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‘Return is struggle, not resignation:’ lessons from the repatriation of Guatemalan refugees from Mexico

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Introduction

Ever since the United Nations General Assembly in 1950 charged the newly established High Commissioner for Refugees (UNHCR) with “seeking permanent solutions for the problem of refugees by assisting Governments ... to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities”,¹ the requirement of “voluntariness” has played a central role in the agency’s approach to repatriation as a long-term solution to refugee crises. The principle demands that the decision to return to the country of origin must be the result of the “exercise [of] one’s own free and unconstrained will in making a meaningful choice between returning or not returning to one’s country of origin in the light of ... existing conditions within both the countries of origin and asylum”.² Furthermore, it implies that this decision be made in “the absence of measures which push the refugee to repatriate,” that is, in the “absence of any physical, psychological or material pressures”.³

These requirements make the principle of “voluntariness” an institutionalized safeguard of one of the most fundamental concepts of international refugee law, the prohibition of forced return: Article 33 of 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 opinion”. Thus, over the past five decades, “voluntariness” has been viewed as the direct corollary to non-refoulement: “The involuntary return of refugees would in practice amount to refoulement.”⁴

My own observations, however, made during a stay in Chiapas (Mexico) and Guatemala between July and September 1997, suggested otherwise: accompanying the repatriation of a group of Guatemalan refugees,⁵ I was struck by the lack of enthusiasm they displayed as their bus crossed the border, returning them to their home country after 15 years of exile. The reception, after all, was overwhelming: flag-waving, jubilant indios lined the streets, welcoming their compatriots home. But not a single person inside the bus waved back. The motionless faces around me suggested, what I found confirmed on many other occasions throughout my stay: far from making a decision in the absence of pressure, these refugees had opted for repatriation because there had seemed to be no alternative.

Contrary to what the direct association of absence of voluntariness with refoulement would suggest, however, I nevertheless did not feel that what I was witnessing could be equated with a return to “territories where [the refugees’] life or freedom would be threatened”. The reason for this is that the Guatemalans’ safety upon return was ensured. It is important to stress at this point that this was not the result of any “fundamental change of circumstances” in Guatemala that would have justified the invocation of the so-called “cessation clause”. According to this provision, a person ceases to be a refugee, and his repatriation can therefore be mandated by the

¹ United Nations General Assembly (1950), p. 1.

² UNHCR (1993), p. 52.

³ UNHCR (1996), pp. 10–11.

⁴ UNHCR (1996), p. 10.

⁵ Return to the “fincas” “Chaquenalito” and “El Triunfo” (municipality of San Mateo Ixtatán), September 1997.

host country, once he “can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality”.⁶

For this to be the case, three essential requirements must be fulfilled: the change in the country of origin “must be of major political and social significance”, it “ must be truly effective” and it “must be durable”.⁷ Clearly, to be certain that this is indeed the case, a substantial period of time, typically “a number of years”, must have passed.⁸ Prior to that, danger of persecution is seen to continue to exist and the non-refoulement principle, therefore, continues to apply to any repatriation taking place. Thus, while the civil war in Guatemala had come to an end in December 1996, the existence of a peace agreement in itself did not amount to such a fundamental change of circumstances and the need for protection against refoulement thus persisted.

The subject of this case study is an analysis of how such protection was safeguarded despite the fact that the refugees did not always return voluntarily. To this end, the section entitled “The Guatemalan repatriation” will first establish the involuntary nature of the repatriation and then examine how this was compensated for through the guarantee of comprehensive safety upon return, as well as analyse the mechanism by which this was achieved. The finding that “voluntariness” is not a necessary precondition for non-refoulement is highly relevant in a context, in which the principle of free choice has been increasingly eroded.

As will be demonstrated in the preceding section, “Setting the stage – current trends in refugee policy”, current trends in international refugee policy are geared towards circumventing the requirement, because it is perceived as placing unacceptable demands on host countries. Thus, if protection against non-refoulement is to be safeguarded, a new corollary needs to be found which combines such protection with less rigorous standard of conditions for return than that set by the principle of “voluntariness”. The existence of such a corollary, and its characteristics, are lessons of the Guatemalan repatriation.

A note on methodology

The history of the Guatemalan exile is extremely complex, due to both its unusual length – over 15 years – and the fact that the refugees were distributed over three Mexican states (Chiapas in the south, and Campeche and Quintana Roo on the Yucatán peninsula), each with its own characteristics. As a result, there were great fluctuations in the nature, intensity and specific combinations of pressures weighing on different people at different times.

Thus the situation described under “The issue of voluntariness” is not intended to be representative of the experience of all Guatemalan refugees. It merely aims to be indicative of the kinds of pressures that existed and that influenced the decision to repatriate. Equally, its claim is not that there were no voluntary returns throughout the entire repatriation process, but

⁶ 1951 Convention, Art. 1, Section C, §5.

⁷ UNHCR (1993), p. 43.

⁸ Ibid.

rather that, at times, these pressures restricted the space for choice to such an extent that to speak of “voluntariness” would be a misrepresentation. The particular group that provides the subject for analysis, the refugees located in Chiapas who made their decision to repatriate in 1997, is, consequently, but one example of such a situation. What makes it particularly suited to the purpose of this analysis is the fact that the lack of “voluntariness” to be demonstrated was especially striking in that context. It therefore sets a rigorous standard against which to test the hypothesis that their return nevertheless did not amount to refoulement.

There are two main reasons why the pressures experienced by this group were particularly pronounced. First, those Guatemalans who had postponed their decision on repatriation until relatively late in the process differed from those who were among the first to go back in that the latter had, in general, closely identified with the political aspect of the return movement and were keen to be involved in the wider struggle for democracy and justice in their country.⁹ The priorities of those who hesitated, on the other hand, can be said to have been focused more on economic prospects.

Thus, for the earlier groups, the negative push factors described may have been compensated to some degree by the positive pull factor of political participation. Later repatriates, however, were more concerned with their economic future, and the prospect of a strenuous new beginning and tough economic conditions in their home country clearly did not have the same pull effect. Secondly, the situation faced by those Guatemalans located in Chiapas was different from that faced by those on the Yucatán peninsula. Whereas, for the latter, pressures to repatriate had gradually decreased and arguably disappeared after 1996 with the announcement of the possibility of attaining permanent residency,¹⁰ in Chiapas the year 1997 represented something of the culmination of a build-up of pressures, as will be demonstrated.

The primary material I use to substantiate my argument in this section was collected during a stay in Chiapas and Guatemala between July and September 1997. One part of my information originates from observations I made while living in a camp with refugees who were, at that time, going through the process of deciding whether or not to repatriate. While I was not there long enough to conduct “participant observation”, through attending community meetings and smaller group discussions I was nevertheless able to gain an impression of the different kinds of pressure under which the Guatemalans perceived themselves to be.

