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Treading a Fine Line: “Voluntary Repatriation” between being a Durable Solution for Refugees in Theory and a Way to Circumvent Non-refoulement in Practice

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"العودة الطوعية إلى الوطن": بين كونها حلاً دائماً للاجئين نظرياً
وطريقة للتحايل على مبدأ عدم الإعادة القسرية في التطبيق.

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الصفحات ٥٥٧ - ٥٧٣

مصطفى سليم

محكمة شبن الكوم الابتدائية ، ماجستير في القانون الدولي للتنمية وحقوق الإنسان ، كلية
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المراسلة: مصطفى سليم ، محكمة شبن الكوم الابتدائية ، ماجستير في القانون الدولي للتنمية
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نظرياً وطريقة للتحايل على مبدأ عدم الإعادة القسرية في التطبيق ، المجلة الدولية للفقہ والقضاء
والتشريع ، المجلد ٢ ، العدد ٢ ، ٢٠٢١ ، صفحات (٥٥٧ - ٥٧٣)

Abstract

Upon drafting the 1951 convention relating to the status of refugees, it was expressly stated that refugees' protection is temporary, and that called for a need for solutions that is "durable" in a sense that it will end the refugee status.

The term Repatriation in refugee law means to return to the country of origin that one fled from in the first place. It has been massively contested that repatriation is the preferable solution to end refugee crisis, and it from the beginning it has been situated at the top of the hierarchy of durable solutions and promoted as such. But of course, in order for such repatriation to be rendered "durable", it came with a prerequisite, repatriation has to be voluntary and not forced, and it has to be carried out in a way that guarantees the refugees' safety and dignity.

In practice, this solution had proven to be far less straight-forward and far more complex. In this essay, I would like to argue that the insistence of the voluntary characteristic of repatriation and it being preferred than integration and resettlement stems actually not for the perspective of refugee protection but rather it serves as an elaborate scheme to circumvent the obligatory principle of non-refoulement in a way that serves the interests of related states and their sovereignty considerations in a way that eviscerated voluntary repatriation from its protection purpose. I argue that the extremely politicized nature of how voluntary repatriation is being practiced makes it tantamount to refoulement, and only if the table are turned and repatriation is to come from below, through meaningful inclusion of refugees in discussions and facilitation of return it can serve as true durable solution and achieve the protection level it promises.

Keywords: International refugee law, voluntary repatriation, durable solutions, non-refoulement

الملخص

ابان صياغة اتفاقية عام 1951 المتعلقة بوضع اللاجئين، تم النص صراحة على أن حماية اللاجئين مؤقتة. وهذا تطلب بطبيعة الأمر الحاجة إلى إيجاد حلول "دائمة" تنهي وضع اللجوء.

مصطلح "العودة إلى الوطن" في قانون اللاجئين يعني العودة إلى البلد الأصلي الذي تم الفرار منه في المقام الأول. راهن الكثير أن العودة إلى الوطن هي الحل الأفضل لإنهاء أزمة اللاجئين، وقد تم وضعها منذ البداية في قمة التسلسل الهرمي للحلول الدائمة وتم الترويج لها على هذا النحو. ولكن بطبيعة الحال، لكي تصبح هذه العودة

إلى الوطن "دائمة"، فقد جاءت بشرط مسبق، وهو أن تكون العودة إلى الوطن طوعية وليست قسرية، ويجب أن تتم بطريقة تضمن سلامة اللاجئين وكرامتهم.

ولكن من الناحية العملية، ثبت أن هذا الحل أكثر تعقيداً بكثير. في هذا المقال، أود أن أزعج أن الإصرار على السمة الطوعية للعودة إلى الوطن وتفضيلها على الاندماج وإعادة التوطين لا ينبع في الواقع من منظور حماية اللاجئين، ولكنه يستغل على نحو منهجي للتحايل على المبدأ الإلزامي المتمثل في عدم الإعادة القسرية بطريقة تخدم مصالح الدول ذات الصلة واعتبارات سيادتها بطريقة تجرد العودة الطوعية إلى الوطن من غرض الحماية. أنا أزعج أن الطبيعة المسيسة للغاية لممارسة الإعادة الطوعية إلى الوطن تجعلها بمثابة إعادة قسرية، وفقط إذا انقلبت الطاولة وأتت الإعادة إلى الوطن من "الأفضل": من خلال الإدمج الهادف للاجئين في المناقشات وتسهيل العودة يمكن أن تكون بمثابة حل دائم حقيقي وتحقق مستوى الحماية الذي تعد به.

الكلمات المفتاحية: القانون الدولي للاجئين ، الإعادة الطوعية ، الحلول الدائمة ، عدم الإعادة القسرية.

