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Access to safety? Negotiating protection in a Central Asian emergency

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Introduction

For about a fortnight in June-July 1997, the Office of the United Nations High Commissioner for Refugees (UNHCR) was involved in a delicate exercise of negotiating protection for 8,000 Afghans who had sought sanctuary in Takhta Bazar, Turkmenistan.¹ The Afghans, ethnic Turcoman,² had fled their village of Marechak for the nearby Turkmen border to escape the advance of their adversaries, the Taleban Islamic Movement of Afghanistan. They fled with basic supplies and, in the case of some amongst the group, their weapons. Once across the border, they were restricted to the Turkmen border security zone, and threatened with summary expulsion, or *refoulement*. Two days after their flight, UNHCR, having been alerted through its Central Asian early warning mechanism, arrived on the scene, and began activating existing contingency plans for the group. Blatant attempts at *refoulement* ended, assistance was provided, and contacts were sustained amongst UNHCR, the Turkmen, the Taleban and the refugees. After eleven days, the refugees decamped *en masse* for Marechak. UNHCR monitored the return, and, along with the Turkmen and Taleban, accompanied the repatriants back to Afghanistan. However, after the repatriation, UNHCR was unable to gain access to the returnees inside Marechak.

The Marechakis needed and sought protection from danger. To find it, they crossed into another state, thereby internationalizing their situation, and setting in motion a particular set of responses. This paper is concerned with the nature of protection, and the practice of its provision, and it uses the Takhta Bazar situation as a case study to demonstrate how these issues manifested themselves and were handled in one specific instance. The Takhta Bazar operation, being an emergency outflow in a tense region, was very much shaped by protection needs and responses. It was discrete and time-bounded, and its phases of escape, asylum-seeking and repatriation encapsulate the life-cycle of a textbook forced migration situation. The size and the troubled context of the operation bring to light the way in which UNHCR emerged as both a vital guarantor and a marginal actor in seeking to fulfil its ‘obligatory not discretionary, functions of providing international protection to, and seeking permanent solutions for the problem of refugees,’ in other words, ‘ensuring the safety of refugees’ (UNHCR 1998a:11).

Two overarching themes emerge from this case study: the critical roles played first by access and then negotiation in meeting protection needs. In the case of the Marechakis, access to Turkmen territory was the initial, and possibly most critical, step in their search for protection from their enemies. Access of another sort, the physical access by the international community to the refugee that Shacknove (1985) argues is a necessary component of refugeehood, activated the provision of international protection or, perhaps more accurately, it created a space in which international protection for the

¹ This article is grounded in my experience as a member of the UNHCR emergency response team in Takhta Bazar (on mission from Afghanistan), and was written during a sabbatical year spent at the University of Oxford’s Refugee Studies Programme. I acknowledge with gratitude the substantive, conceptual and organizational comments on earlier drafts of this paper provided by UNHCR colleagues, academic staff at the Refugee Studies Programme and others. The views expressed in herein are made in a personal capacity and are not necessarily shared by UNHCR.

² ‘Turkmen’ in this text is used to denote citizens of Turkmenistan, while ‘Turcoman’ refers to an ethnic group. Most Turkmen — over three-quarters — are Turcoman, while very few Afghans are.

group could be negotiated. This process of negotiation, of advocating in favour of the refugees while taking into account host government concerns, was the means through which protection, albeit of a circumscribed nature, was afforded to the Marechakis during their stay in Turkmenistan. Negotiation and access of a different sort came to the fore at the repatriation phase as refugee mechanisms relegated international agencies and norms to the margins. And finally, if access by the international community to the refugees in Turkmenistan enabled international protection mechanisms to function, the denial of access upon their repatriation rendered them invisible to the international community, and thus inaccessible to its protection.

The paper is structured around the three phases of the emergency: escape, asylum and repatriation. Each section summarizes the events related to the relevant phase, and then analyses a set of issues raised by those events and the responses to them. The first, escape, focuses on the protection needs of the Afghans, and the role of access — access by the refugees to refuge, and by the international community to the refugees. The second, asylum, concentrates on the threats to the refugees' protection, host country concerns and UNHCR's strategy for minimizing the threats — its attempt to negotiate protection for this group. Repatriation, the third section, reflects upon the limits of outsiders in the face of 'spontaneous' repatriation. It looks at the international norms surrounding repatriation, voluntary and involuntary, and suggests that the scope for action may be restricted in such situations. Finally, the conclusion recapitulates the arguments made in the paper, and ends with a brief look at some of the operation's implications.

Escape: access to refuge; access to refugees

On the night of 23/24 June 1997, some 8,000 persons, nearly the whole village of Marechak, Afghanistan, fled to nearby Takhta Bazar, on the Turkmen side of the Afghan-Turkmen border. Commander Amin, the leader of Marechak, was allied with the Junbish-i-Milli. The Junbish were at that point losing in their battles against the Taleban, and the Taleban were within a few kilometres of Marechak. Rather than face an at best uncertain fate at the hands of the approaching Taleban, the Marechakis made a rapid decision to evacuate their village and make for the Turkmen border. They were able to bring with them some essential items, including shelter material, food supplies, some animals and their multi-purpose, vividly coloured flat-weave carpets. One group also brought across military supplies, mostly light arms and communications equipment. Their fields, however, were left untended, and the majority of their livestock were left in the hands of a few *chupan* (shepherds), who stayed behind to tend them.

The choice of seeking asylum in Turkmenistan was clear. The Taleban were approaching from the south-west. The north-east was in non-Taleban hands, but its fall appeared likely. Just a few kilometres to the north was Turkmenistan, previously home of the Marechakis' Soviet enemies but now run by their ethnic brethren. The border was unmistakable and, the Marechakis would have assumed, out of bounds for an army in hot pursuit.

The Turkmen border security zone, which was established in the Stalinist era, has been inherited from the former Soviet Union, and is an emphatic statement of sovereignty

and territoriality. It consists of two boundaries, one along the actual frontier and the other, between one and fifteen kilometres from the first one, delimiting the end of the border security zone within Turkmenistan. The area, which is off-limits to most civilian Turkmen, is studded with watchtowers and land-mines, and the border itself is indicated by means of fences and the Murghab river. When they realized that Marechak was empty, the Taleban continued their pursuit of the villagers up to the first fence, marking the international frontier, where they were stopped short, and their offensive was reduced to desultory and ineffectual bursts of gunfire. Thus the refugees were, in the first instance, safe from immediate danger.

