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## **From the unmixing to the remixing of peoples: UNHCR and minority returns in Bosnia**

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## **Introduction**

Of the three durable solutions to displacement – resettlement, local integration and return – the return of refugees has been the subject of the greatest amount of scholarly focus in the past two decades. One specific sub-category of return, however, merits more analysis. “Minority returns”, or the return of individuals following ethnic conflict to regions controlled by another ethnic group, is a very distinct category of return. This category raises unique practical and ethical questions and thus warrants separate analysis.

A policy of promoting minority returns captures the tension between three contradictory elements in UNHCR’s work, namely: (a) the tension between its responsibility to protect and responsibility to ensure durable solutions; (b) the trade-off between “bringing safety to people” and “bringing people to safety;” and (c) the challenge of balancing practical compromise with adhering to general normative frameworks.

This paper<sup>3</sup> will explore the following core questions: Is the return of displaced persons to their place of origin<sup>4</sup> a realistic policy to prioritize following ethnically-based conflict? Even if the policy is not realistic, should UNHCR still support it on moral grounds? And what might have been the ethical impact of prioritizing alternative durable solutions in the Bosnian case?

## **Minority returns**

UNHCR first introduced the policy of “minority returns” following the war in Bosnia in which over half the population was forcibly displaced. Prior to the 1992-1995 war, most of Bosnia’s municipalities were ethnically mixed. Following the end of the conflict, only 5 per cent<sup>5</sup> of the original ethnic Croats and Muslims remained in the Serb-controlled regions. Similarly, only a small percentage of ethnic Serbs remained in the joint Croat-Bosniak controlled Federation. In other words, an ethnically mixed country had become almost completely “un-mixed” in a matter of four years.

As a challenge to this new reality, the internationally-brokered Dayton Peace Accords (DPA), signed on 14 December 1995, established the right of all Bosnian refugees and displaced persons to return to their homes of origin. As stated in Annex 7 of the DPA:

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return

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<sup>3</sup> This research is based on three years of secondary research, primary research in UNHCR archives, United States Department of State cables, European Union Parliamentary archives, and interviews with officials intimately involved in the minority returns policy process.

<sup>4</sup> It is important to emphasize “place” here as it is meant to contrast with the traditional understanding of return as a return of an individual’s to his or her “country” of origin.

<sup>5</sup> These are only estimates. Demographic data tends to be rather problematic as no census has been conducted since the war.

of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.<sup>6</sup>

The rationale behind Annex 7, according to the DPA drafters, “was to ensure that the ethnic cleansing that had occurred during the war could be reversed.”<sup>7</sup> However, the Annex did not specify how such a feat should be carried out, nor who would enforce it. Yet despite this legal ambiguity, UNHCR was charged with implementing this unprecedented reversal policy.<sup>8</sup>

Return, following ethnic cleansing, can come in two forms: return of individuals to areas in which they make up part of the ethnic majority and return of individuals to areas in which they constitute an ethnic minority. The DPA divided Bosnia into two administrative entities, one controlled by ethnic Serbs (Republika Srpska) and one controlled by a union of Bosnia’s Muslims and ethnic Croats (the Federation). Thus, in the Bosnian case, “majority returns” generally referred to the return of displaced persons to the entity in which their ethnic group was in power. Inversely, “minority returns” generally signified the return of displacees to an entity in which their ethnic group was not in control (e.g. Bosnian Muslims returning to Republika Srpska).

One year after the signing of the Dayton Accords, UNHCR estimated that only 250,000 individuals out of an estimated total of over 2 million displaced persons had returned.<sup>9</sup> The majority of these returns were “spontaneous,” i.e. initiated without UNHCR support or impetus.<sup>10</sup> In addition, most of those who chose to return, returned to areas where they would be part of the ethnic or religious majority. Rather than “re-mixing” the population, these majority returns further extended the ethnic “un-mixing”. So long as returnees were unwilling to return to homes where they would be in the ethnic minority, UNHCR could not achieve the true intent of Annex 7.

During the period following the signing of the DPA, UNHCR was also under intense pressure from European host states to facilitate the return of Bosnian refugees as quickly as possible. Germany, bearing the largest asylum burden, began to involuntarily return Bosnian asylees in the fall of 1996. The UNHCR staff in the field, however, recognized that the return of individuals to a country still fraught with ethnic strife would lead to the further

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<sup>6</sup> Bosnia and Herzegovina et al. (1995). General Framework Agreement for Peace in Bosnia and Herzegovina. Dayton/Paris: Annex 7, Article 1.

<sup>7</sup> A.A. (2011). Interview with Legal drafter of General Framework Agreement. Washington, D.C. Interviews with Chief Drafter of Annex 7, Chief Negotiator at Dayton and with UNHCR special consultant for Annex 7.

<sup>8</sup> While the DPA stipulated that returns must be “voluntary” and while it allowed for a right to choose compensation over restitution, its drafters specifically emphasized that returns were to be prioritized. The unstated assumption seemed to be that people, if given the choice, would prefer to return.

<sup>9</sup> Not only were there far fewer returns during this year than expected but ethnic cleansing between the different factions continued. According to the US Committee for Refugees 1997 World Survey: “Rather than uprooted persons being able to return to their original homes - a fundamental principle of the Dayton Peace Accords - displacements and “ethnic cleansing” continued during the year, accentuating the trend toward ethnic separation and away from the ideal of a single, multi-ethnic state enshrined in the Dayton Peace Accords.”