Introduction:

Upon drafting the 1951 convention relating to the status of refugees, it was expressly stated that refugees' protection is temporary protection.⁽¹⁾ Temporary meant that refugees' protection will extend only until a final solution is found, and that called for a need for solutions that are 'durable' in a sense that it will end the refugee status. International refugees law acknowledges namely three durable solutions: a) repatriation to the country of origin, b) integration to the host country, and c) resettlement in a third country.

The term Repatriation derives from the Latin word repatriare, meaning 'to return to homeland'. And in refugee law it means to return to the country of origin that one fled from in the first place.⁽²⁾ It has been massively contested that repatriation is the preferable solution to end refugee crisis, and from the beginning it has been situated at the top of the hierarchy of durable solutions and promoted as such. Even at the times when in practice repatriation where not the go to solution, the idea of a refugee returned to the country of his original habitual residence held the rigor of it being the durable solution, and in only if its not possible the other two solutions' applicability should be examined. But of course in order for such repatriation to be rendered 'durable', it came with a prerequisite, repatriation has to be voluntary and not forced, and it has to be carried out in a way that guarantees the refugees' safety and dignity. This idea of voluntariness finds its origins within the core

⁽¹⁾Jeremy R Tarwater, 'Analysis and Case Studies of the 'Ceased Circumstances' Cessation Clause of The 1951 Refugee Convention' (2001) 15 Georgetown Immigration Law Journal 563, 563.

⁽²⁾Daniel Mathew, 'Voluntary Repatriation and State Sovereignty: Seeking an Acceptable Balance' (2008) 8 ISIL YB Int'l Human and Refugee 144, 144.

protection principle of refugee international law of non-refoulement, which states that no refugees shall be forced to return to the country he fled for fear of persecution.

In practice, this solution had proven to be far less straight-forward and far more complex. In this essay, I would like to argue that the insistence of the voluntary characteristic of repatriation and it being preferred than integration and resettlement stems actually not from the perspective of refugee protection but rather it serves as an elaborate scheme to circumvent the obligatory principle of non-refoulement, in a way that serves the interests of related states and their sovereignty considerations in a way that eviscerated voluntary repatriation from its protection purpose. This is prevalent from examining the United Nations High Commissioner for Refugees (UNHCR) different treatment of the principle of voluntary repatriation throughout history. I argue that the extremely politicized nature of how voluntary repatriation is being practiced makes it tantamount to refoulement, and only if the tables are turned and repatriation is to come from below, through meaningful inclusion of refugees in discussions and facilitation of return it can serve as true durable solution and achieve the protection level it promises.

I. Legal Standing on Voluntary Repatriation:

The first codification attempt towards refugee repatriation was in Article 8(c) of the UNHCR Statute in 1950 which notes that ‘The High Commissioner shall provide for the protection of refugees falling under the competence of his office by-Assisting governmental and private efforts to promote Repatriation or assimilation.’⁽³⁾

In 1951 UN Refugee Convention the principle of non-refoulement was codified in Article 33, which stated ‘no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.’⁽⁴⁾ Considered as the cornerstone of refugee protection,⁽⁵⁾ voluntary repatriation hold its legal character as a corollary to the principle of non-refoulement.⁽⁶⁾ If the code clearly express that no forced returns shall be allowed, the only legal discourse is voluntary returns. The principle was further solidified in Article 5 of OAU Convention Governing the Specific

⁽³⁾UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950 art 8 (c).

⁽⁴⁾Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33.

⁽⁵⁾Jeff Crisp and Katy Long, ‘Safe and Voluntary Refugee Repatriation: From Principle to Practice’ (2016) 4 Journal on Migration and Human Security 141, 142.

⁽⁶⁾Katy Long, ‘Back to Where You Once Belonged A Historical Review of UNHCR Policy and Practice on Refugee Repatriation’ (Refworld) <<http://www.refworld.org/docid/5226d8f44.html>> accessed May 10, 2020.

Aspects of Refugee Problems in Africa, 1969, which states 'The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.'⁽⁷⁾ Further elaborations of the principle were added throughout the following years. The UNHCR Executive Committee 1985 conclusion confirmed that voluntary repatriation shall be 'to be carried out under conditions of absolute safety'. In 1992, the UNHCR Discussion Note on Protection Aspects of Voluntary Repatriation added another concept, that safety need to be accompanied by dignity.⁽⁸⁾ The phrase 'voluntary repatriation must be carried out under conditions of safety and dignity' became one of the most recognized phrases in use by UNHCR in recent years.⁽⁹⁾ In 1996, the UNHCR issued its Voluntary Repatriation Handbook. Voluntariness was defined as 'the absence of any physical, psychological or material pressure . . . which push the refugee to repatriate'. The handbook stressed on the requirements of safety and dignity and required that refugees upon repatriation 'are not manhandled', when they 'can return unconditionally', 'at their own pace', 'are not arbitrarily separated from family members' and 'are treated with respect and full acceptance by their national authorities.'⁽¹⁰⁾

