

# **NEW ISSUES IN REFUGEE RESEARCH**

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## **From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems**

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## Introduction

The history of durable solutions to the global refugee problem in the period after the Second World War can be divided into two distinct phases. In the first phase, which lasted roughly from 1945 until 1985, the solution of resettlement was promoted in practice, even as voluntary repatriation was accepted in principle as the preferred solution. In the second part of my paper I offer a brief review of the period in which resettlement was seen as the most appropriate solution to the refugee problem.

The second phase, beginning in 1985, may be divided into three periods. In the first period (1985-93) voluntary repatriation came to be promoted as *the* durable solution, with an emphasis on ensuring the voluntary character of repatriation. In 1993, the notion of safe return was introduced into the discourse on solutions in the context of temporary protection regimes established in Western Europe; in the continuum between voluntary and involuntary repatriation the idea of safe return aspired to occupy the middle ground. In 1996, the doctrine of imposed return was aired by UNHCR to draw attention to constraints which could compel it to accept the reality of involuntary repatriation.

To be sure, neither the notion of safe return nor the doctrine of imposed return has necessarily been advanced to replace the standard of voluntary repatriation. In the case of safe return, the contention is that the standard of voluntary repatriation is irrelevant, since the cessation clause in Article 1C of the 1951 Convention Relating to the Status of Refugees (hereinafter the "1951 Convention") requires nothing more than either safe return, or that individuals be in a situation where they were given protection on the specific understanding that the standard of safe return would apply. On the other hand, the doctrine of imposed return has been advanced to carve out what are viewed as unavoidable exceptions to the standard of voluntary repatriation.

In the third part of my paper I contest the particular interpretation of the cessation clause deployed to legitimize the notion of safe return. Next, I point to the dangers of attempting to contextualize the standard of voluntary repatriation. I then go on to argue that it is the absence of burden sharing in the post Cold War era which explains the growing acceptance of involuntary repatriation as a solution to the global refugee problem.

In the fourth part of the paper I go on to explore the meaning and implications of the new focus on returnee aid and the underlying assumption that refugees cannot be successfully repatriated if the receiving society does not sustain a certain level of development. I argue, among other things, that unless there is a clear recognition of the role external economic factors play in creating the conditions which lead to refugee flows, and steps proposed to address them, the humanitarian aid community may, in the final analysis, be seen as an instrument of an exploitative international system which is periodically mobilized to address its worst consequences.

## **The first phase, 1945-1985: insistence on the solution of resettlement**

In 1939, reflecting on the different possible solutions to the refugee problem, Sir John Simpson wrote:

The possibility of ultimate repatriation belongs to the realm of political prophecy and aspiration, and a programme of action cannot be based on speculation. ... It can be ignored as an important element in any future programme of international action aiming at practical liquidation of the existing refugee problems.<sup>1</sup>

It is said that while this "pessimistic assessment" was "basically right for refugees of his time—Russians, Turkish Christian minorities, German Jews and others", it was "not for all times and for all refugees".<sup>2</sup> After all, at the end of the Second World War millions of refugees did return home.<sup>3</sup> Yet, it was not until 1983 that the preference for the solution of voluntary repatriation acquired "an absolute character" in relevant United Nations General Assembly resolutions.<sup>4</sup> Even then it is the one solution for which UNHCR, the international community and individual states had "the greatest limitations of mandate, influence, time and resources".<sup>5</sup> The reason for this state of affairs was that within a year of the end of the Second World War the question of a solution to the refugee problem had become an integral part of the Cold War. The latter's politics demanded the rejection of the solution of voluntary repatriation.

This was also a period in which the economies of the Northern states "experienced unprecedented economic expansion in the context of depleted populations".<sup>6</sup> A key factor facilitating rapid economic recovery was the heavy influx of refugees which offset the loss of the labour force in the War.<sup>7</sup> This reality reinforced the determination of the Northern states to advocate resettlement as a solution to the problem of the 1,000,000 remaining refugees in Europe.<sup>8</sup> Thus, despite the fact that the International Refugee Organization (IRO) (1947-1950), at the insistence of the former Soviet Union, formally adopted voluntary repatriation as a solution to the refugee problem, "the

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<sup>1</sup> Sir John Hope Simpson, *The Refugee Problem: Report of a Survey* (Royal Institute of International Affairs, London: Oxford University Press, 1939), p. 529.

<sup>2</sup> Barry N. Stein, "Prospects for and Promotion of Voluntary Repatriation", in Howard Adelman (ed.), *Refuge or Asylum: A Choice for Canada* (Toronto: York Lanes Press, 1990), pp. 190-220 at p. 192.

<sup>3</sup> *Ibid.*

<sup>4</sup> Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff Publishers, The Hague, 1997), p. 81.

<sup>5</sup> *Ibid.*, p. 202.

<sup>6</sup> Robert F. Gorman and Gaim Kibreab, "Repatriation Aid and Development Assistance" in James C. Hathaway (ed.), *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff Publishers, 1997), pp. 35-82 at p. 39; George Stoessinger, *The Refugee and the World Community* (Minneapolis: The University of Minnesota Press, 1963), p. 114.

<sup>7</sup> Gorman and Kibreab, "Repatriation Aid".

<sup>8</sup> Stoessinger, *The Refugee and the World Community*.

organization devoted most of its attention to resettlement projects, in agreement with the intentions of the Western powers".<sup>9</sup> During its lifetime the IRO "repatriated 72,834 refugees, a meager 5 per cent of the total number of displaced persons registered with IRO".<sup>10</sup> Indeed, "although it was evident to IRO officials that the cost of repatriation per refugee was a fraction of the cost of resettlement, this argument never appeared in the discussions of the General Council".<sup>11</sup>

In so far as the Northern states accepted the solution of repatriation as the ideal solution in principle, they strongly supported freedom of choice even though 1,000,000 refugees were involved. So much so that even the decision to provide three months of rations to refugees deciding to repatriate was sharply criticized.<sup>12</sup> By contrast, in the months immediately after the end of the War, when resettlement had yet to become a part of the Western discourse on solutions, refugees had to organize and resist forcible repatriation.<sup>13</sup> It may also be recalled in this context that "under the refugee regime represented by UNRRA [United Nations Relief and Rehabilitation Agency, the predecessor of IRO] there was no formal respect for the basic rights of the individual. DPs [displaced persons] were repatriated against their will ....".<sup>14</sup> While UNRRA later abandoned this practice, it was not until after the onset of the Cold War, and the formation of the IRO regime, that an individual's right to flee from political persecution and to choose where he or she wanted to live was recognized.<sup>15</sup>

The only conclusion that one can draw from this episode in the evolution of the international refugee regime is that humanitarian factors do not shape the refugee policies of the dominant states in the international system.<sup>16</sup> It underlines the need to be alert to the non-humanitarian objectives which are pursued by these actors from time to time behind the facade of humanitarianism. I will return to this theme later in this paper.