Once inside, though, they faced threats of a different sort. To the Turkmen Border Guards (TBG), they were not asylum-seekers, worthy of special consideration, but illegal entrants and security threats. Charged with safeguarding their newly independent nation's security, and holding the refugees to be a clear threat to this security, they acted accordingly, and attempted to send the Marechakis back to Afghanistan. Twice during the first two days they brought an armoured personnel carrier (APC) to one of the four sites and flattened the reed structures the refugees had erected for their shelter. The affected groups retreated towards Afghanistan, but soon doubled back and settled anew in other border locations. It was at this point, two days after the refugees' arrival, that UNHCR, alerted of the situation through its Central Asia early warning mechanisms, arrived.

Protection needs

A refugee, in the narrow but widely accepted 1951 UN Refugee Convention definition, is someone who is outside his or her country of nationality 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.'³ More broadly, ordinary usage definitions of refugees have been taken to comprise 'persons whose presence abroad is attributable to a well-founded fear of violence' (Zolberg 1989) or 'someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable' (Goodwin-Gill 1996:3). Regional instruments, notably the 1969 OAU Convention, UNHCR Executive Committee conclusions and UNHCR institutional practice use refugee definitions wider than the 1951 Convention one.

The Marechakis, I believe, would have qualified as refugees under the 1951 Convention. They were outside of their country of origin, and suffered from a well-founded fear of persecution from the invading Taleban based on their nationality; i.e., they were visually distinguishable ethnic Turcomans who feared - in light of past Taleban treatment of non-Pashtoon minorities (United Nations 1997) - that, owing to their leader's position in the anti-Taleban alliance, they would suffer from retaliation based on imputed political stance.

The above case has been made in the briefest terms. Formal recognition as refugees, in this case as in most others involving mass movements, was not the salient feature in determining the protection response to their plight. Rather, it was access, both to a place of refuge and to the international community, that shaped these responses.

³ 1951 Convention, Ch. I.A(2).

Refugee status is declaratory: a person is a refugee the moment he or she meets the criteria laid down in the applicable instruments.⁴ But while being in flight from persecution may make one a refugee, it is access that injects meaning into the concept. Flight from the reasonable possibility of persecution was the first step in the Marechakis' journey to refugeehood; the seeking of refuge in another state was the second, tautological stage that turned them into refugees (rather than internally displaced persons); while their access to the international community was what triggered the workings of the international refugee regime in their favour.

Thus, although I have attempted to show that the Marechakis were likely candidates for qualification as Convention refugees, it would not have made much difference if they had been refugees under the OAU or even broader definitions. Once UNHCR had arrived on the scene — had obtained access — institutional practice would have led it to treat the group as people of concern to the Office.

Access to refuge

In the Takhta Bazar scenario, in which an army on the offensive was poised to seize a strategic town belonging to a population ethnically and politically different from it, the evacuation of the Marechak inhabitants into Turkmenistan served the initial purpose of allowing them to escape from a pitched battle with its attendant casualties and possible post-conflict punitive actions. The Taleban, though a reputedly unsophisticated non-state force, knew better than to follow the Marechak Turcoman into Turkmenistan. Many of them, after all, had benefited from crossing another border – the Afghanistan/Pakistan one – and were thus aware of both the refuge and the military regroupment possibilities afforded by such demarcations. Thus, once inside Turkmenistan the Marechakis were essentially safe from their original agents of persecution.

While the obligation to grant refuge to persons fleeing danger is a delimitation of state sovereignty (Hathaway 1991:113), the protection muscle of refugee status itself derives from an assertion of state sovereignty. An internally displaced person is not a refugee because he or she has not crossed an international border, and has thus not availed himself or herself of the protection, in the first instance, of another sovereign state.⁵ Had the Marechakis chosen an internal flight alternative, their pursuers may not have respected their domestic refuge as peremptorily as an international one. But they knew the consequences of breaching national sovereignty, and thus would not have ventured into territory under the control of another state.

To function, though, the receiving state must both permit the asylum-seeker access to

⁴ As explained in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, a 'person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. *Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.*' (UNHCR 1979: para. 28. Emphasis added).

⁵ Shacknove, in the same argument that informs this paper's views regarding access and what he refers to as refugeehood, contends that 'alienage is an unnecessary condition for establishing refugee status' (Shacknove 1985:277); rather, the fact of access to the international assistance is the determining factor. While this definition is conceptually, and in many cases practically, useful, the act of crossing a frontier remains the pre-eminent, and most legally sound, means of obtaining such access.

its territory, and undertake to not return (*'refouler'*) him or her to a country in which he or she would face danger. While the two propositions, the obligation to grant asylum and the duty to observe *non-refoulement*, appear to be two facets of the same principle, their respective legal statuses differ. The right to seek and to enjoy in other countries asylum from persecution is a human right,⁶ but the prohibition of *refoulement* enjoys a firmer status, being perhaps the most important element in the 1951 Convention, as well as appearing in the OAU Convention, the 1984 UN Convention Against Torture and other human rights and humanitarian law conventions and agreements (Goodwin-Gill 1996:124). Both Goodwin-Gill (1996:117-171) and Hathaway (1991:26) have made the case for the principle of *non-refoulement* having attained the status of customary law, regarding the minimum notion of respect for *non-refoulement* as entailing an obligation to offer at least temporary refuge to persons fleeing danger.

The minimum the Marechakis might have expected would have been temporary refuge. Yet in the first days, the TBG tried to repel them, crumpling makeshift shelters under the treads of their APCs in an attempt to collapse any notion that Turkmenistan was a country of refuge. So the original need of the Marechakis - protection from the incoming Taleban - was both supplemented and revived by the attempted *refoulements* of the country of asylum.

