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Temporary Protection in Europe After 1990: The “Right to Remain” of Genuine Convention Refugees

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Temporary Protection in Europe After 1990: The “Right to Remain” of Genuine Convention Refugees

Davor Sopi^{*}

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I. INTRODUCTION

The wars of dissolution in the Former Yugoslavia from 1991 to 1995 created a refugee crisis on a scale unseen in Europe since the end of the second World War.¹ A chief aim of the aggressors in these wars of dissolution was to physically displace large numbers of people utilizing systematic terror campaigns of murder, rape, torture, and other forms of intimidation—collectively known as “ethnic cleansing.”² The goals of ethnic cleansing were to create ethnically “pure” territories within the republics, specifically those that previously confederated to form the Socialist Federal Republic of Yugoslavia (SFRJ), and to force the re-drawing of national boundaries to reflect the ethnic make-up of the newly devised majorities in these territories.

Until that crisis in Europe, the Convention Relating to the Status of Refugees³ (1951 Convention) and the Protocol Relating to the Status of Refugees⁴ (1967 Protocol) were the only legal foundations for refugee protection in the European context. In the years following the second World War, the 1951 Convention, setting high standards of eligibility, provided lasting protection for the predominantly political refugees that invoked its aid. The host countries provided stable shelter for those refugees, and their status as 1951 Convention refugees regularly led to permanent integration into a new society.⁵ Return to their home country, although the most favorable ending to their refugee status, was not a realistic option. As a result, the use of the cessation clauses of the 1951 Convention almost never became reality.

For the first time following the second World War, the disintegrating Former Yugoslavia presented the European States with a large number of refugees at one time. The 1951 Convention

1. See generally NORMAN L. CIGAR, GENOCIDE IN BOSNIA: THE POLICY OF “ETHNIC CLEANSING” (1995).

2. See *id.*

3. Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 137, 152 [hereinafter 1951 Convention].

4. Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, ¶ 2, 606 U.N.T.S. 267, 268 [hereinafter 1967 Protocol].

5. See *infra* Part II.C.

mechanisms, although adequate for the mainly “political refugees” of the second World War, were no longer adequate to meet the emerging post-war protection needs. Finally, in the 1990s, existing European refugee law and policies reached a breaking point.⁶ Not only did the European States consider refugee determination procedures to be overly burdensome, but there also were significant discrepancies in “burden-sharing” between the individual States.

In addition, the conflicting opinions and interpretations concerning the character of the war against Bosnia-Herzegovina and Croatia complicated the international community’s early political and humanitarian efforts. Ultimately, characterization of the conflicts in the Former Yugoslavia as “civil wars” ignited the European States strict position that those fleeing civil war situations were not 1951 Convention refugees, automatically excluding those fleeing the Former Yugoslavia from 1951 Convention refugee status. Nonetheless, people fleeing the horrors of aggressions against Bosnia-Herzegovina and Croatia were still in need of protection. The international community needed to find a compromise.⁷

Meanwhile, the international peace process included peace-keeping efforts and the provision of material assistance to people within active war zones. The peace-keeping process also was aimed at preventing large numbers of people from moving across

6. See, e.g., UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORD’S REFUGEES (1995).

At the end of the Second World War, everything was different. The war had wrought considerable damage and manpower was needed for rebuilding. Moreover, during the heyday of the Cold War, many European nations had strong ideological reasons for welcoming refugees. Today, the political and socioeconomic climate has changed. It has been years since growth was taken for granted. The emphasis now is on conserving what Europe has. Today’s high unemployment—12 million people jobless in Western Europe—exacerbates a growing tendency toward xenophobia. The European continent sees one racist attack every three minutes—and reception centers for asylum-seekers are all too often target. Meanwhile, Europe is producing refugees. With the Yugoslav crisis and the dramas unreeling across the Caucasus—in Georgia, Armenia and Azerbaijan, Chechnya—the continent of Europe now counts more than 6.5 million refugees.

Id.

7. See STANLEY HOFFMANN, THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION 195-206 (1996).

international borders,⁸ thereby forming the political foundation for Europe's introduction of a new "temporary protection" concept.⁹ This concept's legal foundation consisted of two premises: the obligation of a State not to produce refugee outflows, and the right of people to return to their home country.

The obligation of a State not to produce refugee outflows as an internationally recognized duty, as in the case of Bosnia-Herzegovina and Croatia, automatically landed on the Socialist Republic of Yugoslavia. Their political actions and military operations caused huge numbers of people to seek security in neighboring neutral countries. Based on the obligation of a State to provide a minimum standard of treatment for its citizens, and the obligation not to produce refugees, a new discussion concerning the "right not to become a refugee" emerged in refugee law. However, international law has neither established nor recognized this "right to remain" in the home country. In contrast, for those forced to flee their countries of origin, the "right of return" to their home countries became an internationally recognized human right that ought to be guaranteed. The exercise of this right of return was envisaged as the cornerstone of the concept of temporary protection.

In short, under a new concept of temporary protection, emphasis was placed on the prevention of refugee movements in the first instance, followed by the exercise of the right of return to the home country after a short period of protection in European countries. The entire concept was return-oriented. States were to use money that was saved on refugee status determination procedures, guaranteed to 1951 Convention refugees for peace-building and humanitarian operations, not only to assist the remaining population of Bosnia-Herzegovina to survive, but also to facilitate the return process of those sheltered in European countries.

This Article addresses problems inherent in the application of temporary protection to the large number of genuine 1951 Convention refugees from Bosnia-Herzegovina. After termination of their temporary protection status, such refugees usually had two

8. See JAMES GOW, TRIUMPH OF THE LACK OF WILL: INTERNATIONAL DIPLOMACY AND THE YUGOSLAV WAR 12-45 (1997).

9. *Id.*

options: return to their country of origin, usually to a place determined on the basis of their ethnicity as opposed to their place of former residence, or apply for permanent resettlement in the United States, Canada, or Australia.¹⁰ This Article concentrates on differences between return to the home country for 1951 Convention refugees and return to the home country for those given temporary protection. Analysis of the ongoing return process to Bosnia-Herzegovina, under the existing operational plan and related provisions of the Dayton Peace Accords,¹¹ reveals that the right of return offered to people under temporary protection does not satisfy internationally accepted requirements established for the voluntary repatriation of 1951 Convention refugees. First, return is not truly voluntary because the decision to return lies with the host State and not with the refugee. Second, the return process is not a true repatriation, but rather a relocation for ethnic purposes.¹²

This position is based two premises: actions that were taken violated refugees' rights to remain in their home country, and refugees' exercise of the right of return does not meet internationally recognized standards. This Article argues that refugees from Bosnia-Herzegovina who spent more than five years under temporary protection in Europe are in fact genuine 1951 Convention refugees and therefore should be granted regular 1951 Convention refugee status. In addition, these 1951 Convention refugees should be given the opportunity to remain in the country where they have already integrated their lives and established intentional residence. They should not be forced to return to their home country or forced to resettle in yet another country.

This Article will attempt to add a new perspective to the overall-positive idea of temporary protection, an idea aimed toward addressing the causes of refugee flight and prompting restoration of peace and security in the country of origin, ultimately leading to fast

10. See, e.g., *Bosnian Refugees: Hearing Before the Subcommittee on International Operations and Human Rights of the Committee on International Relations*, 104th Cong. (1995).

11. The Dayton Peace Accord, Nov. 21, 1995, Annex Seven, available at <http://www.usis.usemb.se/bosnia/dayton7.htm> (last visited May 1, 2001) [hereinafter Dayton Peace Accord].

12. See *infra* Parts III and IV.

and effective repatriation of those forced to flee. Keeping in mind the ultimate goal of the entire international peace process in Bosnia-Herzegovina, the results of this analysis will show that granting 1951 Convention status to genuine 1951 Convention refugees from Bosnia-Herzegovina would, in the end, better serve the lasting peace and the future prospects of the country. By granting 1951 Convention status and later applying the cessation clauses of the 1951 Convention, thereby securing the ultimate goals of refugee protection and repatriation, the international community would better protect refugees from involuntary and premature return and from forced application for permanent resettlement in overseas countries. A timely and truly voluntary return to Bosnia-Herzegovina, through the application of the cessation clauses of the 1951 Convention, would better serve the European States' ultimate goal of temporary protection. In addition, voluntary return of Bosnia-Herzegovina citizens to their original homes in their home State will incorporate a very important human element into the efforts for a lasting peace and stable future for Bosnia-Herzegovina.

Part II of this Article will first analyze the actual causes of migration from the Former Yugoslavia in light of the obligation of a State not to create refugee outflows. Part II shall then examine arguments for the "right not to become a refugee" in the context of the war in Bosnia-Herzegovina. Further, Part II will analyze related provisions of 1951 Convention, in particular the determination, application, and cessation provisions in cases of mass migrations.

Part III will analyze the normalization process of temporary protection in Europe. Here, detailed discussion of the legal framework of temporary protection and the actual effects of its application to genuine 1951 Convention refugees from Bosnia-Herzegovina supports the argument for granting regular 1951 Convention refugee status to the group of genuine 1951 Convention refugees under temporary protection.

Based on the conclusion that both political and legal foundations for implementing the concept of temporary protection failed to provide adequate protection for genuine 1951 Convention refugees, Part IV will address the right of return to the home country—the second legal foundation of the European concept of temporary protection. Through analysis of the actual process of return to

Bosnia-Herzegovina, this Part will illustrate that the return process is not truly voluntary. Rather, it is a relocation resulting in further ethnic division that contradicts the goal the international community originally envisioned when it first introduced the concept of temporary protection. Part IV will also briefly analyze the legal aspects of the possibility that genuine 1951 Convention refugees can remain in the host country upon a grant of regular 1951 Convention refugee status.

