Taking "Voluntariness" Seriously: Legal Challenges Impeding the Syrian Refugees' Right of Return

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Since the end of the Cold War, dramatic increase in refugee caseloads resulted in growing international enthusiasm about promoting repatriation as the most preferred solution to problems of refugees. However, this emergent "repatriation culture" in the international refugee regime has increasingly undermined the principle of voluntariness. The present work introduces "burden-sharing" – an equitable distribution of global refugee protection responsibilities – as a key condition for voluntariness and makes two fundamental claims: (1) the international refugee regime needs to shift its focus to "burden-sharing" to prevent involuntary returns and (2) to ensure that returns are voluntary, burden-sharing must involve full protection for refugees in a safe state, either in the homeland or through integration elsewhere. The paper analyzes each claim in the context of the Syrian refugee crisis and concludes with a number of recommendations for addressing current and future challenges facing the global refugee regime in ensuring safe and voluntary return of refugee populations.

Introduction

According to the United Nations High Commissioner for Refugees (UNHCR), over six million Syrians have been internally displaced and more than five million seek refuge abroad since the beginning of the Syrian uprising (UNHCR 2017a). Currently, the vast majority of Syrians remain in five key countries: Egypt, Iraq, Turkey, Jordan and Lebanon. Despite Syria's continuing conflict, significant numbers of spontaneous returns to and within Syria were reported by UNHCR in June 2017. According to estimates, nearly half a million Syrians returned to their homes during the first six months of 2017, including 440,000 internally displaced and more than 31,000 refugees returning from neighboring countries (UNHCR 2017b). This development immediately put the repatriation of Syria's five million refugees on the international community's agenda. However, extreme caution should be exercised while assessing these self-organized returns as UNHCR data (2017a) indicates that far more refugees are leaving Syria than are returning home. From January through May of 2017, the number of registered Syrian refugees increased from 4.9 to 5.1 million which demonstrates that promoting large-scale returns is currently ill-advised and creates a narrative that is open to exploitation by host and donor states who wish for a quick solution to the Syrian refugee situation.

The present work engages in an international law analysis of the Syrian refugee crisis with a focus on the concept of "voluntary repatriation". Voluntary repatriation has been widely discussed in the literature as one of the durable solutions for refugee situations (Gerver 2014; Hathaway 1997; Rogge 1994; Stein 1990; Zieck 1997). As emphasized by Gerver (2016), Long (2013) and Barnett and Finnemore (2004), what complicates effective implementation of this measure is the problem of refugee consent. The "voluntary" in voluntary repatriation refers to the principle that the refugee should consent to return to the country of origin that in his/her view no longer represents a threat to personal safety (Barnett 2001). While voluntary repatriation originally required refugee consent, as the end of Cold War swelled refugee caseloads, states have increasingly become less willing to house the growing number refugees and more interested in seeing them speedily return home. The distressing implication was that refugees began to face growing pressure to return to their home country that is deemed to be "improving" or "safe". These new developments in the refugee regime made repatriation possible under less than ideal conditions, creating circumstances that can potentially lead to refoulement and involuntary returns. In this context, the paper argues that since the end of the Cold War, the international refugee regime has evolved into a system of deterrence and containment which is marked by a growing enthusiasm for repatriation with a general decline of voluntariness.

This article recognizes the difficulty of operationalizing true voluntariness. For one, the assessment of the situation in the country of origin is a highly subjective process, especially in cases like Syria where the conflict is protracted and switches back and forth between high- and low-intensity. Refugees might choose to return even in non-ideal circumstances if their subjective assessment of the situation in their home country makes returning a more attractive option than remaining in exile. Further, in cases where refugees establish close social, economic, and personal ties with their host states, establishment of conditions of safety in the country of origin should not automatically lead to an assumption that repatriation will take place unless refugees voluntarily choose to do so.

The ethical bottom line adopted by this article points to three criteria that must be fulfilled to ensure voluntariness in repatriation. First, refugees must be free from pressure in the host country and must not be physically coerced into returning. Second, they must be fully informed of the circumstances in the home country in order to make an informed decision. Voluntariness of any given decision becomes questionable if individuals act without having

access to all relevant and necessary information about prospects of reintegration, reconciliation, restitution of property, etc. (Long 2013, 161-162). Third, voluntariness requires the availability of a choice which refers to the need to provide refugees with alternative solutions to their plight (Long 2013). They must have at least one option that ensures an acceptable level of welfare and safety which, at a minimum, includes freedom from fear of persecution and access to sufficient food, shelter, education, medical care and other basic rights (Gerver 2017, 635).

What strategies should the international refugee regime incorporate to ensure effective implementation of these criteria? The present work makes two claims: (1) the international refugee regime needs to shift its focus to "burden-sharing" to prevent involuntary returns and (2) to ensure that returns are voluntary, burden sharing must involve full protection for refugees in a safe state, either in the homeland or through integration elsewhere. Burden-sharing represents an understanding that refugee issues are of concern to the entire international community which is expected to step in and share the burden when large refugee flows place a disproportionate burden on the countries of first asylum. Where the volume of refugees exceeds the capacity of countries of asylum, refugees are forced to choose between either living under circumstances underpinned by lack of access to basic needs such as education, primary healthcare, clean water, shelter and nutrition or forcibly returning to an unsafe home country. Their choices are, therefore, involuntary as they are forced to choose between two unacceptable alternatives. Burden-sharing is a key way in which states can cooperate to work towards a fair distribution of refugee protection responsibilities. In this way, states would be more likely to provide for refugees which, in turn, would make it more likely for refugees to engage in voluntary returns.