In addition, my participation in a number of return movements enabled me to speak to refugees and returnees at all stages of the process – from the first acts of preparation to the initial period of re-integration. I also conducted semi-structured interviews with returnees who had been back in Guatemala for several years. My fieldwork may have involved a certain bias towards group leaders, as many, though not all, of my informants were “leaders” in some way: for example, several of the women I interviewed were actively involved in women’s organizations and the men tended to be either community leaders or teachers, health promoters and so on. One of the reasons for this is, clearly, that these people were used to speaking out and, as a result, felt less inhibited about talking to me. In general, however, the issues they raised reflected the major concerns of the refugee community as a whole, or of the sectors they represented.

⁹ Cohen (1997), p. 15.

¹⁰ Kauffer (1997a).

Setting the stage: current trends in refugee policy

Fifty years after it was first introduced, the notion of “voluntariness” as a precondition for repatriation is at the heart of a conceptual debate which questions its continued viability in the light of changed political realities. Suggestions to the contrary have emanated especially from western Europe, where in the early 1990s fundamental changes in the approach to immigration were brought about by two key developments: the end of the Cold War and the conflict in the former Yugoslavia.

Prior to the collapse of the Soviet bloc, most persons applying for asylum in the West had come from the other side of the Iron Curtain, and the welcoming attitude displayed towards them was a consequence of the ideological connotations associated with their escape, together with the fact that their numbers were, naturally, limited. Integration in the country of asylum was, thus, the most obvious solution to their situation, and no significant practice of repatriation developed. With the demise of communist rule, however, the admission of refugees ceased to have strategic value. This development coincided with the first occasion since 1945 when European countries were exposed to a mass influx of people displaced by war in their country of origin.

The response to the mass migration caused by the break-up of Yugoslavia represented the end of Europe’s historic openness towards refugees: it was marked by highly restrictive attitudes and a search for policies which would reduce to a minimum host states’ responsibilities towards refugees. Two concepts came especially to prominence: one was the notion of “prevention”, which followed the rationale that seeking international refuge could be made unnecessary by protecting people within the borders of their home country. The other was the policy of “temporary protection”, which provided European countries with a mechanism to restrict the rights associated with the granting of refugee status. Most significantly, unlike the individuals admitted during the Cold War period, the “war refugees” were expected to return home as soon as was feasible.¹¹ In other words, the granting of asylum was made conditional upon an understanding that it would not lead to a long-term presence.

The dilemma which presents itself is that the new emphasis – on minimizing the time spent by refugees outside the borders of their country of origin that is reflected in these policies – seems irreconcilable with the notion of a free decision, made in the absence of pressure, about whether or not to repatriate, that is inherent in the principle of “voluntariness”. One possible reaction to this challenge to established standards is to resist political pressures and insist on compliance with existing norms. This, however, is likely to be futile, and even counterproductive, in the absence of the necessary political will. Rather than bringing states to adhere to requirements they do not consider tenable in the light of domestic political imperatives, it is more likely to provoke them to devise innovative policies which allow them to circumvent the rules or even to avoid contact with migrants altogether. In both cases, the existing refugee regime would be relegated to irrelevance and thus deprived of the capacity to fulfil its function as a protection mechanism. If this is to be prevented, some sort of reform of the present system seems necessary to restore its viability in the light of changed political realities. In particular, a rethinking of the threshold for repatriation would seem essential.

¹¹ Koser, Walsh and Black (1998).

UNHCR has found itself caught between the recognition of this need for reform and the fear of a possible erosion of its basic mandate by “trying too zealously ... to tip the balance towards state interests, to the point where the protection content ... is marginalized”.¹²

The key to reconciling the two lies in the difference in status between “non-refoulement”, which is included in the 1951 Convention and as such is a legally binding principle, and the requirement of “voluntariness”, which is merely contained in a number of universal instruments, such as the UNHCR statute, that do not impose legal obligations on states. Its function is, therefore, that of a policy recommendation which is supposed to guide state practice in a way that ensures compliance with their obligations; it is a mechanism for implementing the 1951 regime, rather than part of it. As a consequence, by focusing on the level of policy recommendations it is possible to carry out the necessary reforms without making a single amendment to the fundamental legal framework that safeguards the protection of refugees. The central question, consequently, is whether an innovative mechanism, a new corollary to “non-refoulement” could be found to replace “voluntariness” – one which would permit the introduction of a somewhat lower standard for repatriation without sacrificing its role as a safeguard against forced return.

One possibility, which has been examined by UNHCR as well as in recent academic literature, is that of “safety of return”. This is based on the argument that in circumstances where, as a result of changes such as a comprehensive peace agreement, conditions in the country of origin can be considered “safe”, it could be acceptable to treat the will of the refugees as secondary without infringing upon the prohibition of returning them “to territories where his life would be threatened”.¹³

There are, however, significant risks involved in relying on “safety” as a criterion for sanctioning return.¹⁴ After all, in those situations in which the principle of voluntariness is relevant and in which, correspondingly, the “safety” requirement would be applied, the change of circumstances falls short of what would justify the application of the cessation clause. By implication, a potential risk of persecution remains. In this context, mistakes in judgement regarding the “safety” of a country would “create space for repatriation under duress”¹⁵ and could have potentially grave implications for the refugees.

Some indications of a way of obviating these problems and thus of reconciling the need for reform with the requirement not to compromise UNHCR’s mandate of protection can be found in the repatriation of Guatemalan refugees from Mexico. Although not a case usually looked at in connection with questioning the continued viability of the concept of voluntary repatriation and, on the contrary, typically regarded as exemplary of the traditional approach, this repatriation contains some highly relevant lessons with respect to current developments in the international refugee regime.

¹² McNamara (1998), p. 233.

¹³ Zieck (1997).

¹⁴ UNHCR Draft Guidelines contain the following: “... seen in the context of conditions justifying the application of the cessation clause, the voluntary repatriation of refugees can occur *at a lower threshold*” (p. 43, my emphasis).

¹⁵ Chimni (1993), p. 454.

The Guatemalan repatriation

The flight of hundreds of thousands of Guatemalans to neighbouring Mexico between 1981 and 1983 was the direct result of the extreme violence that marked the height of the civil war that had riddled this Central American country since the 1960s. The root cause of this conflict can be found in extreme economic inequality: in a country in which agriculture is the basis of subsistence for the great majority of the population, 72 per cent of all arable land belong to only 2.1 per cent of landholders (mostly from the non-indigenous minority), while 88.4 per cent, of mainly indigenous and so-called “ladino”¹⁶ origin, divide a mere 14.3 per cent of agricultural land among themselves.¹⁷ Following the overthrow in the early 1950s of President Jacobo Arbenz Guzmán, under whose administration the first and only serious attempt to rectify these imbalances had been undertaken, power was consolidated in the hands of an alliance of conservative military and private-sector interests which suppressed any reformist dissent. Out of this situation grew the movement of armed resistance in the early 1960s. It was not until the end of the following decade, however, that the kind of generalized violence occurred that forced more than 200,000 people into international exile and led to the internal displacement of over one million persons.¹⁸ Starting during the administration of General Romeo Lucas García (1978–1982) and continuing under General Efraín Ríos Montt (1982–1983) and General Oscar Mejía Víctores (1983–1985), the rural population of Guatemala was subjected to a counter-insurgency strategy marked by exceptional violence. In the army’s attempt to deprive the guerrillas of their base, the civilian inhabitants of the villages in the country’s northern highlands, mainly indigenous peasants, became the direct targets of scorched earth tactics and indiscriminate massacres.