Despite very clear provisions to the concept of refugee voluntary repatriation, the conditions of repatriation (voluntariness, safety, and dignity) are often in practice stretched to their absolute limits, rendering repatriation operations are much closer to refoulement than a durable solution, supposedly are carried out towards refugee's protection.⁽¹¹⁾ Host countries are eager to see their refugee population leave their territory, countries of origin are eager to have them back to show internal stability and end of conflict to the international community, and donor states are more than complacent to end funding to refugee assistance programs.⁽¹²⁾

All of these factors had laid tremendous pressure on UNHCR while handling repatriation operations. That lead for the UNHCR handbook to be more focused on 'return' rather than protection, seemingly void of human rights standards. That's evident in cases when UNHCR had promoted, encouraged and facilitated repatriation even when the conditions of safety and dignity were substantially hindered.⁽¹³⁾ The handbook also identified whom

⁽⁷⁾Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ('OAU Convention'), 10 September 1969, 1001 U.N.T.S. 45.

⁽⁸⁾Crisp and Long (n 5) 142.

⁽⁹⁾Long (n 6) 1.

⁽¹⁰⁾UN High Commissioner for Refugees (UNHCR), Handbook - Voluntary Repatriation: International Protection, January 1996.

⁽¹¹⁾Katy Long, Repatriation: A Historical Perspective in *The Point of No Return: Refugees, Rights, and Repatriation*, Oxford University Press 2013 (chapter 3).

⁽¹²⁾Crisp and Long (n 5) 142.

⁽¹³⁾Saul Takahashi, 'The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection' (1997)

those do not join a voluntary repatriation operation as residual caseload and called for a re-determination of their refugee status.⁽¹⁴⁾ Such process raises serious questions of the voluntariness of repatriation. Because how voluntary can repatriation really be if the refugee is faced with only the option of return or possible cessation of his status?⁽¹⁵⁾

I. The Evolution of The Theory of Voluntary Repatriation:

Since the introduction of the durable solutions, voluntary repatriation had been promoted as the first solution to resort to, even if that were not the case in practice.

The condition of voluntariness got attached to repatriation as a result of Cold War politics. Following the Second World War, the allied forces agreed secretly to forcibly repatriate all of the Soviet Union refugees, despite knowing for a fact that they will be imprisoned or even killed.⁽¹⁶⁾ That raised dismay among UK and US political elites, that correlated with the emergence of the new 'geo-political' conflict between the Western bloc and the Soviet Union, that resulted in the birth of the notion of voluntary repatriation. The aim at the time was actually to ensure a fact that no one will voluntarily choose to return to a communist state.⁽¹⁷⁾ So in a sense, the principle of voluntary repatriation was introduced to promote integration and resettlement rather than return to the country of origin.

Another important aspect stemming from cold war politics that discouraged the notion of repatriation was the nature of the refugees of that era. Refugees at the time represented educated, skilled, and willing labor that offered a solution to the problem of heavily diminished labor force in the aftermath of the Second World War, which contributed to the rapid recovery of the economy.⁽¹⁸⁾

Those two factors combined, reinforced the notion that refugees are 'ex definition unrepatriable persons'.⁽¹⁹⁾ Hence at this phase a minimal percentage of refugees were repatriated, opposed to a substantive amount that were resettled.⁽²⁰⁾

Thus, it is only logical that after the end of the Cold War in the 1980's, and with the proliferation of the notion of population migration as 'the most serious threat to peace,

9 International Journal of Refugee Law 593, 612.

⁽¹⁴⁾Marjoleine Zieck, 'Voluntary Repatriation: Paradigm, Pitfalls, Progress' (2004) 23 Refugee Survey Quarterly 33, 43.

⁽¹⁵⁾Ibid 48.

⁽¹⁶⁾Long (n 6) 4.

⁽¹⁷⁾Ibid.

⁽¹⁸⁾B. S. Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23 Refugee Survey Quarterly 55, 57.

⁽¹⁹⁾Zieck (n 14) 36.

