanda truly safe? These fundamental concerns should govern when a decision is taken to repatriate refugees. But these critical questions were overlooked or given very short shrift in the rush to meet the arbitrary deadline [of 31 December 1996]. That these oversights were possible, were legitimized by the UNHCR, and were so readily accepted by the international community speaks volumes': 'Great Lakes Region; Still in Need of Protection', Amnesty International, London, 1997, 2.

⁷ Statement of the High Commissioner to the 42nd session of the Executive Committee, 7 Oct. 1991, 4: *Report of the 42nd Session of the Executive Committee*: UN doc. A/AC.96/783, (Oct. 1991), Annex.

situations today is most likely where the solution is made an integral part of a 'package' which strikes a humane balance between the interests of affected States and the legal rights, as well as humanitarian needs, of the individuals concerned.⁸

There can be no doubt that the political realities which surround refugee situations may at times force the UNHCR into extremely difficult positions.⁹ However, that is no justification for promoting a framework which does not have the protection of refugees as its primary concern. UNHCR exists to ensure that refugees are protected and their interests are advocated; not to strike some kind of balance between seemingly conflicting interests of states and refugee populations.

This paper does not deal with the phenomenon of 'spontaneous repatriation'. Some 90 per cent of the world's refugees return without the assistance of aid agencies¹⁰ and no comprehensive study of repatriation would be complete without a detailed examination of this phenomenon. However, spontaneous repatriation and repatriation organised and promoted by UNHCR are two separate issues. Refugees who return spontaneously have often never received aid from international agencies, and in many cases neither the international community nor the authorities of the host state are even aware of their existence.¹¹ This in no way discharges UNHCR from its responsibility to ensure the protection of such refugees, a fact rightly recognised by the organisation.¹² However, there is a world of difference between UNHCR's capacity to influence any repatriation programme for refugees in its care and its impact on those who do not choose to receive its assistance.

The distinction between organised and spontaneous repatriation is crucial in conceptualising the issues at hand. The two types of repatriation are often blurred, frequently to the detriment of protection. Commentators

⁸ UN doc. A/AC.96/799, (1992), paras. 38, 39.

⁹ See, for example, Morris, N., 'Protection Dilemmas and UNHCR's Response: A Personal View from within UNHCR', 9 *IJRL* 492 (1997). This is the view also of many independent observers as well; see Robinson, C., *The Long Road Home: The Repatriation of Cambodian Refugees*, US Committee for Refugees, Washington DC, 1993, 4: 'It would be naive to think that in a repatriation operation UNHCR would first and only serve the needs of refugees; it must also try to reconcile these needs with the interests of the host country and the country of origin.'

¹⁰ Cuny, F., Stein, B. & Reid, P., *Repatriation During Conflict in Africa and Asia*; Center for the Study of Societies in Crisis, 1992 (hereafter Cuny, Stein, and Reid 1992), 15: 'Since 1975 almost seven million refugees have returned home. Although virtually all of the figures and totals are suspect, they reveal a pattern; of the millions of returnees, over ninety percent returned in an unorganised or irregular fashion, without significant international assistance.' UNHCR has published a more modest figure, to the effect that of the 2.4 million refugees who repatriated in 1992, 1.7 million did so spontaneously: UNHCR, *The State of the World's Refugees: The Challenge of Protection*, Penguin, 1993 (hereafter UNHCR *State of the World's Refugees* 1993), 107.

¹¹ See, for example, Harrell-Bond, B., *Imposing Aid*, Oxford University Press, 1988, (hereafter Harrell-Bond *Imposing Aid*), 388-9.

¹² 'UNHCR's responsibilities for refugee protection and assistance in voluntary repatriation are engaged regardless of whether refugees are returning in an "organised" manner under UNHCR auspices or "spontaneously" on their own': UNHCR, *Handbook on Voluntary Repatriation; International Protection*, Geneva, 1996 (hereafter UNHCR *Voluntary Repatriation* 1996), 23.

have noted that most spontaneous repatriation takes place when the situation in the country of origin has not yet abated; for example, despite the fact that the conflict which gave rise to the initial flight is still continuing. All too often, this is considered to justify the implementation of an organised repatriation programme, the logic being that since repatriation is taking place on such a scale, conditions in the country of origin must have sufficiently improved for return to be promoted.¹³

This is to turn logic on its head. Refugees return 'spontaneously' for a variety of different reasons, most of which have not yet been adequately researched, although some commentators have pointed out that it often has more to do with the sorry state of protection in the country of asylum than anything else.¹⁴ However, the fact that refugees are returning for one reason or another does not by itself indicate that the situation has changed sufficiently, and it most certainly does not give aid agencies *carte blanche* to initiate organised repatriation. As one observer has rightly said, 'Refugees may choose to risk insecurity, but the international community should not compel them to.'¹⁵ If refugees wish to return, so be it, but UNHCR has no mandate to encourage return unless the human rights conditions in the country of origin have improved. Spontaneous repatriation is not a substitute for an objective assessment of the situation in the country of origin.