<sup>10</sup> This does not mean that there was no locally orchestrated support. Local refugee organizations were instrumental in these “spontaneous” returns (Donais 2002). In addition, though this paper is written in generalities about those displaced, it is clear that there is much variety in preferences and needs. For a thorough analysis of the differences amongst those displaced in/from Bosnia, see Stevanovic: “Some have no desire whatsoever to return, some are determined to return home even if that means great risks, and others might return if some conditions (security, social services, economic opportunities, etc.) are met. The group in question is very complex and diverse and so are their interests.”

homogenization of Bosnia's communities as returnees would wish to live amongst their own group. Contrary to the assumptions outlined in Dayton, early returns were, in fact, creating ethnic enclaves rather than recreating the multi-ethnic communities that existed in the pre-war period.<sup>11</sup> Thus, beginning in 1997, UNHCR officials began explicitly appealing to the international community to redirect support towards minority returns. As a means of highlighting this goal, UNHCR designated 1998 as "the Year of Minority Returns." Donors, led by the United States and Germany, generously invested in this new approach. Their donations enabled UNHCR to pilot a range of new programmes and initiatives all directed at promoting minority returns.<sup>12</sup>

While the biggest obstacles to majority returns had been structural and logistical (i.e. the damage or destruction of former property and the lack of basic services), the obstacles to minority returns proved much harder. Local officials, who had participated in the conflict in leadership roles were intent on maintaining majority control and actively opposed minority returns. Their opposition included refusing to evict people occupying returnees' homes and failing to protect returnees from local intimidation and harassment. Compounding these security challenges, most municipalities lacked the educational and religious facilities to meet minority needs, and offered no outlet for minority representation at the local political level.<sup>13</sup> Given these obstacles, it is not surprising that the rate of minority returns had hardly changed in the three years following UNHCR's initial efforts to promote minority returns.

In 1998, however, under intense pressure from the Office of the High Representative (OHR) of Bosnia and Herzegovina<sup>14</sup> and in collaboration with UNHCR, the Republika Srpska and the Federation passed new property laws that enabled homeowners to reclaim their properties. In order to reinforce these new laws, OHR imposed legislative measures in 1999 to better harmonize and monitor property laws under the "Property Law Implementation Plan" (PLIP).

By overturning these wartime laws, OHR in collaboration with UNHCR hoped to refocus international efforts on enforcing the *rule of [property] law* as a means of de-politicizing the return process.<sup>15</sup> Combined with a heightened international security presence, the authority to sack non-compliant officials, and improved inter-agency coordination, minority returns finally began to increase in 2000 and peaked with 102,111

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<sup>11</sup> Anonymous (2011). Interview with Chief Protection Officer, UNHCR. Phone interview. July 2011.

<sup>12</sup> These included UNHCR's Repatriation Information Reports and its Open Cities Programme, Reconstruction and Return Task Force, and work on fostering co-existence.

<sup>13</sup> Group, I.C. (1999). Preventing Minority Return in Bosnia and Herzegovina. *The Anatomy of Hate and Fear. Europe Report*. 73.; Cox, M. (1998). *Strategic Approaches to International Intervention in Bosnia and Herzegovina*. CASIN.

<sup>14</sup> The Office of the High Representative is the internationally orchestrated chief civilian peace implementation agency. It was created under the DPA in 1995 and is charged with "overseeing implementation of civilian aspects of the accord ending the war in Bosnia and Herzegovina" (OHR Website: [http://www.ohr.int/ohr-info/gen-info/default.asp?content\\_id=38519](http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=38519)).

<sup>15</sup> Williams, R. (2005). " Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice." *New York University Journal of International Law and Politics* 37(441). Philpott, C. B. (2006). "From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina." *Int J Refugee Law* 18(1): 30-80.

returns in 2002.<sup>16</sup> In response to these results, international organizations and donor states heralded the long awaited start of the reversal of Bosnia's ethnic cleansing.

Observed more closely, however, the success of this policy was not evident. Under the new "rule of law" approach, officials recorded "returnees" based on property reclaimed and not on the permanent return and reintegration of property owners. What minority returnees did with their property once repossessed was not recorded. Field studies conducted in the intervening years indicate that most minority returnees sold or rented their properties, after reclaiming them, to members of the majority group. The original owners, meanwhile, often chose to continue living in their ethnic majority areas or abroad.<sup>17</sup>

As the international community often framed re-mixing as best for the welfare, interests and rights of displaced persons, why did so few displaced persons take advantage of the opportunity? In order to tackle this question, it is important to first understand why there were so few minority returns. Extensive studies exploring this question have generated three primary hypotheses: First, individuals displaced through the ethnic conflict preferred to live with their own ethnic group, following the conflict whether or not this allowed them to return to their former homes.<sup>18</sup> Second, "home" is much more than the physical house. Thus, while UNHCR could rebuild houses for displacees, they cannot rebuild homes. Third, and finally, a lack of employment opportunities, educational opportunities, and basic infrastructure contributed to the low rate of minority returns.<sup>19</sup>

