

The International Law of Voluntary Repatriation

It is a commonplace that the 1951 Convention Relating to the Status of Refugees¹ focuses on the treatment of refugees in the country of asylum. In terms of solutions for refugees, the 1951 Convention provides in Article 34 that states shall facilitate as far as possible the assimilation and naturalization of refugees, but there is no obligation.² The Preamble can be read to recognize the importance of resettlement in third states rather than overburden ‘certain countries’:

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

Even more implicitly, the Preamble provides the framework for voluntary repatriation: paragraphs 1 and 2 refer to the Universal Declaration of Human Rights 1948³ and that refugees should be assured “the widest possible exercise of these fundamental rights and freedoms”. Article 13.2 UDHR gives everyone the right “to return to his country”, which was then incorporated in Article 12.4 of the International Covenant on Civil and Political Rights:⁴ “No one shall be arbitrarily deprived of the right to enter his own country”. While the right to return to one’s own country cannot be gainsaid, the international protection of refugees owed by states, guaranteed by *non-refoulement*, reaffirms the entirely voluntary character of repatriation.⁵

Nevertheless, international law does provide a framework of rights and obligations *vis-à-vis* voluntary repatriation through customary international law and various elements of international human rights law. While repatriation might indicate some action by a state to return non-nationals on its territory, the voluntary character thereof recognises the refugees’ autonomy in this regard, consistent with them benefitting from international human rights law guarantees. This paper will look at the sources of international law pertaining to voluntary repatriation before moving on to consider its content.

1. Sources of the International Law of Voluntary Repatriation

The principal framework for this sub-branch of international refugee law is customary international law. At one level, *non-refoulement* (whether under the 1951 Convention or custom) protects the

¹ 189 UNTS 137. See also, 1967 Protocol, 606 UNTS 267.

² See the naturalization of over 160000 Burundians by Tanzania in 2014 - <<http://www.unhcr.org/afr/news/latest/2014/10/5441246f6/tanzania-grants-citizenship-162000-burundian-refugees-historic-decision.html>>.

³ UNGA res. 217A (III), UN Doc A/810 at 71 (1948) – hereafter UDHR.

⁴ UNGA res. 2200A (XXI), 21 UNGAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171 - hereafter, ICCPR.

⁵ It should be noticed in the African context that Article V of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa does deal with voluntary repatriation – 1001 UNTS 45.

refugee against forced return:⁶ international human rights law and international refugee law⁷ provide the refugee with a set of guarantees pertinent to returning to one's country of nationality or habitual residence when they are ready.

In addition, though, customary international law on voluntary repatriation has developed. As always, customary international law requires state practice and *opinio juris*.⁸ Part of the *opinio juris* will be evidenced through respect for *non-refoulement*, since it respects the voluntary character of the refugees' return. Other evidence, however, derives from situations of repatriation of refugees or government statements regarding such. In that regard, cessation under Article 1C.5 1951 Convention ought not to provide evidence *vis-à-vis* voluntary repatriation since the need for refugee status has ended and there is no question of the need for voluntariness. On the other hand, given that voluntary repatriation and safe return often overlap, the surrounding criteria for Article 1C.5 ought to be relevant even if there has been no formal cessation.

More directly, voluntary repatriation has been the subject of General Assembly resolutions and Executive Committee Conclusions. Assuming that they have a normative quality,⁹ such public iterations and reiterations can indicate the customary quality of a practice of states. Given that there are 101 members of UNHCR's Executive Committee, that they act by consensus, that they consist of not just states parties to the 1951 Convention or 1967 Protocol, who would be assumed to act in part due to treaty obligations,¹⁰ but other states most affected by refugee movements,¹¹ suggests that appropriately drafted Conclusions can indicate legal obligations. UNHCR can also form custom.¹² Its practice with respect to voluntary repatriation in co-operation with affected states can also indicate customary international law. Unlike the 1951 Convention, the 1950 Statute does refer to voluntary repatriation.¹³ Paragraph 1 provides that UNHCR has the primary mandate of international protection of refugees, and

of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the

⁶ See Article 33.2 1951 Convention, above note 1; Article 7, ICCPR, above note 4; Article 3, UN Convention Against Torture, UNGA res. 39/46, annex, 39 UNGAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); UNHCR, 'Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions', HCR/GIP/16/12 (2 December 2016) <http://www.refworld.org/docid/583595ff4.html>. See also, Geoff Gilbert and Anna Magdalena Rüsçh, *Policy Brief 5, Creating safe zones and safe corridors in conflict situations: Providing protection at home or preventing the search for asylum?*, Kaldor Centre for International Refugee Law, June 2017, <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Policy_brief_Creating_safe_zones_and_safe_corridors.pdf>.

⁷ For instance, the right to travel documents under Article 28, 1951 Convention.

⁸ For a Third World perspective, which might be more appropriate given that 84 per cent of refugees are in low- or middle-income countries, see BS Chimni, 'Customary International Law: a Third World Perspective' 112 *AJIL* 1 (2018).