2. Voluntary Repatriation in Law

The 1951 Convention recognizes the circumstances in which refugee status may come to an end (article 1C), but makes no mention of voluntary repatriation. Indeed, the only references to return in the text are 'negative'.¹⁶ Article 32 bars state parties from expelling refugees lawfully resident in their territories except for exceptional circumstances, and article 33 lays down the principle of *non-refoulement*. Indeed, the 1951 Convention does not deal with particular solutions, although there is an obvious inclination towards integration (and eventual assimilation) of the

¹³ See, for example, Stein, B. & Cuny, F., 'Repatriation under Conflict', in US Committee for Refugees, *World Refugee Survey* 1991, 21: 'It is evident from a number of repatriations to date that the end of conflict is not a precondition for conflict for repatriation, and that suggests there are political possibilities that need to be explored.'

¹⁴ Cf. Stein, B., 'Ad hoc Assistance to Return Movements and Long Term Development Programmes', in *When Refugees Go Home*, 69: 'the fact that large numbers of refugees choose to return without international "protection" tells us something about the efficacy of the protection process and the fact that many are willing to forgo assistance indicates how aid is regarded during this point in a refugee's exile.' See also Wilson and Junes, 'Repatriation to Mozambique', in Allen, T. & Morsink, H., eds. *When Refugees Go Home*, James Currey, 1994, 174; Harrell-Bond, *Imposing Aid*, 201.

¹⁵ Ruiz, H., 'Repatriation; Tackling Protection and Assistance Concerns', in US Committee for Refugees, *World Refugee Survey* 1993, 25.

¹⁶ See Harrell-Bond, B., 'Repatriation: Under What Conditions is it Desirable?' *African Studies Review* 1989, 47.

refugee in the host state.¹⁷ The situations in which refugee status may be terminated are examined below.

Voluntary repatriation is specifically mentioned in UNHCR's Statute, however. The facilitation of this solution, alongside refugee protection, is one of the main functions of the organisation, and the High Commissioner is to 'provide for the protection of refugees falling under the competence of his Office by . . . assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities'.¹⁸

The Executive Committee of the UNHCR has since elaborated standards regarding voluntary repatriation. In Conclusion no. 18 (XXXI), in 1980, the Committee 'Recognised that voluntary repatriation constitutes generally . . . the most appropriate solution for refugee problems'. The Conclusion '[stresses] that the essentially voluntary character of repatriation should always be respected' and 'called upon governments of countries of origin to provide formal guarantees for the safety of returning refugees'. In 1985, the Executive Committee once again examined the subject and, according to the UNHCR, 'significantly developed doctrine with regard to voluntary repatriation through a clear reiteration of basic protection principles . . .'.¹⁹ More substantively, Conclusion no. 40 firstly '[Reaffirms] the significance of its 1980 conclusion on voluntary repatriation as reflecting basic principles of international law and practice', and goes on to provide that 'the basic right of persons to return voluntarily to the country of origin is reaffirmed'. As well, it declares,

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

¹⁷ This is facilitated by the wide array of rights recognised refugees are to be afforded, such as access to courts equal to nationals (art. 16), the right to work (art. 17), and access to public education equal to nationals (art. 22). As well, naturalisation is to be facilitated 'as far as possible' (art. 34). In *The State of the World's Refugees: In Search of Solutions*, Oxford, 1995, (hereafter, UNHCR, *State of the World's Refugees 1995*), 83, UNHCR notes that '[The] emphasis on settlement outside the country of origin was institutionalised in the [1951 Convention], which set out in considerable detail the various economic, social and civil rights to which exiled populations are entitled . . . By treating refugees in this manner, it was felt, refugees would become assimilated in their new countries, and would avoid the kind of social marginalisation that might result if they were given only a second class status.'

¹⁸ Goodwin-Gill notes that solutions are often listed in order of preference, and suggests that the drafters of the Statute at the time felt voluntary repatriation to be the most preferred solution: 'The Principles of International Refugee Law', in Council of Europe Parliamentary Assembly; *Asylum*, Council of Europe, 1995, 32. For a summary of the debate on the role of repatriation and resettlement in the UN in the 1940s, see Goodwin-Gill, G.S., 'Different Types of Forced Migration as an International and National Problem', in Rystad, G., ed., *The Uprooted: Forced Migration as an International Problem in the Post-War Era*, Lund, Lund University Press, 1990, 15.

¹⁹ UNHCR *Voluntary Repatriation* 1996 at 4.

place of residence of the refugee in his country of origin, should always be respected.²⁰

The strongest direction regarding voluntary repatriation can be found in a regional text, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Refugee Convention), which dedicates an entire paragraph to the standards to be applied.²¹ A detailed examination of the application of the OAU Refugee Convention is beyond the scope of this paper. However, its provisions implicitly assume that there has been a fundamental change of circumstances in the country encouraging refugees to repatriate. After reaffirming the principle of voluntariness, article V(3) of the Convention goes on to provide that '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.' Paragraph 4 declares further that, if necessary, the government of the country of origin should issue an appeal to refugees to return home, assuring them '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'.

3. The Position of UNHCR

The structuring of the theory of voluntary repatriation progressed at a slow pace.²² Though Coles, formerly Head of the Promotion of Refugee Law Section, wrote two comprehensive studies on the subject for UNHCR during the 1980s,²³ these reports were never specifically endorsed by the

²⁰ The Conclusion finally recommends 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.' Detailed discussion regarding such an instrument, however, never materialised. Executive Committee Conclusion 40 was explicitly endorsed by the General Assembly in 1985, further increasing its authority as a text governing standards for voluntary repatriation: UNGA res. 40/118, Dec. 1985.

