

Repatriation of Afghan Refugees from Pakistan: A Legal Analysis*

Ahmad Khalid Hatam**

Abstract

Refugee situations do not last forever. Therefore, international protection provided to refugees fleeing persecution ceases with restoration of national protection through voluntary repatriation, local settlement, or resettlement. However, repatriation not only needs to be voluntary, it must be conducted orderly, in safety and with dignity. Among other things, voluntary repatriation requires an overall general improvement in the situation of the country of origin. Since the Afghan government is planning to welcome refugees from all parts of the world, especially Pakistan, it is essential to evaluate if the return fulfills the criterion laid down by the international refugee law. This paper elaborates the criterion for conducting voluntary repatriation and then argues through evidence of the prevalent situation in Afghanistan that prerequisites for voluntary repatriation are not met and therefore the government of Pakistan, Government of Afghanistan and UNHCR need to work on eliminating the root causes of refuge in the first place and then encourage repatriation. Only then, it will be a lasting and sustainable solution to the problem of Afghan refugees. It also presents recommendations to the government of Afghanistan and UNHCR on how to proceed with repatriation.

Keywords: Afghan Refugees, Voluntary Repatriation, Safety, Dignity, Non-Refoulement, UNHCR

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Introduction

Afghans commenced leaving their country in April 1978 consequent to the *coup d' état* of the Marxist People's Democratic Party of Afghanistan (PDPA) against the Regime of Muhammad Daoud who had seized power from his cousin, the King Muhammad Zahir Shah in 1973 through a bloodless coup. The refugees' flow escalated when the Union of Soviet Socialist Republics (USSR) invaded the country in 1979 as at the beginning of 1981 the number of refugees hit the mark of 3.7 million refugees taking shelter in Pakistan and Iran.¹

By the beginning of 1990s, the number of refugees reached an estimated 6.2 million Afghans living as refugees outside the borders of their homeland.² Currently, United Nations High Commissioner for Refugees (UNHCR) believes that there are almost 2.5 million registered refugees from Afghanistan.³ It also expects that the humanitarian situation in Afghanistan will remain complex.⁴ Overall, UNCHR reports indicate that more than 5.2 million Afghan refugees have repatriated with UNHCR assistance since 2002. In 2017, UNHCR facilitated the voluntary return of 58,817 refugees, while in 2018, 15,699 refugees have returned to Afghanistan.⁵

However, refugee situations do not last forever and refugees need to return to their country of origin as a fundamental human right. Therefore, Afghans too have the right to return to their country. When they should return, however, is for the refugees to decide based on their assessment of the situation and their fear of being persecuted in their place of origin.

2. Voluntary Repatriation as the Preferred Solution

International protection for refugees leaving a territory due to persecution is not normally granted for unlimited period and it has to cease with restoration of national protection, either, in the country of origin (voluntary repatriation), integration in the host country or the

country of first asylum (local settlement), or resettlement in a third country (resettlement). There are, therefore, mainly three durable solutions⁶ to the refugee problems: voluntary repatriation, local integration and resettlement.

From 1945 to 1985, the international community focused on resettlement as the practical solution.⁷ Subsequent to realizing the need to diminish the causes of flight⁸ and consequent to a change in the political interest of the time, the emphasis shifted from resettlement to voluntary repatriation as the strongly preferred solution. Moreover, this shift was one of the principal objectives of the International Refugee Organization established in the wake of World War II⁹, which for different reasons, explained in the proceeding paragraphs, did not consider voluntary repatriation as the favored durable solution.

It was the period from 1985 to 1993, according to B.S. Chimni, during which “voluntary repatriation came to be promoted as *the durable solution*”, with assurance, however, of its voluntary character.¹⁰ The General Assembly called upon states to assist UNHCR in its function to promote voluntary repatriation.¹¹ In 1991, Mrs. Sadako Ogata, the High Commissioner for Refugees, highlighted in the 42nd session of the Executive Committee (Ex-Com)¹² the poor conditions in which refugees¹³ were forced to live in different parts of the world. She asserted that the right of refugees to return to their homeland is recognized in the same way as the right to seek asylum abroad.¹⁴ Furthermore, she vowed to pursue in 1992 every opportunity for ensuring voluntary repatriation as the preferred solution to the problem of refugees.¹⁵ The Ex-Com in the Conclusion 68 (XLIII) of 1992 reaffirmed that:¹⁶

Voluntary repatriation of refugees is the preferred solution, where feasible, and endorses UNHCR’s efforts to work actively to create, from the outset of a refugee

problem, condition conducive to voluntary return in safety and dignity. The success of this solution will depend on a number of factors, including assurances of safety on return, access arrangements and monitoring possibilities for UNHCR, the adequacy of reception arrangements and reintegration possibilities.