Guatemalans in exile

Most of the 46,000 Guatemalans who were recognized as refugees by the Mexican government had originally sought refuge in Chiapas, Mexico’s southernmost state. However, following a number of incursions by the Guatemalan army into Mexican territory in pursuit of the refugees, a programme of relocation was initiated in 1984. In all, about 17,000 refugees were resettled in the states of Campeche and Quintana Roo on Mexico’s south-eastern Yucatán peninsula, which was considered safer due to its greater distance from the border.¹⁹ The remaining Guatemalans, however, refused to leave Chiapas, unwilling to give up its geographical as well as cultural closeness to home.²⁰ As a result the Guatemalan refugee population was dispersed over three Mexican states.

¹⁶ People of mixed Spanish and indigenous origin.

¹⁷ T. and M. Melville (1982), *Tierra y Poder en Guatemala*. Quoted in Zinser (1991), p. 58.

¹⁸ Zinser (1991), p. 60.

¹⁹ Stepputat (1989), p. 12.

²⁰ Freyermuth and Godfrey (1993).

Background to the repatriation

Small numbers of individuals and families had started to return to Guatemala as early as 1984, when the army increasingly managed to isolate the guerrillas in the mountains and people felt that their home communities were no longer immediately threatened. Official efforts at repatriation only began in 1986, however, following the election of President Vinicio Cerezo Arévalo, which marked a return to civilian rule after three decades of military dictatorship. A tripartite mechanism, involving the Mexican and Guatemalan governments as well as UNHCR, was initiated and in February 1987 an agreement was signed which laid out the ground rules for repatriation. Most significantly, the agreement permitted UNHCR to operate within Guatemala and, as a result, continue its provision of assistance to the refugees after they crossed the border.

The refugees, however, wanted to determine for themselves the conditions under which their return would take place. For that purpose they created a group of representatives that same year, the so-called Permanent Commissions (CCPP), which was to enter on their behalf into direct negotiations with the Guatemalan government. The basis for these negotiations was a list of six points which expressed the refugees' main concerns with respect to repatriation:

- the right of every refugee to determine how, when and to which place to return;
- the right of access to land and free choice of place of residence;
- the right to free association;
- the right to life, personal security and community integrity;
- international accompaniment of the returnees; and
- freedom of national and international movement for the returnees and for the Permanent Commissions.²¹

The initial refusal of the government to recognize the group as legitimate representatives of the refugees and, therefore, as negotiating partners, together with factors such as a mutual lack of trust, slowed down the process, and an agreement was not signed until 8 October 1992. The first return²² under the terms of the new accords (hereafter "1992 Accords") took place in January 1993.²³

²¹ Comisiones Permanentes de Representantes de los Refugiados Guatemaltecos en Mexico (1989).

²² From that point, a distinction was made between "retorno" (return), which referred to the mass returns under the terms of the 1992 accords, and "repatriacion" (repatriation), which was the term used for the smaller groups who chose to return outside the 1992 framework and who were given the basic assistance laid out under the 1987 Tripartite Pact. Since this study is exclusively concerned with the mass returns, I will use the two terms interchangeably.

²³ Returns under the accord came to a formal halt in mid-1999. Refugees who still wished to repatriate after that were provided with transport to the Guatemalan border and a small cash grant.

The issue of voluntariness

For a decision to be based on “a meaningful choice between returning and not returning”, two conditions need to be satisfied. First, viable alternatives to choose from must exist, and the person making the decision must have full information about these alternatives. The Guatemalan refugees in Chiapas who faced the decision on repatriation in 1997, were deprived of both: under the then existing conditions, remaining in Mexico did not represent a viable long-term option, and they were knowingly left uninformed about the possibility of future improvement in their situation. This severely reduced the element of choice involved in their decision and they essentially opted for repatriation by default. As a result, to speak of a voluntary act would be a misrepresentation of their experience.

Unlike those refugees who had been relocated to the states of Campeche and Quintana Roo in 1984, the Guatemalans who had refused to leave Chiapas faced significant economic hardship throughout their exile. This was the result of the Mexican government’s determination to discourage permanent settlement in its southernmost state, which had long been marked by social conflict. As the origins of this conflict lay in pronounced economic inequality,²⁴ the presence of thousands of refugees was perceived to exacerbate the competition over resources and thus fuel the discontent. Furthermore, the ethnic affinity of the Guatemalan and Mexican indigenous groups and the similarity of their background as dispossessed peasants brought the refugees under the suspicion of being actively involved in social unrest.²⁵

This attitude translated into marked disparities between the level of assistance provided to the refugees in Chiapas and the support given to the inhabitants of the new camps on the Yucatán peninsula. There, a self-sufficiency approach was adopted, aimed at the achievement of a standard of living comparable to that of the surrounding Mexican communities.²⁶ Despite initial delays, this goal was found by a joint European Commission/UNHCR evaluation mission to have been realized by 1992.²⁷ The gradual improvement in economic conditions was accompanied by an increasingly open orientation towards permanent integration.²⁸

In contrast, the Guatemalans in Chiapas were denied this kind of support in a conscious effort to keep their situation precarious and, thus, discourage long-term settlement. In the eyes of the government, for those who had resisted relocation repatriation was “the most suitable path”.²⁹ Thus for the refugees the already tough conditions in Mexico’s poorest state were aggravated: they were denied access to agricultural subsidies or credit systems, and their movement was

²⁴ Three-quarters of the population of Chiapas are campesinos who depend on subsistence agriculture, but 50% of arable land belongs to only a very small number of big landowners. Freyermuth and Godfrey (1993), p. 16.

²⁵ The most open expression of this was the accusation that the refugees had collaborated with the Zapatista rebels during the uprising in 1994. Beckman, Lindell and Sonderstrom (1985), p. 25.

²⁶ Stepputat (1989).

²⁷ UN Doc. A/AC.96/808. See Lindsey (1996), p. 1.

²⁸ Stepputat (1990). This process was manifested in a period of official ambiguity, accompanied by a tacit acceptance of the de facto state of affairs and gradual softening of restrictions such as the control of movement and production of the refugees. The option of local integration in Campeche and Quintana Roo became official policy with the announcement of the “Migratory Stabilization Plan” in 1996.

²⁹ UNHCR with COMAR (1999), p. 214.

restricted to a limited perimeter around their camp, making it very hard to find employment. Most importantly, through their provisional legal status they were prevented from purchasing land, which made them dependent on rental arrangements.