II. THE DEVELOPMENT OF THE CONCEPT OF TEMPORARY PROTECTION IN EUROPE AFTER 1990

A. *The Actual Causes of Mass Migrations from the Former Yugoslavia*

Beginning in 1991, radical Serbian nationalists in the newly-independent Republic of Croatia launched a strategic campaign to occupy forcefully large portions of territory within the internationally-recognized borders of Croatia and to establish a self-declared “Serbian Republic” within that country.¹³ Backed by the powerful Federal Yugoslav Army (JNA), Serb nationalists succeeded in occupying nearly a third of Croatian territory.¹⁴ In the process, thousands of non-Serb civilians were forcibly displaced from their homes and subjected to gross human rights violations. The international community later determined these acts to be extreme violations of the rules of warfare, and thus constituted crimes against humanity.¹⁵ The ultimate aim of extreme Serb nationalists in Croatia was to acquire, by force and displacement of civilian population, territories contiguously linked with Serbia proper, thus creating an enlarged Serbian state—a so-called “Greater Serbia.” Within this new state, nationalists could take unchallenged political, military, and social control.¹⁶ A major element of the Greater Serbia campaign involved a similar “divide and conquer” strategy for the neighboring

13. U.S. LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE (1994) (Croatia Country Report), available at <http://www.unhcr> (last visited Aug. 1, 2001).

14. *Id.*

15. HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 20-25 (1992).

16. ROY GUTMAN, A WITNESS TO GENOCIDE vii-viii (1993).

state of Bosnia-Herzegovina.¹⁷

Bosnia-Herzegovina was the most ethnically-mixed of the republics within the Former Yugoslavia.¹⁸ After independence was granted to the Former Yugoslav republics of Slovenia and Croatia in 1991, Bosnia-Herzegovina feared domination by the rump-Yugoslav states of Serbia and Montenegro. Thus, it sought and was granted status as an independent, sovereign state in 1992.¹⁹ The first state to grant recognition to Bosnia-Herzegovina was the Federal Republic of Germany.²⁰ Germany was followed by other countries and, finally, by the United Nations (UN).²¹ Once again, with the logistical and strategic support of the Federal Yugoslav Army, radical Serb nationalists within Bosnia-Herzegovina launched an aggressive military campaign that successfully occupied 70% of the territory of the newly formed state of Bosnia-Herzegovina.²² In places where military control was not achieved, the nationalists subjected the civilian population to large-scale siege warfare. Meanwhile, in areas under Serbian control, nationalists conducted a terror campaign that included arbitrary arrest, imprisonment in concentration camps, murder, rape, torture, forced labor, and other forms of extreme harassment and humiliation.²³ The result was large-scale displacement of the civilian population, a result that forced thousands of people to seek refuge in other countries.

17. S. REP. NO. 102-9892, at 129 (1992).

18. See generally ROY GUTMAN, A WITNESS TO GENOCIDE vii-viii (1993); CRIMES OF WAR-WHAT THE PUBLIC SHOULD KNOW? (Roy Gutman & David Reif eds., 1999) [hereinafter CRIMES OF WAR].

19. GUTMAN, *supra* note 16, at 4-6; see Alexandra McGinley, *The Aftermath of the NATO Bombing: Approaches for Addressing the Problem of Serbian Conscientious Objectors*, 23 *FORDHAM INT'L L.J.* 1448, 1473 (2000) (stating that the European Community recognized Bosnia-Herzegovina, Croatia, and Slovenia as independent states in 1992).

20. GUTMAN, *supra* note 16, at 7-8.

21. *Id.*

22. *Id.* at xxix.

23. FRANCIS ANTHONY BOYLE, *THE BOSNIAN PEOPLE CHARGE GENOCIDE: PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE CONCERNING BOSNIA V. SERBIA ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE* 30-39, 112-44 (1996).

B. The Obligation of a State not to Create Refugee Outflows and the Emerging Theory of the Right to Remain in the Home Country

Before addressing the issue of the State obligation not to create refugee outflows and the emerging theory of the right to remain in the home country in the specific context of Bosnia-Herzegovina, a brief overview of the current relationship between refugee law and individual state obligations is in order. A number of principles characterize and limit the legal significance of refugees in international law. On one hand is the principle of state sovereignty, a principle related to the ideas of territorial supremacy and self-preservation. On the other hand are humanitarian principles derived from international law and treaties.²⁴

Nevertheless, refugee law is an incomplete legal system of protection aimed at addressing specific situations related to a particular refugee crisis. Still, many refugees may be denied even temporary protection, and more importantly, the possibility of returning safely to their homes.²⁵ International surrogate protection of refugees is restricted and exclusively shields only a relative minority of those in need.²⁶ It is meant to serve as a temporary measure until a refugee is able to return to his home country or to find another permanent solution through resettlement. However, the reality of today's needs concerning forced migration is strikingly different from the solutions offered by international law.

The increasing diversity of modern refugee-producing phenomena and, in particular, their ability to deprive whole communities of basic needs such as food and shelter, as well as the state's formal protection, inevitably led to a reappraisal of the institutional means whereby assistance was offered to refugees.²⁷ International refugee law was established as the primary form of regulating and controlling

24. See generally GUY S. GOODWIN-GILL: *THE REFUGEE IN INTERNATIONAL LAW* (2d ed. 1996).

25. *Study on Human Rights and Mass Exoduses*, Sarudin Aga Khan, ¶ 5, U.N. Doc. E/CN.4/1987/15 (1987).

26. PATRICIA TUITT, *FALSE IMAGES—LAW'S CONSTRUCTION OF THE REFUGEE* 23 (1996).

27. See McGinley, *supra* note 19, at 1461.

such movements.²⁸ As such, refugee law has both directly and indirectly served as a guide in discourse about refugees.²⁹ The refugee movement from regions in the developing world to the west has been severely constrained by natural and formal barriers.³⁰ Even today, viable responses are limited, thus calling into question the continued function of the law in this sphere—at least insofar as it presently operates to define who is permitted to move between states and what qualitative movement should occur.³¹

A State does not bear any direct legal responsibility for a refugee exodus caused by that state's breach of its international obligations.³² However, States are bound by a general principle of international law not to create refugee outflows and to cooperate with other states in the resolution of such problems as they emerge.³³ As a general principle, States are obligated to treat their nationals in accordance with certain standards of human rights and to re-admit their nationals into their territories.³⁴ In the case of Bosnia-Herzegovina, where half of its citizens were uprooted by aggression, the responsibility for creating the refugee outflows is placed on the side of the aggressor, the Socialist Republic of Yugoslavia.

An analysis of the emerging "right to remain in the country of origin" theory helps establish a link between the inadequate measures taken to preserve and maintain peace in Bosnia-Herzegovina and the need to provide 1951 Convention refugee status for those who are genuine 1951 Convention refugees. The foundations for introducing the concept of temporary protection were: (1) measures to prevent the people of Bosnia-Herzegovina from becoming refugees in the first place; and (2) guarantees through the peace process to provide for a timely return to the home country. The latter was to be accomplished through complex measures by the international community aimed at

28. *See id.*

29. *See id.*

30. TUITT, *supra* note 26, at 1-3.

31. "At the same time as the future of refugee law is being questioned, the morality of its past life is under debate, particularly to the extent that it could be said to have helped create some of the present anomalies in refugee protection." TUITT, *supra* note 26, at 1-2.

32. *See* GOODWIN-GILL, *supra* note 24, at 140.

33. *See id.* at 149-64.

34. VIII ENCYCLOPEDIA OF INTERNATIONAL PUBLIC LAW 429 (1985).

effectively restoring a multicultural and democratic society in Bosnia-Herzegovina.³⁵ In reality, both of these efforts failed.

In a real and substantial sense, every citizen should have a right to remain in their country. After examining the issues of the right to remain, in the context of the practical problems and the obvious inadequacies of the international preventive peace process in Bosnia-Herzegovina, clearly those people whose right to remain in their home country was not protected should have been given a right to remain in the host country through the guarantees of the 1951 Convention.

In a statement to the Commission on Human Rights, Sadako Ogata noted the following:

The right to remain is implicit in the right to leave one's country and to return. In its simplest form it . . . includes the right to freedom of movement and residence within one's own country. It is linked also to other fundamental human rights because when people are forced to leave . . . a whole range of their rights are threatened, including the right not to be subjected to torture or degrading treatment and the right to privacy and family life.³⁶

A statement from the Report on Human Rights concerning the Former Yugoslavia interestingly notes that:

A large number of displaced people would not have to seek refuge abroad if their security could be guaranteed and if they could be provided with both sufficient food supplies and adequate medical care. In this context the concept of security zones within the territory of Bosnia and Herzegovina should be actively pursued . . . The argument that providing refuge . . . is to conform to the policy of ethnic cleansing cannot override the imperative of saving their lives . . . Thus far, European countries have agreed to provide refuge to only a small percentage of those whose lives are at stake. In order to ensure

35. See generally Dayton Peace Accord, *supra* note 11.

36. Sadako Ogata, Statement to the Commission on Human Rights (Mar. 3, 1993) (on file with author).

that providing refuge will not contribute to ethnic cleansing, it is essential to reaffirm and provide lasting protection for the right of return.³⁷

In Bosnia-Herzegovina, efforts to prevent a mass exodus of its population failed.³⁸ Either the lack of political power or restrictive interpretations of their mandates placed the international community and various international agencies in the field in a desperate position. They could either monitor the ongoing crime of genocide and the process of ethnic cleansing but not take any action, or they could assist people in need while simultaneously providing de facto support for the process of ethnic cleansing. Attempts to prevent movement of the population from Bosnia-Herzegovina, as in the cases of Srebrenica and Zepa, resulted in the horrifying crimes of genocide against the civilian population whose “right to remain in the home country” was supposedly protected by the United Nations Protection Forces (UNPROFOR).³⁹ In short, the international community never dealt with the causes of the war or effectively identified its motivation. Rather, the international community attempted to alleviate the resulting human suffering.