The discussion above underlines the fact that since the beginning voluntary repatriation has not been deemed the preferred solution. Consequent to the Cold War politics and modern history of European religious and racial groups, it was assumed that the refugee movements were in fact good and that refugees did not admire of return to 'home'. The perception was that refuge entitled the oppressed to look for, and enjoy, a better life outside and allowed the states to utilize the sentiments of the refugees in their campaigns against the adversary.¹⁷

Most importantly, 'the North' was passing through tremendous economic expansion, and, hence, it was in need of labor. The Refugees, therefore, were used as a cheap labor force.¹⁸ In view of the above, the emphasis in international instruments on refuge and asylum had been mainly on 'exile.' This attitude, according to Gervase Coles, amounts to 'exile' bias and needed to be altered.¹⁹ Similarly, under the refugee regime of the United Nations Relief and Rehabilitation Agency (UNRRA), the predecessor of International Refugee Organization (IRO), no formal respect for the basic rights of individuals was safeguarded, and so the displaced persons could have been repatriated against their will. Although, UNRRA disapproved this practice subsequently, it was at the commencement of the Cold War and formation of IRO regime that individuals' right to flee from persecution²⁰ and choose the place of asylum was recognized.²¹

Focusing on the 1951 Convention,²² Article 34 of the same²³ refers to assimilation and naturalization of refugees with some other

Articles containing the terms of "settlement" and "resettlement" conveying an implied status given to them of solutions and ignores repatriation as such.²⁴ Nonetheless, the desirability of addressing durable and permanent solutions and the temporary nature of refugees could be figured out of Article 1 (C) of the Convention, which provides for cessation of refugee status on voluntary acquisition of a new nationality, the voluntary reacquisition of the former nationality and/or the voluntary retrieval of the protection²⁵ of the country of origin.²⁶

Dealing with the language of 1951 Convention, James C. Hathaway points out that the convention speculates two distinct options for putting an end to refugee status: voluntary reestablishment and repatriation consequent to a fundamental change of circumstances.²⁷ Referring to voluntary repatriation, he emphasizes that "the routine use of this terminology is however problematic". He holds that "return" to the country of origin is not the same as "repatriation". For him, refugee status comes to an end by operation of Article 1 (C) (4) of the 1951 Convention "if the voluntary return amounts to reestablishment in the country of origin".²⁸ He believes that this act of return and reestablishment however is not appropriately referred to as repatriation, since there is no requirement at law that the result of the return home be the restoration of a normal relationship between the 'former' refugee and the government of the country of origin. It appears that he values and focuses on restoration of the bond between the returnee and the government of the country of origin as against the mere fact of return to the country left earlier.²⁹

Similarly, the 1967 Protocol³⁰ goes without making any mention of the voluntary repatriation as a solution to the problem of refugees. It was only the Statute of UNHCR that mentioned voluntary repatriation amongst the durable solutions to the refugee problem.³¹ Likewise, a proposal to incorporate an article asserting that "nothing

in the declaration shall be interpreted to prejudice the right of everyone to return to his country as stated in Article 13, paragraph 2 of the Universal Declaration on Human Rights” was opposed and rejected in 1966 when the UN General Assembly (UNGA) was adopting the Declaration on Territorial Asylum. Surprisingly, even UNHCR did not mention voluntary repatriation as the most preferable solution and instead regarded external settlement as the normal solution.³²

A transformation is evident in the proceeding years as more states objected to this ‘bias’ and called for promoting the idea of prevention of the causes of displacement and encouraging voluntary repatriation instead. This could be best elaborated by the assertion of the Australian Government in 1981 that considering external settlement as the favored durable solution could not be justified neither on humanitarian nor political grounds.³³ Subsequently, when although ‘North’ did not require the labor force anymore nevertheless refugees from the ‘South’ were arriving there, the need for altering the exilic bias of the refugee regime and developing “a new approach to the refugee problem... based on human rights” was highlighted and emphasized.³⁴

It was in this context that UNHCR declared the decade of 1990 as the decade of repatriation.³⁵ It was settled then that exile to the country of first asylum or a third country is nonetheless the same. Therefore, the earlier response of the international community to the events involving persecution in shape of external settlement seems obscure and is rightly transformed to repatriation as the favored solution. Notwithstanding the fact that the transformation in the choice of durable solutions indicates a reform in the favorability of the three durable solutions, they complement each other and when combined together form an exclusive strategy for dealing with the refugee problem.³⁶

As of now, apart from Universal Declaration of Human Rights 1948 (Art. 13 (2)) which is a non-binding instrument, the right to return is incorporated in various binding international human rights instruments, including the International Covenant on Civil and Political Rights (Art. 12 (4)), the International Covenant on the Elimination of all Forms of Racial Discrimination (Art. 5 (d) (ii))³⁷, the Convention on the Rights of Child (Art. 10 (2))³⁸ and other regional human rights instrument and national legislation of various states.³⁹