⁽²⁰⁾Long (n 6) 2.

security, and the sovereignty of nations,'⁽²¹⁾ and most refugees are currently hailing from the south in a time with no shortage of labor, it was time to rethink resettlement outside the 'limited cold war context'⁽²²⁾, and it is time to advocate for 'voluntary' repatriation as the go to solution. As Toft describes it:

The once trickle of well-educated refugees became a flood of poor, hungry, sick, and desperate peoples. The 'diamonds' refugees had been become a 'plague of locusts,' and as states sought ways to either pre-empt or mitigate these refugee flows, they settled more and more on a standard policy response: repatriation.⁽²³⁾

That development led to general view for all actors involved to the durable solutions in a hierarchical manner, with the solution of voluntary repatriation well entrenched on the top of it. This shift reflected on many of UNHCR official statements and conclusions. Executive Committee Conclusion 58 of 1989 requested governments to cooperate with UNHCR, to 'promote appropriate durable solutions, with particular emphasis firstly on voluntary repatriation and, when this is not possible, local integration and the provision of adequate resettlement opportunities.' In Conclusion 79 of 1996, it explicitly stated voluntary repatriation to be 'the most preferred solution' to refugee situations.⁽²⁴⁾

The rise of voluntary repatriation and establishing the hierarchy of durable solutions after the end of cold war, was actually how the North responded to the massive influx of refugees bursting all over the South with a reluctance to burden sharing - either with aid or hosting - with host states, which are mostly underdeveloped poor countries. Chimni noted that the lesson to be learned from this historical shift in the hierarchy in durable solutions and the evolution of the refugee international regime 'is that humanitarian factors do not shape the refugee policies of the dominant states in the international system.'⁽²⁵⁾ In my point of view, the proliferation of the voluntary repatriation as the durable solution serves more as a tool of migration and border control rather than a mean for the protection of refugees.

I. Voluntary Repatriation in practice:

1) Repatriation in the 1980s:

Following the change in the international refugee regime at the end of the Cold War,

⁽²¹⁾ Assefaw Bariagaber, 'States, International Organisations and the Refugee: Reflections on the Complexity of Managing the Refugee Crisis in the Horn of Africa' (1999) 37 *The Journal of Modern African Studies* 597, 597.

⁽²²⁾ Chimni (n 18) 58.

⁽²³⁾ Monica Duffy Toft, 'The Myth of the Borderless World: Refugees and Repatriation Policy' (2007) 24 *Conflict Management and Peace Science* 139, 153.

⁽²⁴⁾ Long (n 6) 5.

⁽²⁵⁾ Chimni (n 18) 58.

UNHCR oversaw during the 1980s a wave of ‘new-style’ repatriation projects, most notably the return of the Rohingya from Bangladesh to Burma (Myanmar), Cambodian refugees from Thailand and Ethiopian refugees from Djibouti (1981). These early programs laid out the groundwork for UNHCR’s repatriation practices until now.⁽²⁶⁾ However, the UNHCR in all these three examples actively facilitated a ‘less-than-voluntary repatriation.’ UNHCR made that choice due to a conviction that the only other course of action was state-led deportation. The UNHCR elected to be involved in such returns in order to provide some sort of protection and humanitarian assistance to those refugees. Nonetheless, that compromise raised some serious concerns impinging the credibility of the UNHCR as a global protection agency.⁽²⁷⁾

1) The 1990s ‘Decade of Repatriation’:

Under a staunch conviction of the presumption that all refugees wished to return home, UNHCR, unbounded by Cold War politics, declared the 1990s as the ‘decade of repatriation.’⁽²⁸⁾

As a result, a staggering 10 million refugees repatriated to countries such as Afghanistan, Cambodia, Mozambique, and Nicaragua. The UNHCR became more actively involved in less-than-voluntary repatriation programs, through promoting return to countries deemed ‘ready’ for refugee repatriation, establishing tripartite commission with origin and host states, cutting back food rations and educational support from refugees populations expected to return, creating and maintaining repatriation targets and deadlines, invoking the 1951 Convention cessation clause to deem return compulsory, participated in involuntary repatriation movements, and developing the concepts of ‘safe’ and ‘imposed’ return, which did not require the refugees voluntariness of refugees.⁽²⁹⁾

The most apparent examples of this ‘return rather than protection’ focused repatriations are the Rohingya return to Myanmar in 1994 and Rwandan return to Zaire and Tanzania in 1997, ‘in which UNHCR-sanctioned repatriations were forcible, unsafe and tantamount to refoulement.’⁽³⁰⁾

Myanmar:

The second wave of organized Rohingya repatriation in 1994 is held by many senior UNHCR staff to be one of the darkest moments of the organization’s history. Bangladesh

⁽²⁶⁾ Long (n 6) 8.

⁽²⁷⁾ Ibid 10.

⁽²⁸⁾ Chimni (n 18) 60.

⁽²⁹⁾ Crisp and Long (n 5) 144.

⁽³⁰⁾ Long (n 11)

used beating and extortion regularly to persuade return, and such actions was regarded by the UNHCR as ‘isolated actions of over-zealous staff’, and on the other handsuch unsafe conditions in refugee’s camps were promoted to prove that Myanmar will offer better conditions to the Rohingya than Bangladesh.⁽³¹⁾ Also the UNHCR in an effort to maintain a good relationship with both Myanmar and Bangladesh committed itself to finalize refugees’ repatriation by 31 of December 1995 and actively promoted repatriation in order to do so.