There is a growing literature that points to the relatively empty terminology of "voluntariness" in refugee repatriation in today's political climate. While some studies discuss state obligations concerning voluntary repatriation (Bradley 2013; Carens 2010; Ullom 2001), other literature focuses on individual motivations of refugees who repatriate (Gerver 2015). This article diverges from the current literature by introducing burden-sharing as a key factor in ensuring voluntariness in repatriation.

The paper primarily makes a case regarding the emergent "repatriation culture" in the international refugee regime and the associated risks for refugee rights. The rest of the article is structured around the two

aforementioned claims. First, the paper focuses on the question of what burden-sharing is and why it is a key condition for voluntariness. Second, a closer look at the Syrian refugee crisis is provided in the context of the relationship between specific burden-sharing mechanisms and prevention of involuntary returns to Syria. Third, the paper discusses how burden-sharing is necessary to provide refugees with protection in a safe state and critically analyzes the current proposals for creating safe zones inside Syria for refugee repatriation. The paper concludes with a discussion on the urgent need for refugee law reform and offers several proposals for addressing current and future challenges facing the international community in ensuring safe and voluntary return of refugee populations.

Taking "Voluntariness" Seriously: The International Legal Framework

International law does not provide much guidance on how to operationalize voluntariness. Voluntary repatriation was not addressed by the 1951 Refugee Convention. The Convention (Art. 1, Sect C) only indirectly refers to the requirement of voluntariness by stipulating that refugee status ceases if refugees voluntarily reestablish themselves in the country of origin. UNHCR provides detailed explanation of voluntariness in both its 1996 and 2004 handbooks on voluntary repatriation. According to the 1996 handbook, voluntariness means "not only the absence of measures which push the refugee to repatriate, but also means that he or she should not be prevented from returning…implying an absence of any physical, or material pressure." UNHCR's definition determines voluntariness largely through the absence of coercion, which stems from the strongly institutionalized status of non-refoulement, the obligation not to forcibly return refugees, as a non-derogable norm under the 1951 Convention. The definition, however, denies refugees the agency to determine the nature of their return. Nor does it require that refugees be offered a choice of solutions to their plight (Long 2013, 158).

The problem with UNHCR's approach originates from the fact that having the freedom to act (absence of coercion) does not automatically translate into having the freedom to choose to act (availability of a choice). For example, a refugee has the freedom to return to his or her country of origin where the circumstances are less than ideal, but this is not a voluntary choice if the alternative is to stay in the camps and live below the subsistence level in the country of asylum. However, if a refugee is able to lead an independent life with full protection and rights in the country of asylum and still chooses to repatriate fully informed of the less than ideal circumstances

in the country of origin, then the freedom to return in this case amounts to a voluntary repatriation. A voluntary choice must not only be the one which an individual is free to make, but one which is measured against "an acceptable alternative" (Olsaretti 2004). In other words, refugees can voluntarily repatriate if they are fully informed about the risks of repatriating, are not physically coerced into returning and have access to "at least one option" that ensures an acceptable level of welfare and safety (Gerver 2017, 635). In broad terms, the available options must include either an acceptable alternative to return such as continued asylum or resettlement, or an acceptable option of return which would enable the refugee to smoothly reintegrate into the political and socio-economic fabric of his or her home country.

Within the framework of these options, ensuring voluntariness requires UNHCR and the international community to offer refugees a choice between solutions as well as encourage their involvement in negotiations concerning the conditions of repatriation. The agency of refugees, however, has not suited the international community's agenda in the post-Cold War period, leading to the infringement of the original principles guiding voluntary repatriation. Gradually, a hierarchy of solutions emerged within the international refugee regime with repatriation on top, and the belief that asylum was the most humane solution was replaced by the view that individuals had a legal and moral right to return home (Barnett and Finnemore 2004, 96).

The doctrinal shift toward repatriation resulted from the changing international political circumstances in the 1980s and 1990s which had direct repercussions for UNHCR's repatriation policy. The 1951 Refugee Convention was drafted in the Cold War context where ideological considerations made asylum and resettlement desirable. Until the late 1970s, refugees were typically from a communist bloc country attempting to escape to the West. Sending them back was politically and ideologically unthinkable for Western governments (Barnett and Finnemore 2004, 94). However, towards the late twentieth century, most refugees were from the developing world, escaping different kinds of conflicts and disasters. They were no longer seen as strategic assets but an economic and political burden (Barnett and Finnemore 2004, 96). Refugee admission and resettlement policies throughout the Western world have become more restrictive because of the ever-expanding number of asylum requests. Meanwhile, UNHCR's financial health worsened because of the dramatic increase in the number refugees which outstripped voluntary contributions by states. These developments

gradually encouraged UNHCR to view repatriation as the more humane alternative.

Throughout the 1990s, the High Commissioners consistently emphasized repatriation as the most desirable solution to the problems of refugees and displaced persons. In his statement to the Executive Committee on October 1, 1990, High Commissioner Thorvald Stoltenberg announced, "My first ambition is that UNHCR should be prepared to seize all the possibilities for voluntary repatriation, which is the best solution for refugees, the most productive use of resources, and a concrete contribution to peace and stability" (UNHCR 1990). Likewise, his successor Sadaka Ogata, in her 1993 speech at the World Conference on Human Rights, stated, "Voluntary repatriation, whenever possible, is the ideal solution. This is why I have stressed the refugees' right to return home safely and in dignity" (UNHCR 1993).