Access to the international community

Refugee protection, as the 1997 meeting of UNHCR's Executive Committee reaffirmed, 'is primarily the responsibility of States,' a role for which UNHCR cannot substitute (UNHCR 1997c:para. 18(d)). Yet, in this case as in many others, it took UNHCR's intervention to convince the host government to uphold its protection responsibility. Thus, it was not until the arrival of UNHCR in Takhta Bazar, two days after the outflow, that direct attempts at *refoulement* ceased and the Marechakis became a refugee community of concern to the international community. At this stage in their flight, the presence of UNHCR was critical in ensuring their immediate need - prevention of *refoulement* - and it was to be the medium through which further efforts at consolidating their position were to be launched.

Without the physical access of the international community to the refugee, and with a host government at best unsure about its international obligations, a refugee would not benefit from special protected status, and decisions on his or her status would be at the discretion of the country of asylum. While this may seem obvious and even naive - given that presence is but the first step in providing protection - it is worth recalling that scarcely five years earlier, the mounting of such an operation in what was then the Soviet Union would have been unthinkable. The international community would have been denied access, and without access, that is, without the consent of the host nation to allow international bodies to the affected region, groups of concern have no

⁶ Art. 14 of the 1948 Universal Declaration of Human Rights (UDHR). Efforts to include a right to asylum in the 1951 Convention, and a later attempt to get the concept widely accepted by means of a new treaty on territorial asylum, foundered in the face of state resistance against what was seen as an onerous obligation disdainful of national sovereignty. Nonetheless, at least one delegate noted during the drafting of the 1951 Convention that "the right of asylum was implicit in the Convention, even if it was not implicitly claimed therein, for the very existence of refugees depended on it." (Goodwin-Gill 1996:172-204).

recourse, and no way to ensure that their potential status as refugees is recognized and respected. The familiar analogy of a tree falling unwitnessed in a forest perhaps captures the essence of this situation.

The UNHCR *Handbook for Emergencies*,⁷ a compact compilation that often serves as the main if not sole source of direction for UNHCR officers in remote emergency locations, states simply that the “most effective means of securing protection is a UNHCR presence where the refugees are” (UNHCR 1982:8). Access permitted presence, and this presence secured the initial breathing space for the refugees, enabling what the *Handbook for Emergencies* terms “the overriding priority...to ensure that at least temporary asylum is granted” to persons who may be of concern to the Office (UNHCR 1982:11).⁸

Asylum: negotiating protection

Access to the international community may have locked in the ‘refugeehood’ of the Marechakis, and assured them of their safety in the first instance, but mere presence and the access of refugees alone would not have guaranteed longer-term protection. In this section I describe how as the refugees’ protection came under sustained attack, a series of negotiations had to be entered into to maintain protection. Negotiation served as the necessary complement to presence in the provision of protection. Nonetheless, if it was a successful strategy in certain respects, it was circumscribed by the circumstances in which it was applied.

Establishing an international presence

In its Statute, the first means by which UNHCR is mandated to provide for the protection of refugees is through “[p]romoting the conclusion and ratification of international conventions for the protection of refugees [and] supervising their application” (Ch. II, para 8(a)). UNHCR’s strategy in the former Soviet Union in general and Central Asia in particular has consisted of “a two-pronged approach of providing the necessary expertise and guidance to build a body of national laws concerning refugees and migrants, and assisting in the establishment of the required structures.” More generally, the strategy is described as engaging in “pro-active, prevention-oriented activities through national-institution and capacity building measures” (UNHCR 1997b:28). In pursuit of these aims, UNHCR had established offices in all the five Central Asian republics within a few years after their creation; for Turkmenistan, a Liaison Office was established in July 1995.

UNHCR’s involvement in a region where, Tajikistan excepted, there were few refugees was unconventionally pro-active. In the Takhta Bazar case, it proved critical, and enabled the initial UNHCR access to the border zone. UNHCR’s regional

⁷ The quotations here are from the old, 1982 version of the manual, which was in use at the time of the Takhta Bazar operation. A comprehensively revised *Handbook for Emergencies* was issued in 1999.

⁸ Goodwin-Gill terms the refusal to allow international agencies access to refugees “[the] reverse of denial of access to refuge” and notes that “[without] access to and by refugees, the displaced, and those affected by conflict, and without the monitoring and oversight inherent in the provision even of relief, rights are more likely to be violated and the objectives of protection and solutions less likely to be obtained” (Goodwin-Gill 1996:253).

strategy, including the CIS Conference process, can be seen as part of a wider project of disseminating international law and norms. Given that the states in question gained independence less than a decade ago, and that prior to that they formed part of the USSR – a country resolutely opposed to such external meddling – this was a considerable achievement.

In Turkmenistan, UNHCR had been working towards convincing the government to accede to the 1951 Convention and its 1967 Protocol, and was also pursuing a series of capacity-building measures. At the time of the Takhta Bazar influx, it had not yet acceded to either of the refugee instruments, but the process was under way, and it had enacted a domestic Refugee Law in June 1997.⁹ By the time of the emergency, UNHCR had already engaged in extensive and successful collaboration with the authorities on other refugee issues, notably the repatriation of Tajik refugees from Herat through Turkmenistan, and arrangements for the transit of Afghan refugees from Iran to northern Afghanistan.

The combination of presence in Ashgabat and the record of confidence-instilling working contacts with the Turkmen allowed the functioning of the early warning system that alerted UNHCR to the influx. UNHCR had already been to the border zone and, in collaboration with the authorities, had formulated contingency plans. Under arrangements agreed in these plans, UNHCR was notified immediately of the outflow. A full international team - comprising UNHCR staff members from offices in Ashgabat, Tashkent, Herat and Osh, as well the International Federation of Red Cross and Red Crescent Societies (Almaty) and Médecins sans Frontières (Herat) - began arriving in Takhta Bazar by the third day of the outflow, establishing an international presence and obtaining access to the refugees, actions that, as we have seen, were critical to ensuring protection in the first instance.