However, an almost instant of reverse refugee movements from Myanmar makes it evident that those repatriation efforts were not sustainable or durable, in way that raised ‘serious ethical questions about UNHCR’s role in brokering solutions.’⁽³²⁾

Rwanda:

The Rwandan repatriation from Zaire and Tanzania manifests more clearly how politicized repatriation efforts were.

An intricate mess, the refugees camps were militarized and controlled by militia. Donor states unwilling to fund such operation that were used to intensify a violent conflict, and Rwanda perceiving the camps as a Military threat pushed for camps’ shutdown and refugees return. That put the UNHCR between a rock and a hard place: closing the camps and forcibly repatriate the refugees is explicitly violating non-refoulement, but continuing to work in camps that were politicized and militarized hinders the protection mandate of the organization and its reputation.⁽³³⁾ The situation then exploded. Rwanda militarily dispersed refugee camps in Zaire, scattering refugee population, which many of them fled back again after return, preferring to hide in the jungles than to remain in Rwanda. Tanzania, which was overburdened by massive refugees’ influxes from Rwanda and Burundi, which was met by general international negligence and reluctance of burden sharing, invoked the 1951 Convention cessation clause, ordering all Rwandan refugees to return by 31 December 1996.⁽³⁴⁾

The UNHCR, faced by immense pressure from stakeholders such as the US and the UK who were actively calling for cutting back funding and calling for the Great Lakes refugees to end promptly, and fearing to repeat the catastrophe of Zaire, that was partially blamed on the UNHCR for being passive and inadequate in providing humanitarian assistance, elected – to the dismay of human rights organizations – to issue a joint statement with the Tanzanian government, ensuring that ‘all Rwandese refugees can now return to their

⁽³¹⁾Long (n 5) 12.

⁽³²⁾Ibid 13.

⁽³³⁾Ibid 13.

⁽³⁴⁾Ibid 14.

country in safety,' and urging them to make preparations for imminent return.'⁽³⁵⁾ Rather than protest Tanzanian refoulement of refugees, the UNHCR ratified its decision, claiming that voluntariness at this situation was 'unaffordable,'⁽³⁶⁾ as more protection for refugees will be offered by the country of origin than the host state.

I. Contestations to the notion of voluntariness:

Voluntary repatriation – given that it is genuinely voluntary and sustainable – is still widely considered as the most desirable durable solution. However, the acknowledgment that voluntariness cannot always be guaranteed, and refugees cannot live in camps indefinitely, the concept of voluntariness was challenged by the notions safe return and imposed return.⁽³⁷⁾

1) Safe return:

Amidst the crisis in former Yugoslavia in 1993, the North once again was concerned with refugee crises. That invoked a shift in the interpretation of the 1951 Convention's temporary paradigm, that it must end, and it only has to be safe, regardless of its voluntary character or absence thereof. The North realized back then that voluntariness was not required by the Convention, and it is only mentioned in the UNHCR's statute. According to James C. Hathaway, 'it is wishful legal thinking to suggest that a voluntariness requirement can be superimposed on the text of the Refugee Convention.'⁽³⁸⁾ From that standpoint, Hathaway – among others – argued that it is safe return, and not voluntary repatriation, is the 'absolute corollary' to the principle of non-refoulement. A refugee will not be repatriated involuntarily until it is safe for him to return to the country he fled, fearing persecution.⁽³⁹⁾

However, the notion of safe return was not able to trump the notion of voluntariness. Because if the conditions of the country of origin are deemed safe, we will not be talking about repatriation, but rather about invoking clauses of refugees ceased circumstances in the 1951 Convention.⁽⁴⁰⁾ While in reality, as Zieck pointed out, 'The solution of voluntary repatriation is predicated on the quality of refugee status and it is acted out between inclusion and cessation.'⁽⁴¹⁾

⁽³⁵⁾Ibid 15.

⁽³⁶⁾Ibid 15.

⁽³⁷⁾UNHCR (2006) *Rethinking Durable Solutions*, in *The State of the World's Refugees*, New York, Oxford University Press (chapter 6).

⁽³⁸⁾James C. Hathaway, 'The Meaning of Repatriation' (1997) 9 *International Journal of Refugee Law* 551, 553.

⁽³⁹⁾James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2000)

⁽⁴⁰⁾Long (n 6) 3.

⁽⁴¹⁾Zeick (n 14) 36.