These statements help explain why, since the 1990s, UNHCR's repatriation policy revolved around the discourse of "home" and development of new concepts like "safe return" rather than "voluntariness". The agency's growing interest in refugee-producing states was accompanied by a of policy of mainstreaming the idea of "safety" which offered states an objective standard for return as well as a legitimate ground to dismiss refugees' concerns regarding repatriation. By leaving the question of who should determine safety unanswered, this emergent repatriation culture undermined the political agency of refugees and created a system that is highly susceptible to manipulation by outside actors who are often quick to proclaim a country of origin "improving" or "safe" for return. This situation explains why UNHCR's current repatriation policy might represent a potential threat to refugees.

Burden-Sharing as a Condition for Voluntariness

There are a diverse set of reasons for states to normatively commit to refugee protection. While neo-realists, such as Waltz (1979), argue that states baulk at cooperation unless they expect to gain more than others in the international system, others, such as Keohane and Nye (1977), argue that mutual benefits arising out of cooperation is possible. Cooperation organized in "institutions" or "regimes" constrain state behavior by setting principles, norms and rules around which expectations of actors converge on a certain issue area. Regimes do not play a role if states think they can realize their interests unilaterally. Rather, regimes reflect states' desire to coordinate their

actions with those of other states when such coordination is necessary to overcome collective goods dilemmas such as arms control, the environment, or international trade.

The international refugee regime serves the same purpose. Refugee protection is not only a humanitarian issue, but also a collective good. States collectively benefit from the availability of refugee protection because failure to act creates a conducive environment for the emergence of threats to national security, economic and political stability, and social cohesion. Continued benefits of refugee protection depend on governments' continued reciprocal commitment to support refugees in the form of asylum, resettlement, financial aid or a collective effort to improve conditions in refugees' home country.

During the relatively manageable waves of political refugees from World War II, the international community, particularly the West, complied with the architecture of reciprocal support which maintained the stability of the international refugee regime. Repatriation, throughout the Cold War, was not clamored for by Western governments as the perceived political and strategic benefits of hosting refugees from the communist bloc outweighed the possible economic and social costs. The complex realities of the post-Cold War era gave rise to mass refugee movements in the Global South and changed the perceptions about refugees who are now seen by the West as imposing social, political and economic costs with no compensating benefits.

As Young (1983) suggests, international regimes are not static constructs, but undergo continuous transformations in response to changes in their political, economic, and social environments. While the Cold War circumstances favored sharing the burden of refugee protection, post-Cold War circumstances significantly affected the compliance mechanisms and created strong incentives for burden-shifting. The stability of the global refugee regime is, thus, being threatened as state parties now view the narrow realist pursuit of national interest as more favorable than making a reciprocal commitment to refugee protection. As burden-shifting increases, options available to refugees in their quest to find safety and welfare decrease which directly affects voluntariness in repatriation.

The Syrian refugee crisis strikingly illustrates the transformations that the international refugee regime has undergone since the end of the Cold War and demonstrates the consequences of burden-shifting for voluntariness. The speed and scale of Syrian displacement have been

exceptional with 11 million Syrians on the run internally and outside of Syria since 2011. In early 2011, when a series of protests and demonstrations began sweeping the Middle East and North Africa, few saw the uprising in Syria coming. As the leader of the anti-imperialist "resistance camp" in the region, the Syrian President Bashar Al-Assad was confident that Syria would remain stable thanks to his reserves of goodwill both domestically and regionwide unlike his deposed counterparts, Mubarak and Ben-Ali, who were widely seen as American puppets (Gelvin 2012, 101). The influx of Syrian refugees has happened so suddenly and increased at such a rapid pace that the strain on Syria's neighbors quickly magnified to unmanageable levels.

As the Syrian refugee emergency shows no sign of coming to an end, the five key states hosting Syrian refugees, Turkey, Jordan, Lebanon, Iraq and Egypt, have become increasingly impatient with the economic and political costs placed on them by the large-scale and long-term refugee populations living in their territory. Moreover, the presence of a growing number of refugees is barely, if at all, tolerated by host country citizens who put pressure on their respective governments to repatriate refugees as quickly as possible. Many Syrians in Jordan, Lebanon, Egypt and Turkey are being forced to return to Syria involuntarily and those who are able to stay are facing serious protection gaps ranging from provision of basic needs to being socially stigmatized. The fact that the current volume of Syrian refugees outstrips the capacity of five key receiving states is the primary reason behind involuntary returns arising from violations of non-refoulement obligations. While all states are bound by the principle of non-refoulement based on its status as a norm of customary international law, its enforcement in the context of large-scale refugee crisis, like the one triggered by the conflict in Syria, becomes problematic in the absence of an effective global responsibility sharing framework.

Global responsibility sharing with respect to refugee protection is not without legal basis. The Refugee Convention emphasizes that the fundamental principle of the refugee regime is international cooperation. Burden-sharing is enshrined in the Preamble to the Convention:

> Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

Specifically, burden-sharing refers to situations where states take on responsibility for refugees who would strictly fall under the protection of other states (UNHCR 2011). It represents an approach towards refugee obligations that is underpinned by international solidarity and shared responsibility (Boswell 2003). In this respect, burden-sharing is crucial to the fulfillment of non-refoulement obligations. Mechanisms of burden-sharing generally include financial assistance and resettlement. States, however, often consider aid to refugees abroad as an act of goodwill and generosity rather than an obligation which creates discrepancy in burden-sharing (Betts 2009; Parekh 2016). Since it is mainly the Global South that is on the move, an overwhelming burden is put on the countries of first asylum in the developing world, while the wealthy countries of the West focus more on providing humanitarian assistance as a method of keeping refugees near the crisis zones. This situation leads to problems such as increasing risk of refoulement and long-term encampment. Without any means to return to their own country or seek asylum elsewhere, exercising voluntariness becomes unattainable for refugees who are trapped in legal systems which deny them the right to lead independent lives and fail to protect them from abuse by members of the receiving population (Democratic Progress Institute 2016).