3. The Meaning of Voluntary Repatriation

Repatriation or return is the reverse condition of refuge. While refugees are seen as uprooted and displaced, returnees are considered to be re-rooted and placed back where they belong, i.e. their country of origin.⁴⁰ The principle remains that international protection is awarded to refugees due to their inability or unwillingness to avail the protection of the country of origin and is, hence, temporary. Article 13 (2) of the Universal Declaration of Human Rights (UDHR)⁴¹ asserts: "Everyone has the right to leave any country, including his own, and to return to his country".⁴² Accordingly, everyone, including refugees, enjoys the fundamental right to leave his homeland and to return to it whenever he wants.⁴³

Refugees and international community, according to UNHCR, declare the voluntary repatriation the most desirable long-term solution,⁴⁴ therefore, refugees seek asylum near the border of their homeland to be able to return as quickly as possible and resume their life contributing to rehabilitation of their homeland.⁴⁵ Respecting this fact, the statute of UNHCR identifies "assisting governmental and private efforts to promote voluntary repatriation" among two of UNCHR's principal activities.⁴⁶ The states parties to the 1951 Convention, furthermore, are required by virtue of Article 35 to cooperate with UNHCR in fulfilling its functions and are therefore bound

to assist the High Commissioner in promoting Voluntary Repatriation as a principal solution to the refugee problems.⁴⁷ Further, as discussed earlier, the international community, in recent years, has shifted its emphasis from an exile-bias approach to voluntary repatriation as the most preferred solution provided that it is conducted “with safety and dignity”- the standard criterion for return.⁴⁸

4. The Nature of Repatriation

Moving to the point of the nature of repatriation, it is important to note that the word “voluntary” is usually annexed to the term “repatriation” as the preferred solution. The reason is to draw attention to the rule that every repatriation, in order to qualify as the preferred solution, must be voluntary and not a consequence of use coercive methods by the host state or others. Rationale is that only a repatriation that is voluntary is most likely to be lasting and sustainable⁴⁹ and, hence, admirable.

As regards repatriation, an international level assumption is that besides being voluntary, it must be assisted and monitored by governments and international agencies in accordance with the terms of the tripartite agreement concluded between UNHCR on one hand, and the governments of the country of origin and the host country on the other.⁵⁰ Moreover, the fundamental requirements of voluntary repatriation are enumerated in Conclusion 18 (XXXI)⁵¹ which, *inter alia*, assert that refugees’ choice of repatriation must be their own. In other words, the notion of voluntariness of refugees could be expressed only through freely expressed wish of the refugees themselves. In addition, they should be enabled and assisted to repatriate in ‘safety’ and ‘dignity’. Subsequent to elaboration of the substantial theoretical framework for cooperation of states in promoting voluntary repatriation, Conclusion 40 (XXXVI) of 1985⁵² was adopted to consolidate existing principles and practical experience into a single

document. Both these conclusions read together signify that while refugees have a right to return voluntarily to their country of origin, it is essential that concentrated efforts be put in place to remove the root causes of displacement.

For a successful and sustainable repatriation, voluntary repatriation is supposed to be carried out under conditions of safety and dignity, preferably to the refugee's place of residence in the country of origin. Hence, mere crossing of the border into the country of origin will not suffice and is not advised. UNHCR as the principal forum dealing with refugees, learnt from its experience of involvement in large scale voluntary repatriation programs that regardless of its size or character, certain fundamental prerequisites are extremely essential for success of any voluntary repatriation program. These prerequisites include dialogue between the major parties and commitment on the part of all parties involved to fully respect the voluntary character of the repatriation and the same must be verified by international bodies.⁵³ In addition, an overall general improvement in the situation of the country of origin should be observed so that return in 'safety' and with 'dignity' becomes possible.⁵⁴ In addition, return must be orderly and in 'safety' and 'dignity', and finally, the basic terms and conditions of the return should be the subject of a formal agreement elaborating the responsibilities of the major concerned parties and an agreement thereupon.⁵⁵

Meeting the condition of return must be orderly and in 'safety' and with 'dignity' depends, in practice, on many factors. These include capacity of the country of asylum to process departures and of the country of origin to absorb arrivals. Moreover, it encompasses arrangements made to protect vulnerable groups, i.e. children, women and elderly and measures adopted to ensure 'safety' and non-discrimination during departure and subsequently. In addition, this

condition will denote the possibilities for ensuring humane departure and reception conditions, arrangement for access of UNHCR or other humanitarian organizations and reintegration assistance.⁵⁶ More specifically, return in 'safety' means that refugees return in conditions of *legal 'safety'* and *physical* as well as *material security*⁵⁷ and *reconciliation*.⁵⁸ Here, aspects of legal 'safety' include, *inter alia*, the adoption and implementation of amnesty laws to ensure protection of the returnees from discrimination or punishment merely because they had fled their country of origin. Legislation to ensure a returnees' citizenship status in addition to access to documentation related to personal status and measures to ensure recovery of property or, in case recovery is not possible, entitlement to sufficient compensation are also components of this condition.⁵⁹