²¹ Some commentators note that this emphasis on voluntary repatriation in a regional African text was in large part due to the context of contemporary anti-colonial wars, in which it was taken for granted that upon independence, the refugees from the conflict would return to their country and contribute to its rebuilding. See, for example, Harrell-Bond 1989, 47.

²² Cf. Coles 1989, 204: 'Despite the large scale practice of repatriation which occurred at this time, some of it not without basic protection problems, the past international reluctance to develop protection thinking on voluntary repatriation remained. Protection principles continued to be stated in relation only to asylum abroad, and action generally shared the same limited scope.'

²³ The first paper was entitled simply, 'Voluntary Repatriation: A Background Study' (hereafter Coles 1985); the second, entitled 'Solutions to the Problem of Refugees and the Protection of Refugees' (Coles 1989), was on durable solutions in general. Both were submitted to round table discussions on the respective topics; copies held in UNHCR, Centre for Documentation and Research, Geneva.

organisation and were effectively 'shelved'.²⁴ Ultimately, in September 1993, UNHCR produced the *Draft Protection Guidelines on International Protection*, which were followed in April 1996, by the *Handbook on Voluntary Repatriation: International Protection*. This is the most recent and definitive statement of the organisation regarding the theoretical framework of voluntary repatriation, and is expected to have a large influence internationally in the structuring of thought on voluntary repatriation. However, its theoretical framework has a number of problematic aspects.

3.1. Voluntariness and the Cessation Clause

Existing standards regarding voluntary repatriation emphasise above all the principle of voluntariness. However, it is striking that the relationship between the existing standards of voluntary repatriation and the 'cessation clauses' of the 1951 Convention (article 1C) has never been fully explored. What should be particularly examined is article 1C(5), which provides that refugee status should terminate if the refugee 'can no longer, because the circumstances in connection 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'.

It is generally recognised that this clause, commonly known as the 'change of circumstances' clause, is not to be applied lightly. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* declares that the cessation clauses 'should be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status'.²⁵ In a discussion paper submitted to the Sub-Committee of the Whole on International Protection of the Executive Committee in 1992, UNHCR stressed,

the need for an exhaustive examination of the profound and enduring nature of the changes of a period of time, before any decision was taken to apply the clause. In addition, each individual affected should have the option to initiate reconsideration of his/her claim ... An appropriate alternative status, if not maintenance of refugee status, should be considered for those refugees who have established strong social and economic links in the country of asylum.²⁶

The paper further stressed that emphasis should be placed upon 'the level of democratic development in the country, its adherence to international human rights (including refugee) instruments and access allowed for independent national or international organisations freely to verify and

²⁴ Allen, T. & Morsink, H., 'Introduction', in *When Refugees Go Home*, UNRISD, 1994, 2: 'Coles' 1985 report was never officially endorsed or released by the UNHCR, and another report written by him for a UNHCR Round Table was similarly "shelved".'

²⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, 1992, para. 116.

²⁶ UN doc. EC/SCP/1992/CRP.1; also *Report of the 23 January 1992 Meeting of the Sub-Committee of the Whole on International Protection*: UN doc. EC/SCP/70, 7 Jul. 1992 at 2.

supervise the respect for human rights.²⁷ In 1992, the Executive Committee endorsed this cautious stance, stressing in Conclusion no. 69 'that, in taking any decision on application of the cessation clauses based on "ceased circumstances", States must carefully assess the fundamental character of the changes in the country of nationality or origin'.²⁸

Since the reason for people becoming refugees is a 'well-founded fear of persecution', once that fear can no longer be said to be reasonable, it is logical that refugee status should end.²⁹ However, it is not clear in the relevant standards how the principle of voluntariness would tie in with this. The connection between the principle of voluntariness and cessation is an ill-defined 'grey zone' in refugee law which results in a dilemma regarding repatriation. If after a fundamental change of circumstances the cessation clause is applied, then the individuals in question are not entitled to the benefits laid down in the 1951 Convention in the matter of expulsion. They are subject to normal legislation regarding the treatment of aliens and could presumably be repatriated to their country of origin, regardless of whether they return voluntarily or not.

On the other hand, for the international community to encourage the refugees to return, there obviously must have been a fundamental change in the country of origin.³⁰ If that were not the case, the international community would be in effect coercing the refugees to return to a situation where their life or freedom may be threatened — a direct breach of the principle of *non-refoulement*. Herein lies the dilemma; if there is to be respect for the principle of voluntariness, what the Centre for Refugee Studies

²⁷ Ibid. Hathaway has pointed out that the emphasis given to the development of democracy in drafting the 1951 Convention 'highlights the magnitude of change which should exist before the consideration of cessation is warranted . . . The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections, the assumption of power by a government committed to human rights, and a guarantee of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise is the appropriate indicator of a meaningful change of circumstances. It would, in contrast, be premature to consider cessation simply because relative calm has been restored in a country still governed by an oppressive political structure': Hathaway 1991, 200.

²⁸ In the 'Note on the Cessation Clauses' submitted to the Standing Committee of the Executive Committee in June 1997, UNHCR observes: 'There is no requirement that the standards of human rights achieved must be exemplary. However, where real progress has been achieved in the general human rights situation in the country . . . these will constitute grounds for deciding that fundamental changes have occurred': UN doc. EC/47/SC/CRP.30, para. 23.