Burden-Sharing and the Syrian Refugee Crisis: A Closer Look

The principle of non-refoulement is enshrined in Article 33 (Sect. 1) of the Refugee Convention which stipulates that "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The Convention, in its Introductory Note, emphasizes the non-derogatory character of non-refoulement by stating that "the principle of non-refoulement is so fundamental that no reservations or derogations may be made to it."

Among the five key states hosting Syrian refugees, only Turkey and Egypt are parties to the Refugee Convention. Jordan, Iraq and Lebanon are still required to fulfill their non-refoulement obligations under customary international law. As the Syrian conflict has devolved into a stalemate, the protection space available to refugees is continually diminishing. The five key receiving states have already begun to actively limit the number of Syrians permitted to seek asylum in their territory, either directly through

forcible returns to Syria or indirectly by closing borders altogether and denying entry (Sanderson 2013, 778).

Egypt is a party to the Refugee Convention but has no established domestic asylum law necessary to fulfil its international obligations. UNHCR administers refugee protection in Egypt in accordance with the memorandum of understanding signed between UHCR and Egypt in 1954 (Akram et. al. 2015, 80). In July 2013, the Egyptian government imposed a new visa policy which required Syrians to acquire visas to enter the country. Previously, Syrians were freely granted renewable visas upon entry. Since the Egyptian Embassy in Damascus was not issuing visas at the time due to lack of security in Syria, the new policy essentially stopped the flow of Syrians to Egypt. Human Rights Watch (2013) reported that Syrian refugees were detained and coerced to return on grounds of national security threats or immigration violations. Egyptian authorities denied the accusations and claimed that entry visa requirements would soon be dropped. Yet, the policy is still in effect as of September 2017.

Jordan is not a party to the Refugee Convention and like Egypt has no established domestic refugee law. Refugees in Jordan can register with UNHCR to have access to humanitarian aid and basic services such as public healthcare and education. However, Jordan's national legislation avoids any official recognition of a refugee status. Those fleeing Syria are referred to as "foreigners" or "visitors" and provided temporary residence until securing a resettlement space to a third country (Democratic Progress Institute 2016). Refugee Council USA Mission to Jordan (2015) reported that the Jordanian border has been closed to Syrian refugees since the end of 2014 due to security concerns, and of the limited numbers who are able to reach Jordanian territory, many are quickly returned to Syria, without access to UNHCR or appropriate procedures for processing their claims.

Lebanon is currently hosting the largest ratio of refugees to citizens of any country in the world which puts substantial strain on its economy and infrastructure. It is not a signatory to the Refugee Convention and, like Egypt and Jordan, lacks a formal domestic asylum policy. Since the beginning of the crisis, Lebanon's actions towards Syrian refugees are governed primarily by *ad hoc* policies. Signed in 2003, Lebanon's memorandum of understanding with UNHCR specifies that Lebanon is not a country of asylum and that refugees are not entitled to a permanent stay in the country but must be resettled (Akram et. al. 2015, 29). Overwhelmed by an influx of more than 1 million refugees, Lebanon has been restricting the entry of Syrians since

August 2014 both to ensure security and to ease the burden placed on its economy.

Turkey hosts the largest number of refugees. As of January 2018, the number of refugees in Turkey reached over three and a half million. Turkey is a party to the 1951 Convention and unlike other refugee hosting states, has established relevant domestic legislation to process refugee claims. The problem with the Turkish system is that Turkey has acceded to the Refugee Convention but retained the "geographical limitation" whereby only the asylum-seekers arriving from Europe are protected by the Convention (Akram et. al. 2015, 101). Thus, Turkey's status as one of the contracting parties has no practical effect on the rights of those arriving from Syria. Syrians are granted temporary protection under the 2013 Law on Foreigners and International Protection (LFIP) which provides refugees with the right to a lawful stay in the country until safe return conditions are established and grants access to services such as education, healthcare, and employment (Icduygu 2015). LFIP provides a strong legal basis for preventing refoulement, but Turkey's compliance record with the principle of non-refoulement is questionable. In April 2016, Amnesty International reported that Turkey had been expelling groups of around 100 Syrian men, women and children to Syria on a near-daily basis since mid-January 2015.

What explains the international community's collective failure to protect Syrian refugees from forced returns? The current situation results partly from fragmented national legal frameworks and the fact that the Syrian refugee crisis has been uncoordinated and unbalanced. Although the vast majority of Syrians fulfill the criteria of refugees as set out in the Refugee Convention, the level of protection offered to them is entirely at the discretion of the host country governments. The Refugee Convention does not set legal obligations for states to provide protection in the form of either granting asylum or aiding and resettling refugees through UNHCR. The Convention "recommends," but does not "obligate" states to "continue to receive refugees in their territories and act in concert in order that refugees may find asylum and the possibility of resettlement." In Article 33 (Sect. 2), the Convention provides an exception to the principle of non-refoulement when "there are reasonable grounds for regarding (a refugee) as a danger to the security of the country in which s/he is… or (s/he) constitutes a danger to the community of that country". The key refugee receiving countries justified their decisions to restrict entries by Syrians mainly based on this provision.