Not comprising the principle of voluntariness and insisting on it is the true way to ensure true protection of refugees and their safety. Voluntary repatriation represents the respect for the institution of asylum and a recognition that a return is truly safe, and until then refugees must be allowed to remain refugees. Moreover, voluntariness is the only guarantee that refugee's return will sustain, and allow for repatriation to be aligned with long-term reintegration and development processes.⁽⁴²⁾

1) Imposed return:

The aforementioned Rwandan repatriation had raised serious questions about the validity of the condition of voluntariness.⁽⁴³⁾

The doctrine of imposed return, first coined by the UNHCR in September 1996, suggested that refugees may be returned to less than safe conditions to their country of origin.⁽⁴⁴⁾ The forceful nature of this return was justified by the notion that it is safer to repatriate refugees to their home country when it is believed that more protection will be provided for them there than in host countries. A workshop dedicated to find guidelines for safe and sustainable return, suggested a guideline for 'non-voluntary return' that the UN security council could authorize such repatriation if it determined that the conditions of asylum are more 'dangerous' and 'not correctable' by the host state, met with a 'reasonable expectation of provision of human rights' on a 'non-discriminatory basis' in the country of origin.⁽⁴⁵⁾

However it was intelligible that the notion of imposed return was never meant to replace voluntary repatriation. Instead, it was intended to offer a humanitarian justification for the UNHCR whilst engaging in return movements where there were not any other options available. However in practice, When Host States such as Bangladesh and Tanzania coerced refugees to disperse from their territory, they did it through choice, and thus the UNHCR's condoning of those returns was considered a breach to its core protection mandate. However, the case is not always that clear and straight forward. The situation becomes really tricky when the country of asylum becomes more dangerous than the country of origin. In 1996, Zairean refugee camps were subject to genuine genocidaires control, rendering the UNHCR unable to fulfill any meaningful protection for the refugees there. However the refugees, fearing persecution, were unwilling to return to Rwanda. The worsen situation in Zaire made some of the UNHCR staff to argue that refugee safety and voluntary repatriation

⁽⁴²⁾Long (n 6) 38.

⁽⁴³⁾UNHCR (n 37) 130.

⁽⁴⁴⁾Chimni (n 18) 63.

⁽⁴⁵⁾Ibid 64.

does not always goes hand in hand, because in such circumstances the model of voluntary repatriation does not offer a solution any more, but in fact itself becomes the problem.⁽⁴⁶⁾

Nonetheless, the approved UNHCR Zaire refugees return to Rwanda was catastrophic. More than thirty instances of human rights violations were reported; most of the refugees forced to return reverted back or were unaccounted for. This led imposed return to be considered as a last resort 'where there has been a fundamental failure in the mechanism of international protection' and presented in purely humanitarian terms, rendering its doctrine to manifest as humanitarian evacuation rather than a durable solution. While this analysis offers a-some-what reasonable justification for the UNHCR's involvement in imposed return, it concurrently raises very critical ethical questions, while normalising very dangerous practices and sets them as precedents. When will the UNHCR acknowledge the absence of any other alternatives than return and stop any attempt to protect refugees in their country of asylum? Does the UNHCR's willingness to be involved in imposed returns, will intriguestates to perform or threaten large-scale deportations? How the UNHCR could justify involvements in refugees return if they are at risk of being subjected to persecution in their country of origin? Finally, How could the fine line between imposed return practices as a form of humanitarian engagement in saving lives and an effective collusion in refoulement be determined?.⁽⁴⁷⁾

Therefore, the notion of imposed return did not garner enough conviction for it to be codified or mandated. Chimni rightfully criticized the mentioned guideline supposition, dubbing it as an 'open invitation' for host states to create conditions inducing return, country of origin to claim back their subjects, and for other states to cut back funding and assistance. Moreover, including the Security Council in return decisions will further solidify the political nature of repatriation, rather than a humanitarian one.⁽⁴⁸⁾

I. Voluntary Repatriation and Cessation:

The 1951 UN Refugee Convention set out six 'cessation clauses'.⁽⁴⁹⁾ While the first four deal with the refugee voluntarily elect to return to their country of origin or acquiring a new nationality, the fifth and six clauses are concerned with obligatory cessation. Known as the 'ceased circumstance' clauses, they deal with the state that the circumstances caused the refugees to flee have ceased to exist, hence revoking his refugee status as he no longer deserving of the

⁽⁴⁶⁾Long (n 6) 29.

⁽⁴⁷⁾Ibid 30.

⁽⁴⁸⁾Chimni (n 18) 65.