The first hypothesis is highlighted not only in the literature but also in UNHCR's own publications on durable solutions. In various papers citing best practices for integration and resettlement, UNHCR has suggested that return, resettlement, and local integration are most successful when displaced persons and their hosts share a common ethnic or religious background.<sup>20</sup>

Interviews with various UNHCR field officers highlight this point. As one interviewee explained:

UNHCR's obligation should not simply be to return a refugee to his country. But the right to return "home" should also not be thought of as the right to return to one's physical home. This is a misunderstanding of the word "home." In the many years I've worked with UNHCR [in Tanzania, Kenya, Thailand and Central Asia], I've seen that the only place refugees can return to successfully is to the place where their tribe is – where they'll be looked after. That is home. They aren't welcome anywhere else.<sup>21</sup>

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<sup>16</sup> Belloni, R. (2007). *State building and international intervention in Bosnia*, Routledge, p. 139.

<sup>17</sup> Albert, S. (1997). "The return of refugees to Bosnia and Herzegovina: Peacebuilding with people." *International Peacekeeping* 4(3): 1-23; Heimerl, D. (2005). "The return of refugees and internally displaced persons: From coercion to sustainability?" *International Peacekeeping* 12(3): 377-390.

<sup>18</sup> Adelman, H. and E. Barkan (2011). *No return, no refuge: rites and rights in minority repatriation*. New York; Chichester, Columbia University Press.

<sup>19</sup> Caplan, R. (2005). *International Governance of War Torn Territories*. , Oxford Univ. Press.

<sup>20</sup> Fielden, A. (2008). "Local integration: an under-reported solution to protracted refugee situations." *New Issues in Refugee Research* (158); Brubaker, R. (2009). *Co-ethnic Insiders as Refugee Outsiders*. *Refugee Studies Centre*. Oxford, Oxford University.

<sup>21</sup> Anonymous (2011). Interview with UNHCR Protection Officer. Geneva. 11 April.

The interviewee went on to explain that if the tribe has moved [whether voluntarily or against their will], the best place to send a returnee is still to his or her own group.

Absent in these recommendations, however, is any mention of concern about cementing further ethnic division and of the human rights principles of non-discrimination, pluralism and the right to freedom of movement. While the assumption that individuals prefer to be with their own group following inter-group conflict is also widely contested, it is important to ask why UNHCR seems to support one concept (i.e. encouraging individuals to return to their own groups) in certain situations, as well as in a second concept (encouraging the re-mixing of groups) in the Bosnia case.<sup>22</sup>

Turning to the second hypothesis, some scholars contend that minority return efforts generally failed in Bosnia because when individuals are forcibly displaced, they lose far more than their houses. They lose their social and economic networks, their life patterns and their trust in former friends and neighbours, all of which comprise their sense of “home.” From this perspective, return is impossible. Lives have to be rebuilt from scratch, and this rebuilding may be more difficult in a place that holds traumatic memories than in an entirely new place.

As one UNHCR officer, who had worked for many years in Bosnia, explained:

The international community [in Bosnia] slowly began to realize that even if you want to return, it is like a China jar; once it breaks in pieces, you can't put it back together... If I were a minority returnee, from a place where I used to be in the majority, in an area where there are people still living who were involved in the conflict against me, even if I wanted to return in theory, I wouldn't feel comfortable. So you sell the house. And go to live elsewhere.<sup>23</sup>

For those who *do* choose to return to their original homes, however, reconciliation takes time, sometimes generations.<sup>24</sup> In sum, according to this perspective, return in general, and minority returns in particular, tend to be unsuccessful following ethnic conflict because they are based on an overly simplistic notion of “home” and what it would take to rebuild one.<sup>25</sup>

A third source of resistance to minority returns, experts believe, was the lack of employment opportunities, education opportunities and basic infrastructure. Prior to the war, 80 per cent of Bosnians lived and worked in rural communities. One of the consequences of the war, however, was the “urbanization” of the Bosnian population, as most of those

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<sup>22</sup> For a more nuanced critique of this ethno-centered assumption, with analysis covering sub-group and individual differences as well as the ever-shifting and constructive nature of group boundaries see: Brubaker 2009; Brubaker, R. (2004). Ethnicity without groups. Cambridge, Mass.; London, Harvard University Press. For an analysis specific to the Bosnia case, see Toal, G. and C. Dahlman (2011), Bosnia remade : ethnic cleansing and its reversal, New York; Oxford, Oxford University Press. and Loizides, D. S. a. N. (2010). "The Way Home: Peaceful Return for Victims of Ethnic Cleansing." Human Rights Quarterly.

<sup>23</sup> Anonymous (2011). Interview with UNHCR Protection Officer. Geneva. April 19<sup>th</sup>.

<sup>24</sup> Heimerl, D. (2005). "The return of refugees and internally displaced persons: From coercion to sustainability?" International Peacekeeping 12(3): 377-390.