Physical security is not restricted to protection from armed attacks and mine-free routes or at least demarcated settlement sites, while material security signifies for instance access to land or a means of livelihood, and income generation opportunities.⁶⁰ Finally, reconciliation implies promotion of equity between displaced persons and local residents in addition to development of structures and mechanism to promote confidence building and co-existence.⁶¹

Now, return in 'dignity'⁶² requires that refugees must not be manhandled and ill-treated. They should be able to return unconditionally and in case their return is spontaneous, they can do so at their own pace. Moreover, it means that refugees are not arbitrarily separated from other family members and they are treated with respect and full acceptance by their national authorities, including full restoration of their rights.⁶³ Since UNHCR and countries of asylum venerate a durable solution to the problem of refuge, UNHCR establishes, if necessary, a presence in the country of origin for a two-fold purpose of assistance and protection until achieving a satisfactory level of integration. Meanwhile, it provides integration assistance,

puts efforts to ensure non-discrimination among the returnees and fulfillment of other fundamental human rights. It could also serve as a bridge of communication between the opposing parties in case a country is still observing some internal polarization.⁶⁴

The country of asylum is bound by the fundamental principle of *non-refoulement*⁶⁵ and is further obliged to treat refugees in accordance with the internationally accepted standards as long as they are on its territory. It should, further, allow and facilitate UNHCR fulfill its leading role in promoting, facilitating and coordinating the repatriation and to ascertain the voluntary nature of the return in the exercise of its international protection functions, to supervise the well-being of refugees. Similarly, it should ensure that adequate and objective information on conditions in the country of origin is communicated to refugees. Every host state is required to contribute to the promotion of voluntary repatriation as a durable solution.⁶⁶

5. Types of Repatriation

Voluntary Repatriation could be broadly divided into two categories⁶⁷ of organized repatriation,⁶⁸ which refers to return through means organized by UNHCR and possibly linked with other assistance and spontaneous repatriation, which is return by refugees' own means.⁶⁹ A voluntary repatriation promoted by UNHCR is usually an organized repatriation. It takes place only after complete cessation of the cause(s) of displacement, and subsequent to agreements concluded among the countries of asylum and origin and UNHCR. However, in case of spontaneous repatriation, there are no formal agreements concluded and is often than not carried out even prior to cessation of hostilities. Therefore, lack of registration procedures and of organized international assistance are other traits of this form of repatriation.⁷⁰

It is important to highlight, however, that UNHCR's responsibility for refugee protection and assistance in voluntary repatriation are relevant in both forms of repatriation.⁷¹ Because voluntary repatriation is one of the functions of UNHCR by virtue of UNGA Resolution 428 (V) of 14 December 1950 that adopted the UNHCR Statute and called upon the governments to cooperate with UNHCR in performance of its functions, which included "assisting the High Commissioner in efforts to promote the voluntary repatriation of refugees."

6. Repatriation and *Non-Refoulement*

The prohibition of sending, expelling, returning or otherwise transferring (*refoulement*) a refugee to a territory where he or she would face persecution on account of his or her race, religion, nationality, membership of a particular social group or political opinion is incorporated in the 1951 Convention, its 1967 Protocol and is enshrined in numerous universal⁷² and regional instruments.⁷³ Article 33 (1) of the 1951 Convention deals with "prohibition of expulsion or return ("*refoulement*")" and asserts 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.

Non-refoulement, a fundamental humanitarian principle,⁷⁴ constitutes the cornerstone of international refugee protection. *Refoulement*, on the other hand, signifies the removal of a person to a territory where he would be at risk of being persecuted, or of being moved to another territory where he apprehends the risk of persecution. *Refoulement* of refugees, or even asylum seekers,

constitutes a violation of the principle of *non-refoulement*, and is therefore a breach of refugee law and of the customary international law.⁷⁵ *Non-refoulement* is recognized as a non-derogable principle,⁷⁶ emerging as a new norm of *jus cogens* that is applicable in all circumstances irrespective of the nature of activities carried by the person concerned or his immigration status. In addition, return and expulsion remains prohibited not only to the country to which the person faces immediate return but also to “any other country where he runs a risk of being expelled or returned”.⁷⁷

In view of the above, it is noteworthy that the country of refuge or asylum is legally barred from exerting pressure expressly or impliedly or creating a situation⁷⁸ which will force refugees want to return to their country of origin. Goodwin Gill is very eloquent in asserting that “the very existence of a program of involuntary return should shift the burden of proof to the returning state when the facts indicate the possibility of some harm befalling those returned for any of the above reasons”. Moreover, a state may be held liable for a breach of the duty of *non-refoulement* regardless of notions of fault, either directly for the acts and omissions of its officials or indirectly where it’s legal and administrative systems fail to provide a remedy or guarantee which is required by an applicable international standard.⁷⁹

The discussion above reiterated that voluntariness is the cornerstone of repatriation of refugees and they are the main actors to signify their voluntariness and readiness for the same. As such, they are the main decision-makers who must participate in designing nitty gritty of repatriation and are required to assess their situation in exile and the conditions in their country of origin and return to their country only if they believe that it is safe and better than staying outside.⁸⁰ A state that forces return of refugees to a territory where persecution exists, or it produces refugees, or has a consistent poor record of

human rights, or is passing through a civil war or a situation of disorder, is, *prima facie*, in violation of the principle of non-refoulement.