²⁹ That is not to say that any repatriation to the country of origin need not take into account certain humanitarian considerations, such as the length of the refugee's stay in the country of asylum and the degree of integration. For example, Hathaway advocates permanent status immediately for some groups, such as 'unaccompanied minors, individuals who have been severely traumatised or injured, and other vulnerable groups.' See Refugee Law Research Unit, York University Centre for Refugee Studies; 'The Temporary Protection of Refugees', 1996 (hereafter York University *Temporary Protection*), 53.

³⁰ See, for example, Amnesty International, 'Bosnia Herzegovina; the International Community's Responsibility to Ensure Human Rights', 1996, 90: 'Temporary protection must only be lifted when there is durable safety in Bosnia and Herzegovina according to the standards of the cessation clauses in [the 1951 Convention].'

in York University calls 'mandated return',³¹ is to be avoided, and refugees can only be encouraged to return of their own free will. For voluntary return to be promoted, there must have been a fundamental change in the country of origin so that it is indeed truly safe to return. However, if there has been a fundamental change, then the cessation clause should apply and logically, the persons are no longer refugees. This dilemma has been noted as 'one of the unresolved theoretical paradoxes of UNHCR's institutional responsibilities'.³²

In the view of this author, for voluntary repatriation to be promoted, there must have been a fundamental change of circumstances in the country of origin at such a level as would justify the application of the cessation clause. There must have been an effective and durable improvement in the human rights situation in the refugees' country for them to be encouraged to return home; any other standard would inevitably be against the principles of refugee protection. The standards for cessation and for encouraging repatriation can only be the same, for premature repatriation could result in grave consequences for the refugees concerned.

However, UNHCR's position is that the two standards differ. It has declared flatly that 'voluntary repatriation of refugees can take place at a *lower threshold* of change in the country of origin than cessation'. The level of change needed for cessation is a substantive one, implying a long term process. The UNHCR need not wait for a fundamental change of this magnitude before actively promoting the voluntary return of refugees, but only for a 'general improvement'.³³

Little justification is given for this differentiation in standards. UNHCR observes merely that a 'fundamental change of circumstances' implies the consolidation, over time, of a process of stabilisation.³⁴ It seems to be taken for granted that the promotion of return must begin as soon as possible. Postponing repatriation pending a fundamental change in the home country appears to be incompatible with the objective of repatriation.

³¹ 'It is critical to develop standards and to establish criteria that will govern both the moment and mechanisms of repatriation, and to recognise that repatriation may frequently be mandated rather than voluntary. In that regard, basic human rights values, drawing both on the requirements of refugee law and of general international human rights law, should be brought to bear on the process by which mandated repatriation is to be effected': York University, *Temporary Protection* 55.

³² Goodwin-Gill 1996, 270.

³³ UNHCR *Voluntary Repatriation*, 44. The UNHCR position had already been formulated in 1992, as can be seen in the above-mentioned discussion paper submitted to the Sub-Committee of the Whole. In his address to the Sub-Committee on the issue, the Director on International Protection 'drew attention to the fact that the relationship between cessation and voluntary repatriation was not dealt with in the paper ... he noted the importance of not confusing the two issues in terms of the judgements and the criteria which should apply': *Report of the Sub-Committee: UN doc. EC/SCP/70*, 2.

³⁴ UNHCR *Voluntary Repatriation* 1996, 10.

As the basis for its position, UNHCR asserts that 'the voluntary nature of the refugee's decision to repatriate constitutes the core element in promoting and facilitating repatriation.'³⁵ Therefore, unlike in the cessation clause, the key issue in repatriation is not the objective situation to which the refugee is returning, but the subjective will of the particular refugee, that is, the fact that he or she is returning voluntarily. Some commentators and UNHCR see voluntary return as the necessary corollary of the principle of *non-refoulement*, which prohibits forced return. In this sense, a refugee would volunteer to repatriate only if his or her life or freedom were not in danger upon return. The fact that the refugee is returning voluntarily shows that he or she no longer fears persecution. Since the phrase 'well-founded fear of persecution' contains a subjective element (fear) as well as an objective one (well-founded), the willingness to return on the part of the refugee 'negates' that fear, and implies that he or she is no longer a refugee.³⁶ Otherwise, 'the involuntary return of refugees would in practice amount to *refoulement*.'³⁷

In assessing whether a repatriation truly fulfils the condition of voluntariness, UNHCR puts forward a number of criteria, to the effect that refugee repatriation is *not* voluntary when,

- host country authorities deprive refugees of any real freedom of choice through outright coercion or measures such as, for example, reducing essential services, relocating refugees to hostile areas, encouraging anti-refugee sentiment on the part of the local population;
- factions among the refugee population or exiled political organisations influence the refugees' choice either directly by physically pressuring them to return, or indirectly by activities such as disinformation campaigns about the risk of remaining in the country of asylum or dangers related to returning home;
- certain interest groups in the host country actively discourage voluntary repatriation by disseminating false information including incorrect promises of assistance, economic opportunities or improvement of the legal status.³⁸

³⁵ Ibid.

³⁶ Cf. Goodwin-Gill 1996, 274–5.