Meanwhile, it is not at all surprising that the end of the Cold War has meant a slow return to the days of the UNRRA, although dominant states have now to contend with the significant developments in international human rights law achieved in the period after the Second World War. It explains why contemporary attempts at justifying the departure from the standard of voluntary repatriation rest on a different set of arguments. These include the idealization of the solution of repatriation, a turn towards objectivism in interpreting the definition of refugee and the cessation clause contained

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<sup>9</sup> Kim Salomon, *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (Lund: Lund University Press, 1991), p. 243.

<sup>10</sup> Stoessinger, *The Refugee and the World Community*, p. 111.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, pp. 68-71 and p. 202.

<sup>13</sup> Yury Boshyk, "Repatriation and Resistance: Ukrainian Refugees and Displaced Persons in Occupied Germany and Austria, 1945-1948", in Michael R. Marrus and Anna C. Bramwell (eds.), *Refugees in the Age of Total War* (London: Unwin Hyman, 1988), pp. 198-219.

<sup>14</sup> Salomon, *Refugees in the Cold War*, p. 249.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* p. 255.

in the 1951 Convention, a stress on contextualism in considering compliance with the standard of voluntary repatriation, and an internalist explanation of the root causes of refugee flows. The following sections examine critically the validity of some of these arguments.

### **The second phase 1985-98: from voluntary to forced repatriation**

Since the early 1980s, from the time of the arrival of "new asylum seekers" in the North, there have been calls to rethink the exilic bias of international refugee law. The theoretical justification for this has assumed the form of "a new approach to the refugee problem ... based on human rights".<sup>17</sup> It asserts that "the goals of separation and alienation, which animated so much of the approach of the past, should be recognized as contrary to both individual human interest and the well-being of societies, particularly in today's conditions".<sup>18</sup> Shorn of euphemistic verbiage the new approach stated that since refugees from the South were now making their way to the North, and since there was at present no shortage of labour, it was time to rethink the solution of resettlement in other than the limited Cold War context. Even as this argument was being advanced, and despite the Office of the High Commissioner for Refugees complaining that the solution of voluntary repatriation had "not been examined in any depth by experts or scholars",<sup>19</sup> the Executive Committee of the UNHCR proceeded to adopt in 1985 a major conclusion on the subject.<sup>20</sup> A few years later, unconstrained by the politics of the Cold War, UNHCR declared the decade of 1990s to be the decade of repatriation. Needless to add, it was not the sudden availability of scholarly studies which emboldened the organization to make such an announcement.

On the contrary, from the very beginning scholars such as Harrell-Bond warned that "there are no published research data which could be used to test the assumptions which govern current policies and practices of governments and international agencies".<sup>21</sup> Subsequently, other researchers noted that "what is being promoted as the most desirable solution to refugee crises is a poorly understood social and spatial phenomenon".<sup>22</sup> However, the advocates of voluntary repatriation simply assumed that

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<sup>17</sup> Gervase Coles, "The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry", in Alan E. Nash (ed.), *Human Rights and the Protection of Refugees under International Law* (Nova Scotia: Institute for Research on Public Policy, 1988), pp. 195-221 at pp. 216-17.

<sup>18</sup> *Ibid.*

<sup>19</sup> UNHCR study cited by Stein, *Voluntary Repatriation*, p. 202.

<sup>20</sup> UNHCR Executive Committee, Conclusion No. 40 (XXXVI) on Voluntary Repatriation (1985).

<sup>21</sup> Barbara Harrell-Bond, "Repatriation: Under What Conditions is it the Most Desirable Solution for Refugees? An Agenda for Research", *African Studies Review*, Vol. 32, (1989), pp. 41-69 at p. 43.

<sup>22</sup> Johnathan Bascom, "The Dynamics of Refugee Repatriation: The Case of Eritreans in Eastern Sudan", in W.T.S. Gould and A.M. Findlay (eds.), *Population Migration and the Changing World Order* (New York: John Wiley and Sons, 1994), p. 226. See also Norwegian Government, Department of Immigrant and Refugee Affairs, *Refugees and Repatriation: Our Current Knowledge on the Subject* (Oslo, May 1994). The study states at

all refugees desired to go home. It was not seen as a "hypothesis to be tested", but as a statement of fact which presumed knowledge of refugees.<sup>23</sup>

Those who undertook the more difficult task of testing the hypothesis discovered, however, that there were a number of situations in which refugees did not want to go home. First, it was found that the passage of time can be a crucial factor when it comes to a decision to return. Thus, second generation refugees may not want to return to a home they know little about.<sup>24</sup> Second, exile affects individuals and groups in a profound way so that the meaning of home is often transformed. "Home is where you make it" is the title of a recent article on "repatriation and diaspora culture among Iranians in Sweden". It suggests that "the diaspora consists of 'multiple' homes including the original homeland which is merely 'the place of nostalgia' as opposed to other homes which meet more practical needs. Thus 'returning' home can mean returning to a home other than the original homeland".<sup>25</sup> Third, a gendered view of exile and return contested the "cozy image of home" projected by the advocates of repatriation.<sup>26</sup>

However, despite this evidence, the tendency to generalize "the refugee experience", particularly as an expression of loss, did not subside.<sup>27</sup> The simplest explanation for this is that an idealized image of return helped legitimize measures which compelled refugees to return. Furthermore, once this image was captured and set out in legal terms it tended to occlude the consideration of alternative solutions as being beside the point. For example, in her recent book on the legal aspects of voluntary repatriation Zieck states categorically: "Although it is often assumed that everyone wants to return to the country of origin, i.e. 'home', no attempt will be made to assess the validity of the assumption since it appears, in the absence of other options, to be largely irrelevant."<sup>28</sup>

#### *From 1993: safe return*

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p. 5: "Even if repatriation has come more and more in focus, there is a lack of conceptual and empirical knowledge about the issue, especially in regard to why the refugees return and which factors influence their decision."