Threats to protection

Nonetheless, protection for the Marechakis faced a number of threats, which stemmed principally from a perceived divergence of interests between the refugees and their hosts. Newly independent, authoritarian¹⁰ Turkmenistan was preoccupied with issues of national sovereignty, security and stability. Its official doctrine, enshrined in permanence in General Assembly resolution 50/80 of 12 December 1995, is ‘positive neutrality’, a stance that values, *inter alia*, “common sense, the protection of people’s interests, and ensuring stability”, “the development of neighborly relations on a mutually beneficial basis” and “ensuring the territorial unity of the country, and peace and quiet on its borders” (Niyazov 1994:53-81). Another concern of the Turkmen was their relationship with the Taleban. Alone of the Central Asian States, Turkmenistan

⁹ While having states accede to the international instruments is preferable, in that it enshrines obligations, non-accession does not disqualify persons meeting refugee criteria from benefiting from international protection. As noted in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, a person can be recognized as a refugee under the UNHCR Statute and thereby “[qualify] for the protection of the United Nations provided by the High Commissioner, regardless of whether or not he is in a country that is a party to the 1951 Convention or the 1967 Protocol or whether or not he has been recognized by his host country as a refugee under either of these instruments” (UNHCR 1992:5).

¹⁰ It has been termed variously “the least transformed former Soviet Republic” (Ochs 1997:312) and “one of the most oppressive regimes in Central Asia” (EIU 1999:6).

did not support the anti-Taleban Northern Alliance (with whom the Marechakis had been allied), and it feared that the grant of asylum to the Marechakis would be taken by the Taleban as a political rather than a humanitarian gesture.¹¹ In addition to security and stability, some other Turkmenistan concerns that conditioned its attitudes in the Takhta Bazar operation were its reliance on Russian military assistance, particularly along its borders (Smith 1998), and its desire to find a viable outlet for its vast natural gas reserves (Rashid 1997).¹²

Afghanistan, with which Turkmenistan shares a 744 kilometre border, was viewed by Ashgabat with circumspection and apprehension. Parts of what is now Turkmenistan were wrested from Afghan influence by Tsarist Russia in the nineteenth century. In this century, Afghanistan became the Soviet Union's 'Viet Nam' and many in the region see it as having been responsible for the unravelling of the USSR. Kushka, the Soviet Union's southernmost town, was the launching post for the Soviet ground invasion of Afghanistan. In 1997, the renamed Gushgy, Turkmenistan's only official border crossing with Afghanistan, served as a focus for fears about the entry of drugs, arms and radical Islam from the south, and hopes for the construction of a natural gas pipeline through Afghanistan to the Arabian Sea.

Not surprisingly, the Takhta Bazar influx was viewed as a security threat emanating from a particularly dangerous source.¹³ The authorities' instinct was to neutralize this perceived danger, while UNHCR's mandated role was to protect the Afghans who had sought sanctuary in Turkmenistan. It did this mainly by assisting in measures aimed at curbing any threat that might have existed and, through working together with the authorities, attempting to convince them of their protection obligation towards the Marechakis.

Negotiating protection at the field level

As we have seen, the foundations for providing international protection had been laid through UNHCR's policy of capacity-building in Central Asia. At the time of the outflow, an office was in place in Ashgabat, and contingency plans permitted the rapid deployment of an emergency team to the sensitive border zone. Once on the ground, it was up to the small group of UNHCR officers in Takhta Bazar to interact with the

¹¹ The Taleban certainly pushed this line; during a 29 June 1997 UNHCR/TBG/Taleban border meeting, they told UNHCR to facilitate return, or stand accused of assisting the Northern Alliance war effort.

¹² At the time of the operation, the Turkmen were negotiating with the Taleban and the American firm Unocal regarding a natural gas pipeline to run through Afghanistan.

¹³ Turkmen President Niyazov had been quite clear about the danger from the south. In a 1994 speech delivered to the Turkmenistan Defence Committee he outlined what he considered to be the existing and potential military threats to the country: "local wars and armed conflicts near the Turkmenistan borders;...destabilization of the political situation in Turkmenistan; international terrorism; ...attacks at the Turkmenistan state border, initiation of border conflicts, and provocative armed actions; preparation of armed groups and other units for transfer into Turkmenistan's territory from other states..." (Niyazov 1995:139). In taking a national security approach to Afghanistan, Turkmenistan was reflecting the attitudes of its Central Asian neighbours; to cite one example, just a few weeks before Uzbekistan had prevented possible refugee flows into its country by literally blocking the Friendship Bridge border crossing with cement slabs (see UNHCR 1997d:64). The examples of Pakistan and Iran, which had hosted millions of Afghan refugees, sometimes at the expense of national security, weighed heavily in the Central Asian states' attitudes towards Afghan refugees.

various host country authorities, and thereby attempt to protect the Marechak refugees from potential *refoulement* effected in the name of national security. The situation they were faced with – attempting to protect and assist, using whatever means were at their disposal – was not unlike that faced by many UNHCR staff in difficult asylum situations the world over. The following segment explores this process. It describes the operational set-up, and then notes a few specific examples of protection strategies and their results.

General operational arrangements

The refugees being located in the border security zone, UNHCR's main governmental counterparts were the Turkmen Border Guards. UNHCR held daily liaison meetings with them, and often visited the refugee sites jointly. The TBG representative was invariably accompanied by a Russian military adviser and a representative of the KNB (Committee on National Security, the successor to the Soviet-era KGB). Other Turkmen counterparts included the provincial governor (*Hakimlik*), representatives of the local *kolkhozes* (collective farms) and the Turkmen Red Cross. Although these actors had various levels of authority to take decisions - with the TBG having the greatest - in a one-party state such as Turkmenistan, it was clear that any policy decisions had to be approved at the Ashgabat level. UNHCR's Ashgabat representation was thus critical. Staff from that office shuttled between Ashgabat and Takhta Bazar.

Contact: persuasion and explanation

Once the legal and practical framework permitting international access to the refugees, the most important tools at UNHCR's disposal centred around constant contact and discussion with the authorities. UNHCR's military interlocutors were trained to think and act in terms of security threats, while its civilian counterparts were for the most part ex-apparatchiks currently working for an authoritarian state. Throughout the duration of the emergency, the UNHCR team met, travelled and dined with various members of the government, mostly from the military. Individual staff members tried to use these moments to speak with them, explain the Office's mandate and notions of international responsibility, to grasp their own concerns and policy objectives, and to attempt to mediate divergences between the two.