³⁷ UNHCR *Voluntary Repatriation* 1996, 10. This idea of the voluntariness being a necessary result of respect for the principle of *non-refoulement* is by no means confined to the UNHCR; for example, private aid agencies have also made statements to that effect; see Helton, A.C., Lawyers' Committee for Human Rights, 'Repatriation or Refoulement', in *Refugees*, July 1992, 39: 'Refugee repatriation must be voluntary. This principle is a corollary of the right of *non-refoulement*; presumably, a refugee would genuinely volunteer to return only if he or she would not face persecution upon return.' See also US Committee for Refugees, *Refugee Reports*, June 1992, 2: 'Repatriations . . . run the risk of not being voluntary, and therefore, in violation of the principle of *non-refoulement*, the international legal norm that prohibits the return of a refugee to a place where his or her life would be threatened.'

³⁸ UNHCR *Voluntary Repatriation* 1996, 42.

It is not clear whether the UNHCR requires all these criteria to be fulfilled in order to promote repatriation. The *Handbook on Voluntary Repatriation* observes merely that,

As a *general rule*, UNHCR should be convinced that the positive pull factors in the country of origin are an overriding element in the refugees' decision to return rather than possible push factors in the host country ...³⁹

This would seem to be based on the assumption that 'push factors' in the country of asylum are an inevitable element of any repatriation operation and that some kind of balancing exercise must be done by UNHCR staff. Indeed, past criticisms of the role of UNHCR in particular repatriation operations have centred on whether or not the organisation has abided by the above criteria — in other words whether the repatriation could be said to be truly voluntary.⁴⁰ Thus, external observers have also focused on the principle of voluntariness, but whether their criticism was justified in the particular circumstances, in the opinion of this author, like the arguments of UNHCR, they miss the point.

In the context of *promotion*, the voluntary nature of repatriation is useful as one additional safeguard,⁴¹ but voluntariness alone cannot possibly be the main criterion; the central issue is the situation in the country of origin. Indeed, as a point of law, the involuntary return of a refugee to a territory in any manner whatsoever where his or her life or freedom may be endangered is *refoulement*; the numerous references to voluntariness in international texts notwithstanding, what is ultimately relevant is the objective situation in the country of origin and whether it has improved to an extent that the refugee can return or be returned.

If the circumstances have not changed to the extent that the refugee is no longer in danger, then forcible return is *refoulement*. UNHCR's attempts to provide a theoretical framework for the difference in thresholds between the promotion of voluntary repatriation and the application of the cessation clause suggests the existence of a 'grey zone' between the two situations. In practice, such grey zones indeed exist; but that fact does not justify encouraging refugees to repatriate when it is not certain

³⁹ *Ibid.*, 11. Emphasis added.

⁴⁰ The Lawyer's Committee for Human Rights has assessed numerous repatriations in Africa against the notion that 'the essence of repatriation is voluntariness'. 'The fundamental question that has to be asked of any repatriation programme is whether the refugee is returning voluntarily.' *African Exodus*, 1995, 6, 118. Human Rights Watch has also noted that there have been 'situations where, among other things, UNHCR employed or acquiesced to the use of negative factors such as the reduction of rations to "encourage" refugees to repatriate. In other instances, UNHCR failed to provide the neutral, accurate and objective information refugees need in order to make a truly voluntary choice to return.' Human Rights Watch 1996, 2.

⁴¹ See, for example, Amnesty International, 'Great Lakes; Still in Need of Protection', above note 6, 4: 'Voluntariness also recognises that it is refugees themselves who are generally the best judges of whether conditions have become sufficiently safe in the country of origin. In that respect it plays an important protection role.'

whether they will be safe. The central question is whether the refugee is at risk and must be protected from *refoulement*. Making voluntariness the central criterion in the promotion of repatriation loses sight of this fact and shifts the focus to the refugees' subjective frame of mind. UNHCR has indicated that it should engage in the promotion of repatriation only when there has been a certain amount of change in the country of origin.⁴² However, the standards of change adopted by UNHCR are inadequate from a human rights standpoint.

3.2 Inadequate incorporation of human rights principles

From the standpoint of human rights law, many of the legal standards governing the conditions under which voluntary repatriation should take place are vague. None of the texts make any in-depth reference to an assessment of the human rights situation in the country of origin before the promotion of voluntary repatriation is to commence. Nowhere in the two Executive Committee Conclusions, widely considered to be the main source of standards of repatriation does it provide that an improvement in the situation in the country of origin should be a prerequisite for voluntary repatriation. The only reference to the situation which caused the initial refugee outflow is in Conclusion 40, which simply provides that '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.'

UNHCR has elaborated these provisions to a small extent, stating that the country of origin has a responsibility to 'allow its nationals to *return in safety and with dignity* without any fear of harassment, discrimination, arbitrary detention, physical threat or prosecution on account of having left or remained outside the country, and should provide guarantees and/or amnesties to this effect. It should also take all measures to ensure the restoration of full national protection.'⁴³ This concept of conditions of 'safety and dignity' is often put forward by the UNHCR; however, close examination indicates that this seems to refer to the conditions of the repatriation operation itself, rather than the human rights situation after return. The *Handbook on Voluntary Repatriation* explains the concept of 'safety' as,

Return which takes place under conditions of legal safety (such as amnesties of public assurances of personal safety, integrity, non discrimination and freedom from fear of persecution or punishment upon return), physical security (including protection from armed attacks, and mine free routes and if not mine free then

⁴² 'Promotion of repatriation can take place when a careful assessment of the situation shows that the conditions of 'safety and dignity' can be met; in other words, when it appears that objectively, it is safe for most refugees to return and that such returns have good prospects of being durable.' UNHCR *Voluntary Repatriation* 1996, 16.