This was a great source of insecurity, as can be demonstrated by the example of the camp of La Sombra, located in the Comalapa municipality: when the population of this camp went through the process of deciding whether or not to apply for repatriation, one of the main factors influencing their deliberations was the fear of non-renewal of the contract for their land. The community had been renting the terrain from its Mexican owner on the basis of five-year contracts. In 1996, however, the landowner laid claim to those parts of the plot used for agriculture, and merely extended the lease of the village grounds for another two years. As a result, the refugees were forced to find new fields for cultivation, some of which lay at a distance of up to two hours' walk from the camp, which greatly complicated the task of securing their livelihood. More significantly, the landowner's change in attitude had generated a climate of insecurity, and the refugees frequently voiced the fear that they would have to leave the area altogether.³⁰

The uncertain basis on which this community was forced to continue its existence was not an isolated occurrence. Rather, fundamental insecurity was inherent in the situation of the Guatemalans in Chiapas. This became abundantly clear during the Zapatista uprising of 1994. The displacement of parts of the local population from the areas directly affected by the conflict (the Margaritas and Independencia municipalities) greatly increased the pressure on resources in the rest of the state. This led, in some cases, to the occupation of land hitherto cultivated by refugees or, more frequently, to the inflation of rents. At the same time, intense competition for the few opportunities of local temporary employment drastically reduced the possibility that the refugees would be able to gain an income to meet the increased costs.³¹ Thus, without the opportunity to own land, the Guatemalans could never feel secure with regard to even their most basic means of subsistence – a situation that was not tenable in the long term.³²

Permanent settlement in Chiapas could, therefore, have represented a viable option for the refugees only if they could reasonably have expected an improvement in their circumstances. However, the Mexican government took care to prevent such impressions from arising, refusing “to specify the future status of those who remain, or where they will be entitled to live, [so as not] to do or say anything that would discourage refugees from returning to Guatemala”.³³ In fact, it deliberately fostered a climate of insecurity by explicitly excluding Chiapas from the “Migratory Stabilization Programme” which, from August 1996 onwards, offered the Guatemalans in Campeche and Quintana Roo the possibility of becoming permanent residents.³⁴ As intended, this was viewed as a sure sign that integration was not an option in Chiapas.³⁵ The extent of

³⁰ Checchinato and Riess (1997).

³¹ Gonzalez (1995), p. 9.

³² Ruíz (1993), p. 9; Gonzalez (1995), p. 35.

³³ Ruíz (1993), p. 20.

³⁴ The inhabitants of the Chiapas camps were, instead, issued with so-called “FM-3” documents which “specifically precludes integration as it is a visitor, non-immigrant document and thus does not represent a durable solution”. UNHCR (1997), p. 3.

³⁵ UNHCR (1997), p. 3.

manipulation involved is evident in the fact that, no sooner had registration for returns come to a conclusion in the summer of 1998, that the Stabilization Programme was extended to Chiapas – as, by then, keeping the refugees in the dark with regard to their future status no longer served the purpose of encouraging them to return.

In this context, evidence of a trend from 1996 onwards of a gradual phasing out of the international assistance on which the refugees had relied throughout the duration of their exile, took on added significance. In the absence of a prospect of being given the opportunity to fend for themselves, the perception of “abandonment” by the international community created additional momentum towards repatriation. One substantial blow was the termination in February 1996 of food donations by the World Food Programme.³⁶ That same year, the NGO sector, on which the refugees depended heavily in areas such as health and education, as well as some of the Mexican institutions supporting them, experienced significant cutbacks.³⁷

Again, the situation in the La Sombra camp serves to illustrate what this meant for the Guatemalans. Responsibility for medical attention for refugees in the area where the camp was located had fallen to the Mexican Institute of Social Security (IMSS), which had provided both basic equipment and medication, as well as a doctor, for more than a decade. All these services were suddenly terminated at the end of July 1997, leaving the community without even the most basic medical care. Due to its isolated location (a characteristic La Sombra shared with many of the camps in Chiapas), the nearest doctor was a strenuous two-hour walk away and access to a clinic required an additional three-hour bus ride. The health promoter of the camp had only the most rudimentary knowledge and, without medication, even that was of little use. Not surprisingly, this situation was cause for great concern in the community and contributed to the momentum towards repatriation.³⁸

In the light of these conditions, local integration was not a viable option in 1997. This situation opened the door for involuntary repatriation. For several years, the refugees remaining in Chiapas had reacted to their lack of alternatives by postponing their decision, adopting a wait-and-see attitude in the hope that, with time, things would either get better or, at least, clearer. Thus in a way they had been able to express their will by *not* making a decision. However, by 1997 this was no longer an option. The signing of the Guatemalan Peace Accords in December 1996 formally put an end to the circumstances that had created the refugee crisis. In the eyes of the international community, as well as of the two governments immediately concerned, there was therefore no longer a need for there to be refugees. The time had come to create lasting solutions.³⁹ For the refugees this meant that definitive decisions in favour or against repatriation

³⁶ In a survey conducted among NGOs involved with the refugees, the prevailing opinion was that it would be difficult for the refugees to do without this assistance. Gonzalez (1995).

³⁷ Such as PROSECO (Promocion de Servicios Comunitarios), which was one of the key organizations in the health sector, running three clinics in the largest settlements, training health promoters and midwives and having an overall responsibility for nine million refugees in 1995. As a result of cutbacks, PROSECO had to reduce its personnel as well as the frequency of its training courses. Gonzalez (1995), pp. 26–27.

³⁸ Checchinato and Riess (1997).

³⁹ The Guatemalan government, for example, announced in July 1997 that registration for returns under the 1992 Agreement would be possible for only one more year, and the programme was to come to an end by December 1998. This time limit was formally established in an agreement with refugee representatives dated 17 September 1997. UNHCR (1998b), pp. 489, 498.

would have to be made. Under these circumstances, their inability to assess what their future in Mexico would look like amounts to a fundamental deprivation of a meaningful choice.

It is important at this point to emphasize the striking contrast between this limbo in which the refugees found themselves with respect to the option of integration and the extensive knowledge they possessed with regard to repatriation. They had been thoroughly familiarized with the provisions of the 1992 agreement, through information campaigns conducted by both the Permanent Commissions and UNHCR. More importantly, the refugees not only had knowledge of the formal guarantees, but also of the impact these had in practice. At all times, they were extremely well informed about what reality looked like for those who returned.

This information was obtained in part through a variety of media that were circulated especially for that purpose, ranging from audio-cassettes with messages from returnees to special refugee newspapers and radio programmes.⁴⁰ Most importantly, however, cross-border movement and contact between friends and family members was intense, ensuring a constant flow of communication.⁴¹

Taking all these factors into account, it no longer seems surprising that the mood on my bus was less than triumphant. In the face of difficult present conditions and an uncertain future in Chiapas, and confronted with the need to take a decision, these refugees had opted, essentially by default, for a return process in which, at least, the parameters of their future were clear.