<sup>23</sup> D.C. Sepulveda, "Challenging the Assumptions of Repatriation: Is it the Most Desirable Solution?" (1996), unpublished paper on file with the author, pp. 12-13.

<sup>24</sup> John R. Rogge, "Repatriation of Refugees", in Tim Allen and Hubert Morsink (eds.), *When Refugees Go Home: African Experiences* (United Nations Research Institute for Social Development, 1994), pp. 14, 24, 31-4, 43-6.

<sup>25</sup> Mark Graham and Shahram Khosravi, "Home is Where You Make It: Repatriation and Diaspora Culture among Iranians in Sweden", *Journal of Refugee Studies*, Vol. 10, No. 2 (1997), pp. 115-33.

<sup>26</sup> See for example, Helia Lopez Zarzosa, "Internal Exile, Exile, and Return: A Gendered View", *Journal of Refugee Studies*, Vol. 11, No. 2 (1998), pp. 189-99.

<sup>27</sup> L. Malkii, "Refugees and Exile: From 'Refugee Studies' to the National Order of Things", *Annual Review of Anthropology*, Vol. 24, (1995), pp. 495-523.

<sup>28</sup> Zieck, *UNHCR and Voluntary Repatriation*, p. 447, fn. 77.

The crisis in former Yugoslavia led to "a resurgence of interest among Northern governments in the [1951] Convention's paradigm of temporary protection, including the right to repatriate when refugee status comes to an end".<sup>29</sup> It was now discovered that the 1951 Convention did not require the application of the standard of voluntary repatriation. It merely called upon state parties to ensure safe return.<sup>30</sup> For the requirement of voluntariness is not mentioned in the 1951 Convention; it finds a place only in the Statute of the Office of the High Commissioner for Refugees. Therefore, according to Hathaway, "it is wishful legal thinking to suggest that a voluntariness requirement can be superimposed on the text of the Refugee Convention".<sup>31</sup> In his opinion, "once a receiving State determines that protection in the country of origin is viable, it is entitled to withdraw refugee status".<sup>32</sup>

However, we need to stop and remind ourselves here that despite the inclusion of the cessation clause in the 1951 Convention international refugee law was at the time of its drafting firmly wedded to an exilic bias. In other words, as Goodwin-Gill points out, the Convention "was drafted at a time when voluntary repatriation was effectively obsolete".<sup>33</sup> It is therefore not surprising that the requirement of voluntariness did not find a mention in what was initially a Eurocentric Convention, the chronological and geographical limitations of the 1951 Convention only being lifted in 1967. Second, the task of ensuring adherence to the standard of voluntary repatriation had in the past been assigned to an international agency, that is, the IRO. It was perhaps the reason that the requirement of voluntariness found a mention in the Statute and not in the Convention. Furthermore, the preamble to the Statute calls upon states to assist the Office of the High Commissioner for Refugees to promote the voluntary repatriation of refugees. States could hardly have been expected to do so by denying the requirement of voluntariness.

As for the claim that it is for the host State alone to decide when protection in the country of origin is viable, it has been perceptively observed: "State proponents of 'safe return' effectively substitute 'objective' (change of) circumstances for the refugee's subjective assessment, thereby crossing the refugee/non-refugee line."<sup>34</sup> The refugee/non-refugee line was, however, crossed well before the idea of safe return was advanced. In my view, once refugee determination authorities began to rely on objective factors, as opposed to a combination of subjective and objective factors, to determine refugee status, the standard of voluntary repatriation was undermined. It has

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<sup>29</sup> James C. Hathaway, "The Meaning of Repatriation", *International Journal of Refugee Law*, Vol. 9, No. 4 (1997), pp. 551-8 at p. 553.

<sup>30</sup> "The notion of safe return" has, as Goodwin-Gill points out, "come to occupy an interim position between the refugee deciding voluntarily to go back home and any other non-national who, having no claim to international protection, faces deportation or is otherwise required to leave." Guy S. Goodwin-Gill, *The Refugee in International Law*, 2<sup>nd</sup> edn. (Oxford: Clarendon Press, 1996), pp. 275-6.

<sup>31</sup> Hathaway, "The Meaning of Repatriation", p. 553.

<sup>32</sup> *Ibid.*, p. 551.

<sup>33</sup> Guy S. Goodwin-Gill, "Editorial", *International Journal of Refugee Law*, Vol. 7, No. 1, (1995), p. 8.

<sup>34</sup> Goodwin-Gill, *The Refugee in International Law*, p. 276.

been aptly observed that "refugees are by definition 'unrepatriable' ... as long as a person satisfies the definition of refugee in the contemporary instruments, he remains ... 'unrepatriable' and consequently benefits from the prohibition of forced return".<sup>35</sup> To put it differently, it is difficult to justify the statist interpretation of safe return without at first giving the word "refugee" a different meaning. Thus, for example, it is no accident that Hathaway who supports the idea of safe return has all along been a proponent of what I call objectivism in the determination of refugee status.<sup>36</sup>

Objectivism, in my view, disenfranchises the refugee through eliminating his or her voice in the process leading to the decision to deny or terminate protection.<sup>37</sup> Lyotard has termed such objectivism an ethical tort; it has been described as "an extreme form of injustice in which the injury suffered by the victim is accompanied by a deprivation of the means to prove it".<sup>38</sup> Objectivism is sustained on the mistaken view that there are facts out there waiting to be discovered in order to arrive at a just decision with respect to the denial or termination of protection. Unfortunately, however, facts do not exist outside the world of interpretation.<sup>39</sup> Therefore, most often, what objectivism tends to do is to substitute the subjective perceptions of the State authorities for the experience of the refugee. Its injustice relates above all to the fact that "all traces of particularity and otherness are reduced to a register of sameness and cognition", whereas fear, pain and death are "radically singular; they resist and at the limit destroy language and its ability to construct shared worlds".<sup>40</sup>

It is the objectivistic interpretation of the cessation clause contained in the 1951 Convention which permits the argument that it is for the state alone to decide when there has been a sufficient change in the circumstances in the country of origin. It represents at best one possible, albeit dubious, interpretation of the 1951 Convention. This becomes clear when you take into account the simple fact that for decades it was the practice of Northern states, and continues to be the practice of UNHCR, to consider a combination of objective and subjective factors to determine refugee status.<sup>41</sup>

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<sup>35</sup> Zieck, *UNHCR and Voluntary Repatriation*, pp. 101-2.