<sup>25</sup> For more information on this approach see Markowitz, F. a. S., A. , Ed. (2009). Homecomings: Unsettling Paths of Return. Oxford, Lexington.

displaced found havens in large cities. During the years of refuge, many displacees became accustomed to city life and employment outside the agricultural sector. Thus, following the war, all but the elderly were reluctant to return to homes in villages and isolated towns.<sup>26</sup> This preference was compounded by the fact that economic opportunities were scarce in the villages when compared to the cities, especially when individuals were from an ethnic minority. For this reason, the few minorities who did return, tended to be the elderly.<sup>27</sup>

In addition to the lack of employment, former field staff also emphasize the lack of appropriate schools for their children as curriculums were changed to reflect the perspectives of the majority ethnic group in each region. Families often had a choice between sending their children to a school teaching an ethnically slanted curriculum or starting their own schools with scarce resources and facilities. Finally, in the more remote villages, many returnees faced severely lacking infrastructure including basic utilities and, in some cases, even roads.<sup>28</sup>

Given the three rationales discussed – co-ethnic preference, the challenge of rebuilding “homes”, and the lack of employment, education, and necessary infrastructure – the international community’s insistence that minority returns were: (a) necessary; (b) constituted the best interest of those displaced; and (c) were a vital means of ensuring peace and security seems misplaced.

Could policy drivers have had other reasons for privileging minority returns besides the ones cited above? According to international officials, human rights organizations, state leaders and UNHCR, the primary reason for supporting minority returns was in order to show that ethnic cleansing had to be reversed. Attempting to reverse ethnic cleansing was a means for international actors to demonstrate that they did not condone ethnic cleansing. Any lack of action on this front, many believed, would be akin to condoning ethnic cleansing and the ethno-centric ideology underpinning it.<sup>29</sup>

It is clear from examining UNHCR’s archives that UNHCR officers understood the obstacles to minority returns and the comparative benefits of relocation and resettlement. Yet the stigma of being seen as “facilitating ethnic cleansing” was so strong that actors were pressured to divert the vast majority of their efforts towards pursuing a policy that was proving ineffective.

Given the ineffectiveness of the policy regarding its intent,<sup>30</sup> was the international community’s emphasis misplaced? Should UNHCR, instead, have been pursuing the most

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<sup>26</sup> Donais, T. (2002). "Halfway Home: The Political Economy of Return in Post-Dayton Bosnia." York University Centre for International and Security Studies: 1-18. p. 3.

<sup>27</sup> Most of those who did return to rural regions as ethnic minorities were elderly Bosnians, drawn by nostalgia and a heightened resistance to change. Their returns were also facilitated by the fact that ethnic majority communities were less resistant to their returns. Seemingly, the isolated nature of the villages and the age of the returnees both made the returns less threatening.

<sup>28</sup> Interviews with field staff based at UNHCR HQ and the field (April 2011, November 2011 and May 2013).

<sup>29</sup> Evidence that there was no option but return in the eyes of the international community certainly contributed to the desire to promote “secure” returns and returns that seemed based in rebuilding a broken society rather than off-loading a refugee burden. Given the limited scope of this paper, however, this contributing factor will have to be explored elsewhere.

<sup>30</sup> I purposefully want to emphasize “regarding its intent,” because, while it is widely agreed that the policy of promoting minority returns was ineffective in terms of seeing minorities choosing to return permanently, the policy did, have (unintended) positive consequences. One of these was providing an avenue for receiving compensation through the reselling of property. This then allowed minority displacees the financial freedom to remake their



effective solutions, even if these solutions extended ethnic divisions within Bosnia? Or were international actors right to insist on the “reversing” principle as a means of creating a new (or defending an emerging) precedent within international law? If the latter is true, did UNHCR have no choice but to support the international actors in this normative endeavour, even if it meant compromising effectiveness (and, some would argue, refugee welfare) in the process?

In order to tackle these questions and to reach a deeper understanding of the origin of the rationale for minority returns, it is important to turn to the history of UNHCR’s durable solutions’ policies, the relation between international refugee law and international human rights law, and review changes in international responses to population transfers.

### **The preference for return among durable solutions**

The *1951 Convention relating to the Status of Refugees* outlines three durable solutions to the plight of refugees. These include local integration in the place of refuge, resettlement to a third country, or return to the country of origin (i.e. Bosnia). UNHCR’s focus has shifted between these preferences and, during the 1990s, UNHCR viewed return as the “ideal” solution. Many reasons are offered for this prioritization.

Khalid Koser and Richard Black, for example, argue that the end of the Cold War brought an end to Western states’ strategic incentives to accept Eastern European refugees as symbols of communist resistance.<sup>31</sup> During the Cold War, the West viewed refugees from the communist block as strategic. The refugees were evidence that people were “voting with their feet” against communism and in favour of capitalism. Given this ideologically charged context, it was unthinkable for Western states to return refugees across the iron curtain, until the curtain fell.<sup>32</sup>

Stephen Castles posits a macro-economic analysis for the shift preferences for durable solutions. He blames a reduction in labour demand for the decline in asylum options. Up until the late 1970s, Castles explains, the United States, Australia, Germany, Canada, and other main host states had rapidly expanding economies and were in need of new labour. Thus, they were more than willing to accept refugees for resettlement, not according to their legal obligations under refugee law per se but rather according to the demand of employers. As the economies peaked and began to contract by the 1970s, demand for labour decreased and countries became increasingly reluctant to open their borders to newcomers, migrants and refugees alike.<sup>33</sup>

Nick Van Hear and others have shown that the increased profile of mixed migration flows (refugees and migrants taking the same routes and arriving on the same shores) and with these flows, the recognition of mixed motivations for migrating (insecurity and lack of economic

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lives in ways that other displacees, caught in limbo between return and other durable solutions, have not been able to. One can acknowledge these unintended positive results, however, while still questioning the policy.