The bigger problem, however, is that the situation in hand has built up to refoulement because of the lack of an effective global responsibility sharing framework. Despite the flaws in their domestic legislations, or lack thereof, Turkey, Lebanon, Jordan, Egypt and Iraq responded to the influx of Syrian refugees with outstanding generosity. As of January 2018, one in six people in Lebanon is a Syrian refugee, and one in sixteen people in Jordan is a Syrian refugee (UNHCR 2018). Iraq is struggling with the influx of Syrians on top of more than 1 million internally displaced Iraqis due to Iraq's own ongoing insurgent conflict. Turkey, which hosts more than 3 million refugees, faces increasing tensions between refugees and local communities due to the strain on national structures and resources. Under these circumstances, it is not realistic to expect such generosity to persist indefinitely. Rather, the solution lies in the development of strategies to relieve the burden on Syria's immediate neighbors to stop forced repatriations, while simultaneously working on long term plans to establish permanent peace in Syria to ensure sustainable return of refugees.

Burden-sharing has been considerably limited in relation to the Syrian case. According to UNHCR's 2017 Progress Report regarding the response to the Syria crisis, the US, Germany and the EU are the top three donors of Syria humanitarian appeals, followed by the UK, Norway, Canada, Japan, Sweden and Denmark. The UN's Syria appeals, however, remain chronically and severely underfunded. The 2016 and 2017 humanitarian appeals for Syrian refugees were 56% and 53% funded respectively. Syria situation grand total funding for 2012-2017 remained 61% with 39% funding gap (UNHCR 2017a). As the war drags on, donors are increasing their contributions, but the percentage of needs they meet is decreasing due to both the growing numbers of Syrians fleeing their homes and the rapidly decreasing capacity of the key receiving countries to provide for them. If refugees neither have an acceptable option of return, nor an acceptable asylee status as an alternative to return, then they must be provided with the option of resettlement in a third country to be able to exercise voluntariness in repatriation. Yet, state action is even more lacking when it comes to burden-sharing in the form of resettlement.

According to Amnesty International (2016), as of late 2016, the total number of resettlement and other admission pathways pledged globally since the start of the Syria crisis is 224,694 which equates to a mere 4.7% of the total population of Syrian refugees in Lebanon, Jordan, Iraq, Egypt and Turkey. Outside the Middle East, the most generous resettlement offer was provided by Germany which admitted 43,500 Syrians under resettlement

and humanitarian admission programs since 2013. Other EU states have pledged around 60,000 places for Syrian refugees since 2013, around 1% of the Syrian refugee population in the main host countries (European Resettlement Network 2017). The U.S. resettled nearly 18,000 Syrian refugees during fiscal years 2012-2017 (U.S. Department of State 2017). In March 2017, the Trump Administration imposed a 120-day freeze on the U.S. Refugee Admissions Program which was only resumed in October 2017. Since then, the flow of refugees to the US has slowed dramatically with only 11 Syrian refugees resettled in the US in 2018. Inside the Middle East, the Gulf States did not offer any resettlement places to Syrian refugees. According to UNHCR (2018), approximately 10% of the Syrian refugee population are in need of resettlement which amounts to a total of 478,170 Syrians in Egypt, Iraq, Jordan, Lebanon and Turkey.

The Syrian situation provides strong evidence that the current approach of the international community towards burden-sharing overwhelmingly prioritizes financial assistance over resettlement which indicates a strong determination to prevent refugee arrivals to countries outside the Global South. This points to what Betts (2009) calls a "North-South impasse" which refers to the gap between the Global North and the Global South in terms of sharing the burden of providing protection to refugees. The post-Cold War refugee regime implicitly confers greater responsibility to those who are near crisis zones than to those that are far (Betts 2015). Currently, there are 22.5 million refugees worldwide and 86% of the world's refugees are hosted in developing countries. Turkey, Pakistan, Lebanon, Iran and Uganda are the top five host countries, hosting, as of January 2018, approximately 7.3 million refugees (UNHCR 2018). The reluctance of distant states to share the protection responsibilities threatens the economic and social fabric of host countries and traps refugees in systems where they are unable to independently sustain themselves and are at constant risk of forcible return. Without an acceptable option available that provides refugees with adequate welfare and safety, they essentially constitute a disenfranchised periphery, become vulnerable to assault and abuse, being infiltrated by militant networks, and, in desperation, turning to crime and conflict themselves (Democratic Progress Institute 2016).

Burden-Sharing: Safe States vs. Safe Zones

Burden-sharing is vital to prevent refoulement and provide refugees with acceptable alternatives to return where conditions conducive for safe refugee returns are not in place. Burden-sharing is also crucial to provide

refugees with an acceptable option of return which requires a collective international effort to address the root causes of refugee flows. Based on the criteria to be fulfilled to ensure voluntariness, any international effort to create conditions conducive for safe refugee returns must include accurate and objective communication of the information on the conditions in the country of origin to the refugees.

Addressing the root causes of refugee flows, especially given Syria's uncertain political outlook, requires formation of a comprehensive framework that enshrines restoration of effective national protection and full political and socio-economic reintegration for all displaced people. In this regard, challenges of voluntary repatriation range from technical issues such as rebuilding infrastructure and providing basic services to political processes such as cessation of hostilities, reconciliation and addressing injustices. Since the basic administrative, economic and judicial infrastructure of the country of origin is often dysfunctional in protracted conflict situations, involvement of the international community is necessary to address these challenges.

From a strategic standpoint, collective dedication of resources to the creation of effective conflict resolution and economic and political reconstruction mechanisms in countries at war solves a pressing collective goods dilemma: elimination of the refugee crisis and reestablishment of global stability. From a legal perspective, on the other hand, mitigating violent conflict by providing legitimate mechanisms for the resolution of grievances constitutes a binding obligation for the international community. Under international humanitarian law, the Fourth Geneva Convention (Art. 132, 133, 134) and its related Protocols contain rules aimed at implementation of the general right of return of displaced persons following the cessation of hostilities in armed conflicts. Therefore, it is crucial that refugees' right of return be recognized and coordinated as an integral part of any comprehensive peace settlement concerning the war in Syria. Where repatriation forms a part of a peace plan, the Syrian refugee community should be included in negotiations so that they are fully informed about the possible challenges of choosing to repatriate and that their concerns are incorporated into the decision-making procedures.