The dilemma is obvious. The right to remain is not a recognized human right, and, in some circumstances, enforcing such a right by making people risk their lives and stay in their country of origin would be contrary to the principles of human rights. As Guy Goodwin-Gill concluded, “[t]he ‘prevention of refugee movements,’ in particular where the emphasis is on stopping flight rather than removing causes, is no solution and, so far as it follows from the actions of other States, will often amount to an abuse of rights.”⁴⁰ In the context of Bosnia-Herzegovina, as in many other cases, all efforts

37. U.N. Division of Int’l Protection, 1st Spec. Sess., at ¶ 25(b)&(2), U.N. Doc. E/CN.4/1992/S-1/10 (1992).

38. See CRIMES OF WAR, *supra* note 18; PATRICK MCCARTHY ET AL., AFTER THE FALL, SREBRENICA SURVIVORS IN ST. LOUIS (2000).

39. See generally, T. Modibo Ocran, *How Blessed Were the UN Peacekeepers in Former Yugoslavia? The Involvement of UNPROFOR and Other UN Bodies in Humanitarian Activities and Human Rights Issues in Croatia, 1992-1996*, 18 WIS. INT’L L.J. 193 (2000).

40. Guy S. Goodwin-Gill, *The Right to Leave, The Right to Return and the Question of a Right to Remain*, in THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 103 (Vera Gowlland-Debass ed., 1996).

to remove the causes of flight failed and the right to remain was not protected to such an extent as to avoid the need for flight to find asylum.

As Goodwin-Gill notes:

The right to remain comprises the common or garden sense of not having to become a refugee, not having to flee, not being displaced by force or want, together with the felt security that comes with being protected. It is another way of expressing, in concrete terms, the connection between individual, community, and territory, but its effective realization depends upon human rights and development considerations that are staggering in their breadth. Perhaps this is the sort of challenge that we need for the next century.⁴¹

C. 1951 Convention Status Determination and its Application in the Cases of Mass Migrations

When thinking of refugees, people most often think of those who qualify as refugees under the 1951 Convention and 1967 Protocol. The word 'refugees' denotes those who are outside of their countries of origin, who reasonably believe that they are at-risk for serious harm if returned to their countries because of their political or civil status, and who can prove that the government of their countries of origin cannot or will not provide adequate protection.⁴² The adoption of the 1967 Protocol extended the 1951 Convention refugee definition by eliminating the 1951 Convention's specified geographical and time restrictions.⁴³ Based on different circumstances and needs in Africa⁴⁴ and Latin America,⁴⁵ the refugee

41. *Id.* at 104.

42. 1951 Convention, *supra* note 3, art. I.

43. *See supra* note 4.

44. Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, art. I, ¶. 2, U.N.T.S. 14691, available at www.unhcr.org/refworld/refworld/legal/instrume/asylum/ref_afre.htm (last visited Sept. 1, 2001).

... [t]he term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave

definition was extended in order to provide protection for a wider group of people forced to migrate from those specific areas. However, in the European context, the only valid framework under international law for refugee protection are the 1951 Convention and its 1967 Protocol.

For the purposes of this Article, it is important to highlight the essential elements a refugee claimant must satisfy in order to be recognized as a 1951 Convention refugee: (1) the claimant left his country of origin, or a stateless person left his country of habitual residence; (2) there exists an actual risk of harm in the country of origin; and (3) the claimant must prove a well-founded fear of persecution. Other required elements relate to an explicit link between the claimant's fear of persecution and an internationally recognized human rights violation, as well as an objective failure of the State's duty to provide protection to its nationals.

In addition, the risk of persecution must have a direct link to the claimant's race, religion, nationality, membership in particular social groups, or political opinions. In other words, the refugee's claim is judged by criteria related to unexpressed political opinions and explicit political action. There must also be an established need for international protection. Specifically, there must exist no possibility of reclaiming protection from the country of origin, no sound alternative such as acquisition of other citizenship, and no proof that a refugee committed a serious crime against humanity.

European States insist on a clear-cut distinction between 1951 Convention refugees and "de facto refugees."⁴⁶ De facto refugees are those fleeing because of civil wars or generalized violence.⁴⁷ People

his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality.

Id.

45. *Annual Report of Inter-American Commission on Human Rights 1984-85*, OEA/Ser L/II 66. Doc. 10. Rev. 1 at 190-93, available at www.unher.ch/refworld/refworld/legal/instrume/asylum/cnt_eng.htm (last visited Sept. 1, 2001). The Cartagena Declaration states that "people who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances which have seriously disturbed public order."

46. PIRKKO KOURLA & MARTINUS NIHOFF, *BROADENING THE EDGES, REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED* 157-58 (1997).

47. *Id.* at 159.

fleeing situations of civil wars and generalized violence are excluded from 1951 Convention refugee status on three grounds. First, governmental actions during civil wars or generalized violence do not constitute persecution because such actions are carried out in order to uphold law and order and to preserve the integrity of the national territory. Hence, governmental actions in civil wars and situations of generalized violence are not motivated by the race, religion, ethnic origin or political opinion of the victim as is required of 1951 Convention refugees.⁴⁸

Second, people fleeing situations of civil wars and generalized violence are not “singled out” for persecution as is required of 1951 Convention refugees. That is, *de facto* refugees are not usually persecuted individually due to individual characteristics such as race, religion, ethnic origin or political opinion. Rather, *de facto* refugees are victims of the general situation in their countries of origin.⁴⁹

Third, some argue that the principle of non-refoulement does not cover people fleeing situations of civil war and generalized violence.⁵⁰ This strict interpretation of the 1951 Convention results in a detailed, costly, and time consuming individual refugee status

48. See 1951 Convention, *supra* note 3, art. I(A)(2).

49. See GOODWIN-GILL, *supra* note 24, at 76.

Whenever large numbers of people are affected by repressive laws or practices of general or widespread application, the question arises whether each member of the group can, by reason of such membership alone, be considered to have a well-founded fear of persecution; or does persecution necessarily imply a further act of specific discrimination, a singling out of the individual? Where large groups are seriously affected by a government's political, economic, and social policies or by the outbreak of uncontrolled communal violence, it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual.

Id.

50. Non-refoulement is discussed in greater detail in Part III.A.1. See 1951 Convention, *supra* note 3, art. 33:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

determination procedure,⁵¹ which is obviously not a practical solution when states face the problem of mass migrations of people uprooted by civil strife or situations of generalized violence.

Once a claimant's status as a 1951 Convention refugee has been determined, the *United Nations High Commissioner for Refugees (UNHCR) Handbook* implies a certain duration and stability of that status. This strict approach towards the determination of refugee status emanates from the need to provide refugees with the assurance that their status will not be subject to constant review in light of temporary changes—not of fundamental character—in the situation prevailing in their country of origin.⁵²

In many situations of mass migrations, both the UNHCR and the national authorities of individual states have applied a “group determination” system for refugee status.⁵³ This system assumes that the people who have fled certain situations and are seeking refuge are *prima facie* 1951 Convention refugees.⁵⁴ When utilized, the group determination system provides 1951 Convention refugee status to all members of the particular group, and thus, access to the full protections and rights guaranteed by the 1951 Convention.⁵⁵ The legal consequences of temporary protection in the European context are not the same as those of the above-mentioned group determination system. Based on the strict distinction between 1951 Convention refugees and *de facto* refugees, only the former is entitled to full 1951 Convention status; *de facto* refugees given temporary protection are not.⁵⁶

At issue are the implications of temporary protection for those people who are genuine refugees within the meaning of article 1A of the 1951 Convention. From the beginning, UNHCR has been aware of the particular problems related to the application of temporary protection to genuine 1951 Convention refugees.⁵⁷ UNHCR has questioned whether the 1951 Convention standards for refugee

51. See, e.g., UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6.

52. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6.

53. GOODWIN-GILL, *supra* note 24, at 78.

54. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 124 (1993).

55. GOODWIN-GILL, *supra* note 24, at 149-64.

56. WALTER KALIN, *TOWARDS A CONCEPT OF TEMPORARY PROTECTION* 19 (1996).

57. See KOURLA & NIHOFF, *supra* note 47, at 110-11.

treatment are suitable for situations of mass influx.⁵⁸ It is interesting to see that the 1951 Convention itself makes distinctions between certain levels of applicability.⁵⁹

The treatment and adequate protection of the rights of a 1951 Convention refugee could be improved. The rights guaranteed to refugees by the 1951 Convention depend largely on the duration of their stay, the refugee's attitude toward the country of refuge, and the refugee's actual efforts to integrate by forming intentional residence in the country of refuge.⁶⁰ Based on these factors, temporarily protected people who are genuine 1951 Convention refugees, legally residing in the host country for a long period of time, might improve their situation in the host country by invoking 1951 Convention guidelines.

In sum, the status rights guaranteed under the 1951 Convention vary depending on the character of the refugee's stay in the host country. Certain rights are available to all refugees regardless of whether their presence in the country of refuge is considered lawful or not.⁶¹ However, all of the 1951 Convention provisions should apply to temporarily protected people who are in fact 1951 Convention refugees. In addition, the right to self-employment and freedom of movement should also be available to the group of genuine 1951 Convention refugees granted temporary protection.⁶² Interestingly, most status rights are granted to refugees who are "lawfully staying" or "residing" in the country of refuge.⁶³ Although "lawfully staying" does not require permanent settlement, a refugee must show intent to stay and a certain duration of residence.⁶⁴ After five years in host countries, many people's temporary shelters have become their homes.⁶⁵ Therefore, all of the guarantees available to

58. UNHCR Division of Int'l Protection, ¶ 28.29, U.N. Doc. A/AC.96/830 (1994).

59. GOODWIN-GILL, *supra* note 24, at 307.

60. *Id.*

61. *See supra* note 6.

62. *See supra* note 6.

63. *See supra* note 6.