<sup>31</sup> Black, K. a. (1999). *The End of the Refugee Cycle*.

<sup>32</sup> Ibid.

<sup>33</sup> Castels, S. (2003). "Towards a sociology of forced migration and social transformation." *Sociology*(37): 3- 34.

opportunity) also contributed to the growing reluctance of host states to accept asylum seekers.<sup>34</sup>

In her thorough and enlightening review of repatriation, Katie Long suggests that UNHCR began prioritizing return not only as a reaction to dwindling options (such as resettlement), but also in response to a growing perception among the academic and advocacy community that return was the most natural of solutions for those displaced and thus should receive the most support.<sup>35</sup> This perception was reinforced by the growing legal weight of the “right to return” within the human rights advocacy community (to be discussed more in section 5).<sup>36</sup>

### **Historical context of protection in return**

Another ongoing debate within UNHCR involves the extent of its protection obligations during the return and reintegration process. Initially, UNHCR assisted displaced persons only once they had successfully left their own countries and reached a country of asylum. Thus, if individuals wished to return, they either were on their own or they had to rely on organizations other than UNHCR. In order to maintain its position as an apolitical and humanitarian organization, UNHCR avoided working inside countries of origin for fear of disrupting relations with the state generating refugees.<sup>37</sup>

Over time and to fill operational gaps, however, UNHCR began assisting in the return and reintegration process. From the beginning of its engagement in this process, UNHCR has faced the same question: How far should it go? According to Jeff Crisp, UNHCR’s Director of Policy Development and Evaluation Service, UNHCR’s assistance in the early days of return assistance, was limited to “a cooking pot and a handshake.”<sup>38</sup>

The policy has since expanded to include resettlement allowances, job training, reconstruction assistance, and even reconciliation and reintegration programmes. Within the organization there is concern that, as a first responder organization, UNHCR should not commit itself to long and drawn out development-type commitments.<sup>39</sup> Yet, when it comes to the successful reintegration of minority returnees, “long and drawn out development-type commitments” are precisely what is needed.

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<sup>34</sup> Nyberg Sorensen, N., N. V. Hear, et al. (2002). "The Migration&#x2013; Development Nexus Evidence and Policy Options State&#x2013;of&#x2013;the&#x2013;Art Overview." *International Migration* 40(5): 3-47.

<sup>35</sup> Long, K. (2010). Home Alone? A review of the relationship between repatriation, mobility, and durable solutions for refugees. *Policy Development and Evaluation Service (PDES) Working Paper Series*, UNHCR.

<sup>36</sup> Adelman and Barkan (2011); Rosand, E. (1997-1998). Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent. *19 Mich. J. Int'l L.*

<sup>37</sup> Loescher, G. and Oxford University Press. (2001). *The UNHCR and World Politics A Perilous Path*. Oxford, Oxford University Press: p. 446.

<sup>38</sup> Crisp, J. (2011). Bigger and better? How and why UNHCR’s mandate has continued to expand Internal. Geneva, UNHCR Policy Development and Evaluation Service.

<sup>39</sup> Ibid.

## Ensuring durable solutions while maintaining protection obligations

UNHCR's founding mandate calls on it to: (a) "[Provide] international protection to refugees"; and b) "[Seek] permanent solutions for the problem of refugees."<sup>40</sup> In the specific case of minority returns, there is a potential tension between these two core goals. The possibly least secure place for an ethnic minority, following an ethnic conflict, is back in the community from which that person was forcibly expelled. Yet, this is precisely what UNHCR, OHR, and donor states were proposing through the "minority returns" policy. The policy of promoting minority returns, therefore, placed additional pressure on UNHCR to extend the return process further and maintain a presence for longer than many within UNHCR deemed appropriate. The result being that the reintegration of ethnic minorities into unreceptive communities could take decades or even generations.<sup>41</sup>

In the past, UNHCR has resolved the dilemma between protection obligations and the preference for return to one's home through the application of the internal flight alternative (IFA) principle.<sup>42</sup> The IFA was introduced as a means of sanctioning safe returns prior to applying the cessation clause of the Convention of 1951. UNHCR's core mandate only requires that the organization assist with return to the *country*, rather than the *home* of origin. IFA, as a concept, enables UNHCR to return individuals to areas within the country, other than their place of origin, as long as returnees will be safer in the new location. According to a comprehensive study of IFA commissioned by UNHCR, safe alternative flight locations are often equated with regions where returnees will be part of the ethnic majority.<sup>43</sup>

The rationale behind minority returns, however, suggests that IFA – or, in other words, return to any place but the home of origin – is inappropriate, because it extends rather than reverses ethnic cleansing. According to this logic, return is not truly achieved until individuals are able to safely return to their original dwelling place. Yet for the vocal supporters of minority returns, such as *Amnesty International* and *Human Rights Watch* writing in reference to Bosnia, anything short of return to one's home could be considered as "internal displacement."<sup>44</sup>

Thus, in contemplating when and to what extent UNHCR should support minority returns following ethnic conflict, UNHCR has often been stuck between a rock and a hard place: If the organization pursues minority returns, it is criticized for low success rates and insufficient protection of the returnees. However, if it instead promotes in-country relocation to "safer" resettlement areas, it is accused of condoning ethnic cleansing.