<sup>36</sup> James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 65-97.

<sup>37</sup> See Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (London: Pluto Press, 1996), chapter 5.

<sup>38</sup> See Costas Douzinas and Ronnie Warrington, "A Well-Founded Fear of Justice: Law and Ethics in Postmodernity", in Jerry Leonard (ed.), *Legal Studies as Cultural Studies* (New York: State University of New York Press, 1995), pp. 197-229 at p. 209.

<sup>39</sup> As H.L.A. Hart, perhaps the most famous advocate of legal positivism this century, has written: "Fact situations do not await us neatly labelled, creased and folded; nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand ...." H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), pp. 63-4.

<sup>40</sup> Douzinas and Warrington, "A Well-Founded Fear of Justice", p. 209.

<sup>41</sup> The principles of interpretation of treaties laid down in the Vienna Convention on the Law of Treaties 1969 states in Article 31(3)(b) that to the interpretive exercise is important "any subsequent practice" of states "which establishes the agreement of the parties regarding its interpretation". UNHCR's authoritative *Handbook on Procedures and Criteria for Determining Refugee Status* was written as late as 1979 and has remained unchanged since, although it was re-edited in January 1992. "The standard of proof for bringing refugee status

Is it not strange that whereas the element of subjectivity is celebrated when it translates into the spontaneous return of the refugee, it is ignored when it involves a decision to stay. In this scheme of things, refugees are rational actors when they decide to return but are moved by extraneous motives if they decide to stay? In the same vein, you are charged with ignoring refugee voices when you suggest, for instance, that UNHCR should not promote spontaneous return unless it is convinced that the return can take place in safety and dignity. On the other hand, when refugee voices are in favour of staying and UNHCR protests their return, little heed is to be paid to these voices. This "heads I win and tails you lose" logic needs to be squarely rejected.<sup>42</sup>

Objectivism, finally, does not merely mean that the state decides when it is safe for a refugee to return but also whether it is necessary for him or her to return to the place from where he or she fled. In this instance too the appropriate move has already been made in the realm of status determination. The idea of safe return is thus linked to the idea of the internal flight alternative (IFA).<sup>43</sup> This understanding merely carries the disenfranchisement of the refugee a step further. Apart from being forcibly returned to a place where the refugee has no desire to return, it confronts him or her with a host of difficult problems relating to property claims, employment, education etc. For example, the experience of returnees to post conflict Bosnia with the Commission on Real Property Claims set up under the 1995 Dayton Peace Accord has been that its decisions are never implemented by the local authorities concerned.<sup>44</sup> In other words, objectivism means that the refugee has to undergo the trauma of displacement a second time around.

#### *From 1996: involuntary return*

The doctrine of imposed return was "officially" aired first by Dennis McNamara, the Director of UNHCR's Division of International Protection (DIP), in September 1996. Under a doctrine of "imposed return", refugees may be sent back "to less than optimal conditions in their home country" against their will.<sup>45</sup> It is important to try and

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to an end", as Goodwin-Gill has rightly pointed out, "is the balance of probabilities—is the nature of the changes such that it is more likely than not that the pre-existing basis for fear of persecution has been removed? ... [C]hange alone may be insufficient; it is relevant only in relation to the claim, as part of the evidence of the existence or non-existence of risk". Goodwin-Gill, *The Refugee in International Law*, p. 87.

<sup>42</sup> For example, a group of Dutch non-governmental organizations (NGOs) have contended that for the most part the conditions under which repatriation must take place for both rejected asylum seekers and those who, having been given exceptional leave to remain, subsequently have to return to their own countries, are those spelled out by UNHCR in its Handbook entitled *Voluntary Repatriation: International Protection*, (Geneva: UNHCR, 1996). See Working Group on International Refugee Policy, "Guidelines for NGOs in Relation to Government Repatriation Projects", *Journal of Refugee Studies*, Vol. 11, No. 2 (1998), pp. 182-8.

<sup>43</sup> Goodwin-Gill, *The Refugee in International Law*, p. 276.

<sup>44</sup> "Bosnian Property Commission Struggles to Fulfill its Potential", *The Forced Migration Monitor*, No. 25 (New York: Open Society Institute, September 1998), pp. 1-3.

<sup>45</sup> Reuters, 29 September 1996.

understand, even as we are critical, the circumstances under which he advanced the idea of imposed return. First, of course, there is the reality that involuntary repatriation is taking place in large numbers today. As one UNHCR publication bluntly puts it: "it is quite clear that a large proportion of the world's recent returnees have repatriated under some form of duress".<sup>46</sup>

From the reality of involuntary repatriation has emerged the growing belief that the standard of voluntary repatriation needs to be contextualized. For, after all, the reasoning goes, repatriation takes place under a variety of different conditions and it is unrealistic to insist on adherence to the standard of voluntariness without taking into account the peculiar conditions in which it has to be practised. For example, in recent years UNHCR's Division of International Protection has had to confront situations under which it is said to have been "torn between the urge to stick to the spirit of international instruments and the need to find a viable solution in an environment increasingly hostile to refugees".<sup>47</sup> The Division's sticking to first principles has on occasions meant its marginalization in the UNHCR decision-making process.<sup>48</sup> In airing the doctrine of imposed return the Director of the Division of International Protection was presumably stating that in the future his division should not be expected to stick to first principles in all circumstances.