Notes and References

- ¹ Rhoda Margesson, *CRS Report for Congress, Afghan Refugees: Current Status and Future Prospects* (Congressional Research Service, 26 Jan 2007), 2. Available online at: < <https://fas.org/sgp/crs/row/RL33851.pdf>> (Last accessed: 22.04.2019).
- ² Susanne Schmeidl and William Maley, *Finding Durable Solutions in Contested Transitions, the Case of the Afghan Refugee Population* (San Francisco: The International Studies Association, 2008), 16.
- ³ < <https://www.unhcr.org/afghanistan.html>> (Last accessed: 20.04.2019)
- ⁴ For details on UNHCR in Afghanistan, visit: <http://reporting.unhcr.org/node/4505#_ga=2.252970633.124179439.1558327311-1774559036.1555309324> (Last accessed: 20.04.2019)
- ⁵ UNHCR, *Operational Fact Sheet: Afghanistan - 31st December 2018*. Available online at: <<http://reporting.unhcr.org/sites/default/files/UNHCR%20Afghanistan%20Operational%20Factsheet%20-%20December%202018.pdf>> (Last accessed: 22.04.2019)
- ⁶ “A durable solution for refugees is one that ends the cycle of displacement by resolving their plight so that they can lead normal lives”. UNHCR, *An Introduction to International Protection, Protecting Persons of Concern to UNHCR* (Geneva: International Protection Department (IPD), 2005), 137. Available online at <<http://www.unhcr.org/refworld/docid/4214cb4f2.html>> (Last accessed: 11.04.2019).
- ⁷ B.S. Chimni, *From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems*, *Refugee Survey Quarterly*, 23:03 (October 2004), 55–73, at 55.
- ⁸ Ragini Trakroo Zutshi, Jayshree Satpute, Md. Saood Tahir, eds., *Refugees and the Law*, 2nd Edn. (New Delhi: Human Rights Law Network, 2011), 189.
- ⁹ Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1985), 219.
- ¹⁰ Chimni, *From Resettlement to Involuntary Repatriation*, 55.
- ¹¹ *Ibid.*
- ¹² The Economic and Social Council (ECOSOC) of the United Nations (UN) established in 1958 the Executive Committee of the High Commissioner’s Program in

accordance with paragraph 4 of the UNHCR Statute. The Ex-Com is a subsidiary organ of the UN General Assembly (UNGA) wherefrom its documentation is issued in a series and the annual report is submitted to the UNGA directly for consideration in the Third Committee. Ex-com holds one annual session during the first half of October for one week in Geneva. See, <https://www.unhcr.org/executive-committee.html> (Last accessed: 22.04.2019). It consists of 102 members, as of 2018, who review and approve UNHCR's programs and budget, give advice on international protection and discuss a wide range of other issues with UNHCR and its inter-governmental and non-governmental partners. For Ex-Com's mandate, structure and offices see, <https://www.unhcr.org/excom/announce/3b4f09faa/background-executive-committee.html> (Last accessed: 22.04.2019).

- ¹³ The term refugee is defined by the Convention relating to the Status of Refugees 1951 as the 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. However, the customary international law, in Chimni’s view, has amplified the scope of the term ‘refugee’ from that enshrined in the 1951 Convention and has caused inclusion within the ambit of the term of displaced persons who are not protected by the government of their country of origin. Guy S. Goodwin Gill, “Non-refoulement and the New Asylum Seekers”, in, *International Refugee Law: a reader*, ed. B.S. Chimni (New Delhi: Sage Publications, 2002), 109.
- ¹⁴ Right of Asylum is a three-fold concept, it denotes, i. Right of entry, ii. Protection from forced Return and iii. Enjoyment of some rights while remaining in the host state. While the 1951 Convention deals with the final two elements, it does not affirm the first element. Instead, it ‘overlooks’ the illegal entry. Numerous international and regional human rights instruments are negotiated recognizing the ‘right of entry’ to those fleeing their homelands. Therefore, the combination of Article 33 with other relevant provisions of the 1951 Convention is a form of rights based refuge. Tom Clark, “Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation”, in *International Journal of Refugee Law*, 16:04 (2004), 584-608 at 587.
- ¹⁵ UNHCR, *Discussion Note on Protection Aspects of Voluntary Repatriation*, 1. Available online at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae68cd314> (Last accessed: 20.04.2019)
- ¹⁶ See, a *Thematic Compilation of Executive Committee Conclusions*, Chapter on *Conclusions Specific to Voluntary Repatriation / General*, 479.