Building sustainable peace is challenging in societies, like Syria, that are deeply divided along political, ethnic and religious lines. The final settlement should be designed in accordance with the rules of international humanitarian law, which requires the commitment of all warring parties to

comply with the terms of the peace plan they negotiated as a precondition for setting road maps for the protection of civilians, including refugees and internally displaced people. Over the course of the Syrian war, there has been several international peace initiatives, but they failed to provide a durable solution due to the irreconcilable, multi-faceted agendas pushed by various internal and external actors which turned Syria into a global power game of chess. Currently, the Syrian peace process is pursuing a dual track strategy in which two separate, but complimentary negotiating platforms are taking place in Astana, Kazakhstan and Geneva, Switzerland. While the Astana talks are aimed at de-escalating violence and securing a ceasefire, the talks in Geneva are aimed at establishing a broader political settlement in Syria. Both processes gain their legitimacy from the UN Security Council (UNSC) Resolution 2254 (2015) which was adopted in December 2015 and established a broad international consensus on a timetable for UN-facilitated talks between the Syrian government and the opposition. However, given the complex web of relations between the warring parties in Syria and their foreign backers, both initiatives face compelling legal and political challenges that complicate the task of creating a secure environment for sustainable refugee returns.

The latest initiative aimed at reducing violence in Syria was introduced in May 4, 2017 as part of the Astana talks under the sponsorship of Turkey, Russia and Iran. The plan calls for the cessation of hostilities between government and opposition forces in four so-called "de-escalation zones" in mainly rebel-held areas of Syria, with Turkey, Russia and Iran to act as guarantors. In December 2016, the UNSC adopted Resolution 2336 in support of the efforts of Russia and Turkey to end violence in Syria, yet Russia's efforts to secure a Security Council endorsement for the establishment of de-escalation zones have so far yielded no result.

The new de-escalation areas are viewed by the three guarantor countries as a step towards establishing safe zones into which refugees can be repatriated. The May 4 agreement specifically mentions refugee returns as one of the purposes of the establishment of de-escalation zones. In fact, establishment of safe zones in Syria to harbor the internally displaced as well as to stem the flow of refugees has been on the international community's agenda since 2012. The proposal for a no-fly zone in northern Syria was introduced by Turkey first in 2012, then again in early 2016 with the primary purpose of protecting civilians from regime-perpetrated barrel bombs. Nonetheless, the legality of both proposals was called into question in the absence of either the Syrian government's consent or a UNSC authorization.

In the face of strong opposition from Russia and China, which precluded any possibility of UNSC action, the anti-Assad coalition, composed of Turkey, the US, the EU and their Arab allies, failed to build an international consensus in support of the plan. Although the ongoing human atrocities in Syria provided the operation with moral justification, the humanitarian goals of the plan were met with suspicion due to the West's explicit anti-Assad rhetoric and military support for anti-regime rebels.

The deal reached in May 2017 has not yet received the endorsement of the UNSC, but Resolution 2336 approved the Astana process in principle. Furthermore, different from the plan for a no-fly zone, which was going to be unilaterally imposed on the Assad Government by the West, the plan for de-escalation zones was accepted by the Syrian regime which agreed to halt combat operations in the four designated areas. As far as humanitarian goals are concerned, both plans raise concerns regarding the protection of civilians from attacks. Establishment of safe zones under International Humanitarian Law is premised on the condition that all warring parties agree to set them up and respect their civilian character. Although the Syrian government and the opposition agreed to halt hostilities in the de-escalation areas, the deal was rejected by some rebel groups which calls the safety of the designated zones into question in the absence of full agreement of all parties to the conflict.

In July 2017, UNHCR reported that nearly half a million Syrians have returned to their homes during the first six months of 2017, including 440,000 internally displaced people and more than 31,000 refugees returning from neighboring countries. Some governments and aid agencies immediately linked these spontaneous returns to improving conditions of safety in Syria owing to the Astana deal (The Guardian 2017; CBS News 2018). The validity of these claims, however, is highly questionable. While "discernible reduction" in violence was reported in some parts of de-escalation zones, the UN Human Rights Council (2017) stated that fighting has continued, and some provinces have even witnessed escalated violence. Continued fighting was foreseen by the Astana deal itself which stated "Turkey, Iran and Russia would take all necessary measures to continue the fight against ISIL, Nusra Front and other entities associated with Al-Qaeda or ISIL within and outside the de-escalation areas." (Astana Memorandum 2016). The three guarantors agreed to deploy armed monitors on the ground to help secure the designated zones. Yet, absent agreement by all parties, the deployment of military forces to safeguard these areas risks attracting attacks from groups

excluded from the ceasefire, undermining the very purpose of the deal to protect civilians.

These details indicate that new de-escalation areas are not "safe zones" and it is the responsibility of the international community and UNHCR to prevent the internally displaced and refugees from obtaining a misguided sense of enhanced security in Syria. The problem lies with the idea of "safety" which has become highly susceptible to manipulation by states interested in removing refugee populations from their territory or preventing refugees from arriving to their territory in the first place. The Refugee Convention makes clear in Article 1C (5) that the refugee status ceases once the circumstances in connection with which a person has been recognized as a refugee have ceased to exist. This was confirmed in 1991 by UNHCR Executive Committee Conclusion 65 which stressed the applicability of cessation clauses "where a change of circumstances in a country is of such a profound and enduring nature that refugees from that country no longer require international protection and can no longer continue to refuse to avail themselves of the protection of their country."