Once it is conceded that the standard of voluntary repatriation has to be made context sensitive there is a need to identify the situations in which it may be neglected. Such exercises are already underway. For example, Bayefsky and Doyle (relying on discussions held in a workshop on Sustainable Refugee Return in Princeton University in early 1998) have drafted a set of "Guidelines and Principles for Safe and Sustainable Return". One guideline is entitled "Mandating Non-Voluntary Return" and reads as follows:

The Security Council or appropriate regional body could authorize a non-voluntary repatriation if it determined that the conditions of asylum were (a) more dangerous and debilitating than those in the country of origin and (b) were not correctable by the actions of the host state, with international assistance. The conditions in the country of origin justifying such a decision would need to include both of the below:

- a reasonable expectation of the provision of basic human needs, including shelter, nutrition, and basic human rights, including freedom from gross violations of the integrity of the person (murder, torture, arbitrary imprisonment).

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<sup>46</sup> UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (Oxford: Oxford University Press, 1997), p. 147.

<sup>47</sup> Joel Boutroue, *Missed Opportunities: The Role of the International Community in the Return of the Rwandan Refugees from Eastern Zaire*, Working Paper No. 1 (Boston: Massachusetts Institute of Technology, June 1998), p. 20.

<sup>48</sup> *Ibid.*

- the national standard of human rights could be enjoyed by the returnee population on a nondiscriminatory basis.<sup>49</sup>

This guideline is an open invitation to third states to deny assistance and to host states to create the circumstances in which refugees may be compelled to return to the country of origin. Further, giving the UN Security Council the authority to decide when non-voluntary repatriation is justified is to guarantee that political rather than humanitarian factors will influence the decision.<sup>50</sup>

Second, it is said that from the point of view of international law, where prima facie determination of refugee status is arrived at in the context of a mass influx, "it might at times be at odds with UNHCR's insistence that repatriation must be viewed from an international [*sic*] angle".<sup>51</sup> In my view the fact of mass influx has no direct bearing on the standards which control return. The standard of return is linked more to the principle of *non-refoulement* which applies not merely to those granted refugee status or an intermediate humanitarian status, but also to asylum seekers. Furthermore, in the context of mass influx and return there is available, as Zieck has pointed out, "a body of *leges speciales*" constituted by the numerous bilateral and tripartite agreements entered into by UNHCR, the country of asylum, and the country of origin to regulate the modalities of return.<sup>52</sup> According to Zieck, the agreements

presuppose that the refugees whose return is thus regulated (regardless of whether or not their entitlements derive simultaneously from other applicable agreements, universal or regional customary international law, or even *comitas gentium*) are unrepatriable .... and that both UNHCR and the country of refuge are *bound* to observe the prohibition of *refoulement* (regardless of whether or not that obligation may be derived from other sources of law).<sup>53</sup>

Third, it is said that "in the era of mass movements the doctrine of individual expression of free will to return has been less relevant and less used (as a term). What we see are decisions by authorities and leaderships followed by acceptance by the masses".<sup>54</sup> The relevant literature, however, seems to suggest that there is a need to question whether "authorities and leaderships" always represent the interests of the

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<sup>49</sup> *Sustainable Refugee Return: A Report of a Workshop at Princeton University, 13-14 February 1998*, pp. 23-4.

<sup>50</sup> The participants in the Princeton workshop were therefore right to state that, while the standard of voluntary repatriation is "often difficult to meet in practice, the consequences of abandoning it as a principle are potentially very harmful" *ibid.*, p. 19. Yet on the assertion that the drafted guidelines and principles reflected "a widely shared view" Bayefesky and Doyle have proceeded to erode the standard of voluntary repatriation.

<sup>51</sup> For example, see Boutroe, *Missed Opportunities*, p. 20, fn. 63.

<sup>52</sup> Zieck, *UNHCR and Voluntary Repatriation*, p. 107.

<sup>53</sup> *Ibid.*, p. 108.

<sup>54</sup> Dennis McNamara made this point in his presentation to the Princeton workshop, p. 6.

refugees.<sup>55</sup> Without implying that all traditional structures are necessarily undemocratic efforts clearly need to be made to democratize the world of refugees before accepting that decisions of authorities and leaderships are in the best interests of refugees.

Finally, as McNamara pointed out in his Washington presentation, "imposed return has become necessary because of pressure from host states and a lack of money to care for refugees".<sup>56</sup> I would like to suggest this indeed is the real reason why involuntary repatriation is coming to be so widely discussed and practised in the Third World. The pressure from the host states is increasing because they are most often extremely poor countries and are confronted with a situation in which Northern states are unwilling to actualize the principle of burden sharing. The absence of burden sharing is manifested, it needs to be emphasized, both at the level of asylum and at the level of resources. The regime which the Northern states have constructed to prevent refugees from reaching their shores, and the unseemly hurry to return refugees from former Yugoslavia, has taken away their moral authority to protest at involuntary repatriation when this takes place in the South.<sup>57</sup> On the other hand, the unwillingness of the North to share the burden of the poor host states at the level of resources has meant that the "refugees must either repatriate or become the sole responsibility of the host state".<sup>58</sup>

Take the case of Zaire and Tanzania which gave asylum to 2,500,000 Rwandan refugees in 1994. They are among the poorest countries in the world with a ranking according to the United Nations Development Programme human development index (HDI) of 142 and 149 out of 179 respectively.<sup>59</sup> Given the absence of burden sharing and the economic crises which afflict the two countries, the decision of Tanzania, for example, to abandon its open door policy has been correctly characterized as being "unfortunate but understandable".<sup>60</sup> Tanzania, as has been pointed out, "survives on loans from the World Bank and the IMF [International Monetary Fund], whose conditions include charging the public for every service, including health care and education, and removal of government subsidies on basic amenities. It is unrealistic to

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<sup>55</sup> See for example Barbara Harrell-Bond, "Humanitarianism in a Straightjacket", *African Affairs*, Vol. 84, No. 334 (January 1985), pp. 3-15 at p. 12; Johan Pottier, "Relief and Rehabilitation: Views by Rwandan Refugees; Lessons for Humanitarian Aid Workers", *African Affairs*, Vol. 95 (1996), pp. 403-29 at p. 429.