⁹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, [1986] ICJ 14, paragraphs 188-89.

¹⁰ See *North Sea Continental Shelf*, Judgment, [1969] ICJ Reports 3, 76.

¹¹ *North Sea Continental Shelf*, above note 10, 74.

¹² See *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, [1949] ICJ Reports 174.

¹³ 14 December 1950, UNGA res. 428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>. The Statute was endorsed every three, then five, years by the General Assembly from 1950 to 2003, at which time the mandate was made permanent – see UNGA res. 58/153, 22 December 2003.

voluntary repatriation of such refugees, or their assimilation within new national communities.¹⁴

Protection is defined in Paragraph 8:

8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:

...

(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities.

Given that the primary mandate in Paragraph 1 is international protection, then the High Commissioner cannot promote voluntary repatriation unless certain criteria are met about conditions in the country of nationality that indicate repatriation will be sustainable, durable and dignified.¹⁵ While Paragraph 2 asserts that “[the] work of the High Commissioner shall be of an entirely non-political character”,¹⁶ that does not prevent engagement with the governments of the country of asylum and the country of nationality in order to ensure international protection of refugees, and there is a long history of tripartite agreements in such contexts. Paragraphs 17 and 18 deal with liaison and consultation between the High Commissioner and Secretary-General on matters of mutual interest, with the Secretary-General providing all necessary facilities subject to budget constraints. Thus, from the outset international protection and voluntary repatriation were linked, with UNHCR promoting the latter given this did not contravene its primary protection mandate.

The omnibus General Assembly resolution on UNHCR of December 2017 reinforces these linkages.¹⁷ At Paragraph 32, the General Assembly recognises that protection is dynamic and that the treatment of refugees must be in line with internationally agreed standards that ensure “durable, protection-oriented solutions”.¹⁸ The General Assembly endorsed very high standards for voluntary repatriation

¹⁴ Paragraph 9 provides that:

The High Commissioner shall engage in such additional activities, including *repatriation* and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal. (emphasis added)

Paragraph 3 reinforces UNHCR’s norm enhancing conduct as a subsidiary organ of the General Assembly under Article 22 of the Charter.

3. The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council.

¹⁵ And see Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., 2007, 495, fn 191.

¹⁶ See, ExCom Conclusion 40 (1985) on Voluntary Repatriation, (f) – available from, UNHCR, Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975–2017 (Conclusion No. 1 – 114), HCR/IP/3/Eng/REV. 2017, www.refworld.org/docid/5a2ead6b4.html (hereafter, Conclusions Compendium).

¹⁷ UNGA res. 72/150, 19 December 2017.

39. *Strongly reaffirms* the fundamental importance and *the purely humanitarian and non-political character of the function of the Office of the High Commissioner of providing international protection to refugees and seeking durable solutions to refugee situations*, and recalls that those solutions include voluntary repatriation and, where appropriate and feasible, local integration and resettlement in a third country, while reaffirming that voluntary repatriation, supported, as necessary, by rehabilitation and development assistance to facilitate sustainable reintegration, remains the preferred solution; (emphasis added)

¹⁸ Above, note 17.

32. *Emphasizes* that the international protection of refugees is a dynamic and action-oriented function that is at the core of the mandate of the Office of the High Commissioner and that it includes, *in cooperation with States and other partners*, the promotion and facilitation of the admission, reception and treatment of refugees *in accordance with internationally agreed standards* and the ensuring of

that called on the country of nationality and the international community to guarantee international protection for returning refugees.

42. *Encourages* further efforts by the Office of the High Commissioner, in cooperation with countries hosting refugees and countries of origin, including their respective local communities, relevant United Nations agencies, international and intergovernmental organizations, regional organizations, as appropriate, non-governmental organizations and development actors, *to actively promote durable solutions, particularly in protracted refugee situations, with a focus on sustainable, timely, voluntary, safe and dignified return, which encompasses repatriation, reintegration, rehabilitation and reconstruction activities, and encourages States and other relevant actors to continue to support these efforts through, inter alia, the allocation of funds;*

...

44. *Recognizes*, in the context of voluntary repatriation, *the importance of resolute efforts in the country of origin, including rehabilitation and development assistance, to foster the voluntary, safe and dignified return and sustainable reintegration of refugees and to ensure the restoration of national protection;* (emphasis added)

The above all draws on previous practice since the foundation of the Office of the High Commissioner and emphasizes that the protection mandate imposes obligations *vis-à-vis* voluntary repatriation, obligations established under international human rights law and customary international law.

2. The Content of the International Law of Voluntary Repatriation

This is not a comprehensive set of obligations pertaining to voluntary repatriation, nor does it only speak to the country of nationality even though it is focused on the rights of the returning refugee, for the international community has recognized its shared responsibility for refugee protection.