This, essentially, is the position of the field worker in a protection organization: negotiate, within the context of the organization's mandate and the often broad brief given by headquarters, for certain principles with the party that is both the guarantor and potential violator of these principles. Poor communications, with most locations accessible only via expensive satellite connections, and the relatively low magnitude of the outflow meant that, within the broad parameters mentioned, field-level decision-making authorization was high.

The TBG were able to help within certain bounds. They permitted international access to highly sensitive area, and they assisted the UNHCR mission in such matters as transport (mobilizing, at various occasions, APCs and a helicopter), security clearances, visas for NGO partners and accommodation; and the operation through assisting in the transport of supplies and the tankering of water to the sites. And they

did soften in their initial uncompromising stance towards the refugees. UNHCR's main interlocutor at the TBG, a few days into the operation, enunciated his own form of humanitarianism – at least compared to summary reconduction – when he stated that his goals vis-à-vis the refugees were (i) preventing deaths in the camps and (ii) ensuring that the refugees returned as soon as possible, but of their own free will.

The dialogue approach was successful in creating a framework for collaboration with border personnel characterized, if not by trust, then at least a certain mutual respect. It enabled agreed-upon actions to proceed smoothly, and permitted joint discussions on solutions to field-level problems. However, given the nature of command structures in Turkmenistan, the scope for making progress being made on substantive issues away from Ashgabat was circumscribed.

Disarmament

At the beginning of the operation, one of the major obstacles to the refugees' continued stay was the fact that one of the four groups of Marechakis that entered Turkmen territory on the night of 23/24 June had come in with their weapons - light arms, military vehicles, communications equipment and even anti-aircraft guns. The Turkmen, understandably, saw this as an unacceptable state of affairs and used it to justify their plans to push back not only the soldiers, but also the civilians in their midst and the unarmed denizens of the three other sites.

Weapons go against with the civilian conception being a refugee, and their presence in refugee situations has posed major problems for UNHCR, most recently regarding Rwandans in the Great Lakes, and previously in respect of Kurds in Iraq, Afghans in Pakistan, South Africans in southern Africa and Cambodians in Thailand.¹⁴ The presence of weapons in Takhta Bazar was worrying the TBG, and undermining protection prospects for all the Marechakis. Brushing aside technical concerns¹⁵ UNHCR pressed for a comprehensive disarmament, to which the TBG acquiesced. With UNHCR monitoring the process, the Marechakis in the armed camp surrendered their weapons to the TBG, submitted themselves and their possessions to a search, and, once cleared, were transported by the TBG to one of the other sites that sheltered some of their unarmed compatriots.

The disarmament exercise enhanced the protection situation of all the Marechakis while at the same time created conditions for a working relationship with the TBG based on mutual trust and confidence. It was effected by advocating a solution that allayed legitimate concerns of the host government while being in conformity with UNHCR's protection mandate.

¹⁴ UNHCR's Executive Committee has addressed the issue on several occasions, notably in its 1987 conclusion 48 (XXXVIII), Military or Armed Attacks on Refugee Camps and Settlements in which, *inter alia*, the "the exclusively civilian and humanitarian character of [refugee] camps" was noted; and at the 1998 Executive Committee, which noted the phenomenon of composite flows (UNHCR 1998b:para. 21(y)); and at a 1999 meeting of its Standing Committee (where the issue was explored in a paper entitled *The Security, and Civilian and Humanitarian Character of Refugee Camps and Settlements* (EC/49/SC/INF.2).

¹⁵ Given that soldiers were involved, the ICRC might have been better suited to deal with it. But it was not present on the ground.

Camp location

The siting of the refugee camps, on inhospitable terrain inside the border security zone and within sight of Afghanistan, posed immediate security problems and assistance delivery complications, and, as explored in the next section, reflected the authorities' general unwillingness to acknowledge other than minimal obligations towards the refugees. Throughout the operation, UNHCR tried to convince the authorities to move the refugees to a safer and more hospitable location; it made no headway on the substantive issue, although it did obtain minor concessions that at least ameliorated the humanitarian situation.

The advisability of ensuring secure locations for refugees, away from border areas, is recognized in the 1969 OAU Refugee Convention,¹⁶ and has been the subject of UNHCR Executive Committee conclusions.¹⁷ In this case, the refugees were initially exposed to sniper fire, although this was to cease, apparently as a result of contacts between the Turkmen and the occupying Taleban. In addition, the sites themselves were deeply unpleasant: in one, the refugees were encamped, literally, on the slope of a sand dune, while in others the danger of snakes and insects was ever-present.¹⁸ None of the sites provided any possibility of ensuring self-sufficiency in either water or food, and were thus dependent on outside provisionment.

In attempting to persuade the authorities to give ground on this issue, and permit the refugees access to a more dignified locale, the UNHCR team invoked the international norms concerning camp placement, and appealed, at various times, to a convergence of interests over security (i.e., that it would be just as much in the Turkmen interest as that of the refugees to be in a different location), to questions of logistical practicality, and to wider considerations of humanitarianism and honour. It approached not only the TBG, but also the *Hakimlik* and *kolkhoz* leaders, although it fast became apparent that these last two had no authority on the matter at hand.

UNHCR scored one small but significant success when, through its role in disarming the Afghans at one site, it managed to persuade the TBG to effect a relocation of those people from their place atop a sand-dune and to one of the other camps within the security zone. But it failed to convince the authorities to move the refugees into a more amenable location within Turkmenistan proper, and the sites remained where they were, transiently perched on the marshy Turkmen side of the Murghab river.

Ultimately, the choice of site for the Marechakis reflected the terms of the debate, with

¹⁶ "For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin." 1969 OAU Convention on the Specific Aspects of the Refugee Problem in Africa, Art. II, para. 6.

¹⁷ See in particular the above-mentioned Executive Committee Conclusion 48 (XXXVIII) (1987) on Military or Armed Attacks on Refugee Camps and Settlements, Conclusion 72 (XLIV) (1993) on Personal Security of Refugees and No. 77 (XLVI) (1995) General Conclusion on International Protection (para. q). See also Crisp 1998 for a succinct overview of the topic, and for a counter to the 'anti-camp' argument.