64. GOODWIN-GILL, *supra* note 24, at 309.

65. People from the Former Yugoslavia have various social, cultural and geographical ties to Germany. For example, the two countries shared in common migrant workers and had many immediate family links. As a result, the majority of people who fled Bosnia-Herzegovina and Croatia sought refuge in Germany where their family, relatives or friends already lived. Thus,

1951 Convention refugees should be available to genuine 1951 Convention refugees who are under temporary protection.

In Bosnia-Herzegovina, both the needs of genuine 1951 Convention refugees and the ultimate goal of the temporary protection concept would be better served if genuine 1951 Convention refugees under temporary protection were granted regular 1951 Convention status. The most favorable outcome of refugee protection in general, and temporary protection in particular, is return to the home country.⁶⁶ An analysis of the cessation clauses provides a useful foundation for the proposition that peace and future stability in Bosnia-Herzegovina will be better achieved through granting regular 1951 Convention refugee status and timely application of the 1951 cessation clauses.

Article 1C(1) of the 1951 Convention sets the conditions under which a 1951 Convention refugee's status ceases. These conditions are based on the consideration that international protection should not be granted where it is neither necessary nor justified.⁶⁷ The first four conditions are based on the willful act of the individual who decides either to reestablish himself in his country of origin or to avail himself of the protection of his country.⁶⁸ The last two cessation clauses are based on the consideration that international protection is neither needed nor justified due to changes in the country where persecution was feared, making the reasons a person became a refugee nonexistent.⁶⁹ The most important issue regarding these last two cessation clauses is the restriction in application provided in UNHCR's *Handbook*: "Provided that this paragraph shall not apply to a refugee falling under section A1 of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of his nationality."⁷⁰

In addition, the UNHCR's *Handbook* specifies that the cessation clauses are "negative in character and are exhaustively enumerated.

Germany sheltered the majority of refugees from Bosnia-Herzegovian and Croatia.

66. See KALIN, *supra* note 56; KOURLA & NIHOFF, *supra* note 46, at 120.

67. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6.

68. See *id.*

69. See *id.*

70. See *id.*

Therefore they should be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.”⁷¹ The last two cessation clauses provide an ideal foundation for the timely and safe return of genuine 1951 Convention refugees under temporary protection in Europe. Further, the restrictions on their application provide safety for those among this group whose past persecution enables them to invoke compelling reasons not to return to their home countries. However, the provisions of the 1951 Convention protect only those who have been able to establish that they are 1951 Convention refugees at the outset.⁷² These provisions are of no use to genuine 1951 Convention refugees under temporary protection.

III. THE FORMALIZATION OF TEMPORARY PROTECTION

In 1992, European governments were confronted with the fact that 1951 Convention refugee status was not practical in times of mass migration, as existed during the conflict in the Former Yugoslavia.⁷³ Thus, the UNHCR introduced the concept of temporary protection as an element of the *Comprehensive Response to the Humanitarian Crisis in Former Yugoslavia* in order to cope with the problems caused by the flight of hundreds of thousands from armed conflict, genocide, “‘ethnic cleansing’ and other forms of systematic and serious human rights violations.”⁷⁴ In 1993, the Council of Europe Report recommended to the European States that they should “clarify the legal status of temporary refugees.”⁷⁵

71. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 1988 HCR/IP/4/ENG. REV. 1, 111-39 [hereinafter UNHCR Handbook].

72. 1951 Convention, *supra* note 3, art. I.

73. See McGinley, *supra* note 19, at 1463-64.

74. *Note on International Protection*, UNHCR Division of Int’l Protection 22-24, U.N. Doc. A/AC.96/830 (1994).

75. EUR. PARL. DOC. (Com. 6740) ¶ 5 (1993). In Recommendation 1205 on the situation of refugees and displaced people in several countries of the former Yugoslavia, adopted by the Parliamentary Assembly of the Council of Europe on February 3, 1993, the Assembly recommended that the Committee of Ministers “instruct the competent committee to speed up the work to clarify and harmonize at regional level the legal status of people fleeing situations of war or generalized violence who are in need of temporary protection.” See also Recommendation 1236 (1994) on the Right of Territorial Asylum, adopted on April 12, 1994,

According to UNHCR, temporary protection:

[h]as served as a means, in situations of mass outflow, for providing refuge to groups or categories of people recognized to be in need of international protection, without recourse, at least initially, to individual refugee status determination. It includes respect for basic human rights but, since it is conceived as an emergency protection measure of hopefully short duration, a more limited range of rights and benefits are offered in the initial stage than would customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol. In many respects it is a variation of the admission and temporary refuge based on prima facie or group determinations of the need for international protection that have been used frequently to deal with mass flows of refugees in other parts of the world.⁷⁶

In the context of the Former Yugoslavia, the following basic elements of temporary protection were defined by UNHCR:

Admission to safety in the country of refuge;

respect for basic human rights, with treatment in accordance with internationally recognized humanitarian standards such as freedom of movement in the country of refugee with restrictions limited to those which are necessary in the interest of public health and public order; necessary assistance covering the food, shelter and basic sanitary and health facilities; non-discrimination; free access to courts and other competent administrative authorities; respect for family unity; protection against refoolment; repatriation when conditions in the country of origin allow.⁷⁷

In summary, “[t]he idea was to provide protection against refoolment

where the Assembly recommends that the Committee of Ministers, “considering the developments in the former Yugoslavia, urge member states to extend protection to displaced people through applying accordingly the number of minimum standards as formulated in 1981 in Conclusion No. 22 (XXXII) on the protection of asylum-seekers in situations of large-scale influx of the Executive Committee of the UNHCR.” *Id.* ¶ 8ii.

76. See *Note on International Protection*, *supra* note 74, ¶ 46.

77. See *id.* ¶ 48.

and respect for fundamental human rights while waiting return in safety and with dignity following a political solution of the conflict in former Yugoslavia. The other intention was to avoid overwhelming the national refugee status procedures already considered as overburdened.⁷⁸

Several European states responded positively to UNHCR's invitation to implement the concept of temporary protection. In most cases without formal refugee status,⁷⁹ approximately 700,000 people from Bosnia-Herzegovina and Croatia found shelter in Western Europe.⁸⁰

Thus, some states implemented the new concept on an ad hoc basis using the existing legislation.⁸¹ Later, some states developed specific legislation for temporary protection based on the need for sheltering people from the Former Yugoslavia and concerns over the concept's applicability to possible future situations of mass migration.⁸² Plans for the adoption or abandonment of temporary protection reflect the various approaches by individual states.⁸³

Acceptable treatment of temporarily protected people varies amongst the states.⁸⁴ The number of people from the Former Yugoslavia granted temporary protection status in different states ranges from less than 2,000 in Finland and Spain to 350,000 in Germany.⁸⁵ Apart from obvious differences, all European states agreed on return as the only outcome of the temporary protection

78. See Luca Donatella, *Questioning Temporary Protection*, 6 INT'L J. REFUGEE L. 535, 535 (1994).

79. See, e.g., UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6.

80. *Report of the Sub-Committee of the Whole on International Protection* ¶5, U.N. Doc. A/AC.96/858 (1996).

81. See McGinley, *supra* note 19, at 1466-69 (discussing the temporary protected status of refugees).

82. See *id.*

83. See Kalin, *supra* note 56.

84. There are huge differences with respect to the fundamental rights that are guaranteed. For example, access to education is granted in all countries with regard to primary and secondary education, while only some countries extend access to higher education. The right to work is given in most countries, although not immediately or unconditionally. Housing assistance is provided in all states, most often in reception centers. However, the family reunification process for nuclear family members differs significantly from State to State.

85. Humanitarian Issues Working Group of the International Conference on the Former Yugoslavia, *Survey on the Implementation of Temporary Protection* 31, 71 (1995), available at <http://www.unhcr.ch/legaldocuments/8.htm> (last visited Aug. 1, 2001).

system and further agreed on a limited duration of protection after which all people should be returned to their countries of origin as soon as possible.⁸⁶

Upon UNHCR's efforts to promote and implement temporary protection, European states moved towards a unified approach on the temporary protection of people fleeing conflict in the Former Yugoslavia.⁸⁷ In 1992, the beginning of the war in Former Yugoslavia, a meeting of the Immigration Ministers convened in London.⁸⁸ The Immigration Ministers adopted the *Conclusion on People Displaced by the Conflict in the Former Yugoslavia*, concluding that states were ready to provide shelter for people from the Former Yugoslavia that were coming directly from areas of military activity and, thus, were unable to return to their homes.⁸⁹ It further found it important to provide protection to people returning from bordering states to dangerous areas.⁹⁰ It also stated that admitted individuals should be given opportunities in terms of local integration and social and educational benefits, all aimed at providing better conditions for their prospective returns.⁹¹

Interestingly, UNHCR stated during that same meeting that its views on temporary protection for people fleeing the conflict in the Former Yugoslavia were that "[s]tates do not necessarily need to provide simultaneous access to individualized asylum procedures."⁹²

Obviously, UNHCR found it more important to secure shelter for the large number of people fleeing the war than to protect the rights of those genuine 1951 Convention refugees among them. Further, in 1993, UNHCR adopted the resolution setting forth common guidelines for the admission of particularly vulnerable people from

86. KALIN, *supra* note 56.

87. See McGinley, *supra* note 19, at 1466-67 (discussing the codification of temporary protected status in Western European law).

88. See KALIN, *supra* note 56.

89. See *id.*

90. See Nadia Yakoob, *Report on the Workshop on Temporary Protection: Comparative Policies and Practices*, 13 GEO. IMMIGR. L.J. (1999).

91. *Conclusion on People Displaced by the Conflict in the Former Yugoslavia* ¶4 (1992) (meeting of Ministers Responsible for Immigration, London, Dec. 1992), available at <http://www.unhcr.ch/legal/bibliographic/papers.4htm> (last visited Aug. 1, 2001).