The standard of "ceased circumstances" set by the 1951 Convention in effect confirms an "absolute" level of safety, so secure that it ends the refugee status altogether, in which case, safety can be considered an ethical substitute for voluntariness. However, if repatriation will take place at a lower threshold, then, for the requirement of voluntariness to be fulfilled, the refugee must be fully informed about the risks of repatriating and face no coercion to leave a host country where he/she has access to an acceptable level of safety and welfare. In other words, the very reason for setting such a high standard as "ceased circumstances" is the acknowledgement that determining safety is a subjective process and that relative safety can be a condition for return only if the decision to return remains in the hands of the refugee.

The case of de-escalation zones in Syria is not a case of "ceased circumstances". Nor does it meet the criteria for relative safety to be a condition for return as Syrians are already being exposed to forced returns and facing serious protection gaps, such as long-term encampment in host countries. More importantly, creation of temporary ceasefires in certain areas of a country at war should not be promoted as a substitute for one's right to leave his/her country and pursue asylum (Sidahmed 2017). Whether they are marked as safe or de-escalation zones, ceasefires and other cessations of hostilities are steps in the right direction for creating conditions conducive

for refugee returns. However, creation of these zones should not be used as a lure to move refugees back into a country in active conflict which is a direct violation of international refugee law.

The legal justification to declare conditions in Syria as "safe" or "improving" following the Astana deal originates from UNHCR's efforts to set out a concept of "safe return" in the mid-1990s which was aimed at establishing objective measurements of safety. The 1996 Voluntary Repatriation Handbook eventually provided a list of standards for "safe" refugee return which describes safe return as:

> Return which takes place under conditions of legal safety (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return), physical security (including protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites), and material security (access to land or means of livelihood).

The Handbook reveals an understanding of safety as a set of objective and measurable criteria which establishes "safe repatriation" as a process that can be externally judged and managed by international institutions (Long 2013, 166). In doing so, the Handbook negates the understanding that determining benchmarks for safety and measuring how the conditions in the country of origin compare to these is a subjective process and that refugees' understandings of safety may differ considerably from those of the international community (Long 2013, 166). Hence, in an ethically problematic way, relative safety that is judged by external actors, rather than the refugees, becomes the standard for return without relying on voluntariness.

The Astana deal, for example, contains several important humanitarian elements including the provision of rapid, safe and unhindered humanitarian access, creation of conditions to meet basic needs of civilians, and implementation of measures to restore basic infrastructure facilities such as water and electricity (Astana Memorandum 2016). While these explicit references to humanitarian services are welcome, provision of access to such material safety resources cannot be promoted as an incentive to encourage refugees back into a country in conflict (Weizmann 2017). The delivery of humanitarian aid has been an integral part of various ceasefire agreements brokered in Syria since early 2016. However, it was reported by the UN that both the Syrian government and the opposition forces were responsible for

delaying aid deliveries to civilians in violation of their obligations under international humanitarian law. Likewise, the UN Human Rights Council (2017) reported that the de-escalation plan was failing to achieve securing improved humanitarian access to civilians caught in the fighting and that the U.N. has only been able to make one humanitarian delivery in 2017. These circumstances indicate that safe zones or de-escalation zones cannot be promoted as an alternative to the right to seek asylum or used as a pull factor to move refugees in politically expedient directions.

Conclusion and Recommendations

The case of the Syrian crisis demonstrates that the more protracted a refugee situation becomes the harder it gets to garner international support to provide refugees with adequate protection. As the situation in Turkey, Iraq, Lebanon Jordan and Egypt indicates, this leads to "asylum fatigue" on the part of the countries of first asylum, which in turn, results in gradual erosion of protection standards and increasing pressure on refugees to involuntarily depart. Protracted refugee situations, as strongly exemplified by the Syrian case, have the potential to perpetuate cycles of violence into the future, provoking challenges such as infiltration of armed elements into refugee camps and militarization of refugees and internally displaced people due to inadequate protection and lack of prospects. Renewed conflict serves to cause more people to flee their homes, facilitating a negative spiral in which the failure to provide for refugees serves to create even more refugees (Democratic Progress Institute 2016). Thus, collective goods dilemmas, such as preservation of global economic and political stability, deteriorate. While burden-sharing is not sufficient to eliminate these problems entirely, incorporation of legally binding burden-sharing mechanisms into the international refugee regime would immensely help prevent involuntary returns and encourage collective efforts to reintegrate refugees into the state system, either in the homeland or in a third country. Based on this conclusion, the present research makes the following recommendations.

Solutions to the ongoing global refugee crisis must start with the recognition that the current refugee regime of the 1951 Refugee Convention is ineffective and outdated. Drafted at a time of relatively manageable waves of political refugees from World War II, the Refugee Convention has proven inadequate to handle the complex realities of the post-Cold War era which gave rise to mass refugee movements in the developing world in the late 20th and early 21st centuries. The 1980s and 1990s were marked by a notable change within UNHCR regarding how repatriation was understood in

relationship to other solutions. The emergent hierarchy of solutions and establishment of repatriation as the most desirable solution to the problems of refugees made the execution of repatriation operations possible under less than ideal conditions, opening the door to violations of refugee rights. The latest debate on the possibility of repatriating Syrian refugees to the so-called de-escalation zones in Syria perfectly exemplifies the extent to which barriers to repatriation are lowered.