¹⁷ Gervase Coles, “Approaching the Refugee Problem Today”, in *International Refugee Law, a Reader*, B.S. Chimni, ed. (New Delhi: Sage Publication, 2002), 346.

¹⁸ Chimni, *From Resettlement to Involuntary Repatriation*, 57.

¹⁹ Gervase, *Approaching the Refugee Problem Today*, 347.

²⁰ Persecution, in Hathaway’s view, is ‘the sustained or systematic violation of basic human rights demonstrative of a failure of state protection’. A well founded fear of persecution exists when one reasonably anticipates that the failure to leave the country may result in a form of serious harm which a government cannot or will not prevent”. See, Gorlick Brian, “The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees”, *International Journal of Refugee Law*, 11:3 (1999), 479-495 at 480. While according to Para. 65 of the *Handbook on Criteria and Procedures for Determining Refugee Status*: “persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. ...Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.” See, UNHCR, *Update of the Situation in Afghanistan and International Protection Considerations* (Jul 2003), 33.

²¹ Chimni, *From Resettlement to Involuntary Repatriation*, 57.

²² *The Geneva Convention Relating to the Status of Refugees 1951*. Available online at: <https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfece1d47> (Last accessed: 20.05.2019).

Article 34 of the 1951 Convention calls on contracting states to facilitate as far as possible “the assimilation and naturalization of refugees” and that the states must “in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings”.

²⁴ For instance, Article 19: *Liberal professions* and Article 30: *Transfer of Assets*.

²⁵ It must be clarified regarding the concept of ‘protection’ that it is not defined in any international or regional refugee or human rights instrument, this may thus, indicate that “there is no singular concept of ‘protection’ in international law”, Goodwin-Gill terms it as “term of art”. See, McAdam, *Complementary Protection in International Refugee Law*, 35. Notwithstanding this, the phrase ‘International Protection of Refugees’ is described by UNHCR as

“interventions by states or UNHCR on behalf of asylum-seekers and refugees to ensure that their rights, security and welfare are recognized and safeguarded in accordance with international standards. Such interventions include: ensuring respect for the principle of *non-refoulement*, admission to safety, access to fair procedures for the determination of refugee status, humane standards of treatment and the implementation of durable solutions” while “UNHCR is the only [UN] agency with a mandate for the protection of refugees”. See, UNHCR, *Refugee Protection: a Guide to International Refugee Law* (2001), 129. While according to Erika Feller the ‘Effective protection is the quality protection’. See, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come”, *International Journal of Refugee Law*, 18:3-4 (2006), 509-536 at 516.

- ²⁶ Discussion Note on Protection Aspects of Voluntary Repatriation, 1.
- ²⁷ James C. Hathaway, *The Rights of Refugees Under International Law* (New York: Cambridge University Press, 2005), 917-918.
- ²⁸ “This Convention shall cease to apply to any person falling under the terms of section A if... [he] has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution”.
- ²⁹ Hathaway, *The Rights of Refugees*, 918.
- ³⁰ Protocol relating to the Status of Refugees 1967. Available online at: <<https://www.ohchr.org/Documents/ProfessionalInterest/protocolrefugees.pdf>> (Last accessed: 20.05.2019).
- ³¹ Through General Assembly Resolution 428 (V) of 14 December 1950 “The General Assembly in view of its resolution 319 A (IV) of 3 December 1949: 1. Adopt the annex to the present resolution, being the Statute of the Office of the United Nations High Commissioner for Refugees, 2. Calls upon Governments to cooperate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office, especially by: ... (d) Assisting the High Commissioner in his efforts to promote the voluntary repatriation of refugees,”. “General Provisions” 1. The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities”. Similarly, clause 8 (c) of the UNHCR Statute calls on the High commissioner to provide for protection of refugees by “Assisting governmental and private efforts to promote voluntary repatriation or

- assimilation within new national communities". The Statute is available online at: <<https://www.unhcr.org/3b66c39e1.pdf>> (Last accessed: 16.04.2019).
- ³² Gervase, *Approaching the Refugee Problem Today*, 348.
- ³³ *Ibid.*
- ³⁴ Chimni, *From Resettlement to Involuntary Repatriation*, 58.
- ³⁵ *Ibid.*, 59.
- ³⁶ Goodwin-Gill, however, puts it in other words as he states: "to the ultimate objective of permanent solutions to refugee problems, there are two basic alternatives, voluntary repatriation, or assimilation in new national communities, with the latter encompassing either integration in the country of first refuge or resettlement in a third state". See, Gill, *The Refugee in International Law*, 219.
- ³⁷ UNHCR, *Handbook: Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996), 8.
- ³⁸ Action for the Rights of Children, *Module 2: Foundation: Durable Solutions, Voluntary Repatriation*, 9. Available online at: <<https://www.unhcr.org/3bb822654.pdf>> (Last accessed: 22.04.2019).
- ³⁹ For instance: the African Charter on Human and People's Rights 1981 (Art. 12 (2)) and American Convention on Human Rights 1969 (Art. 22 (5)). See, *UNHCR Collection of Texts on Refugees and Displaced Persons*, 2:18 and 2:141 respectively.
- ⁴⁰ Tania Ghanem, *When Forced Migrants Return 'Home': The Psychosocial Difficulties Returnees Encounter in the Reintegration Process* (Oxford: Refugee Studies Centre, 2003), 3.
- ⁴¹ Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution # 217 A (III) of 10th December 1948.
- ⁴² For full text of the Declaration see, <https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> (Last accessed: 22.04.2019).
- ⁴³ Ragini, *Refugees and the Law*, 189.
- ⁴⁴ UNHCR, *Handbook: Voluntary Repatriation: International Protection* (1996), 4.
- ⁴⁵ Kate Jastram, and Ms. Marliyn Achiron, *Refugee Protection, a Guide to International Refugee Law, Handbook for Parliamentarians* (np: UNHCR and Inter-Parliamentary Union, 2005), 76.
- ⁴⁶ See Clauses 8 and 1 of the Statute.
- ⁴⁷ *Discussion Note on Protection Aspects of Voluntary Repatriation*, 1.