¹⁸ One woman died of a snake-bite and several others suffered injuries. The marshes did serve one useful purpose, though: in the days before the arrival of the international agencies, refugees were able to use the reeds to erect relatively sturdy shelters for themselves.

the host country unwilling to assume, even symbolically, a commitment to the grant of anything more than temporary, functional refuge to the refugees.

Appeals to civil society

While refugee protection is a state obligation, it is clear that widespread support for refugees amongst the host country population may strengthen a government's willingness to uphold asylum. In respect of the Turcoman Marechakis, the case for their popularity in Turkmenistan might have seemed clear. It was a small group and, given that it comprised the whole of Marechak, and that ethnic Turcoman in Afghanistan are few, looked likely to remain that way. And the ethnicity and common language of the refugees should have been strong cards in their favour.

In the event, civil society had no role to play with the refugees, owing partly to the brief time-frame of the emergency, but more importantly to the nature of the Turkmen polity. Some members of the UNHCR team were struck by the profile of the caseload, and the favourable opportunities it suggested. Turkmenistan was fast replacing traces of its Russian and communist past with Turcoman-derived symbols, and the president was styled the Turkmenbashi, or father of the Turcomans. The Marechakis were their long-lost brethren – many, in fact, had escaped the Bolsheviks and settled in Afghanistan in the 1920s. But over the course of the emergency, it became clear that Pan-Turcomanism was an instrument geared towards building cohesion within the nation-state; those outside its boundaries were not necessarily looked upon as members of this state, or children of the Turcoman father. The TBG never referred to the refugees as other than Afghans, and it seemed that they refused to countenance the thought of any sort of kinship tie with them.

As to Turkmen civil society, this proved an elusive entity. While in Takhta Bazar, the aid teams on the ground made contact with provincial leaders, *kolkhoz* managers and members of the local Red Cross Society. While these people were helpful in their own limited spheres of action, they were uncomfortable with taking decisions, and did not appear to play any sort of advocacy role. There was not media presence at all in the secure Takhta Bazar border area, and it appeared that the Turkmen public at large was unaware of the influx, and therefore not in a position to pressure the authorities on the issue were they permitted to do so.

'...the best that was possible in the circumstances'?

UNHCR engaged the Turkmen regarding correct treatment of the refugees primarily at the field level, through presence, liaison and steady, bilateral negotiation. It appealed to its interlocutors on normative, interest-convergence and even ethnic arguments, but was only marginally successful in advancing the refugees' case beyond permitting them to enjoy temporary refuge.

Should it have done more, and if so, could it have? UNHCR's primary purpose, in the words of its mission statement, "is to safeguard the rights and well-being of refugees." In pursuit of this goal, it "strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state." The refugees did receive refuge in Turkmenistan. Beyond that, their conditions and treatment were well below the

standards contained in the international instruments. At the field level, UNHCR did its utmost to advocate for better conditions of asylum for the refugees, in the main, that they be allowed to relocate to a safer and more dignified location. As we shall see in the next section, it was also deeply involved in preparations for finding a possible durable solution for the group.

UNHCR senior manager Nicholas Morris, writing in the *International Journal of Refugee Law*, has noted the far from ideal conditions under which UNHCR operates and suggested that it accepts the notion of working “in a bad protection option”. He contends that “the practical achievement for which [UNHCR] should be held accountable can only be the best that was possible in the circumstances” (Morris 1997). This is meant to read as a counterweight to unrealistic expectations of UNHCR’s capacity to influence events, and a recognition that the responsibility for protection belongs to the state.

During the second world war, the ICRC, agonizing over the dilemma between silent action and public denunciation, received the following advice: “when you can act, act and don’t protest. When you can’t act, protest. But don’t not act and not protest” (Moorehead 1998:424). UNHCR at first acted and did not protest. When, in the middle of the operation, things appeared static, UNHCR might have considered resorting to what is sometimes referred to as ‘the mobilization of shame’; essentially, going public about a country’s refusal to comply with international law. Shaming is the enforcement mechanism for a corpus of laws that has no other means of ensuring compliance. In respect of a nation such as Turkmenistan, desirous of ‘[joining]...the ranks of the developed countries’ (Niyazov 1994:13), shaming could have provided a plausible entrée in forcing more stringent compliance with international norms.

In the event, the situation on the ground moved much swifter than anticipated, and less than two weeks after their arrival at Turkmenistan, the refugees had already repatriated. UNHCR was there, and monitored and accompanied the repatriation. Yet, in a significant way, its role was over, and it became instead a marginal player and a witness to compulsions beyond its grasp.

Repatriation: the limits of international action

Marechak lies on the southern bank of the Murghab river that, at Takhta Bazar, demarcates the Turkmen-Afghan frontier. A washed-out stone bridge, reputed to have been erected by Alexander of Macedon, testifies to past linkages and traffic, but at the time of the operation, the only way across was by wading the river. And on 3 and 4 July 1997, the 8,000 refugees did just that, exchanging their dusty abode of refuge in Turkmenistan for the Marechak oasis.

‘...seeking permanent solutions for the problem of refugees’

UNHCR’s mandated functions include, in addition to providing international protection, “seeking permanent solutions for the problem of refugees” (UNHCR Statute, Ch. I, 1). Three solutions for refugees are recognized: voluntary repatriation, resettlement and local integration; the first has been recognized the UNHCR Executive

Committee as “the most appropriate solution for refugee problems” (18(XXXI)-1980, para. (a)) and the “pre-eminent solution” (UNHCR 1998b:para. 21(gg)).

From the start, and in line with UNHCR’s recent emphasis on solutions and the related ‘situational approach,’¹⁹ the Takhta Bazar team included a staff member from the refugees’ country of origin, and began immediate planning for solutions. The only viable one was voluntary repatriation. Resettlement is today rarely applied on a blanket basis, being reserved for persons with special protection needs or for whom the resettlement country feels a special obligation. In the absence of a life-threatening protection need, transferring 8,000 rural Afghans to one of the ten traditional countries of resettlement - all industrialized nations - would have, at the least, raised enormous adjustment problems amongst the group. And local integration, given the Turkmen attitude towards even temporary refuge, was hardly an option.