First and foremost, simply returning to the country of nationality does not end refugee status.¹⁹ While an international border must be crossed in order to be a refugee,²⁰ that status persists until a durable and sustainable solution is achieved, as does UNHCR's mandate under Paragraph 1 of its Statute. That requires continued access to the refugees across the border²¹ – UNHCR regularly has to coordinate across borders in two different United Nations operations and under two different memoranda of understanding.²² Due to its unique mandate, UNHCR's presence is also needed to

durable, protection-oriented solutions, bearing in mind the particular needs of vulnerable groups and paying special attention to those with specific needs, and notes in this context that the delivery of international protection is a staff-intensive service that requires adequate staff with the appropriate expertise, especially at the field level; (emphasis added)

¹⁹ Article 1C, sub-paragraphs (1), (2) and (4), above note 1, all speak of the voluntary character of re-obtaining national protection.

²⁰ Article 1A.2 1951 Convention, above note 1.

²¹ See the Conclusions Compendium, above note 16, Conclusion 101, Legal Safety Issues in the Context of Voluntary Repatriation of Refugees (2004):

(q) Reiterates that UNHCR, in line with its mandate responsibility, be given free and unhindered access to returning refugees, as needed, in particular, so as to monitor the latter's proper treatment in accordance with international standards, including as regards the fulfilment of amnesties, guarantees or assurances on the basis of which refugees have returned

See also, Conclusions 74(y) and 102(r).

²² See the recent separate agreement between UNHCR and Bangladesh regarding the Myanmar Rohingya - <http://www.unhcr.org/news/press/2018/4/5ad061d54/bangladesh-unh...Subscribers&utm_campaign=HQ_EN_therefugeebrief_external_160418>.

ensure that other UN agencies include returning refugees in the developmental planning for the country of nationality.²³

If UNHCR has access, then it can monitor that the voluntary repatriation is safe and dignified and withdraw from the operation when its sustainability and durability are confirmed. Those characteristics are repeated in several Executive Committee Conclusions dating back over many years.²⁴ Voluntary repatriation must be in safety and dignity, it must address root causes,²⁵ with calls for the country of asylum to re-establish the rule of law.²⁶ In line with the Preamble to the 1951 Convention's call for international co-operation²⁷ and the 1970 Declaration on Friendly Relations,²⁸ one can argue that the source state has obligations to the international community to create conditions conducive to voluntary repatriation. The Executive Committee has gone further.²⁹

6. Recalls the voluntary character of refugee repatriation and the right of refugees to return to their own countries, and recognizes in the context of voluntary repatriation, *the importance of resolute efforts in the country of origin, including rehabilitation and development assistance to foster the voluntary, safe, and dignified return and sustainable reintegration of refugees, and to ensure the restoration of national protection*; (emphasis added).

Given that refugees will spontaneously return to their country of nationality, even where it is not objectively safe, in line with their right to return, the safe return/ voluntary repatriation dichotomy is one where there are no clear dividing lines, but the country of nationality has obligations to the individual and to other members of the international community under the duty to co-operate, to promote conditions, including upholding international human rights law and rule of law, so as to bring refugee displacement to an end, and, in parallel, to facilitate UNHCR's international protection mandate.

3. Conclusion

State practice over decades has been to promote voluntary repatriation, to call on states to respect the rights of refugees and to share responsibility for refugees, to require that certain conditions are met in the country of nationality before voluntary repatriation can be endorsed and to grant UNHCR a continuing protection role until the refugees return in safety and dignity can be said to be durable and sustainable. International human rights law, *non-refoulement*, repeated statements in the General Assembly and in the High Commissioner's Executive Committee all support the claim that there is an international law of voluntary repatriation.

²³ See the Conclusions Compendium, above note 16, Conclusion 40 (i) and (k).

²⁴ See the Conclusions Compendium, above note 16, Conclusions 68(s), 74(u)-(ii), 77(k), 95(i), 99(u), 101 Preamble and 102(r).

²⁵ See the Conclusions Compendium, above note 16, Conclusion 40(c), 62(a)(vi), 80 Preamble, and 101 Preamble.

²⁶ See the Conclusions Compendium, above note 16, Conclusion 101(s). See also, Geoff Gilbert and Anna Magdalena Rüsçh, 'Rule of Law and UN Interoperability', 30:1 *International Journal of Refugee Law*, forthcoming 2018.

²⁷ Above, note 1.

²⁸ Declaration on Principles of International Law concerning Co-operation and Friendly Relations among States in accordance with the UN Charter, 1970, UNGA res. 2625 (XXV), 24 October 1970, Preamble (d), and *The duty of States to co-operate with one another in accordance with the UN Charter*.

²⁹ See the Conclusions Compendium, above note 16, Conclusions 112(6). And see Conclusion 114(2):

2. Stresses the need for countries of origin to contribute to conditions conducive to voluntary repatriation and return, including through addressing root causes and providing the necessary travel documents;

See also, Conclusion 62(a)(vi) combining this with addressing root causes.

Professor Geoff Gilbert

Professor of International Human Rights & Humanitarian Law, School of Law and Human Rights
Centre, University of Essex.