Despite all this, however, to suggest that these findings amount to a criticism of UNHCR for being, once again, involved in an involuntary repatriation exercise and thus failing to fulfil its protection mandate would be inappropriate. This is because, despite the absence of voluntariness, the principle of non-refoulement had nevertheless been safeguarded.

Refugee participation

Although the safety of the Guatemalans upon return was guaranteed, the lesson of the Guatemalan repatriation is not that the principle of “voluntariness” can simply be replaced by that of “safety” as corollary to non-refoulement. As this section will demonstrate, any attempt to do so within the framework of the criteria and mechanisms currently employed for determining “safety” would involve significant risks. Through contrasting the conditions the refugees would have returned to under conventional practices with what really constituted security for them, it is shown that for “safety” to provide an effective safeguard against refoulement, a more comprehensive approach must be taken.

Under standard operating procedures, the question of the conditions under which a safe return of refugees is possible is addressed within the framework of a so-called “tripartite commission” composed of the country of origin, the country of asylum and UNHCR. The role of the refugees in this mechanism is reduced to being “kept informed of the progress of repatriation negotiations”. Their active involvement is considered “essential” only “at a later stage [when] the

⁴⁰ Gonzalez (1995).

⁴¹ Zinser (1991), p. 88; UNHCR with COMAR (1999), p. 163.

refugees' input with regard to the timing, organization and ... identification of vulnerable groups" will be sought.⁴² In addition, the criteria usually employed in determining safety are general and objective, rather than specific and subjective: conditions in the country of origin are considered safe, if there has been "an *overall, general* improvement in the situation of the country of origin", so that "*objectively*, it is safe for most refugees to return".⁴³ This is typically taken to mean a change in government or a cease-fire, that is, a formal removal of the "causes of the original flight".⁴⁴

Initially the Guatemalan repatriation looked set to occur according to precisely these procedures. In February 1987, one year after Cerezo's election, UNHCR signed a Tripartite Agreement with the Guatemalan and Mexican governments. While conditions in Guatemala were not considered entirely "safe" in the absence of a peace agreement, the election of a civilian government after more than three decades of military dictatorships and the emphasis given by the new president to the issue of repatriation of the refugees were viewed as encouraging signs. While the refugees were, therefore, informed that "without a peace agreement, guarantees were not 'absolute'"⁴⁵, the general view was, nevertheless, that with the change in government conditions were favourable to return⁴⁶ and that through the Tripartite Agreement the most "fundamental protection elements" had been covered.⁴⁷

The Guatemalan refugees, however, disagreed: in their eyes, conditions were not "conducive" to return. This was due to the fact that, in itself, the election of a civilian president did not represent an improvement to them. Their concern was with the immediate impact that this change would have on their lives.⁴⁸ And, in this respect, they harboured a fundamental distrust towards the new government. They regarded its promises as mere rhetoric⁴⁹ – which, to a large extent, they were. What motivated Cerezo in his attempts to promote repatriation was not so much genuine concern for the wellbeing of the refugees as the need to improve his country's poor human rights reputation and thus legitimize the new administration in the eyes of the international community.⁵⁰ The result were inconsistencies between government claims regarding the situation

⁴² UNHCR (1996), p. 34.

⁴³ UNHCR (1996), p. 16.

⁴⁴ UNHCR (1993), p. 44. This reflects the kind of "liberal mathematics" in UNHCR's approach to refugee repatriation that has been discussed in some recent literature: if individual citizen + war = refugee, then refugee – war = individual citizen (Koser 1999), p. 93, also Warner (1994).

⁴⁵ Personal communication, Diana Goldberg, April 26, 1999.

⁴⁶ Zinser (1991), p. 96.

⁴⁷ UNHCR (1993), p. 48.

⁴⁸ The point here is thus not to dispute that the termination of conflict can contribute to the overall climate of security. The argument is rather that other indicators, which are not typically taken into consideration, may have a more direct and concrete impact on the safety of the refugees and thus be more relevant.

⁴⁹ Monzon (1999), p. 164; Manz (1988b), pp. 10–11.

⁵⁰ Ruíz (1993), pp. 9–10; Manz (1988b), pp. 6–7.

in Guatemala and the picture of reality painted by the information the refugees obtained through their own sources.⁵¹

All this was exacerbated by the perception that the elections had brought about a change in the administration but not in the structure of power. Most fundamentally, the military not only remained institutionally unchanged from the days of the massacres, but it also continued to constitute a dominant force in Guatemalan politics and society.⁵² Unavoidably, its influence also extended to the repatriation of the refugees. In fact, not only was the Ministry of Defence a recognized member of the Tripartite Commission, but “in order to gain the approval of the military, the civilian authorities had to assure them that nothing in the agreement contradicted their interests and authority”.⁵³

Thus, no repatriation process based on a tripartite mechanism which relied on “assurances” made by the very institutions that had been responsible for their flight and which, in fact, entrusted to those institutions the “protection” of the returnees, could ever generate the necessary feeling of security among the refugees. They needed additional safeguards. Furthermore, their main concerns regarding their future safety lay with concrete issues that had not been addressed in the Agreement. Thus, they organized themselves and set out to establish a framework for their repatriation that would provide them with concrete, comprehensive and credible guarantees regarding all the conditions whose fulfilment they considered essential for their security upon return.

One of the main factors on which, in the eyes of the refugees, their safety depended upon their return was protection from the Guatemalan military. The major threat in this regard was not seen to be a repetition of the massacres of the early 1980s. While the human rights situation under President Cerezo continued to be among the worst in Latin America,⁵⁴ mass killings were no longer part of government policy. The threat was now of a different nature and more directly affected the everyday life of the individual. It was the result of an extensive level of control which the army had established over parts of the rural population – particularly in those areas from which many of the refugees originated (and would, therefore, return to).⁵⁵ Through a system of so-called *polos de desarrollo* (designated development areas) military authority had been institutionalized at a local level, permitting the exercise of control over every aspect of community life.

These areas were made up of “model villages”, which were newly constructed in such a manner as to facilitate the surveillance of their inhabitants: Instead of the traditional, dispersed arrangement, buildings were concentrated in the centre and partially populated by settlers chosen for their loyalty to the army.⁵⁶ In addition, the communities were organized in so-called “civil-

⁵¹ Figueroa and Espinoza Leyva (1999), p. 163. See also WOLA (1989), p. 11; Zinser (1991), p. 88; Manz (1992), p. 17.

⁵² Manz (1988b), p. 69; Costello (1995), p. 3.

⁵³ Zinser (1991), p. 101.

⁵⁴ Costello (1995), p. 4.

⁵⁵ Zinser (1991), p. 94, Manz (1988a), p. 42, Costello (1995), p. 3.