At first, it appeared that neither was voluntary repatriation; the refugee *shura* (joint leadership) in the four sites made it clear to UNHCR that they were completely against return with the Taleban in control. Nonetheless, UNHCR prepared for the eventuality, using as its guide the UNHCR *Voluntary Repatriation Handbook* - a publication that both distils protection norms and provides practical guidance on repatriation planning. In the very week that the emergency began, UNHCR’s Chargé de Mission to Afghanistan had succeeded in pushing through with the Taleban a returnee amnesty²⁰ which set out a series of measures designed to promote the voluntary return of all exiled Afghans in conditions of safety and dignity. In Takhta Bazar, UNHCR pushed for a tripartite repatriation meeting between the Turkmen, the Taleban and UNHCR and arranged a ‘look and see’ visit of prospective returnees to Marechak, to be accompanied by all three parties. And it checked the pulse of the refugees daily, informally interviewing different groups of people in the four sites, gauging their views on future prospects.

Then, precipitately it seemed, less than two weeks after the refugees’ arrival and on the day of the planned visit, the whole group began crossing over. The UNHCR Protection Officer stayed on the Turkmen side of the river, attempting to ascertain why people were suddenly - but calmly - going across, and trying to determine the voluntariness of the move. I myself converted the ‘look and see’ visit into a repatriation escort mission, and, along with the Taleban commander and a general from the TBG, KNB and the Russian Federation representatives, and 8,000 refugees, crossed into Afghanistan.

Voluntary or coerced?

Turning again to the *Voluntary Repatriation Handbook*, we see that the principle of voluntariness, ‘implying an absence of any physical, psychological or material pressure to repatriate...is the cornerstone of international protection with respect to the return of

¹⁹ Wherein refugee problems are treated on a holistic, situation basis involving all affected countries as well as the country of origin. This contrasts with previous country-based approaches.

²⁰ Promulgated by the Taleban Office of the Chief Justice on 26 June 1997. Given that the Taleban at that point were neither the legally recognized government of Afghanistan, nor in control of all its territory, the status of the amnesty was ambiguous; nonetheless, it was taken by UNHCR as a sign of Taleban goodwill.

refugees' (UNHCR 1996: 10). Goodwin-Gill views voluntariness as 'the necessary correlative to the subjective fear which gave rise to flight; willingness to return negatives that fear' (Goodwin-Gill 1996:275). The *Handbook* lists three situations in which refugee repatriation is not considered voluntary, including when the 'host country authorities deprive refugees of any real freedom of choice through outright coercion or measures such as, for example, reducing essential services, relocating refugees to hostile areas, encouraging anti-refugee sentiment on the part of the local population' (UNHCR 1996:42).²¹

So could the Takhta Bazar repatriation have been considered voluntary? The simple answer is no. The refugees, sequestered in the scorching security zone, unwanted in Turkmenistan, were arguably deprived of 'any real freedom of choice'. Yet if the movement was not entirely voluntary, neither was it forced. Physical coercion on the part of the Turkmen military had ceased, and an international humanitarian effort had by then claimed parts of the border zone, its familiar paraphernalia of plastic sheeting, tented clinics, flags, Land Cruisers, inflatable water bladders and sacks of grain demarcating a humanitarian space. Had the refugees wished to benefit from a minimal, but protective, form of temporary asylum, it seems that they could have. But they did not, instead returning *en bloc* for Marechak. And, having taken that step, second thoughts would have been hard to act upon: immediately upon their departure the TBG torched the refugee settlements, setting off billowing plumes of smoke clearly visible from Marechak.

Negotiating protection, again

If the Marechakis were neither returning with complete voluntariness, yet nor were they pushed, what then were the motives behind their repatriation? Going by *Voluntary Repatriation Handbook* measures, it might be argued that "the positive pull-factors in the country of origin [were] an overriding element in the refugees' decision to return rather than possible push-factors in the host country or negative pull-factors, such as threats to property, in the home country." (UNHCR 1996: 11). In other words, adverse conditions in the country of asylum notwithstanding, conditions in the country of origin had changed sufficiently to convince them to return.

Recasting the emergency from the refugees' perspective and with hindsight, one could build the following picture. Realizing that their adversaries, the Taleban, were approaching, and fearing mistreatment at their hands in the heat of battle, the Marechak *shura* instructed the village to prepare their belongings and flee. They crossed into nearby Turkmenistan, a country in which they realized they would be less than welcome, but also in which they hoped they would be protected from any aggressive Taleban action. Despite initial hostile actions on the part of the TBG, this manoeuvre worked, saving the Marechakis in the first instance from Taleban violence. With the breathing space afforded them by temporary asylum in Turkmenistan, and with the camps being located close enough to the border to permit frequent comings and goings,

²¹ For a view in favour of involuntary repatriation in certain circumstances, see Barutciski 1998, who argues that "[to] maintain the credibility of what is left of the 1951 regime, it is necessary to return individuals who no longer need protection."

the leadership was able to make contact with the Taleban occupiers and begin their own process of negotiating for return to Marechak - of “making ‘rational’ choices among unsatisfactory options, striving for an outcome that achieves relative security and some small degree of control over their lives” (Stein 1992:18). The Turkmen assisted this process by hosting a series of tripartite meeting (Turkmen-Taleban-UNHCR plus the refugee commander) on the Turkmen-Afghan border. UNHCR played its traditional role in these meetings, calling for security guarantees and access to returnees, but these seemed to be marginal issues to the other parties. When the Marechakis had received guarantees they considered satisfactory, and given the long-term untenability of their situation in Takhta Bazar, all the refugees repatriated together.

The limits of outsiders

UNHCR, with its mandate to provide international protection and the weight of institutional operational procedure, found itself confronted in Central Asia by on the one hand an authoritarian, security-focused mentality, and on the other an isolated rural population escaping from a country steeped both in warfare and traditional brokering mechanisms. It had created an opening for itself, and thereby ‘the international community’ into a closed nation, and it had, through its presence and negotiation, convinced the host country to grant at least temporary protection to the Marechakis.