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<sup>40</sup> UNHCR's mandate was originally set out in its Statute, annexed to Resolution 428 (V) of the United Nations General Assembly of 1950.

<sup>41</sup> Adelman and Barzan (2011), for example, argue that empirically minority returns have never been successful, except where they were initiated by force.

<sup>42</sup> IFA refers to the growing practice in refugee status determination procedures of determining whether or not an asylum applicant can find protection in another region of their country. If the applicant can, then some within UNHCR and International Refugee Law experts argue that an individual can be sent back to their country. Often the region most secure for returnees is among their own ethnic group (Hathaway and Foster, 2001).

<sup>43</sup> Bonoan 2001; Kelley, N. (2002). "Internal Flight/ Relocation/ Protection Alternative: Is it Reasonable?" *International Journal of Refugee Law* 14(1).

<sup>44</sup> Archives, U. (1993-1998). *Bosnia Files*. Geneva.

## International refugee law and international human rights law

These two bodies of law are generally thought to complement and reinforce each other. The refugee law regime outlines the appropriate actions and obligations vis-à-vis refugees based on an individual's identification as such. The human rights regime protects anyone who is human. Given that refugees are human, it is perhaps quite obvious that developments in human rights law should strengthen tenants in international refugee law.<sup>45</sup> For example, the 1951 *Convention Relating to the Status of Refugees*, states that:

No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political.<sup>46</sup>

This clause is known as the *non-refoulement* clause. There are, however, derogations to the Convention's prohibition on *refoulement*. Article 33 (2) states that:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The *European Convention on Human Rights* (ECHR) blocks its signatories from using the Convention's derogations on *refoulement* by citing co-existing human rights law. ECHR Article 3, for example, forbids any state from *refouling* an individual to face a risk of death or torture. Similarly, Article 3 of the *Convention Against Torture* and Article 7 of the *International Covenant on Civil and Political Rights* both prohibit the return of an individual to a high risk of torture. Thus, while European states have the right to deny claimants refugee status (if individuals fall under Article 33 (2) of the Refugee Convention), states under the ECHR do not have the right to deport claimants to a risk of torture or death.<sup>47</sup> Accordingly, human rights law plugs certain protection gaps in international refugee law.

In the case of durable solutions, however, human rights law may actually be weakening the refugee law regime. To explain further, consider the core mandate of the 1951 Convention. Article 1a(2) sets out the grounds for qualifying for refugee status, stating:

The term "refugee" shall apply to any person who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>48</sup>

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<sup>45</sup> Durieux, J. F. Lecture Oxford University Course on Forced Migration.

<sup>46</sup> Convention Relating to the Status of Refugees (1951), Article 33(1).

<sup>47</sup> In some cases, European states have maneuvered around this clause by arranging bi-lateral diplomatic assurances against torture and the death penalty.

<sup>48</sup> Article 1a(2).

Given this definition, the refugee convention could be seen as the inverse of human rights declarations against discrimination and cruel and inhumane treatment, i.e. those that decree that individuals *shall not* be persecuted based on their race, religion, nationality, or membership in a particular social group or political opinion. Thus, in theory, the stronger human rights provisions become in a given state, the fewer refugee claims the state should produce.

In the case of the right to return, states may have exploited this inverse relationship.<sup>49</sup> In the Bosnian case, Western host states justified their growing reluctance to offer asylum through their emphatic support for the reversal of ethnic cleansing through return. They framed return as a fundamental right, brushing over the fact that it was one of three possible remedies for displacement – the being including local integration and resettlement. Following ethnic cleansing in Bosnia, European host states argued that return was the only acceptable solution. Looking at state asylum policies of the time, however, it would be more accurate to suggest that return, no matter the source of displacement, was the only acceptable policy for host states bearing the largest asylum burden, such as Germany.<sup>50</sup>

Once the human rights community joined states in their advocacy for return as the only acceptable solution in Bosnia, the emphasis on this right may well have furthered the erosion of the sense of obligation on the part of states to provide either of the other two durable solutions – local integration and resettlement. The strength of the “right to return” discourse in the Bosnia case actually diminished UNHCR’s authority to advocate policy alternatives, for so long as a right to safe return was preferred or even normatively required following ethnic cleaning, then the host states did not need to find alternatives to return.<sup>51</sup>

### **Bringing safety to people versus bringing people to safety**

A policy supporting minority returns is at the heart of the tension between human rights law and international refugee law. This tension is best illustrated in a quote from a UNHCR field officer who described UNHCR’s work with IDPs and returnees as “bringing safety to people rather than bringing people to safety.” This is an enormous conceptual shift from UNHCR’s original role as an organization that would wait at the border to receive those fleeing persecution. In this model, UNHCR interacted only with host states and not with states producing refugees.

However, in order to pursue a policy of “bringing safety to people” in Bosnia, UNHCR had to place itself at the source of the persecution and to promise to do away with the persecution itself. While noble in concept, this was a promise that went far beyond UNHCR’s mandate, expertise and capacity.