⁴³ UNHCR *Voluntary Repatriation* 1996, 14.

at least demarcated settlement sites), and material security (access to land or means of livelihood).

'Dignity' is described in similar terms:

In practice, elements must include that refugees are not manhandled; that they can return unconditionally . . . that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.⁴⁴

Although these notions are clearly related to human rights, the checklist which follows focuses on logistical matters and is disappointing in its failure adequately to incorporate human rights standards:

Among the elements of 'safety and dignity' to be considered are:

- the refugees' physical safety at all stages during and after their return, including en route, at reception points and at the destination,
- the need for family unity,
- attention to the needs of vulnerable groups,
- the waiver or, if not possible, reduction to a minimum of border crossing formalities,
- permission for refugees to bring their movable possessions when returning,
- respect for school and planting seasons in the timing of such movements, and
- freedom of movement.⁴⁵

'Safety and dignity' in this sense is largely irrelevant to the issue at hand. While the concern of UNHCR for the conditions of the actual repatriation is wholly appropriate, an assessment of those conditions cannot be a substitute for an assessment of the broader human rights situation to which refugees are returning. Security on the way home is important, but more important is security after returning home.

UNHCR has suggested certain standards which should be followed in the context of repatriation, called 'Suggestions for Action'. Put forward in the context of returnee protection, they are the standards by which UNHCR staff engaged in returnee monitoring are to measure the treatment accorded to repatriated refugees. In arguably the most detailed examination of human rights and the rule of law in the entire UNHCR *Handbook on Voluntary Repatriation*, the organisation instructs its staff to engage in numerous activities, including '[facilitating] re-establishment . . . of the rule of law . . . by supporting governments in capacity building', '[promoting] the accession . . . to international human rights instruments', and '[obtaining] a firm commitment by all relevant parties to abide by human rights and humanitarian principles.'⁴⁶

⁴⁴ Ibid., 12.

⁴⁵ Ibid.

⁴⁶ Ibid., 73.

However, the context is returnee monitoring, repatriation already having taken place. In other words, it seems to be assumed that organised repatriation is to be implemented without a truly comprehensive assessment of the human rights conditions in the country of origin, and that human rights standards apparently come into play only after the refugees have returned home. Instead of going forward with repatriation and considering human rights standards only after refugees have returned, it is essential that they be given due consideration *before* organising repatriation, in order to assess whether repatriation is truly an option. Actions such as 'obtaining firm commitments' to abide by human rights standards should be a *condition* of repatriation, not something to be attempted after the refugees have all returned. The monitoring of the welfare of repatriated refugees is necessarily important to ensure that their human rights are protected; however, it is more important to ensure that refugees do not repatriate to a dangerous situation in the first place.

UNHCR's central standard for the human rights protection of returnees is also inadequate. The organisation instructs staff engaged in returnee monitoring that: 'The basic *international law standard* guiding returnee protection is the principle of *non-discrimination*.'⁴⁷ The *Handbook* continues:

Returnee monitoring does not seek to privilege the returning refugees or to elevate their standards above that of the resident population. Rather, it seeks to ensure that returnees *are not targeted* for harassment, intimidation, punishment, violence, or denial of fair access to public institutions or service, or discriminated against in the enjoyment of any basic rights.⁴⁸

These and other statements by UNHCR in regard to particular repatriation operations,⁴⁹ seem to imply that as long as the level of human rights protection enjoyed by repatriated refugees is roughly equal to that of their fellow citizens, the repatriation is a success.

There is indeed a general principle of non-discrimination on certain grounds in human rights law, as can be seen from its inclusion in nearly

⁴⁷ Ibid., 64. Emphasis in original.

⁴⁸ Ibid. Emphasis added.

⁴⁹ For example, it was reported that during the highly controversial repatriation operation of Rohingya Burmese to Bangladesh, UNHCR stated that its objective was to ensure that the returnees were not treated differently than other residents of the region; see US Committee for Refugees, 'The Return of the Rohingya Refugees to Burma; Voluntary Repatriation or Refoulement?' 1995, 12. Moreover, the joint UNHCR-WFP appeal for funding for the repatriation declared that, 'The most important aspect of [the] monitoring role is to ensure . . . that the rights of returnees are respected and that they are not treated differently from other residents of Rakhine State': UNHCR-WFP Joint Appeal, 1. The joint appeal went on to note that 'UNHCR has access to all returnees inclusive of the detained ones', without questioning why returning refugees might be detained, referred euphemistically to forced labour and portering for the Burmese military as 'compulsory labour', and stated that as a result of UNHCR's interventions, 'the authorities have agreed to exempt all returnees for the first two months after their arrival date to limit compulsory labour for the entire population in the area to four days of work per month'. Ibid.

all international human rights instruments.⁵⁰ However, refugee law centres on the concept of persecution, meaning a violation of the individual's human rights, not on non-discrimination alone. If refugee protection is to be seen as human rights protection, the issue is whether the refugee's human rights as an individual would be violated, not whether they would be violated on an equal level with fellow citizens. According to the UNHCR's policy, if all the citizens in a certain country equally faced serious violations of their rights, repatriation could be encouraged as all in the country would be treated equally. Such assertions may have been acceptable in the world of 1923, when Dr Nansen, the League of Nations High Commissioner for Refugees, reported to the League that 'the repatriated [Russian] refugees were in no worse position than the rest of the population with regard to personal liberty.'⁵¹ However, now that internationally recognised principles of human rights are recognised to be central in the protection of refugees, such statements are hardly acceptable.