<sup>56</sup> Reuters, 29 September 1996.

<sup>57</sup> In relation to recent US policies Frelick writes: "Africa, which for decades stood as a shining example of solidarity and hospitality, retreated from fundamental principles. On both sides of the continent, the spirit of generosity withered. ... Like it or not, U.S. actions set a standard. If the United States treats refugees and asylum seekers without regard to fundamental refugee principles, rest assured that other countries will cite that as justification for their own misbehavior." Bill Frelick, "The Year in Review", *The World Refugee Survey* (New York: United States Committee for Refugees, 1997), pp. 14-19 at p. 14.

<sup>58</sup> Bonaventure Rutinwa, "Beyond Durable Solutions: An Appraisal of the New Proposals for Prevention and Solution of Refugee Crisis in the Great Lakes Region", *Journal of Refugee Studies*, Vol. 9, No. 3 (1996), pp. 312-26 at p. 318.

<sup>59</sup> United Nations Development Programme, *Human Development Report 1997* (New York: Oxford University Press).

<sup>60</sup> Bonaventure Rutinwa, "The Tanzanian Government's Response to the Rwandan Emergency", *Journal of Refugee Studies*, Vol. 9, No. 3 (1996), pp. 291-302 at p. 300.

expect a country in such a desperate state to be generous to refugees",<sup>61</sup> in particular if the rich states have behaved no differently in the recent past<sup>62</sup> and refuse to share the burden of the poor host state.<sup>63</sup> The situation is not unique to Tanzania. Several other host countries which offer refuge to thousands and thousands of refugees are among the poorest in the world including, for instance, Guinea (HDI ranking 167), Uganda (HDI ranking 159), Sudan (HDI ranking 158), Nepal (HDI ranking 154), Bangladesh (HDI ranking 144), and Pakistan (HDI ranking 139).

What does this mean for refugees? It often means that "a life of exile is for many a life of misery—of poverty, dependency and frustration".<sup>64</sup> The situation is not new. Examining the repatriation of Ugandan refugees from Sudan and Zaire in the early 1980s, Jeff Crisp has written:

For the largest group of returnees, repatriation has more to do with the quality of life in Sudan and Zaire than conditions in their homeland. ... Food and medical supplies were often in acutely short supply in the refugee camps of Southern Sudan. By August 1984 the problem of hunger was becoming especially serious in the older settlements where food aid had been withdrawn. For refugees suffering in this way, *anything* was better than the prospect of indefinite exile.<sup>65</sup>

Indeed, the protection and assistance available has often been so inadequate that refugees have preferred to return to continuing insecurity at home. In such circumstances, they can hardly be said to have exercised a free choice.<sup>66</sup>

Of course all this does not mean that we need to accept morally offensive notions of burden sharing which would have Northern states pay for the care of refugees in exchange for being refugee free states.<sup>67</sup> Such a proposal seeks to mock at the poverty

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<sup>61</sup> *Ibid.*

<sup>62</sup> "In closing its borders, the Government of Tanzania appears also to have been emboldened by the behaviour of major powers in similar situations. Citing the examples of the Haitian refugees, the Cuban exodus and the saga of the so-called boat people, the Minister for Foreign Affairs said that it was a double standard to expect weaker countries to live up to their humanitarian obligation when major powers did not do so whenever their own national rights and interests were at stake." *Ibid.*, p. 298.

<sup>63</sup> "Failure of the international community to give adequate assistance was the main reason for the closure of the border." *Ibid.*

<sup>64</sup> UNHCR, *The State of the World's Refugees: The Challenge of Protection*, (Harmondsworth: Penguin Books, 1993), p. 104.

<sup>65</sup> Jeff Crisp, "Ugandan Refugees in Sudan and Zaire: The Problem of Repatriation", *African Affairs*, Vol. 86, No. 4 (1986), pp. 163-80.

<sup>66</sup> *Ibid.*, p. 104.

<sup>67</sup> See James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection", *Harvard Human Rights Journal*, Vol. 10 (Spring 1997), pp.115-211; James C. Hathaway, *Reconceiving International Refugee Law* (Dordrecht: Martinus Nijhoff Publishers, 1997).

of the Southern states. It is not realism but arrogance and a certain moral insensitivity which dictates such solutions.

### **The new focus on returnees**

The growing emphasis on repatriation has turned the attention of the international community towards "problems of return" where it has been confronted with the reality that the countries of origin are very often poorer than the countries from which refugees are being returned. Comparing the data on refugee movements and the UNDP's human development index, UNHCR's *The State of the World's Refugees* noted in 1995:

Countries with the lowest ranking on the HDI have by far the highest propensity to generate large movements of refugees and displaced people. Thus of the 30 states at the bottom of the index, half have experienced substantial forced migration ..., including many of the countries most seriously affected by the problem of human displacement: Afghanistan, Angola, Bhutan, Burundi, Liberia, Rwanda, Sierra Leone, Somalia and Togo.<sup>68</sup>

It is not surprising then that the governments of countries of origin are often in no position to assume responsibility for the reintegration of returning refugees and other displaced populations. This fact highlighted the problem with the traditional approach to repatriation which focused on the immediate consumption needs of returnees and did little to initiate and sustain a development process necessary to prevent further crises and population displacements in the country of origin.<sup>69</sup>

In considering the problems of returnees it has also been realized that it is often inappropriate to distinguish between refugees and internally displaced persons (IDPs).<sup>70</sup> For returnees are only "displaced persons of a special kind" and their numbers are likely to reduce in the future when compared with the number of IDPs.<sup>71</sup> Thus, "it can no longer be assumed that the needs of returning refugees are any greater than those of other citizens affected by war and the loss of development opportunities".<sup>72</sup>

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<sup>68</sup> UNHCR, *The State of the World's Refugees: In Search of Solutions* (Oxford: Oxford University Press, 1995), p. 147.