92. *Id.* ¶6.

the Former Yugoslavia.⁹³ This resolution extended temporary protection to specific categories of people, such as: (1) those who were detained in a prisoner-of-war or internment camp whose lives are presently threatened; (2) those who are injured or seriously ill; (3) those who could not obtain adequate medical treatment locally; (4) those who are under direct threat to life or limb and who could not be protected otherwise; and (5) those who were subjected to sexual assault, if there are no means to help them locally.⁹⁴

The resolution created neither obligations for the member states to accept fleeing people nor individual rights for those granted temporary protection. Its greatest accomplishment was the creation of a framework for a unified policy regarding the grant of temporary protection by individual states.⁹⁵ Finally, in 1995, the Resolution of the Council of the European Union on Burden-Sharing With Regard to the Admission and Residence of Displaced People on a Temporary Basis was adopted.⁹⁶ The goal of the resolution was to use earlier decisions related to the Former Yugoslavia to develop a concept generally applicable for situations of mass influx.⁹⁷ However, members of the European Union (EU) are not obligated to grant temporary protection as individual rights. Rather, this resolution provided a concept for possible mass influx situations where protection was unavailable in a region close to the region of origin or where the EU is close to the region of “refugee source.”⁹⁸ Significantly, the resolution presents the principle of “burden-sharing,”⁹⁹ but does not address the unique standard of treatment for people under temporary protection. Due to the need to assist large

93. ELSPETH GUILD, *THE DEVELOPING IMMIGRATION AND ASYLUM POLICIES OF THE EUROPEAN UNION: ADOPTED CONVENTIONS, RESOLUTIONS, RECOMMENDATIONS, DECISIONS AND CONCLUSIONS* 293-309 (1996).

94. *Id.*

95. *Id.* at 299.

96. Resolution of the Council of the European Union on Burden-Sharing With Regard to the Admission and Residence of Displaced People on a Temporary Basis, September 25, 1995, at 1, *available at* http://www.eurdpa.eu.int/eur-lex/en/resolution_95/pdf (last visited Sept. 1, 2001).

97. *Id.* ¶8 (Preamble).

98. *Id.* ¶2.

99. *Id.* ¶4. “[T]he burden in connection with the admission and residence of displaced people on a temporary basis in a crisis could be shared on a balanced basis in a spirit of solidarity.” *Id.*

numbers of people fleeing war, civil war, or any situation of generalized violence, apart from protection of 1951 Convention refugees, different parts of the world adopted different approaches. African states adopted a regional convention applicable in all situations of flight.¹⁰⁰ The Cartagena Declaration of 1984 extended the 1951 Convention refugee definition, providing protection for various causes of flight.¹⁰¹ Unlike other global regions, European states have maintained a strict distinction between 1951 Convention refugees and other de facto refugees that were forced to migrate but did not fall within the strict framework of the 1951 Convention.¹⁰² Additionally, the European states emphasized return as the only solution for temporarily protected people.¹⁰³ In contrast, the African or Southeast Asian approach uses temporary protection as a predecessor to permanent admission or to resettlement in neutral countries.¹⁰⁴ In conclusion, European states were not willing to broaden the coverage of the 1951 Convention. For the European states, the concept of temporary protection provided an ideal means of protecting those fleeing civil wars and other situations of generalized violence. Meanwhile, the European states have kept the traditionally narrow 1951 Convention definition for 1951 Convention refugees.

A. *The Legal Framework of Temporary Protection*

Temporary protection is not an established part of public international law. Rather, it is a political instrument designed to cope with specific situations, such as the mass migration of people caused by the war in the Former Yugoslavia.¹⁰⁵

In accordance with the general principle of international law, individual states have absolute power of discretion in admission of

100. 1969 OAU Convention, *supra* note 44.

101. Cartagena Declaration, *supra* note 45.

102. See KOURLA & NIHOFF, *supra* note 46, at 157-58.

103. See generally, Yakoob, *supra* note 90, at 236 (contending that refugees admitted to a country under temporary protection often never leave).

104. African states look at return as the optimal result but stress it should be truly voluntary in nature. In South-East Asia, resettlement to a third country was the most common option for temporary protected people.

105. KALIN, *supra* note 56.

aliens to their respective territories. While there is a right to apply for asylum, no state is required to grant it.¹⁰⁶ Article 31 of the 1951 Convention provides for the protection of refugees who are legally in the host country, but the second paragraph clearly says that states are free to send refugees to another country and to deny them admission even on a temporary basis.¹⁰⁷ However, there are a few elements from sources such as treaties and customary laws that limit State power with respect to the treatment of aliens or refugees.¹⁰⁸

First, Article 33, paragraph 1 of the 1951 Convention prohibits sending refugees back to the country of persecution; the country where their lives or freedom would be threatened because of their “race, religion, nationality, membership in a particular social group or political opinion.”

Second, according to the 1951 Convention, states are obligated to provide all refugees in their territory certain status rights such as the freedom of movement within the country of refuge; assistance with food, shelter, basic sanitary and health facilities; freedom from discrimination; access to courts; and respect for family unity.

Third, human rights conventions explicitly prohibit the return of individuals to situations of imminent torture or serious human rights violations and also provide for other basic human rights applicable to the treatment of people under temporary protection status.¹⁰⁹

1. The Principle of “Non-Refoulement”

Given the reality of States’ lack of obligation to grant asylum under international law, the principle of “non-refoulement” is fundamental to refugee protection under the 1951 Convention.¹¹⁰ The

106. G.A. Res. 2312, U.N. GAOR, 22nd Sess., U.N. Doc. A/6716 (1968).

107. 1951 Convention, *supra* note 3, art. 31:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life of freedom was threatened in the sense of the Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Id.

108. GOODWIN-GILL, *supra* note 24, at 14-16.

109. *Id.* at 109.

110. 1951 Convention, *supra* note 3, art. 33:

principle of non-refoulement provides for protection from return to situations of persecution even if the asylum application is denied or rejected by the host country.¹¹¹ Apart from the 1951 Convention, the principle of non-refoulement has become a norm of customary international law.¹¹² It prohibits forcible return to the country of persecution as well as rejection at the state border of the host country.¹¹³ UNHCR's position on non-refoulement is illustrative:

Every refugee is, initially, also an asylum seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim has not been established.¹¹⁴

The principle of non-refoulement protects people granted temporary protection who were excluded from individual refugee status determination procedures as well as people for whom such procedures are postponed under the presumption that they may be 1951 Convention refugees.¹¹⁵ However, those who are genuine 1951 Convention refugees lose legitimate rights with the passage of time by the granting of temporary protected status.¹¹⁶ First, if the individual is denied access to a status determination, temporary protection provides the same benefits and lasts an equal amount of time for both genuine 1951 Convention refugees and those who do

No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life of freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Id.

111. GOODWIN-GILL, *supra* note 24, at 118-19.

112. *Id.* at 167.

113. *Id.* at 123.

114. *Note on International Protection*, *supra* note 74, ¶ 11.

115. GOODWIN-GILL, *supra* note 24, at 118-19.

116. *Id.*

not fit the criteria definitions. Second, if the individual status determination is postponed until the end of the temporary protected status, those who had a valid refugee claim may not be able invoke it due to the period of time spent under temporary protection.¹¹⁷ A strong refugee claim may weaken with time, especially because the authorities deciding to lift temporary protection status will neither be patient nor have the resources to fulfill their obligation of conducting individual status determination interviews properly. In practice, a 1951 Convention refugee claim basically consists of two elements; one subjective and the other objective.¹¹⁸ A “well-founded fear of persecution” is established by balancing subjective fear with objective evidence that lends credence to the authenticity of the established subjective fear.¹¹⁹ With the passage of time, the situation in the home country might significantly change enough to provoke a decision to end temporary protection. This may also diminish the objective elements of the individual’s claim to 1951 Convention refugee status.¹²⁰

Nevertheless, the principle of non-refoulement secures admittance to the host country and provides safety until the reasons for flight from the home country no longer exist.¹²¹ Also, the principle of non-refoulement is invoked if the solution of resettlement to a third country

117. A “well-founded fear of persecution” is always future oriented, *i.e.*, towards the prospect of possible return. Thus, actual past persecution may play a significant role in preventing the return of the recognized 1951 Convention refugee, but does not significantly advance the assertions of those genuine refugees who spent a significant period of time under temporary protection.

118. See UNHCR Handbook, *supra* note 71, at 11.

119. See *id.*

120. For a better illustration: A person detained in the prison camp for a significant period of time, subjected to various sorts of torture based on his ethnicity, religion, or political opinion will not be “offered” to return to his habitual residence, neither by the authorities of the host country nor by the country of origin, as it is absolutely impossible in most of the cases. After the end of temporary protection, instead of remaining in the host country, such individual will be offered return to his home country, but to an area designated by the government. However, the past persecution in the context of temporary protection may not be a sufficient ground for establishing the needed “well-founded fear.” This is due to the safety guarantees offered by his home country of returning him to some other area where his ethnicity constitutes majority population. The only option apart from return would be resettlement to a third country. In the case of refugees from Bosnia and Herzegovina, only the United States, Canada, and Australia offer this possibility.

121. GOODWIN-GILL, *supra* note 24, at 124.

is not possible. Most important, the non-refoulement principle sets the criteria for the termination of temporary protection, ensuring that repatriation can take place only when the danger of persecution in the country of origin no longer exists.¹²²

Some states have argued that the principle of non-refoulement does not apply in cases of mass influx because, under the 1951 Convention, non-refoulement protects only 1951 Convention refugees;¹²³ most people fleeing war, civil war, and situations of generalized violence are not 1951 Convention refugees.¹²⁴ Some states deny asylum to these types of refuge seekers arguing that such people are not 1951 Convention refugees because they were not “singled out” for persecution.¹²⁵ These states claimed that government actions in such cases did not constitute persecution and were not based on the race, religion, ethnic origin or political opinion of the refugee.¹²⁶ This interpretation results from a narrow reading of the 1951 Convention.¹²⁷

The position of the UNHCR is significantly different. It asserts that many states do in fact recognize the need to provide protection to people fleeing civil wars, as they might have well-founded fears of persecution based on their race, religion, ethnic origin or political opinion.¹²⁸ Additionally, the agents of persecution might be de facto authorities or other unofficial groups and thus it is not only the national government that is, in such situations, either unable or unwilling to provide adequate protection for its nationals.¹²⁹

122. *Id.*

123. 1951 Convention, *supra* note 3, art. 1A(2):

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it.