⁵⁶ Human Rights Watch (1996), p. 8.

defence patrols” (PAC), in which every male over the age of 16 had to participate. Officially, the task of these patrols was to “protect” the village, but essentially they provided the army with a means of keeping a tight grip on the population. They controlled all movement in and out of the village and the need to request, explain, and often pay for, any missed patrol turns, made it close to impossible for anyone to leave the village for any extended period of time.⁵⁷

Clearly, such deprivation of freedom in itself constituted a severe infringement of the human rights of the inhabitants of these villages, as well as posing a threat to subsistence by reducing time for agricultural work and removing the possibility of finding paid work outside the village.⁵⁸ In addition, however, life in the development nodes also contained a direct threat to the physical security of potential or actual returnees, which originated in the suspicion with which the refugees were regarded. The view of the military and, through its propaganda, of much of the population under its control was that most of those who had fled had been supporters of the rebels.⁵⁹ As a result any false move by returnees, such as failure to show up for civil patrol duty or even a dispute over land with a neighbour, could result in being branded a guerrilla sympathizer.⁶⁰ The consequences were serious and ranged from repatriates being singled out for intimidation or harassment to physical attacks and even killings.⁶¹

Clearly, a return to such conditions would not have been safe. In fact, had the refugees relied on government promises, the precise factor that constituted the greatest threat to their security – military control over their lives upon return – would have been at the very heart of the authorities’ policy towards them. Only through their direct involvement in negotiations were the refugees able to establish a number of safeguards against excessive military interference: Not only did they secure a three-year exemption of returnees from military service, as well as a guarantee that they could not be “obliged to ... participate in groups or associations of civil defence”,⁶² but more significantly, the negotiation process had provided the refugees with a platform for publicizing their aversion to an armed presence in their communities. This placed the military’s behaviour under international scrutiny, and, as a result, “army commanders instructed their troops not to patrol repatriated villages”.⁶³

Even this was no absolute guarantee of security, though: a split within the military and a general climate of impunity regarding human rights violations⁶⁴ meant that, at times, official army policy and de facto conduct at the local level could be two very different matters.⁶⁵ In its most extreme manifestation, the killing of 11 returnees in Xamán in October 1995 demonstrates that even the recurrence of massacres could not be excluded with complete certainty. However, the

⁵⁷ Manz (1988a), p. 38.

⁵⁸ Manz (1988a), p. 41.

⁵⁹ Zinser (1991), p. 90.

⁶⁰ Costello (1995), p. 3; WOLA (1989), p. 26.

⁶¹ Zinser (1991), p. 92; Manz (1988a), pp. 23, 48.

⁶² Acuerdos de Condiciones para el Retorno de Refugiados Guatemaltecos en Mexico, §2, sections C and D.

⁶³ Human Rights Watch (1996), p. 6.

⁶⁴ Costello (1995), p. 5; Manz (1988b), p. 41.

⁶⁵ Costello (1995), p. 7; Human Rights Watch (1996), p. 6.

international outcry in its aftermath, leading to the resignation of Defence Minister Enriquez Morales,⁶⁶ together with the fact that this was the only incident of its kind, shows that, as a general rule, the refugees' strategy had worked.

An additional safeguard that had been incorporated into the 1992 Accords also played a role here: Article 3 provides for the "accompaniment of the returns ... by the Human Rights Ombudsman, the Church, UNHCR and GRICAR⁶⁷ ... as well as of international governmental and non-governmental organizations ... throughout the phases of transportation, resettlement *and reintegration* [my emphasis] of the returnees". This was to protect repatriates against violations of their negotiated rights beyond the immediate duration of the trip, the rationale being that "the army will be less likely to harass a refugee settlement if it is aware that accompaniers ... will immediately report human rights violations to their embassies and solidarity organizations".⁶⁸ In addition, an International Accompaniers Forum was established to provide a mechanism for rapid dissemination of information about the occurrence or threat of human rights violations and to publish reports on a monthly basis, thus increasing the profile of the repatriates at an international level. In this context, "it is significant that no accompanier was present in Xamán when soldiers opened fire".⁶⁹

One further aspect addressed in the 1992 Accords was the question of access to land. The system of development nodes and military control of the countryside not only posed a threat to the "legal" and "physical", but also to the "material" safety of the returnees.⁷⁰ As mentioned above, many of the model villages were established on the sites of former communities that had been abandoned when their inhabitants fled the violence of the early 1980s.⁷¹ Thus much of the land that had previously been cultivated and owned by refugees was now occupied by new settlers (mostly landless peasants or internally displaced people) who had been attracted to the area by the promise of land as part of the army's campaign to increase its control over the rural population.⁷² For this purpose, the National Institute of Agrarian Transformation (INTA) referred to Decree 15-51, according to which land that had been "voluntarily abandoned" for more than a year passed into possession of the state. Problems in recovering land were furthermore exacerbated for the refugees by the difficulty of proving ownership, as legal documents had frequently been lost and public records destroyed during the conflict.⁷³

⁶⁶ Human Rights Watch (1996), p. 3.

⁶⁷ Below, n. 74.

⁶⁸ Lindsey (1996), p. 3.

⁶⁹ Ibid.

⁷⁰ Material security, defined as "access to land or means of livelihood" constitutes an integral component of "return in safety" as defined in the UNHCR's Handbook (below, n. 80) As the entire refugee population was constituted essentially of subsistence farmers, access to land was the key to their survival.

⁷¹ Resettlement helped to cover up physical evidence of the large-scale violence that had occurred in many of these places. In addition, it was a means by which the military could improve its image, since the national press highlighted the land distributions. WOLA (1989), p. 30; Costello (1995), p. 3.

⁷² Costello (1995), p. 3; Manz (1988a), p. 54.

⁷³ Zinser (1991), p. 94.

Paragraph 6 of the 1992 Accords, therefore, contained detailed provisions regulating the recovery of land, including unhindered access to unoccupied territory owned by a refugee, as well as procedures for the re-establishment of old titles or the provision of alternative land in the case of disputes with new occupants. The accords also included a mechanism for the acquisition of land by refugees who did not own the plot they cultivated prior to their flight, thus guaranteeing the material safety of all returnees: the Guatemalan government committed itself to providing each “block” of refugees applying for repatriation with a credit that would permit them to buy a “finca”, that is, a piece of territory on which to build their village and establish their fields.

In all, therefore, through a process of direct negotiation with the government of their home country, the Guatemalan refugees achieved what a tripartite mechanism would have failed to provide: a return in safety. Only through their participation were they able to ensure that the agreement which regulated their repatriation provided for comprehensive safety and permitted them collectively to return to their country of origin without risking that their “life or freedom would be threatened”, thus fulfilling the fundamental requirements of the principle of non-refoulement.

Findings, implications and recommendations

Two conclusions can be drawn from the case study of the repatriation of Guatemalan refugees from Mexico.

1. “Voluntariness” is *not a necessary* corollary of non-refoulement. A return in safety *can* fulfil the requirements.
2. For “return in safety” to be an effective corollary to non-refoulement, however, the criteria presented by the refugees themselves, rather than formal or “objective” criteria, must be decisive in establishing whether or not conditions in the country of origin are indeed safe.

How can the first conclusion be explained?