⁽⁴⁹⁾1951 Convention Relating to the Status of Refugees, art 1 C.

international refugee protection, and his status will be handled in accordance with the host state migration policy. Cessation and voluntary repatriation share a complex relationship.⁽⁵⁰⁾ They both share similar prerequisites, of safety and dignity, and requires sustainability and guaranteed reintegration to refugees.⁽⁵¹⁾ The UNHCR's Executive Committee Conclusion No. 69 stated that it is essential to invoke this clause to ascertain the fundamental, stable and durable character of the changes justifying cessation.⁽⁵²⁾ It has been suggested that recent UNHCR Executive Committee's interest in the cessation clauses is paving the way towards the inclusion of involuntary repatriation within the organisation's agenda.⁽⁵³⁾

The cessation related provision offer – in theory – is a system that ensures that refugee's protection will be extended to the fullest, as it will continue until the refugee receives protection from his country of origin or a third state after acquiring its citizenship. However, in practice, with the example of Uganda invoking cessation against Rwandan refugees, it was evident that the conditions of Rwanda were less than safe for the refugees to return.⁽⁵⁴⁾

Advocates and refugees' fears' that cessation was put in place by host states to justify a complete expulsions of Rwandan refugees from their territories, echoing the imposed Tanzanian return of 1996, had proven to be very real.⁽⁵⁵⁾ Rwandan refugees were forcibly grouped in trucks by Ugandan soldiers and sent across the border, resulting in a few deaths. While Uganda claimed that these trucks only included rejected asylum seekers (keeping in mind Uganda used to refuse 98% of asylum claims at the time), UNHCR acknowledged that these practices included actual refugees. The controversial Rwandan cessation is a true example of the contention surrounding the standards of safety assessment. Moreover, a great fear is the impact of cessation has on the concept of voluntariness in general, in which refugees were be ultimately deprived from their right to express their freedom of choice between return or pursuing alternative solutions.⁽⁵⁶⁾

Other concerns arise from invoking the cessation clause. Refugees from countries which have been affected by years of vigorous armed conflict and a prolonged history of human

⁽⁵⁰⁾Long (n 6) 31.

⁽⁵¹⁾Ibid 32.

⁽⁵²⁾UNHCR, Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses), 10 February 2003, 4.

⁽⁵³⁾Michael Barutciski, 'Development. Involuntary Repatriation When Refugee Protection Is No Longer Necessary: Moving Forward after the 48th Session of the Executive Committee' (1998) 10 International Journal of Refugee Law 236, 254.

⁽⁵⁴⁾Kelly E.Mcmillan, 'Uganda's Invocation of Cessation Regarding Its Rwandan Refugee Caseload: Lessons for International Protection' (2012) 24 International Journal of Refugee Law 231, 262.

⁽⁵⁵⁾Long (n 6) 31.

⁽⁵⁶⁾Ibid 35.

rights violations could be psychologically incapable of return, even when it is deemed safe to return. Indeed this was not overlooked in the UN Refugee Convention, which states that cessation may not be applied to a refugee 'who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.' However practice shows that states have been exceedingly unwilling to expand effort towards local integration. The main concern is cessation if only linked to repatriation, and not a full intensive solutions scheme that takes into account the economic, social and cultural dynamics of migration, will ultimately results in creating a body of irregular migrants who have no legal residence rights, few links to their country of origin, and who are liable to deportation.⁽⁵⁷⁾

I. The validity of the notion of Voluntariness:

I demonstrated throughout this essay that however the promises given by voluntary repatriation as a durable solution to refugees in theory, it is evident from the deeply politicized practices by the UNHCR that the solution of voluntary repatriation was viscerated from its protection aspect.⁽⁵⁸⁾ In most occasions, the UNHCR was seen to be driven to promote, facilitate and organize less-than-voluntary repatriation programmes, pushing the absolute limits of voluntariness in way it amounts to refolement.

But does that mean the principle of voluntariness should be abandoned? Actually, in my view, it means exactly the opposite. If there is a lesson to be learned from the case studies and theoretical contestations contained in this essay, it is that refugee true protection could only be guaranteed through voluntariness. But how could voluntariness be liberated from the political implications surrounding it? I argue that true voluntariness can only stems from below,⁽⁵⁹⁾ through meaningful inclusion of refugee representatives in the orchestration of repatriation programmes. To adopt a subjective rather than objective approach toward voluntariness,⁽⁶⁰⁾ that will entail abandonment of the hierarchy of the durable solutions. The current prevailing hypothesis that all refugees 'desire to go home', if looked upon from below, will be revealed as not an entirely true statement. Dealing with that hypothesis from a refugee perspective, we will encounter several instances that refugees did not want to return to their country of origin.⁽⁶¹⁾ Many years in exile can transform the meaning of home,

⁽⁵⁷⁾Ibid 33.

⁽⁵⁸⁾Daniela Heimerl, "The Return of Refugees and Internally Displaced Persons: From Coercion to Sustainability?" (2005) 12 *International Peacekeeping* 377

⁽⁵⁹⁾Frank Ahimbisibwe, "The Politics of Repatriation: Rwandan Refugees in Uganda", (2017) 11 *Journal of Identity* 98, 118.