Id.

124. GOODWIN-GILL, *supra* note 24, at 137 n.93.

125. *Id.* at 12.

126. HATHAWAY, *supra* note 54, at 45.

127. 1951 Convention, *supra* note 3, art. 1A(2).

128. *See* GOODWIN-GILL, *supra* note 24, at 7-18.

129. *Note on International Protection*, *supra* note 74, ¶ 22.

Although civilians exposed to war activities between the front lines were not “singled out for persecution” in the Former Yugoslavia, they were usually targeted either because of their ethnic or religious backgrounds or as victims of “ethnic cleansing.”¹³⁰ Persecution of civilians based on political, racial and religious grounds are recognized as constituting crimes against humanity.¹³¹ Thus, proof of a “well-founded fear of persecution”¹³² is not precluded by the fact that a person fled from civil war. However, in reality, many people fleeing situations of generalized violence or civil wars will not meet the 1951 Convention refugee criteria.¹³³ In a situation when temporary protection is granted, the host country will usually accept both genuine 1951 Convention refugees and other people who fall within a wider category of the refugee definition.

General principles of international law obligate states to assist in humanitarian efforts and to cooperate in finding a solution to the problems of mass migrations, regardless of the legal classifications of people arriving at host countries on a large-scale basis.¹³⁴ In other words, there is a general obligation to assist both those who would meet the stringent criteria of a 1951 Convention refugee and those who would not. In addition, states are bound to cooperate and find solutions in such cases by the mandate given to UNHCR.¹³⁵ States agreed on the UNHCR mandate, but then were trying to avoid individual responsibility in situations of mass migrations, justifying their non-participation with the fact that the people in question were not genuine 1951 Convention refugees.¹³⁶ However, involuntary mass-migrations became an increasingly serious problem, and eventually the previously reluctant states started to officially invite UNHCR to assist in these situations.¹³⁷ Thus, in 1957 UNHCR was

130. See MCCARTHY ET AL., *supra* note 38, at 45.

131. *Statute of the International Tribunal for the Prosecution of People Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia Since 1991*, reprinted in 32 I.L.M. 1195, art. 5(h) (1993), available at <http://www.icty.com/general.statute.htm> (last visited Aug. 1, 2001).

132. HATHAWAY, *supra* note 54, at 72.

133. GOODWIN-GILL, *supra* note 24, at 18-29.

134. *Id.* at 25-28.

135. *Id.*

136. *Id.* at 29-31.

137. *Id.* at 9-10.

asked for the first time to assist in a situation of mass flight involving Chinese refugees fleeing to Hong Kong.¹³⁸ In 1973, the General Assembly called upon UNHCR to “continue assistance and protection activities in favor of refugees with its mandate as well as for those to whom UNHCR extends its ‘good offices’ or is called upon to assist in accordance with relevant resolutions of the General Assembly.”¹³⁹

In the 1994 *Note on International Protection*, the General Assembly stated:

In accordance with these resolutions, and with the strong support of the Executive Committee and of the international community as a whole, it has been the regular and consistent policy and practice of UNHCR to provide international protection, mobilize humanitarian assistance and seek solutions for refugees from armed conflicts as well as those fleeing persecution.¹⁴⁰

The central dilemma is: The difference between UNHCR’s extended mandate and States’ obligations to provide protection for all people falling within the extended definition of a refugee.¹⁴¹ However, “good faith” is a general principle of international law. Once a state becomes a member of the United Nations, with all attendant rights including a voice in the General Assembly, good faith behooves the state to abide by General Assembly decisions.¹⁴² In addition, states that are parties to the 1951 Convention “undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.”¹⁴³

It is more or less obvious that states cannot ignore their duty to contribute to adequate solutions in situations of mass influx of both

138. In situations of mass flight, not all people are genuine 1951 Convention refugees within the strict definition of the article 1 (A). 1951 Convention, *supra* note 3, art. 1(A).

139. G.A. Res. 3143, U.N. GAOR, No. 27, U.N. Doc. 3143 (1984).

140. *Note on International Protection*, *supra* note 74, at 31.

141. GOODWIN-GILL, *supra* note 24, at 214.

142. U.N. CHARTER art. 2.

143. 1951 Convention, *supra* note 3, art. 35(1).

refugees who fall within the strict interpretation of the 1951 Convention and those who do not. At the same time, European States are not legally obligated to accept the extended refugee definition and all of its resulting legal implications.

2. Human Rights Instruments' Support for the Temporary Protection System

Although the documents creating the EU do not refer to the 1951 Convention, both the 1966 United Nations Covenant and the European Human Rights Convention—the system of temporary protection developed in response to the Former Yugoslavia's breakdown—are well-grounded in human rights law.¹⁴⁴ Human rights law prohibits forcible return to situations of danger, as specified in Article 3(1) of the 1984 Convention Against Torture, which reads: No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Similarly, the United Nations Human Rights Committee, on the basis of Article 7 of the 1966 Covenant on Civil and Political Rights,¹⁴⁵ stated that State Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulment. Even the European Human Rights Commission, in a case involving a Somalian refugee in Austria, confirmed that Article 3 of the European Convention on Human Rights prohibits the return of a person who fears serious human rights violations in his home country, apart from the situation of an ongoing civil war where persecutors may have been non-governmental actors.¹⁴⁶

Human rights law provides protection against forcible return to the country of origin where a person would be exposed to inhumane

144. KALIN, *supra* note 56, at 21.

145. The Covenant also states that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, that no one shall be subjected without his free consent to medical or scientific experimentation.

146. Sharif Hussein Ahmed v. Austria, App. No. 25964/94, 6 Eur. H.R. Rep. 254 (1995) (Commission Report).

or degrading treatment.¹⁴⁷ On the other hand, human rights law sets out basic principles regarding return to the home country when reasons for flight no longer exist.¹⁴⁸ Similar to an individual's freedom to leave and seek refuge in other countries, a person's right of return, to choose his residence, and to move freely within his country of nationality are also protected by human rights law. This provides security to individuals forced to leave their countries by allowing them to utilize their citizenship rights once the reasons for fleeing no longer exist. The right of return to one's country is a part of the provision of "freedom of residence and movement" provided for in Article 13(1) of the 1948 Universal Declaration of Human Rights.¹⁴⁹ This same right also is provided by Article 12, paragraph 4 of the Covenant on Civil and Political Rights which states that "no one shall be arbitrarily deprived of the right to enter his own country."¹⁵⁰ Apart from the principle of non-refoulement, the right of return is the key concept envisaged by the temporary protection system.¹⁵¹

B. The Effect of Applying Temporary Protection to Genuine 1951 Convention Refugees

A large number of people fleeing from the Former Yugoslavia in Europe were, in fact, genuine 1951 Convention refugees.¹⁵² These people faced the danger that temporary protection could merely become a more expedient substitute for 1951 Convention refugee status. The first categories of people for whom the EU provided temporary protection were "people who have been held in a prisoner-of-war or internment camp and who cannot otherwise be saved from a threat to life or limb."¹⁵³ A majority of the detainees in this group fulfilled all the requirements to attain 1951 Convention refugee

147. GOODWIN-GILL, *supra* note 24, at 125.

148. *Id.* at 124.

149. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 3, at 71, U.N. Doc. A/810 (1948), available at www.un.org/overview/rights.html (last visited Sept. 1, 2001).

150. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966).

151. McGinley, *supra* note 19, at 1466-68.

152. See GOODWIN-GILL, *supra* note 24, at 19-20.

153. See, e.g., GUTMAN, *supra* note 16.

status.¹⁵⁴ The people in this group were “singled out” for persecution, frequently tortured, and both physically and sexually assaulted.¹⁵⁵ Such persecution was based on the detainees’ religious or ethnic backgrounds.¹⁵⁶

A similar situation existed for those in the third category on the EU’s list: “people who are or have been subjected to sexual assaults provided that there is no suitable means for assisting them in safe areas situated as close as possible to their homes.”¹⁵⁷ During the war in Bosnia-Herzegovina, rape was used as an instrument of warfare. Victims were of the same religious and ethnic background, and their persecution claims satisfied the high status standards under Article 1(a) of the 1951 Convention.¹⁵⁸ The need for protection in such cases had its roots not only in the need for assistance, but also in the well-founded fear of persecution.¹⁵⁹

In conclusion, beneficiaries of temporary protection consist largely of people who fulfilled the criteria for 1951 Convention refugee status under Article 1(a) of the 1951 Convention, but who were denied official 1951 Convention status. Thus, the question of access to individual status determination procedures in the cases of mass influx is of some importance. Again, UNHCR’s position interestingly states that “while people receiving temporary protection should not be precluded from applying for refugee status, the consideration of such claims could be suspended while they enjoyed temporary protection.”¹⁶⁰

With respect to genuine 1951 Convention refugees, among the group of those temporarily protected, exclusion from the status determination procedure is incompatible with the obligations of States party to the 1951 Convention if a State either denies convention rights guaranteed to refugees lawfully in the country or forcibly returns such people without examining their refugee

154. *See, e.g., id.*

155. *See, e.g., id.*

156. *See, e.g., id.*

157. GUTMAN, *supra* note 16, at 187.

158. GOODWIN-GILL, *supra* note 24, at 19-20.

159. KALIN, *supra* note 56, at 31.

160. *Note on International Protection*, *supra* note 74, ¶ 3.