The key to explaining the contention that even in the absence of true “voluntariness” the requirement of non-refoulement may still be fulfilled lies in the fact that the policy recommendation of “voluntariness” is more encompassing than the obligations accepted by states when signing the 1951 Convention: while states are bound by the principle of non-refoulement to offer protection to a refugee as long as they are unable to avail themselves of such protection in their home country, they do not have to provide them with durable alternatives to eventual repatriation.⁷⁴ Free choice between viable alternatives, however, is an inherent component of the concept of voluntariness.

Second, and by logical extension, the notion of voluntariness entails some space for personal preference. Since, by definition, any alternative offered to the refugees must safeguard a basic level of protection, a decision between options will be based on which is considered as offering

⁷⁴ UNHCR (1996, p. 13).

greater opportunities for the future, be this in political, economic or social terms. Giving people who have lost everything, endured suffering and face the prospect of starting all over again the opportunity to make this choice is clearly desirable and should, therefore, always be a goal to which to aspire. It is also, however, more than is required for states in order for them to fulfil their legal obligation of non-refoulement.

This gap between what may be in the best interests of the refugee and what is strictly speaking necessary for their protection provides the key to the findings of the case study. As I mentioned earlier, the priorities of those who had remained in Mexico until relatively late in the repatriation process were economic – they had postponed their decision for as long as possible in order to be able to judge more accurately where their prospects for the future were better. In the end, however, they had been unable to make a well-founded evaluation, and had thus been deprived of making their choice on the basis of the criteria that mattered most to them. At the same time, however, they could at least be sure that the basic requirements for a life in physical, as well as legal and material, safety would be fulfilled upon return. Therefore, while their lack of voluntariness is clearly regrettable, their return nevertheless did not amount to refoulement.

The circumstances which constitute the basic parameters of this case study are comparable to what can be expected in most repatriations. In the context of an increasing emphasis on minimizing the time spent by refugees outside their country of origin, as discussed in the section “Setting the stage – current trends in refugee policy”, the kinds of pressures described in “The issue of voluntariness” represent nothing out of the ordinary.⁷⁵ Furthermore, the mechanisms for determining safety that provide the starting point for “Refugee participation” are standard operating procedures and are therefore employed in a more or less identical manner across the globe. Because of factors common to many refugee crises, the problems confronted by the Guatemalan refugees are frequently likely to be replicated. Thus lessons that can be learned from their experience, even where it departed from the common experience, may have general relevance.

Nevertheless, it is important to recognize that this departure was the result of quite unusual circumstances, in that the Guatemalan refugees were essentially able to ensure their active participation in the process. They were able to do so, first, because they displayed an unusual degree of organization. From the beginning of their exile, the camps had elected “mayors” and formed a variety of committees with responsibilities for different aspects of community life. This tradition of democratic participation and community cohesion formed the backbone of the organizational structure that was created to represent the refugee population as a whole on the international stage, and enabled the effective communication flow that maintained commitment and involvement throughout the long years of negotiation.⁷⁶

Secondly, the refugees were able to put substantial pressure on a Guatemalan government which in fact was very eager to promote their repatriation. After decades of military dictatorship and well-documented atrocities, the new civilian government needed to improve Guatemala’s human

⁷⁵ UNHCR (1996, p. 11).

⁷⁶ Figueroa and Espinoza (1999), p. 161.

rights record in order to gain international credibility. Furthermore, the so-called CIREFCA⁷⁷ process had drawn international attention to the significance of finding durable solutions to the problem of displacement to ensure peace and stability in Central America. Being the last country in the region with a substantial refugee population abroad was a source of embarrassment for Guatemala.

Thus, by taking a unified position in rejecting repatriation under the terms offered to them and in that way causing the failure of the Tripartite Agreement to trigger the large-scale return the government had hoped for,⁷⁸ the refugees were able to generate quite a bit of leverage for themselves. Furthermore, they were determined to create additional pressure by consistently building up both national and international solidarity with their cause. Thus they not only enlisted the direct support of a number of countries as well as of international non-governmental organizations,⁷⁹ but also forged links with various sectors of Guatemalan civil society.⁸⁰

Clearly, in the majority of cases such a fortuitous combination of an opportunity to participate and the ability of the refugees to take advantage of this opportunity is unlikely.⁸¹ Therefore the opportunity of refugees to address their concerns within the framework of the mechanisms that set the terms and conditions for their repatriation must formally become part of standard operating procedures:

Recommendations

The lessons from the Guatemalan case study provide a formula for solving the dilemma over the increasingly untenable standard of “voluntariness” and the problems inherent in relying on the requirement of “safety” as adequate corollary of “non-refoulement”. This formula contains three elements: consultation, comprehensive safety and consent.

As discussed under “Setting the stage – current trends in refugee policy”, the main problem in replacing the requirement of “voluntariness” with that of “safety” lies in the difficulty of ascertaining that conditions in the country of origin are indeed safe. It is important to recognize in this context that the “fear of persecution” that must have been removed for a repatriation not to amount to refoulement is a subjective phenomenon. Thus, the existence of “safety” depends

⁷⁷ CIREFCA is the Spanish acronym for International Conference on Central American Refugees. This process had been initiated in May 1989 to complement the regional “Esquipulas” peace process and place the problem of displacement in the context of peace and development.

⁷⁸ The absolute number of returnees under the programme was no more than 3,000, fewer than 10 per cent of the total official Guatemalan refugee population in Mexico. Zinser (1991), p. 68.

⁷⁹ The ambassadors of Sweden, Switzerland, Canada and Mexico, joined by the International Council of Voluntary Agencies and the World Council of Churches, formed the International Advisory and Support Group for the Return of Guatemalan Refugees (GRICAR), which was actively involved in the mediation and verification of the terms of the 1992 Agreement.

⁸⁰ For example, during stays in Guatemala City in the course of the negotiations, the CCPP “took the opportunity to establish contact with different popular sectors of Guatemala’s organized civil society ... in order to ask for their moral support for our continuing struggle to turn the demands of the refugees into reality”. Monzon (1999), p. 168.

⁸¹ The fact that, to this day, the repatriation of the Guatemalans from Mexico is the only case in which a formal agreement between the refugees and the government of their country of origin has been signed, testifies to this.

on a removal of the reasons for this fear *in the eyes of those affected* by it. As the case study has clearly demonstrated, this may require addressing factors entirely different from what may be perceived to be the cause of the fear by UNHCR or the governments concerned. Thus the critical element in determining safety is taking into account the concerns of the refugees themselves.

My recommendation, therefore, is that in the light of political realities a replacement of “voluntariness” by “safety” as the institutionalized safeguard of non-refoulement is desirable as long as it is accompanied by an explicit requirement of *formal collective consultation* of the refugee population. This represents a substantial change from the existing tripartite mechanism, which, as has been demonstrated above, de-emphasizes the participation of refugees. The present clause, which states that “formal representation of the refugee community *can be considered*”,⁸² is not sufficient, because it could too easily be ignored in a context of pressures to bring a refugee crisis to a conclusion.⁸³

The collective determination of the most fundamental aspects of safety seems an appropriate mechanism at a time when refugee status is accorded collectively as well. However, in itself, it cannot establish and constitute a guarantee against refoulement.