Yet at the time of repatriation, and despite its preparations for such an event, and its access to both the TBG and the refugees, UNHCR found itself on the sidelines. Some refugees delayed their departure by a few hours in order to receive a ration of food assistance, but other than that, at this point, the international presence had outlived its utility.

Walking back to Marechak with the refugees, I observed them to be calm and pragmatic. People who only a few days previously had vowed never to return to a Taleban controlled Marechak now merely checked to see that their property was intact (it was) and fretted about having left their fields unattended. As we walked, I asked people why they were going back, and whether they were doing so voluntarily. The question seemed superfluous. No one was happy to be under the Taleban, but now their protection had been guaranteed, and their commander incorporated into the leadership structure. In a square in Marechak, I addressed a group of returnees, assuring them of UNHCR’s continuing commitment to them. I then asked the Taleban military commander, a member of the Kandahar *shura*, if he could guarantee the safety of the returnees. Unhesitatingly, he publicly pledged himself to do so. The audience listened and were pleased, but the event was essentially a side-show, as most of the returnees scrambled to get back to their untended fields.

Repatriation operations can be spectacular, concentrated affairs, involving voluntary repatriation forms, amnesties, organized transport, de-mining awareness programmes, reintegration packages and returnee monitoring. Yet it has long been recognized that such textbook repatriations are rare; the great majority of returns are spontaneous. UNHCR can only promote repatriation “when it appears that objectively, it is safe for most refugees to return and that such returns have good prospects of being durable”

(UNHCR 1996:16); spontaneous repatriation, on the other hand, may be effected under less than ideal conditions. As the UNHCR's 1997-98 *State of the World's Refugees* noted in respect of Afghan returns:

The considerations which influence the decision to repatriate may not always be immediately apparent to the external observer. For many...Afghans, it would appear, the absence of a stable central government is not a major disincentive to repatriation, as long as they can go back to a part of the country controlled by a faction which can offer them some protection. (UNHCR 1997:148)

Marechak is rich, lush and beautiful - in 1885 the Afghan king preferred to lose to the Russians the whole Panjdeh area, containing Takhta Bazar, that he might retain Marechak (Dupree 1997:422). Afghanistan has been haunted by conflict for generations. Some has involved pitched, horrific battles, but for others, an exchange of money has sufficed to make a commander switch allegiances. This could have happened in Marechak; as in many formerly anti-Taleban outposts, its commander too might have cut a deal and hoisted the white Taleban flag. Nominal allegiances would have changed, and the local power structure been altered, but essentially life would have remained as ever.

The Marechakis knew this pattern, and their likely fate under the Taleban. Not having done so before the Taleban advance, and fearful of the consequences of an onslaught, they availed themselves of international protection for a spell. The international response scrambled to obtain for the Marechakis what, normatively, they should have been in need of. But refugees soon bypassed both the Turkmen and the international community when they cut their own deal with their compatriots, and went back to resume their ruptured lives in a relatively privileged corner of a troubled country.

Epilogue: Access denied

Access was the key to ensuring the protection of the Marechakis at the start of the operation, and the prevention of access - to Marechak by the Taleban - remains the main disquieting feature of the episode. Although the Taleban had guaranteed access by UNHCR to the returnees both during the tripartite negotiations and the repatriation itself, once all the refugees had gone back, the city became suddenly unreachable. Getting to Marechak through Afghanistan would have been too risky, for not only was the road barely functional, but it traversed a front-line, and the Taleban Governor of Herat refused to honour a guarantee of safe passage given by his counterpart in Kandahar (technically closer to the seat of power). At Takhta Bazar, the shallow Murghab river became impenetrable once more, as Taleban atop the Marechak citadel pointedly ignored UNHCR/TBG attempts to contact them first by radio and then using flares.

Mahnaz Ispahani, in her work on routes and 'anti-routes' in South-West and Central Asia, has shown how, at a time when Tsarist Turkestan and British India were being penetrated steadily by means of an extensive road- and rail-building programme, the Afghan king Abdur Rahman was doing the opposite: he refused to construct transport networks, believing that only by denying even the possibility for access could Afghanistan preserve its independence from outsiders (Ispahani 1989:96). The Taleban replicated this policy in July 1997. Unreachable by road or river, the returnees

and the Taleban in Marechak, just a few kilometres from the UNHCR office in Takhta Bazar, were completely invisible to the international community. Rumours of their plight, mostly reassuring, sometimes troubling, occasionally reached Herat. But the High Commissioner's "legitimate concern for the consequences of return" without 'unhindered access to returnees' (Excom 40(XXXVI)), remained a pious aspiration, as 8,000 persons faced their fate in an occupied town alone.

Conclusion

For a brief moment in the summer of 1997 UNHCR opened an international humanitarian space in the Turkmen desert, one that straddled the needs and concerns of both a post-communist, security-focused state, and a remote and rural Afghan minority. Neither was conversant with the international legal norms on refugee rights and obligations, but both were confronted with an emergency situation. The Marechakis ran from an enemy, and entered Turkmenistan; the Turkmen hunkered down, and attempted to repulse them. And in the midst of this, an Australian-Lebanese-French-Bosnian-American team representing the international community made contact with the Marechakis and offered them a hope of universal safeguards in the face of threats at home and abroad.

In this paper I have argued that access to refuge and the international community were the keys to protection in Takhta Bazar. Internationalization, first in the crossing of a border, and then in the arrival of UNHCR, allowed this entrée, and the space in which Turkmen, Marechakis and Taleban could negotiate protection. The shared space dissipated, however, as two parties - the Marechakis and the Taleban - negotiated their own deal, one that coincided with Turkmen frontier security considerations and the refugees' desire to reconnect with their livelihoods at home. Once they repatriated, however, they became inaccessible to the outside world, and left to their own, traditional means of negotiating their protection.

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This paper has also made use of internal UNHCR memoranda and situation reports, and interviews with selected UNHCR personnel involved with the Takhta Bazar operation.