<sup>69</sup> *Ibid.*, p. 176; Gorman and Kibreab, "Repatriation Aid", pp. 42-3. Indeed, if anything the focus on development of the host country created the conditions in which refugees would not be expected to return. After all, as Crisp has observed (in the context of the return of Ugandan refugees from Sudan and Zaire) "assistance distributed in the latter [i.e. host country] should be less than that available in the former if the refugees were to be persuaded to accept 'voluntary' repatriation". Crisp, "Ugandan Refugees", p. 177.

<sup>70</sup> "Attention focusing only on returnees would merely plant the seed of divisiveness and render the reconciliation process even more complex." UNHCR document cited by Gorman and Kibreab, "Repatriation Aid", p. 42.

<sup>71</sup> UNHCR, *State of the world's Refugees* (1997), pp. 152 and 147.

<sup>72</sup> *Ibid.*, p. 173.

There is even the suggestion that returning refugees should not be given grants as this tends to discriminate against IDPs.<sup>73</sup>

The role of UNHCR has been transformed in the light of these concerns. According to Gorman and Kibreab: "until recently, the bulk of the UNHCR assistance programmes were almost exclusively channeled to countries of asylum. ... Reintegration was primarily considered the responsibility of the home country, and was expected to occur spontaneously".<sup>74</sup> However, today UNHCR has become extensively involved in the task of returnee integration.<sup>75</sup> Indeed, the UNHCR has played "a vanguard role" in the move away from the traditional approach to the solution of voluntary repatriation.<sup>76</sup>

I want briefly to explore here the wider meaning of this focus on returnee aid. In my view the justification for returnee aid involves the recognition that economic or material factors play a critical role in causing refugee flows, as also in the rehabilitation and reintegration process.<sup>77</sup> As Bill Frelick points out, "the suggestion that development is an indispensable component for solving the refugee dilemma implies that the grounding for displacement is economic".<sup>78</sup>

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<sup>73</sup> "The distribution of grants to refugee families should be discontinued or seriously reduced. The issuing of grants to returning refugee families exacerbates economic inequalities and is socially and politically risky. It is also an inefficient use of financial resources." Richard Jacquot, "Managing the Return of Refugees to Bosnia and Herzegovina", *Forced Migration Review*, Vol. 1, No.1 (January-April 1998), pp. 24-6 at p. 26.

<sup>74</sup> Gorman and Kibreab, "Repatriation Aid", p. 41. Zieck, *UNHCR and Voluntary Repatriation*, likewise writes at p. 94:

UNHCR's contribution in assistance remained limited to supplying relief items to returnees such as short-term grant of food, a cash travel allowance, roofing materials, basic farming tools, and household items, on the assumption that reintegration would occur spontaneously and that other actors, in particular the government of the country of origin with the assistance of development agencies, would take responsibility for the reintegration of returnees in the context of national development programmes.

<sup>75</sup> Zieck, *UNHCR and Voluntary Repatriation*, p. 167. The role originally envisaged for UNHCR did not envisage the new development. Zieck writes at p. 96: "Originally UNHCR's role was considered, in accordance with the pertinent cessation clauses, [to be] to halt at the borders of the country of origin: upon re-entry the refugee ceased being a refugee and the competence of UNHCR ended simultaneously."

<sup>76</sup> *Ibid.*, p. 41. Whether UNHCR will continue to play an important role will depend upon the financial resources made available to it.

<sup>77</sup> As *The State of the World's Refugees* (1993) put it at p. 112: "There is a growing realization that extreme deprivation and competition for resources can re-ignite conflict and undermine the achievements of a fragile peace. ... If repatriation is not linked to the rehabilitation of productive capacity, a vicious circle of renewed disintegration and displacement is likely to emerge. The development gap, for this reason, represents a problem of protection as well as assistance."

<sup>78</sup> Bill Frelick, "Afterword: Assessing the Prospects for Reform of International Refugee Law", in Hathaway (ed.), *Reconceiving International Refugee Law*, pp. 147-57 at p. 151. This recognition should make us view with suspicion any explanation which attributes the cause of displacement, for example, in countries like Rwanda and former Yugoslavia to notions like ethnicity; the competition for resources explanation can always be put forward as a more plausible explanation. However, it may be noted that Frelick questions this understanding, in my view erroneously.

The simple recognition that economic factors have a role to play in causing displacement, important as it is, is not, however, enough. There is a need to identify the different internal and external economic factors at work. For instance, when it comes to returnee aid "economic factors" or "development" are generally defined in narrow terms. The scope of returnee aid is delineated with the objective of establishing minimum material conditions in which the return of refugees can be promoted. The strategy is perhaps best epitomized by Quick Impact Projects (QIPs) executed by UNHCR to help the reintegration process. QIPs are essentially "emergency development" projects which do not take into account the long term problems of recurrent costs and sustainability.<sup>79</sup> Yet the weakness of QIPs merely reflects the "outer limit" of UNHCR's mandate; it can hardly be blamed for this.<sup>80</sup> The situation of the non-governmental organization (NGO) community is no different. With its limited resources it can at best pursue limited developmental objectives. In other words, both UNHCR and the NGO community cannot address the structural economic problems in the country of origin.

Such problems have to be addressed by the international community, in particular those powers which formulate global economic policies. First, of course, large-scale aid needs to be offered to the country to which refugees are returning, except that Northern states are unwilling to earmark the necessary resources for this purpose. For example, in his recent report on Africa Kofi Annan, the UN Secretary-General, notes the absence of support for a number of key reconstruction and development projects identified by the Government of Rwanda.<sup>81</sup> Second, there is a need to address the international economic factors which are responsible for the problems in the country of origin and which contributed to creating the climate in which displacement took place. For example, the role of international financial institutions in creating conditions of conflict in Africa is conceded even by the UN Secretary-General in his report on the subject.<sup>82</sup> He has therefore recommended "a 'peace-friendly' structural adjustment programme" and pleaded with the international financial institutions to ease the conditionalities that normally accompany loans.<sup>83</sup> Yet will this happen? It raises the question as to why the conditionalities were imposed in the first place. This is an important question because often the objective of the narrow development approach is to restore the pre-war

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<sup>79</sup> Gorman and Kibreab, "Repatriation Aid", pp. 47-9.

<sup>80</sup> In fact, as Gorman and Kibreab have pointed out, "within its limited institutional framework, UNHCR has been trying innovatively to adapt to new situations either by the flexible use of its limited mandate or by seeking authority from governments". *Ibid.*, p. 48.