claims.¹⁶¹

As the 1951 Convention does not provide for national status determination procedures, the principle of good faith in *fulfilling* treaty obligations requires States party to the 1951 Convention to act accordingly.¹⁶² At least five different models of dealing with these problems exist.¹⁶³ The first model integrates temporary protection into the asylum procedure.¹⁶⁴ Temporary protection can be granted only after rejection of an asylum request. Both Sweden and Switzerland adopted this model of temporary protection.¹⁶⁵ In contrast, under a second model, temporary protection in the United Kingdom is lifted if a person applies for asylum, but temporary protection is reinstated if the asylum application is rejected.¹⁶⁶ In Spain, temporarily protected people can apply for asylum and keep their temporary status if their asylum applications are denied.¹⁶⁷ A third model is applied in Denmark, Norway and France. In these countries, temporary protection status is limited in duration to two or three years, and authorities automatically start the asylum procedures for temporarily protected people if return is not possible within that period of time.¹⁶⁸ A fourth model, proposed in Switzerland, would be to grant asylum at the end of temporary protection status.¹⁶⁹ The most problematic approaches are the last models in which temporarily protected people are excluded from the asylum application procedure, such as in Germany and Finland.¹⁷⁰ Finish authorities were quick to abandon the temporary protection concept.¹⁷¹ In Germany, temporarily protected people had an opportunity to apply for

161. GOODWIN-GILL, *supra* note 24, at 124.

162. KALIN, *supra* note 56, at 32.

163. *Id.*

164. *Id.*

165. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6, at 191, 202. *See also* KALIN, *supra* note 56, at 42.

166. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6, at 46.

167. *Id.* at 177.

168. *Id.* at 79, 160.

169. *See* KALIN, *supra* note 56, at 33 (“Here, the asylum procedure serves to determine who still have valid reasons to invoke protection under the 1951 Convention when temporary protection is lifted”).

170. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6, at 116, 118.

171. *Id.* at 94.

resettlement.¹⁷²

In short, procedural and administrative efficiency provide States with incentives to accept the concept of temporary protection. Additionally, temporary protection provides several political and economic advantages for individual States that permanent asylum does not.¹⁷³ First, administrative and economic resources are saved through the absence of a full asylum procedure assessing individual claims and applying a *prima facie* group determination.

Second, it becomes easier politically to return the refugee if the situation in the country of origin changes, for then it is not a question of withdrawing a residence permit but, rather, of not renewing it. In this way, a signal is sent to the refugee that his stay in the specific country is only temporary. Finally, a signal is sent to the public at large that this refugee situation is purely a matter of protection with no elements of voluntary migration.¹⁷⁴

IV. ANALYSIS OF THE RIGHT OF RETURN TO THE HOME COUNTRY

This analysis of the right of return to the home country will serve as a foundation for further discussion of the actual repatriation process in Bosnia and Herzegovina. In addition, it will assist in understanding the emerging argument that those refugees whose right to remain was not protected, and those refugees whose voluntary right of return, in dignity and safety, was not guaranteed should be granted 1951 Convention status because application of the temporary protection concept surfaced crucial flaws.

People of all ethnicities from the Former Yugoslavia may have had a right to remain at home; however, the fact is that over 700,000 sought and received temporary protection from ethnic and political violence that existed in their home countries. Within the context of the protection of citizens, the State's right to protect its citizens

172. For Bosnian refugees under temporary protected status in Germany, a Resettlement opportunity to the United States was offered as the only solution for those unwilling or unable to return "voluntarily" to Bosnia and Herzegovina.

173. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6, at 25.

174. Morten Kjaerum, *Temporary Protection in Europe in the 1990s*, 6 INT'L J. REFUGEE L. 444, 449-50 (1994).

abroad¹⁷⁵ corresponds to its obligation to accept its citizens who are not allowed to stay in other States.¹⁷⁶ Hence, citizens have a right of return to their country of citizenship. The background of the right of return lies between the lack of a general duty for states to accept and accommodate foreigners, and the right of an individual to enter his country on the basis of nationality. Article 9 of the Universal Declaration of Human Rights implies a right of return to one's own country, and such right is expressly recognized in Article 13(2) of the same document.¹⁷⁷ The key word, and the only restriction placed on the right of return, is that of "citizenship." The European Convention provides that citizens shall not be deprived of the right to enter their own country. The issue of actual return and right of return is subject to the relations between the state of origin, the state of refuge, and the international community. As Goodwin-Gill states:

The relevance and importance of the human rights dimension for refugees is obvious, for the primary solution of voluntary repatriation is premised upon their basic human right of return to their own country in conditions of security. The State of origin may seek to "write off" those who have fled, and to ignore the link of nationality, but this potentially involves a breach of the obligation to the State of refuge, even though in the prevailing the actual return of refugees may be prohibited by the principle of non-refoulement.¹⁷⁸

With respect to nationality as the basis for the right of return, some clarification is needed. If a person's nationality is not clear, or if the state wishes to deter the return of those who previously fled by depriving them of their nationality, such actions would be directly contradictory to the principles of international law.¹⁷⁹ Further, problems arise with in the case of the imposition of administrative

175. DANIEL TURACK, *THE PASSPORT IN INTERNATIONAL LAW* 133 (1972).

176. GUY GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PEOPLE BETWEEN THE STATES* 45 (1978).

177. Universal Declaration of Human Rights, *supra* note 149, at 71. Article 13(2) reads as follows: "No one shall be subjected to arbitrary arrest, detention or exile." *Id.*

178. GOODWIN-GILL, *supra* note 24, at 101.

179. Kay Hailbronner, *Comments on: The Right to Leave, the Right to Return and Remain; the Question of a Right to Remain*, in *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 109, 116 (Vera Gowland-Debbas ed., 1996).

and procedural obstacles to prevent the return of nationals. “The practical operation of return agreements has frequently been impeded by bureaucratic obstacles and excessive requests concerning proof of nationality.”¹⁸⁰ Apart from the issue of citizenship, an important one in the context of Bosnia and Herzegovina,¹⁸¹ the key issue is whether we can consider “the right of return to one’s home country” fully exercised in the context of the return process to Bosnia and Herzegovina if the country of origin cannot guarantee safety, but rather offers the option of relocation to the areas of “ethnic majority,” designated by the government. Actual cooperation between the State of refuge and the State of origin is an undeveloped area of international law, and most states already insisted on prescribing the rights based on which the actual return will take place.¹⁸²

The Dayton Peace Agreement’s Annex Seven sets the basic principles and conditions by which the repatriation to Bosnia-Herzegovina should be implemented.¹⁸³ The reality of the ongoing return process, however, indicates that there are deviations from Annex Seven which contradict the most important principles of voluntariness and return to the State of origin.

A. Basic Principles of Voluntary Repatriation

An analysis of the basic principles of repatriation and comparison with the principles of return upon termination of temporary protection status should provide an additional argument for approval of regular 1951 Convention status. A discussion of the Dayton Peace Agreement’s Annex Seven will provide a better picture of the “truly voluntary” aspect of the return to Bosnia and Herzegovina—the major repatriation operation after the end of temporary protection in other European countries.

180. *Id.*

181. The phenomenon of “dual citizenship” legislation largely complicates the issue of return to the places of original residence for the entire group of refugees who do not belong to the “ethnic majority group” in their hometowns.

182. In the case of Bosnia and Herzegovina, the states of refuge dictated the return based on the “carrot and stick” method, while the country of origin agreed to implement legal and effective safety measures to ensure the return of “nationals,” under criteria of “ethnicity,” often through return projects lacking basic provisions with respect to dignity and voluntariness.

183. See Dayton Peace Accord, *supra* note 11.

Temporary protection can be terminated as soon as a safe and dignified return to the state of origin is possible. Annex Seven of the Dayton Peace Agreement on Refugees and Displaced People¹⁸⁴ incorporates this principle, representing the framework for repatriation to Bosnia-Herzegovina. The basic principles of repatriation are safety, dignity, and voluntariness.¹⁸⁵

The notions of safety and dignity are not clear, and at least three different definitions exist, all related to repatriation to Bosnia and Herzegovina. Safety is defined as return “without harassment, arbitrary detention or physical threats during or after return;”¹⁸⁶ “return without risk of harassment, intimidation, persecution, or discrimination, particularly on account of ethnic origin, religious belief, or political opinion;”¹⁸⁷ and “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 material security (access to land or means of livelihood).”¹⁸⁸

According to UNHCR in the context of repatriation to Bosnia and Herzegovina, safety consists of the implementation of military measures safeguarding the peace and the proclamation of amnesty for crimes, other than serious violations of international humanitarian law.¹⁸⁹ It is interesting to note that the existence of such an International Peace program is one of the conditions of application for temporary protection. It will also be interesting to see the relationship between the “voluntariness” element of repatriation, and the actual effects of the military measures.

While the principle of “dignity” is even more difficult to define, it is “serious, composed, worthy of [honor] and respect.”¹⁹⁰ In practice, dignity must include a provision that:

184. *See id.*

185. *See infra* note 190.

186. Executive Committee Conclusions No. 65 (XLII), para. 3 (1991), *available at* <http://www.unhcr.ch/legal.bibliographic/conc.12htm> (last visited Aug. 1, 2001).

187. *See* Dayton Peace Accord, *supra* note 11, art. 1, ¶ 2.

188. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6.

189. KALIN, *supra* note 56, at 44.

190. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6.