The question of amnesties for returning refugees also features prominently in the UNHCR texts and is central to its standards of human rights safeguards necessary for repatriation operations. As noted above, Conclusion 40 notes the usefulness of amnesties by stating that the UNHCR 'should be recognised as having a legitimate concern for the consequences of return, particularly when such return has been brought about *as a result of an amnesty or other form of guarantee*.'⁵² However, UNHCR has not gone so far as to make the declaration of an amnesty a necessary requirement for voluntary repatriation operations to commence, observing merely that it 'recommends that ... governments independently promulgate amnesties of legal guarantees for returnees,'⁵³ adding:

UNHCR considers that such texts or declarations should include the right to return and freedom of residence, the provision of an amnesty or other official guarantees. as a minimum, they should stipulate that returnees not be subjected to any punitive or discriminatory action on account of their having fled the country. In addition, issues such as property rights and military service obligations for returnees, international monitoring and the respect for human rights may be covered.⁵⁴

If repatriation goes ahead without a fundamental change in the circumstances of the country of origin, some standard of legal guarantee is commendable. However, from a human rights standpoint, the requirements stipulated by UNHCR are inadequate. They require the

⁵⁰ For example, art. 2 UDHR48; arts. 2, 26 ICCPR66; art. 2, ICESCR66.

⁵¹ Coles 1985 at 23.

⁵² Emphasis added.

⁵³ UNHCR *Voluntary Repatriation* 1996, 65.

⁵⁴ Ibid.

country of origin to refrain only from prosecuting the returning refugees on account of their flight, but fail to address the question of the human rights abuses which were the initial cause of that flight. It would be essential for any kind of declaration of this nature to contain comprehensive and detailed provisions regarding the human rights of returning refugees and their respect.⁵⁵ Again, human rights receive only a cursory mention.

A 'Sample Declaration' in the Annex of the UNHCR *Handbook on Voluntary Repatriation* mentions human rights in the section titled 'Return in Safety and Dignity', but simply to note that, 'No returnee shall be subject to harassment, intimidation, discrimination or persecution for reasons of race, religion, nationality, membership of a particular social group, political opinion or gender.'⁵⁶ As mentioned above, however, 'safety and dignity' refers mainly to the conditions of the repatriation itself, as seems to be confirmed by the fact that there is a separate section titled 'Respect for Human Rights' containing just one sentence: '*In common with all other citizens, the human rights and fundamental freedoms of returnees will be accorded full respect.*'⁵⁷

These positions exhibit a worrying disposition on the part of the organisation to implement repatriation programmes, even if conditions in the country of origin have not sufficiently improved. That is particularly troubling when one considers the repeated assertions that the repatriation of refugees can often be a constructive step in rebuilding confidence in the country of origin. For example, UNHCR has declared that 'voluntary repatriation programmes can perform a valuable confidence-building function by demonstrating in a very tangible manner that the peace process is moving forward and having tangible results.'⁵⁸ While there can be no doubt that the political and social circumstances surrounding refugees are often exceedingly complex, the idea of encouraging return to refugees when the situation has not yet stabilised in the hope that

⁵⁵ See also the standards which UNHCR has put forward for the termination of 'temporary protection' and the repatriation of Bosnian refugees. At the Humanitarian Issues Working Group Meeting in January 1996, it set out three conditions: 1. The implementation of the military provisions of the peace agreement in Bosnia; 2. The proclamation of an amnesty [stating] 'Any returning refugee ... charged with a crime or a common crime unrelated to the conflict, shall upon return enjoy an amnesty'; and 3. The establishment and functioning of mechanisms for the protection of human rights. See Amnesty International, 'Bosnia Herzegovina; the International Community's responsibility to Ensure Human Rights', 1996, 87. However, fulfilment of the conditions demonstrated only the party's compliance with those elements of the peace agreement, and by themselves do not give an adequate picture of the human rights situation in Bosnia. Amnesty noted in a later report that, 'UNHCR has now proposed that refugees can be reasonably expected to return to majority areas of Bosnia-Herzegovina, despite the fact that the parties to the peace agreement have not complied with the requirement of the peace agreement for the establishment and functioning of mechanisms for the protection of human rights': Amnesty International, 'Bosnia-Herzegovina: Who's Living in My House?', London, 1997, 23.

⁵⁶ UNHCR *Voluntary Repatriation* 1996, A32.

⁵⁷ *Ibid.* Emphasis added.

⁵⁸ UNHCR *State of the World's Refugees* 1995, 107.

repatriation will contribute to a settlement is obviously dangerous. While political organs might make such an assessment depending on the particular circumstances, UNHCR is *not* a political organ; its mandate is first and foremost to protect refugees, no matter what the situation may be.⁵⁹

3.3 The Right to Return

A further legal basis for UNHCR's active promotion of voluntary repatriation, in addition to the directive in paragraph 1 of its Statute, is what is commonly referred to as the 'right to return'. The UNHCR *Handbook on Voluntary Repatriation* notes that, 'In international human rights law, the basic principle underlying voluntary repatriation is the right to return to one's own country',⁶⁰ and refers to article 13(2) of the UDHR: 'Everyone has the right to leave any country, including his own, and to return to his country.'