<sup>81</sup> Report of the United Nations Secretary-General to the Security Council, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, (New York: United Nations, April 1998), p. 14.

<sup>82</sup> "In many African countries painful structural adjustment programmes have led to a significant reduction in social spending and consequent reductions in the delivery of many of the most basic social services. Especially when this is coupled with a perception that certain groups are not receiving a fair share of diminishing resources, the potential for conflict is evident." *Ibid.*, pp. 18-19.

<sup>83</sup> *Ibid.*, p. 15.

economy, overlooking the fact that the conflict may have been caused by precisely those pre-war conditions.<sup>84</sup>

The creation of minimum economic conditions of return is also accompanied by an endeavour to create the minimum political conditions of return. The keys to the creation of minimum political conditions are seen to be the conduct of free and fair elections and "the presence of an accountable state which is able to fulfill rudimentary functions such as control over territory, maintenance of law and order, and supply of basic services" which are necessary to successful and permanent repatriation.<sup>85</sup> In this direction UNHCR seeks, for example, to maximize the number of returnees who can participate in the electoral process. It also helps in the difficult task of establishing or sustaining institutions which will safeguard the human rights of returnees and other displaced populations.<sup>86</sup> The NGO community also contributes to this process. In other words, UNHCR and the NGO community contribute in ways they can to support democratic conditions and practices in the state of origin.

However, as in the case of root economic causes, UNHCR and the NGO community cannot address the root political causes of the conflicts which led to the outflow of refugees. Thus they can in no way ensure that political democracy will lead to social and economic democracy. In the words of Chabal: "I am not saying that elections are unimportant; merely that they are no substitute for effective political accountability."<sup>87</sup> Often the meaning of "an accountable state" turns out to be a state which can come to terms with the legitimacy crises and social protest generated by the implementation of a neo-liberal adjustment programme and greater integration into the world economy.<sup>88</sup> What is established is a system of polyarchy in which "mass participation in decision-making is confined to leadership choice in elections carefully managed by competing elites".<sup>89</sup>

I think the concerned non-Northern membership of international institutions and the NGO community need to understand and come to terms with the strategy of dominant states. The Northern states seek to use the humanitarian community to establish in post conflict societies a political system which is better equipped to manage the internal competition for material resources, without taking any step to withdraw at the

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<sup>84</sup> David Keen, *The Economic Functions of Violence in Civil Wars*, Adelphi Paper No. 320 (London: International Institute for Strategic Studies, Oxford University Press, June 1998), p. 13.

<sup>85</sup> Gorman and Kibreab, "Repatriation Aid", p. 68.

<sup>86</sup> UNHCR, *The State of the World's Refugees*, 1997, p. 168.

<sup>87</sup> Patrick Chabal, "A Few Considerations on Democracy in Africa", *International Affairs*, Vol. 74, No. 2 (April 1998), pp. 289-305 at p. 302.

<sup>88</sup> That it has to be neo-liberal adjustment becomes clear from the policy recommendations made to African countries by the UN Secretary-General: "If Africa is to participate fully in the world economy, political and economic reform must be carried out. It must include predictable policies, economic deregulation, openness to trade, rationalized tax structures, adequate infrastructure, transparency and accountability, and protection of property rights." UN Secretary-General, *The Causes of Conflict*, p. 19.

<sup>89</sup> William I. Robinson, *Promoting Polyarchy: Globalization, US Intervention, and Hegemony* (Cambridge: Cambridge University Press, 1996), p. 49.

international level measures (usually promoting a neo-liberal adjustment programme) which adversely affect the effort to augment and fairly distribute resources. To put it differently, the enormous commitment of the humanitarian community is, it would appear, being mobilized to sustain an unjust international system manifested periodically in crisis and conflict in the countries of the South.

This is not to suggest that the humanitarian community should stop offering assistance and protection to those in need or to promote democratic institutions but that it should be more aware of the function it has been assigned in the larger scheme of things and that it should critique from this perspective the practices of the Northern states. Academics, for example, have been alert to the possibility of their services being used to legitimize projects which bring little advantage to groups in whose name the project is implemented. "Anthropologists for Sale?" is the title of a recent essay. In it Ioan Lewis, Emeritus Professor of Anthropology at the London School of Economics, points to "the increasing use of anthropologists to *legitimate* development projects" and cautions against being "manipulated as required by powerful economic and political interests".<sup>90</sup> My intention here is simply to widen the scope and constituency of Lewis' appeal. In other words, international institutions and NGOs also need to reflect on the manner in which their services are used to sustain an iniquitous system.

## Conclusion

It has been my contention in this paper that the dominant states in the international system decide from time to time, in the light of their interests, which solution to the global refugee problem should be promoted as the preferred solution. Today, involuntary repatriation is coming to be pursued as a solution to the refugee problem because in the post Cold War era the rich Northern states see no reason to share the burden of the poor South at both the level of asylum and resources. Involuntary repatriation may thus be described as the favoured solution of the Northern states in the era of globalization which is marked by the end of the Cold War and a growing North-South divide.

I would, however, like to end by drawing attention to those situations where refugees want to go home but are unable to exercise their right to return. I have especially in mind the right of Palestinian refugees to return to their country of origin. A recent article in the *Harvard International Law Journal* has, in my opinion, persuasively argued that the right of Palestinian refugees to return to their country of origin rests on several alternative principles of international law which can withstand the different assessments of the factual circumstances of their departure.<sup>91</sup> I conclude by expressing the hope that the ongoing Middle East Peace process will see the right of return of Palestinian refugees realized in the near future.

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<sup>90</sup> I.M. Lewis, "Anthropologist for Sale?", in Akbar Ahmed and Cris Shore (eds.), *The Future of Anthropology: Its Relevance to the Contemporary World* (London: The Athlone Press, 1995), pp. 94-110 at pp. 100 and 101 (emphasis in original).

<sup>91</sup> John Quigley, "Displaced Palestinians and a Right to Return", *Harvard International Law Journal*, Vol. 39, No. 1 (winter 1998), pp. 171-229.

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