What matters regarding the principle of voluntariness is not only that the situation at home has changed but that refugees have voluntarily consented to return (Betts and Loescher 2010, 122). The international refugee regime must be reformed based on this understanding. Since the current refugee law does not adequately address the concept of voluntary repatriation, there is a need for a new internationally binding agreement that would incorporate a clear definition of voluntary repatriation and corresponding state duties. The definition of voluntariness should not be stretched to the point that it violates informed consent. In cases where refugees are forced or pressured to return to their home country, UNHCR should strictly avoid promoting or facilitating any repatriation operation, even if it is under pressure by host and donor states to do so (Crisp and Long 2016, 146).

The international refugee regime should abandon the hierarchy of solutions established in the 1980s and 1990s. Under no circumstances, should repatriation be invoked as a ground for denying asylum or for refusing admission of refugees through resettlement programs. As the Syrian refugee crisis clearly demonstrates, the North-South impasse in the global refugee protection plays a major role in increasing the risk of refoulement. The current refugee protection system is based on the assumption that most of the responsibility should be borne by neighboring countries. The result is while the poorer countries of the Global South are being forced to bear the brunt of coping with the world's worsening refugee crisis, the Global North favors policies that contain and confine refugee populations in the Global South. Therefore, creation of a comprehensive framework of international cooperation and burden-sharing must be a central part of any effort to reform the refugee regime. Development of a system of fair distribution of refugee protection obligations requires the establishment of legally binding burden-sharing mechanisms based on state parties' wealth, resources and capabilities.

The biggest challenge facing reform efforts is the question of how to remove the incentives to engage in burden-shifting and encourage states to favor a system that spreads the responsibilities towards refugees. While legal reforms are steps in the right direction for a stronger refugee protection system, the problem of enforcement requires a normative shift in the way refugee protection is perceived internationally. The conventional view of refugees as a "burden" essentially originates from the imbalance in the current burden-sharing system which overwhelms states that are near the crisis zones and intimidates those that are far. In other words, the cost or benefit of refugees is the result of prevailing state policies rather than the innate capacity of refugees themselves (Betts 2015). A fair and predictable protection burden per state can provide governments with incentives to approach refugee flows as an opportunity rather than a challenge and develop policies which would allow refugees to make contributions to national economic and social development.

Finally, the current international refugee regime views refugees as passive recipients of outcomes negotiated in distant arenas of power rather than active participants of decision-making procedures that affect their future. Refugees are rarely consulted or represented in peace processes. Syrian refugees and internally displaced persons were not represented in either Geneva or Astana peace talks. Participation of refugees in peace negotiations is not only necessary for the consolidation of peace and post-conflict recovery, but also significant in terms of following ethical criteria with respect to determination of safety and voluntariness. Where repatriation forms a part of a peace plan, the refugee community should be included in negotiations either through direct participation or through representation by interest groups or non-governmental organizations. If formal representation is not possible, the host and origin countries, in collaboration with UNHCR, should establish consultation mechanisms so that the refugee community is kept informed about when and under what circumstances repatriation is warranted. Shifting decision-making authority away from those who are taking risks – the refugees themselves – would leave refugees at risk and open the door to violations of refugee rights (Barnett and Finnemore 2004, 100).

In the context of the Syrian crisis, refugee participation in the Geneva and Astana processes should be encouraged, where possible, through the use of Quadripartite Commissions in which refugees would take their place alongside UNHCR and countries of origin and asylum to negotiate the conditions for return (Crisp and Long 2016, 146-147). Refugees should also

be extensively involved in monitoring the safety. UNHCR should arrange for fact-finding visits to the country or origin by refugee representatives for the purposes acquainting themselves with the situation prevailing in their intended areas of return before making a final decision to repatriate (UNHCR 1996). Political settlements must also recognize refugees' role in post-conflict recovery and reconciliation processes. Refugees should be provided with access to transitional justice mechanisms and their role as active participants of peace-building activities should be facilitated (Yahya and Kassir 2017).

Most importantly, any political agreement must rest on the principle of refugees' right to choose. The Syrian conflict has dragged on for six years. In the meantime, many refugees have established close social, economic, and personal ties with their host states. In such situations, establishment of an acceptable option of return should not lead automatically to an assumption that repatriation will take place. Instead, refugees in these situations should be encouraged by UNHCR and countries of asylum to integrate into the political and socio-economic fabric of their host country. To ensure the cooperation of host countries, the international community should arrange economic support and preferential partnership agreements to help mitigate the costs of local integration efforts.

Although some Syrian refugees do engage in self-organized returns with full knowledge of conditions in their country of origin, from a legal and ethical perspective, the "voluntariness" of these returns is questionable. These spontaneous returns derive from the shortcomings of the current international refugee regime which traps refugees in a situation where they either have to endure harsh living conditions in exile or face coerced returns. UNHCR is correct that repatriation might become the preferred solution if the circumstances in the host country make continued asylum impossible. In view of deteriorating or unsafe conditions in a state of asylum, repatriation might seem like the more humane solution for refugees, but the issue at hand is whether the international community fulfills its duty to ensure refugees' safety by providing them with acceptable options. Repatriation is not voluntary and not the justifiable response even if the conditions in the country of origin are judged to be relatively better or "safer" than in the country of asylum. The fact that the country of asylum is no longer safe does not remove the international obligation to provide refugees with safety. Refugees, in that case, should be relocated – or provided with the option of being relocated – to a safe place through resettlement and other humanitarian admission pathways. Repatriation is voluntary only when a

choice is offered between return based on the refugee's own assessment of the situation in the home country and free movement to a place where the refugee judges they may best integrate and make their "home".

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