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<sup>49</sup> Proponents of the right to return trace this right to Article 13 (2) of the Universal Declaration of Human Rights, Article 12 (4) of the ICCPR, Article 5 (d) (ii) of the International Convention on the Elimination of All Forms of Racial Discrimination, and articles in various regional human rights instruments.

<sup>50</sup> The ease of this reframing was facilitated by a prevalent notion that “the political connections that exist between nation and state, or the cultural connections that associate people and place are “natural” rather than constructed.

<sup>51</sup> In fact, viewed from a particular point, International Human Rights law strongly discourages resettlement of individuals following ethnic conflict for this is seen as “entrenching ethnic cleansing” rather than providing refugee to those persecuted for their ethnic identity. What is seen as a fundamental right in one context (refugee from persecution) in another context, is seen as facilitating an international crime (ethnic cleansing).

At the very least, “bringing safety to people” required substantial military, economic, and civilian support, as well as local buy-in. The one time when UNHCR actually had such comprehensive support was in Bosnia. Even then, however, the support and commitment, while unprecedented, was insufficient for achieving sustainable minority returns. To conclude, so long as it is not possible to “bring safety to people” in a sustainable way, then bringing people to safety should remain UNHCR’s priority.

### **Compromise and principles in debates over minority returns**

When deciding whether or not to prioritize minority returns following ethnic conflict, actors are faced with a recurring moral dilemma: By offering resettlement over return or safe in-country relocation over domicile return, are they entrenching and thus implicitly condoning ethnic cleansing? Is return, particularly in the case of ethnic minorities to their homes of origin, the only ethically legitimate solution following ethnic conflict?

In contemplating these questions, one must recognize the inherent trade-off between protecting particular principles and sacrificing these principles for immediate or long-term protection goals. UNHCR cables sent between Headquarters and donor states and Headquarters and the field often mentioned this trade-off.<sup>52</sup> For example, the tension between protecting certain designated principles and saving lives was widely discussed in the case of assisted evacuations in the midst of ethnic cleansing.

Over the course of the Bosnian war, international human rights groups criticized UNHCR for assisting with the evacuation of individuals following the military offensives, as the offensives were often aimed at “cleansing” one or more ethnic groups from the area under attack. In a sense, UNHCR was doing the attacking forces’ work for them by evacuating and cleansing individuals. Yet, as High Commissioner Ogata argued in her memoirs: “It was [a] dilemma of lending a hand to the process of ethnic cleansing, but we concurred that saving lives was the encompassing humanitarian principle that overrode all other concerns.”<sup>53</sup>

Following the signing of the 1995 Dayton Peace Accords, UNHCR actually reversed its policy, stating that it would not assist in evacuations that furthered “un-mixing.” Thus, when the authority over Serb-dominated Sarajevo suburbs was transferred to the Bosniak-Croat controlled Federation, and the exodus of the Serb population from these suburbs seemed imminent, UNHCR maintained a presence in the suburbs but did not evacuate local residents despite their requests for assistance.<sup>54</sup> Soren Jessen-Petersen, UNHCR’s Special Envoy at the time, refused to assist with the evacuation because it was against UNHCR’s core principles to facilitate further ethnic cleansing.<sup>55</sup>

While it is true that UNHCR had unprecedented means to implement a “reversing of ethnic cleansing” in the Bosnian case, it is also true that sensitivity to this issue of reversing the

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<sup>52</sup> UNHCR Archives.

<sup>53</sup> Ogata, S. N. and K. A. Annan (2005). *The turbulent decade: confronting the refugee crises of the 1990s*. New York; London, W.W. Norton., p. 74.

<sup>54</sup> *Ibid*, p. 115.

<sup>55</sup> UNHCR Archives

cleansing was much stronger in the Bosnian case than in others, such as Afghanistan or Iraq. Was this heightened sensitivity in Bosnia justified?

### **Implications and questions raised**

Returning to the questions presented in the introduction, I wish to address each in turn: These responses are only initial suggestions as this paper is meant to stimulate questions rather than offer authoritative conclusions.

*Question A. Is return to the place rather than simply the country of origin a realistic policy to prioritize following ethnic-based conflict?*

The answer to this question depends on UNHCR's primary goal in a given situation or on its prioritization of competing goals. In the case of supporting minority returns in Bosnia, UNHCR had three competing goals: (a) reversing ethnic cleansing; (b) fostering sustainable returns; and (c) assisting refugee and IDPs to achieve their preferred solutions. Given competing priorities in the future, UNHCR must have some mechanism for deciding when the investment in reversing ethnic cleansing is too high to justify categorical adherence. Clearly, prioritizing minority returns over majority returns contributes more towards reversing ethnic cleansing. Yet, if UNHCR's priority is also to produce sustainable returns, however, to what extent can UNHCR justify prioritizing minority returns over more feasible solutions?