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- ⁴⁸ Ragini, *Refugees and the Law*, 189.
- ⁴⁹ *Protecting Refugees, a Field Guide for NGOs*, produced jointly by UNHCR and its NGO partners (Geneva: United Nations Publications, 1999), 60.
- ⁵⁰ Barry N. Stein and Fred C. Cuny, “Repatriation under Conflict”, in *International Refugee Law, a Reader*, B.S. Chimni, ed., 374.
- ⁵¹ Conclusion# 18(XXXI) of the Ex-Com Reads as: “The Executive Committee, a. recognized that voluntary repatriation constitutes generally, and in particular when a country accedes to independence, the most appropriate solution for refugees problems, b. Stressed that the essentially voluntary character of repatriation should always be respected.” See, *A Thematic Compilation of Executive Committee Conclusions*, 7th Edn. (DIP: UNHCR, June 2014), 538-539.
- ⁵² Conclusion 40 (XXXVI) reads as: *The basic rights of persons to return voluntarily to the country of origin is reaffirmed and it is urged that international co-operation be aimed at achieving this solution and should be further developed. b. The repatriation of refugees should only take place at their freely expressed wish, the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected.* See, *A Thematic Compilation of Executive Committee Conclusions*, 539-540.
- ⁵³ *Protecting Refugees: a Guide*, 61. This requirement signifies that in order to enable the refugees make an informed choice and feel confident about their return, they must have sufficient unbiased and unprejudiced information presented to them through reliable sources. In this regard, agreements between the concerned parties to permit or arrange visits of the representatives of refugees to their country of origin and observe and understand the situation therein, under appropriate arrangements and guarantees, has proved to be a useful tool. See for details: UNHCR, *Discussion Note on Protection Aspects of Voluntary Repatriation*, 4.
- ⁵⁴ *Protecting Refugees: a Guide*, 61. Keeping in view the fact that premature return of refugees could lead to yet another manufactured catastrophe worsening the already fragile situation at the country of origin/country of return; it could not be regarded as a solution to the problem. Hence, repatriation should be triggered and promoted on the basis of improvement in the general situation of the country of origin so that return of the refugees in ‘safety’ and ‘dignity’ is both possible and desired. The socio-economic impact of a rapid return of thousands of repatriates on the country of origin must also be given due consideration. Most important of all, psychological readiness of persons to return to places from which they had felt forced to flee is necessary for a successful repatriation. Attainment of independence, for instance, becomes a sufficient condition or change in the situation of the country of origin, both

removing the cause of flight and permitting repatriation. See; Gill, *The Refugee in International Law*, 220.