⁽⁶⁰⁾Chimni (n 18) 61.

⁽⁶¹⁾Ibid 60.

and in the situation of second or even third generation refugees, it is hard to imagine that they genuinely desire to return to a home they have not been to before.⁽⁶²⁾ Indeed, it was mentioned in the UNHCR guidelines regarding refugee ceased circumstances that the refugee's status will be maintained if he could prove 'compelling reasons' for his need for protection and long term residents with deep social and cultural ties in host states may remain under different status such as resident alien or the like. But the fact remains that those exceptions stem from the humanitarian main spectrum of protection, as they are not required by the 1951 Convention.⁽⁶³⁾

On the other hand, the politicized objectivity that the voluntary repatriation is being handled with tends to overlook the situations where some refugees want to return to their country of origin but cannot do so.⁽⁶⁴⁾ In the case of Palestinians refugees, it has been proven through time that their desire to return home will remain intact even after they are resettled in other countries and acquiring citizenship elsewhere.⁽⁶⁵⁾

That being said, I have also to acknowledge that the UNHCR does not exist in a vacuum. It is true that UNHCR was subject to heavy criticism because of their actions in condoning less-than-voluntary repatriation operations; it is a fact that UNHCR was under tremendous pressure to do so. UNHCR was designed as a non-operational organization, and its structure and funding scheme were put in place in accordance with that fact.⁽⁶⁶⁾ The UNHCR is always faced with the dilemma of having to maintain its mandate of protection whilst dealing with donor states that are eager to cut funding and implementing their own political agenda, host states reluctant to expel refugees from their territory, and origin states that want to promote stability and sovereignty by recalling their subjects back. Further hindering the protection mandate of the UNHCR, is the reluctance of developed countries to share the burden with host states, most of them amongst the poorest countries in the world.⁽⁶⁷⁾

I. Conclusion:

I believe that in the near future we will witness a massive repatriation operation to the

⁽⁶²⁾Laurie Manchester, 'Repatriation to a Totalitarian Homeland: The Ambiguous Alterity of Russian Repatriates from China to the USSR' (2007) 16 *Diaspora: A Journal of Transnational Studies* 353, 353ff.

⁽⁶³⁾UNHCR Guidelines on International Protection, 6.

⁽⁶⁴⁾Chimni (n 18) 73.

⁽⁶⁵⁾Jinan Bastaki, 'The Meanings of Citizenship between Resettlement and Return: the Case of Displaced Palestinians' (2020) 24 *Citizenship Studies* 154, 171.

⁽⁶⁶⁾Zieck (n 14) 34.

⁽⁶⁷⁾B. S.Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' (1993) 5 *International Journal of Refugee Law* 442, 445.

millions of Syrian refugees,⁽⁶⁸⁾ and I am really sceptical to what extent this repatriation will be safe, let alone voluntary. The UN Convention was not designed to handle mass influxes of humanitarian refugees,⁽⁶⁹⁾ and that indeed calls for an exigent reform to the International refugee law.⁽⁷⁰⁾ But until doing so, and with full acknowledgment of the pressures the UNHCR is faced with, the organisation should also not be afraid to call out premature less-than-voluntary repatriations. The UNHCR shall not condone refoulement operations and grant it legitimacy under the guise that it is better to be involved and offer some kind of humanitarian assistance, because as history shows, those operations were not sustainable and were often followed by massive reverse refugee flows. On the other hand, insisting on voluntariness is essential for protection against refoulement. Until fundamental safety that qualifies to invoke cessation is reached, refugees should be allowed to remain refugees. Plus, voluntariness entails long-term reintegration and development, emphasizing return's sustainability.⁽⁷¹⁾ If the UNHCR held those two sides of voluntariness, only true refugee protection could be achieved. Further ensuring repatriation safe and voluntary features, the UNHCR in its operation should consider meaningful refugee inclusion, for example, creating Quadripartite committees, in which refugees are represented equally with the organisation, host states and countries of origin.⁽⁷²⁾

⁽⁶⁸⁾ Ahmet İçduygu and Maissam Nimer, 'The Politics of Return: Exploring the Future of Syrian Refugees in Jordan, Lebanon and Turkey' (2019) 41 *Third World Quarterly* 415, 425.

⁽⁶⁹⁾ Kay Hailbronner, 'Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking' (1986) 26 *Va J Int'l L* 857, 858.

⁽⁷⁰⁾ Marjoleine Zieck, 'Doomed to Fail from the Outset? UNHCRs Convention Plus Initiative Revisited' (2009) 21 *International Journal of Refugee Law* 387, 420.

⁽⁷¹⁾ Long (n 6) 38.

⁽⁷²⁾ Crisp and Long (n 5) 147.