While the right to return to one's country may indeed be a recognised principle of international human rights law; the question is whether it is relevant to the issue at hand. Some commentators have noted that the 'right to return' also operates in the relations between States, as the corollary of the State's duty to re-admit its citizens who are refused permission to remain in, or are deported from, another country.⁶¹ However, the 'right to return', whether it to be a human right *per se* or merely the corollary of an obligation between states, is largely irrelevant to refugee protection, for refugees are by definition people who for the time being at least *cannot* return. They have been driven from their homes by persecution, by conflict, by mass violations of human rights. Most of them may wish to return to their country,⁶² but the point is they are unable to do so.

⁵⁹ See Barutciski, M., 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina', 8 *IJRL* 49. These assertions are not limited to the UNHCR; cf. Stein and Cuny, 'Repatriation under Conflict', in US Committee for Refugees, *World Refugee Survey 1991*, 21: 'repatriation should be seen as a tool for reducing confrontation along tense borders, for expanding or securing zones of peace and stability for returnees, and possibly as an encouragement to talks between the adversaries.'

⁶⁰ UNHCR *Voluntary Repatriation* 1996, 7.

⁶¹ Cf. Goodwin-Gill, G.S., 'Voluntary Repatriation — Legal and Policy Issues', in Loescher, G. & Monahan, L., *Refugees and International Relations*, Oxford University Press, Oxford, 1989, 255, 259–60.

⁶² Simple assumptions regarding refugees' longing to return to their country are often open to question. The UN Research Institute for Social Development (UNRISD) notes, 'The international borders in the Horn [of Africa] ... bear hardly any relation to the subsistence activities, migratory movements and the trade, exchange and support networks of the local people. In these circumstances, deciding where (in which country) a person "belongs" can be an arbitrary and (for the person him or herself) meaningless exercise': UNRISD, *Refugees returning Home*, 1993, 3. Warner also questions the notion that a particular territory is crucial to the defining of a community's identity: 'It is the relations with other people that ground man in his existence, and not the physical grounding of the individual and group with a given space ... The alignment between the nation and the state misconstrues the horizontal contract between individuals to form a community and the vertical contract between citizens of a country to form a government': Warner, D., 'Voluntary Repatriation

The *Handbook on Voluntary Repatriation* even goes so far to declare that, 'voluntariness means not only the absence of measures which push the refugee to repatriate, but also means that he or she should not be prevented from returning.'⁶³ However, far from the picture the UNHCR seems to portray, refugee protection is not about *preventing* people from returning home of their own free will; it is about *preventing the forced return* of people who are in danger. There are cases where countries of origin refuse refugees re-entry, or where elements within the refugee population try to prevent refugees from repatriation. However, these are practical issues to be dealt with on a case-by-case basis; they are not helpful for the purposes of creating a general legal framework for repatriation.

Whatever the forces behind flight, be it the government of their country, an opposition faction, or armed groups, they are *in effect* obstructing refugees from exercising their right to return to their homes. However, emphasising the 'right to return' may lead to insufficient attention being paid to the core principle of refugee protection, which is that as long as danger exists people must be given protection. The starting point of refugee protection is not the 'right of return', but *non-refoulement* — protection of the refugee from forcible return to his or her country. The ultimate objective is not the return of the refugee, but his or her safety; return becomes a viable option only if that danger has been removed.

Discussion regarding the concept itself is in no way new; the 'right to return' features prominently in Coles' 1985 study. However, Coles concludes that the emphasis should be not on the exercise of any such 'right to return', but on eradicating the circumstances which caused flight:

... in the refugee situation the right to return is not just the right to return; it is necessarily also the right to enjoy in the country of nationality all applicable rights. It cannot be said that a right to return exists where conditions in the country of origin, in particular the grave violations of human rights, are such that no reasonable person would wish to return ... The individual can have no free choice in the matter of return where the conditions in his country of origin are such that he has every valid ground for not returning ... There is no meaningful choice for the exercise of his will. Rather the starting point should be that the conditions which gave rise to the situation which produced the refugee problem should be changed.⁶⁴

and the Meaning of Return to Home', 7 *JRS* 165, 166 (1994). Through his research of the Iraqi refugee community in London, al-Rasheed has shown that the strength and character of what he calls the 'myth of return' relies to a large extent on the experience of the particular community and its relationship with the country of origin: al-Rasheed, M., 'The Myth of Return: Iraqi Arab and Assyrian Refugees in London', 7 *JRS* (1994).

⁶³ UNHCR *Voluntary Repatriation* 1996, 10.

⁶⁴ Coles 1985, 194, 200.

Conclusion

The theoretical framework of voluntary repatriation put forward by UNHCR does not take adequate account of international human rights standards. Instead of making a comprehensive assessment of the human rights situation and, on that basis, deciding whether or not repatriation is feasible, the positions of the UNHCR seem to indicate a disposition on the part of the organisation to go forward with repatriation, even if conditions in the country of origin may not have sufficiently improved. Voluntary repatriation is by itself not a goal. Rather, the protection of refugees is the main aim; repatriation in itself is no solution if it is not based soundly on protection and human rights principles.