Similarly, to what extent did the minority returns policy help UNHCR achieve its third goal: assisting displaced persons to rebuild their lives in the way they prefer, given the choices available? Though promoting minority returns was meant to expand choice, the overt emphasis on returns meant alternative solutions were not sufficiently available. Job training and a stipend for housing may have been more effective means for promoting all types of return. To this end, however, the right to repossess and then sell or rent property afforded a round-about means to providing the financial means to pursue alternative solutions on an individual basis.<sup>56</sup>

*Question B. Even if minority returns are not realistic (at present), should UNHCR still support them as a matter of principle?*

There is merit in articulating aspirations, and UNHCR, given its relative moral legitimacy as an advocacy organization, is well placed to set and promote new aspirations. Barnett and Finnemore have written extensively on the role UNHCR can play as a "moral entrepreneur" in the realm of the rights of those displaced.<sup>57</sup> Entrepreneurs use persuasion and their moral authority to advocate new rights and standards of protection. The right to return to one's home, as a minority, following ethnic conflict, is a norm in its infancy. Promotion can help it grow in strength and as it grows in strength, implementation will become more realistic.

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<sup>56</sup> Economic considerations in return and relocation decisions is covered thoroughly in Donais (2002). One UNHCR study, cited in Donais, suggests that "returnees rank employment as a greater concern than security issues or reconstruction assistance," (See Alfaro, M. 2000).

<sup>57</sup> Barnett, M. N. and M. Finnemore (1999). "The Politics, Power, and Pathologies of International Organizations." *International Organization* 53(04): 699-732.

*Question C. What might be the impact of supporting the policy?*

In examining the Bosnia case, two results seem apparent. First, active support for minority returns disabled host states from returning individuals to Bosnia unless these individuals could safely return to their homes of origin. By continually promoting a minority returns policy, even as it was proving generally ineffective, UNHCR held states accountable for their pledges to reverse ethnic cleansing through returns rather than simply rid their territories of refugees.

In other words, UNHCR's minority returns policy kept host states honest regarding their public rationales for prioritizing refugee return over other durable solutions. UNHCR rarely receives credit for this contribution. In addition, OHR's and UNHCR's emphasis on minority returns also created the drive for the reform around property restitution. These reforms, in turn, set a precedent in the realm of compensation.

The future impact of supporting a policy which has proved generally ineffective and expensive is less clear. On the one hand, as Finnemore argues, consistently supporting a principle often contributes to its maturation.<sup>58</sup> Following Bosnia, international lawyers, such as Eric Rosand, Catherine Phuong and Christa Meindersma, have argued that the international community was demonstrating a heightened obligation to resist un-mixing and to implement the "right to return" as the right to return to one's home.<sup>59</sup> With time, if the discourse is maintained and adopted, and reforms are introduced in the manner judges, courts, and organizations approach this issue, it may become easier to both advocate and implement the right of minorities to return.<sup>60</sup>

On the other hand, the failure to produce significant minority returns in Bosnia, even given optimal conditions, may discourage actors from pursuing this policy in the future. Rhetorical support for a principle is not enough. The principle must, eventually, be backed by action. Time will determine whether this principle takes root in the same manner as *refoulement*, or whether the principle will slowly fade, with Bosnia as its point of greatest strength.

*Question D. What might be the impact, on an ethical level, of prioritizing alternative durable solutions to return, following cases of ethnic cleansing?*

Opposing ethnic cleansing is separate from requiring that it be reversed. One can be against ethnic cleansing and horrified at the failure to prevent it without needing necessarily to endorse its reversal. UNHCR's condemnation of ethnic cleansing in Bosnia was clear and consistent throughout. As one UNHCR officer from Bosnia explained:

Anything other than return to actual homes was seen as a failure to reverse ethnic cleansing. It was a moral and ethical issue [for UNHCR] ...being so close to Srebrenica. Srebrenica was burning in the conscience of [UNHCR officials]. Reversing ethnic cleansing was pursued in good faith.

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<sup>58</sup> Finnemore, M. and K. Sikkink (1998). "International Norm Dynamics and Political Change." *Ibid.* 52(4): 887-917.

<sup>59</sup> Rosand (1998); Meindersma, C. (1997). "Population Exchanges: International Law and State Practice--Part 2." *International Journal of Refugee Law* 9(4): 613.

<sup>60</sup> There are some authors who suggest that this is already the case in Kosovo, Libya and Iraq. But explain that the degree to which minority return policy in Bosnia set any sort of precedent is still very much disputed. For further reading see: Adelman and Barkan (2011).



Too often during the Bosnian conflict, these two positions – condemning ethnic cleansing and requiring its reversal – were conflated with debilitating results. Given UNHCR’s role as the primary refugee advocacy organization, it must be able to articulate this distinction, e.g. it cannot be afraid to suggest, in certain cases, given competing priorities, that reversal may not be ideal.

Opening space for debate regarding what was viewed as a closed moral case would serve UNHCR’s future work immensely. UNHCR field officers do not always have the privilege of following a given set of principles when competing demands arise. There are times when the principle of reversal will have to be compromised to achieve immediate housing or safety concerns. While the policy community can argue eloquently without end about the morality of re-mixing over policy alternatives, UNHCR is caught in the fray. While principles may often appear black and white to those farthest removed from the chaos, rules of principle often take on shades of grey for those caught in the chaos of realities on the ground.

Throughout the Bosnian story, there were specific times when the international community’s insistence that ethnic cleansing be reversed seemed to trump their considerations for the preferences or even the security of those forcibly displaced. UNHCR cannot afford to adopt such an exclusive position as the international community did in Bosnia. As a first responder, UNHCR must concentrate on ensuring the security and, to the extent possible, respecting the preferences of those displaced who themselves may have no interest in being part of a reversal.

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