While it has been shown that collective consultation can be an effective mechanism for raising the refugees’ most fundamental concerns regarding their safety upon return, the fear that is at the heart of the concept of the refugee also contains an individual dimension. Thus, in addition to the factors that prompted the collective exodus, persecution may have been specifically targeted at selected individuals. Alternatively, experiences prior to or during the flight may have been so traumatic for some people that stronger assurances are necessary for them to feel safe upon return. Thus, no collective mechanism can determine with absolute certainty that no cause for “well-founded fear of persecution” remains for any single person. In the final instance, therefore, protection against non-refoulement must rest at the level of the individual.

This is all the more necessary when situations may change throughout the duration of the repatriation process. Thus new problems may develop that are not addressed in the agreement regulating the return. Alternatively, aspects that were not considered relevant at the time of negotiations may turn out to be of significance. Furthermore, of course, there is always the possibility that the information that the refugees have suggests that the government may not be fulfilling its promises.

Thus my recommendation is that the requirement of formal collective consultation be complemented by that of *individual consent*. The difference between this principle and “voluntariness” is that it avoids some of the exacting standards associated with the latter, such as the requirement of a free choice between viable options, which have been the cause of doubts about its continued viability. It merely retains the one dimension of “voluntariness” that is essential to the protection against refoulement, that is, the right to say “no”. Thus in a concession

⁸² UNHCR (1996), p. 34, my emphasis.

⁸³ See, for example, the account of the Rohingya repatriation in Jean (1997), pp. 48–49.

to political pressures, it permits a moderating of standards without compromising its capacity to function as the ultimate means of defence against coercion.⁸⁴

The last element of the formula is closely connected to that of refugee consultation: the need to take a comprehensive view of safety. In general terms, this means moving away from the simplistic view, typically applied to a refugee situation, that cause and effect are wholly reversible. Safety is not generated by a formal change in the circumstances that were the original cause of flight, but rather depends on the immediate effects such changes may or may not have on people's lives. Furthermore, situations develop both in the country of origin and in exile which cause some concerns to disappear and others to arise. Overall, a whole set of interrelated issues, some more general, others more specific, some new, others significant throughout the duration of exile, is likely to be important.

This means that any claim that conditions are secure for repatriation must be based on a detailed analysis taking into account factors far beyond superficial changes. In theory, the provisions for this are contained in the UNHCR handbook, which gives an exhaustive definition of safety, including physical, legal and material aspects.⁸⁵ Together with input from the refugees to help pinpoint the areas of main concern, this provides the basis for a comprehensive approach to security.

There is a second side to this coin, however. Introducing a more differentiated picture of safety will also expose as unfounded many generic declarations of countries as not safe, for example, until there is a cease-fire. The Guatemalan case study has demonstrated that, despite UNHCR statements to the contrary, by taking a refugee-driven approach to the question of security repatriation in safety is indeed possible even in the context of an ongoing civil war.⁸⁶ This finding is significant at times of increasing pressure on refugees to go back to their country of origin as early as possible.⁸⁷

Care must be taken in a number of ways when employing these principles. Most fundamentally, it is essential to ensure that the people participating in the consultation and negotiation are true representatives of the refugee population. If they pursue their own goals, rather than those of the majority, then serious protection shortcomings could arise. In the Guatemalan repatriation process, true representativeness can be said to have existed throughout: both the election of the members of the CCPP and the determination of the issues to be raised by them were carried out democratically.⁸⁸ While later in the repatriation process some feelings did arise among the remaining refugees that the Commissions had become more concerned with their own political

⁸⁴ Clearly, a refusal to repatriate would not automatically lead to permanent asylum, but merely guarantee the individual the opportunity to have his or her claim examined.

⁸⁵ UNHCR (1996), p. 12.

⁸⁶ The point here is not to dispute that the termination of a conflict can contribute to the overall climate of security. The argument is rather that other indicators (which are not typically taken into consideration) may have a more direct and concrete impact on the safety of the refugees and thus be more relevant.

⁸⁷ The following figures are indicative in this context: 181 refugees returned before the end of 1996, 8,187 afterwards. This means that 80.5 per cent of the total number of returnees went back *prior* to the Peace Agreement. Boggio (1999), p. 233.

⁸⁸ Zinser (1991), p. 74.

agendas than with the needs of those they were supposed to represent,⁸⁹ the formation of a new group, the so-called Co-ordinadora de Blocques de Retorno (CBR), offset this development.

The second area where problems could arise is where there is the possibility of a failure by the government of the country of origin to implement in good faith the provisions of any agreement concluded with the refugees. As was demonstrated in the case study, the involvement of the international community in both negotiations and repatriation process, together with the direct presence of verifiers in returnee communities, is an important safety net in this respect. Ultimately, however, it cannot substitute for the necessary political will on the part of the country of origin. Thus, despite extensive international support, the Guatemalan refugees faced many obstacles deliberately put in their way by the authorities. This ranged from procrastination in the formalization of land purchases and the provision of loans for this purpose by the government,⁹⁰ to the provision of false information regarding the quality of the soil.⁹¹

Conclusion

Two final questions remain to be asked. One arises from the apprehension of those cautioning against reforming the current refugee regime; they liken political pressures to a constant drip of water on a stone and regard the making of concessions as the beginning of a slippery slope. Do adjustments in established principles not open the door to further and further erosion of the protection offered to refugees? On the contrary, it is argued here that they are necessary to prevent just such erosion. If adherence by host states to their obligations under international law is to be safeguarded, then the mechanisms available to them for implementing these must be relevant to current political realities. What has been suggested here is therefore not an erosion of the legal standards that protect refugees, but rather an innovative mechanism for their application and thus for ensuring their continued validity.

Lastly, are these propositions realistic? Is it not naive to advocate consultation after having established an increasing de-emphasis on the will of refugees? The crucial difference lies in the place accorded to refugee opinion. Whereas the principle of “voluntariness” approaches repatriation with an open-ended question of whether or not the refugees want to go back, “consultation” proceeds from an assumption of eventual return. The requirement of taking the views of refugees into account is, therefore, applied in the context of an already existing momentum towards repatriation, and the focus is on making it safe, rather than debating its merits. As such, the proposed formula provides a pragmatic alternative to the concept of “voluntary return”, which is able to accommodate the political pressures towards repatriation without compromising the essential element of protection against non-refoulement.

⁸⁹ Conversation with Gilberto Camposeco Jimenez, Guatemalan refugee, La Sombra camp, 17 August 1997.

⁹⁰ Costello (1995), p. 12; Gonzalez (1995), pp. 17, 38, 40–41.

⁹¹ Interview on 8 August 1997 with Jolanda Montejo, a returnee in November 1984.

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