- ⁵⁵ As mentioned in the first prerequisite, a dialogue among the concerned parties regarding each phase of the repatriation is essential to the success of the repatriation program, the dialogue then usually, as a current development and a standard practice of UNHCR, leads to drawing up of a Memorandum of Understanding (MOU) which provides exclusive framework of the operation. Moreover, the responsibilities of country of asylum and country of origin must be fully elaborated in the MOU and agreed upon by the states concerned. The country of origin should principally accept, as of the MOU, the responsibility for its nationals, duty to put efforts for alleviating the causes of flight and facilitation of orderly, safe and dignified return. Orderly, safe and dignified return could be assured through assurance of ‘safety’ after return through, *inter alia*, proclamation of amnesties for returnees, waiver of prosecution, repealing of harsh and discriminatory laws, enactment of new laws and measures to encourage reconciliation between rival groups.
- ⁵⁶ UNHCR, *Discussion Note on Protection Aspects of Voluntary Repatriation*, 4.
- ⁵⁷ *Protecting Refugees: a Guide*, 61.
- ⁵⁸ UNHCR, *Handbook for Repatriation and Reintegration Activities* (Geneva, 2004), 3. Available online at: <<https://www.unhcr.org/411786694.pdf>> (Last accessed: 22.04.2019).
- ⁵⁹ *An Introduction to International Protection, Protecting Persons of Concern to UNHCR* (DIP: UNHCR, 2005), 140.
- ⁶⁰ It seems that while economic conditions could not serve as the cause of refuge, they can serve as cause for extending the term of refuge, as refugees could not be returned to a place where they would have to live without means of subsistence and income generation opportunities. *Protecting Refugees, a Guide*, 61.
- ⁶¹ UNHCR, *Handbook for Repatriation and Reintegration Activities*, 4.
- ⁶² The dictionary meaning of the term contains elements of serious, composed, worthy of honor and respect.
- ⁶³ UNHCR, *Handbook: Voluntary Repatriation: International Protection* (1996), 11.
- ⁶⁴ UNHCR, *Discussion Note on Protection Aspects of Voluntary Repatriation*, 4. 99th Conference of the Inter-Parliamentary Union (IPU) also discusses the conditions asserting: “The conference calls on governments and parliaments to facilitate the early and voluntary return, the resettlement and the rehabilitation of refugees and displaced persons, the disarming, demobilization and subsequent training and reintegration of former combatants, especially child soldiers, into civilian life, and the rehabilitation of traumatized populations, in particular women and children”.

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- ⁶⁵ The term *non-refoulement* is derived from the French term “*refouler*” which denotes to drive back or to fend off, “as of an enemy who fails to breach one’s defenses.” Gill, *The Refugee in International Law*, 69. While the English translation of the term includes words like expel, return, repulse, repel or drive back. For details, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, para 27. See, <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>> (Last accessed: 22.04.2019).
- ⁶⁶ UNHCR, *Handbook: Voluntary Repatriation* (1996), 12.
- ⁶⁷ *Protecting Refugees, a Guide*, 63.
- ⁶⁸ Ragini, *Refugees and the Law*, 19.
- ⁶⁹ UNHCR, *Handbook: Voluntary Repatriation* (1996), 19.
- ⁷⁰ *Protecting Refugees, a Guide*, 63.
- ⁷¹ UNHCR, *Handbook: Voluntary Repatriation* (1996), 19. In situations of spontaneous returns, UNHCR strives to put a fine line between promoting and facilitating return and although it will not ask refugees to return it may ask them not to, but will assist those returnees who opt to return on their own wish. It will also continue its attempts to promote the condition of safe return and secure guarantees for protection of those returning. See, Ragini, *Refugees and the Law*, 19.
- ⁷² The principle of prohibition of *refoulement* is contained explicitly or is inferred through interpretation from Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3); the Fourth Geneva Convention of 1949 (Art. 45, Para. 4); the International Covenant on Civil and Political Rights (Article 7); the Declaration on the Protection of all Persons from Enforced Disappearance (Article 8), and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5).
- ⁷³ In addition to the universal instruments mentioned above, *refoulement* is prohibited explicitly or implicitly in a number of regional human rights instruments, including: the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3); the American Convention on Human Rights (Article 22); the OAU Refugee Convention (Article II), and the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Article 2).
- ⁷⁴ Executive Committee of the High Commissioner’s Programme, *Non-Refoulement No. 6 (XXVIII) - 1977*, 12 October 1977, No. 6 (XXVIII). Available online at: <<https://www.refworld.org/docid/3ae68c43ac.html>> (Last accessed: 23.05.2019)

- ⁷⁵ *Refugee Protection: A Guide to International Refugee Law* (the Inter-Parliamentary Union with the Office of the United Nations High Commissioner for Refugees 2001), 131.
- ⁷⁶ International Commission of Jurists (ICJ); L69: *Proposal on Changes to the Danish Aliens Act* (19 November 08), 2. This is the view taken as regarding the international and regional conventions which have not incorporated any exceptions to the principle, but as far as the 1951 Convention is concerned, taking in view Article 33 (2), ‘national security’ and ‘public order’ are justifications for derogation from the principle.
- ⁷⁷ *Non-refoulement under Threat*, 2.
- See, <<https://www.ilpa.org.uk/data/.../06.11.00-ILPA-Non-refoulement-under-threat.pdf>> (Last accessed: 22.04.2019).
- ⁷⁸ Creating such conditions will amount to constructive refoulement. For details, see: Ex-Com’s Program, Global Consultations on International Protection, Geneva 22-24 May, 2002, *Voluntary Repatriation, NGO Statement* prepared by Elizabeth Ferris.
- ⁷⁹ Goodwin Gill, “Non-refoulement and the New Asylum Seekers”, in *International Refugee Law, a Reader*, B.S. Chimni, ed., 110.
- ⁸⁰ Barry N. Stein, Fred C. Cuny, *Repatriation under Conflict* (USCR, World Refugee Survey, 1991), 2. Available online at: <<http://www.msu.edu/course/pls/461/stein/uscr91-98.htm>> (Last accessed: 22.04.2019).