Refugees must not be manhandled; that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members, and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.¹⁹¹

Definitions of those two elements are important indicators of the conditions necessary for termination of temporary protection. UNHCR identified the elements of the return with “safety and dignity”: (1) refugee’s physical safety at all stages during and after their return including en route, at reception points, and at the destination; (2) the need for family unity; (3) attention to the needs of vulnerable groups; (4) the waiver, or, if not possible, reduction to a minimum of border crossing formalities; (5) permission for refugees to bring their moveable possessions when returning; (6) respect for school and planting seasons in the timing of such movements; and (7) freedom of movement.¹⁹²

The first elements of a return with both safety and dignity are the right of return to one’s country, a recognized human right,¹⁹³ together with the corresponding duty of the country of origin to permit the return of its citizens. According to Annex Seven of the Dayton Peace Agreement, refugees and displaced people “have a right to freely return to their homes of origin,” and states have a duty to “accept the return of such people who have left their territory, including those who have been accorded temporary protection by third countries.”¹⁹⁴

With respect to these first elements, legal safety requires positive legislation and actual implementation—meaning a functional and operative administrative and judicial system in the country of origin. Material assistance and availability of reconstruction and development programs are additional elements. In the case of Bosnia-Herzegovina, refugees and displaced people were granted “the right to have restored to them property of which they were deprived in the course of hostilities . . . and to be compensated for any property that

191. *See id.*

192. *See id.*

193. International Covenant on Civil and Political Rights, *supra* note 150, art. 12(4).

194. *See* 1951 Convention, *supra* note 3, Annex 7, art. 1(1).

cannot be restored to them.”¹⁹⁵ The Commission for Displaced People and Refugees, formed in Sarajevo, is in charge of receiving and deciding claims for property in Bosnia-Herzegovina.¹⁹⁶ Although its decisions are final and “recognized as lawful throughout Bosnia and Herzegovina,” the Commission lacks enforcement power and thus has no recourse against noncompliance.¹⁹⁷

By monitoring the repatriation process through domestic mechanisms, UNHCR and other international organizations remain important elements in the return process.¹⁹⁸ The High Commissioner should be recognized as having a legitimate concern for the consequences of return, particularly where such return has been brought about by amnesty or other form of guarantee. Within the framework of close consultations with the state concerned, the High Commissioner should be given direct and unimpaired access to returnees, thereby placing him in a position to monitor fulfillment of amnesties, guarantees, or assurances on the basis of which the refugees have returned. Such access should be inherent in the High Commissioner’s mandate.¹⁹⁹

The element of voluntariness is the most difficult to define. However, when the criteria for safety and dignity are met, a question arises whether people under temporary protected status can be repatriated only on a voluntary basis or whether forced return is permissible. People whose refugee claims were not asserted should be allowed to invoke protection from forcible return under the 1951 Convention.²⁰⁰

Before analyzing the issues of refugee status determination procedures in five-year-long temporary protection cases, and the likelihood that a genuine 1951 Convention refugee might invoke all rights prescribed by the 1951 Convention, we will examine the change in efforts of the host countries and UNHCR regarding the return to Bosnia-Herzegovina.

195. *See id.*

196. *See id.* art. 11.

197. Davor Sopf, *Repatriation*, in *BOSNIA-HERZEGOVINA: PERSPECTIVES* 59, 357 (Dr. Wilfried Heller & Dr. Hansjorg Brey eds., 1997).

198. *Id.*

199. Executive Committee Conclusions, *supra* note 186.

200. 1951 Convention, *supra* note 3, art. 33.

Promotion of voluntary repatriation is a regular activity among States, but the problem remains that some states actively enforce repatriation of people regarded as no longer in need of international protection.²⁰¹ The High Commissioner stated:

[W]e can no longer passively wait for conditions to change so that refugees can volunteer to return. Instead, we must work actively to create the conditions conducive to their safe return. It is important therefore that the protection debate moves on from interpreting voluntary repatriation solely in terms of the expression of individual will to the creation of conditions of safety—in the refugee camps, in the reception centers and in the home areas.²⁰²

With respect to genuine 1951 Convention refugees under temporary protection status, the conditions of Article 1C(5) of the 1951 Convention²⁰³ should be met if a person had no access to individual status determination procedures before making any decision to repatriate. States which excluded temporarily protected people from the individual refugee status determination procedure should provide a regular and fair opportunity for individuals to claim their well-founded fears of persecution and, thus, be protected by the principle of non-refoulement.

Upon previously concluding that those people who, at the time of the lifting of temporary protection, still have valid reasons to invoke protection under the 1951 Convention should not be forcibly returned, the realistic constraints on the exercise of this obligation by the host states deserves some attention. The 1951 Convention does not address the issue of refugee status determination procedures. This

201. KALIN, *supra* note 56, at 49.

202. *See Opening Statement by the United Nations High Commissioner for Refugees at the Forty-Sixth Session of the Executive Committee of the United Nations High Commissioner's Programme*, UN Doc. A/AC.96/860, reprinted in 4 REFUGEE SURVEY Q. 6 (1995).

203. *See* 1951 Convention, *supra* note 3, art. 1C(5):

This Convention shall cease to apply to any person falling under the terms of section A if: . . . 5) He can no longer, because the circumstances in [connection] with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality . . .

Id.

very important and practical area is left entirely to the individual decisions of States.²⁰⁴ Furthermore, the assessment of claims for refugee status complies with the analysis of subjective and objective elements²⁰⁵ while the interpretation of the 1951 Convention regulations is largely based on generally accepted rules.²⁰⁶ With respect to the States domination procedure, the burden of establishing a case is on the refugee claimant. However, certain personal considerations relating to the traumatic experiences of flight are important to the means and methods used to evaluate the facts and credibility of refugee claims.²⁰⁷ The most important element is the establishment of the “well-founded fear of persecution.” A well-founded fear requires that the applicant’s fear have its basis in external or objective facts showing a realistic likelihood that the applicant will be persecuted upon his return to the home country.²⁰⁸ In practical terms it means that “the applicant’s fear should be considered well-founded if he can establish to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.”²⁰⁹

The crucial element of refugee status determination procedures for genuine 1951 Convention refugees under temporary protection is different from persecution experienced or reasonably feared.²¹⁰ The element of “well-founded fear” is always future oriented, meaning that many temporarily protected people who had clear elements of well-founded fears of persecution in the period of their flights may have no guarantees that, after more than five years, they could successfully invoke the same rights that should have initially been available to them.²¹¹ Even when the situation in their home countries

204. GOODWIN-GILL, *supra* note 24, at 34.

205. HATHAWAY, *supra* note 54, at 82.

206. *See* GOODWIN-GILL, *supra* note 24, at 34 (the “UNHCR Handbook on Procedures and Criteria for Determining Refugee Status was prepared at the request of states members of the Executive Committee of the High Commissioner’s Program, for the guidance of governments”).

207. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES *supra* note 6, at 195-205.

208. GOODWIN-GILL, *supra* note 24, at 37.

209. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES *supra* note 6.

210. HATHAWAY, *supra* note 54, at 88.

211. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES *supra* note 6 (noting a “change of circumstances in the country of origin”).

has changed so drastically that safety and dignity becomes possible, genuine 1951 Convention refugees under temporary protection should have a right to reject return to “some other, safe area of their home countries.”²¹² The international community “reasonably expects” the same from them. However, cessation clauses²¹³ were rarely or almost never used for 1951 Convention refugees granted proper status in most of the European countries.²¹⁴ Thus, the element of “voluntariness” has no significance in the ongoing repatriation process of Bosnia-Herzegovina, because temporary protected status was granted to the refugees.

Moreover, relying on the reasons why most of the European countries accepted the concept of temporary protection and the absence of the 1951 Convention regulation dealing with the refugee status determination procedures, individual States will most likely try to avoid their duties or implement them in a way that is less effective for refugee claimants. Apart from the enormous efforts by UNHCR to secure fair and suitable treatment for potential 1951 Convention refugees upon the end of their temporary protection status,²¹⁵ involuntary repatriation, with all its negative impacts on Bosnia-Herzegovina’s future, or resettlement to third countries are the only feasible solutions.²¹⁶

At this stage of transfer from temporary protection to durable solution, an important issue regarding the length of temporary protection has arisen.²¹⁷ The entire temporary protection concept concerns the return of beneficiaries as soon as the situations in the countries of origin change and reasons for temporary protection cease to exist. People who have been granted temporary refuge cannot be left forever in a status of uncertainty. A right to remain after a certain period of time must exist, after taking into account all relevant factors, including the duration of stay, connections with the receiving

212. *See id.*

213. *See id.*

214. The majority of the people granted refugee status in Europe were “political refugees” coming from the East and Central European countries.

215. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6 (questioning: “How long temporary should be?”).

216. Sopf, *supra* note 197, at 309.

217. KALIN, *supra* note 56, at 51.

country, and assimilation to its living conditions. The circumstances under which a right of temporary residency develops into a right of permanent residency are still a domestic matter. However, there may be limits on domestic discretion, based on humanitarian considerations, similar to those developed under the European Convention of Human Rights with respect to the protection of family and marriage.²¹⁸ State practice is largely diverse. In some cases there is no defined limit on temporary protection status. In other States, the period lasts from three to five years.²¹⁹ State practice and other indicators²²⁰ support a reasonable limitation of five years on temporary protected status.

In conclusion, “the right to remain in the host countries” for temporarily protected, genuine refugees from Bosnia-Herzegovina, through the granting of 1951 Convention refugee status, should be a logical and fair solution at the end of the refugees’ temporary protection status. The duration of stay, family links, as well as geographical and cultural links are additional arguments for granting regular 1951 Convention status. The only class of residents with an absolute right to live in a country are that country’s own citizens. Clearly, refugees cannot claim a right to remain on that ground. Rather, their position should be assimilated into that of the 1951 Convention refugees. In particular, these refugees should be protected by the principles of non-refoulement and voluntariness of return.

B. Return Process to Bosnia-Herzegovina and Temporary Protection: Relocation or Repatriation?

The main issue concerning the return of temporarily protected people from Bosnia-Herzegovina was whether return to other parts of the country was permissible, or whether return should have taken place at the original and habitual residences of the returnees. The Dayton Peace Agreement recognized return to the place of former

218. Hailbronner, *supra* note 179, at 117.

219. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 6, at 45. In the Netherlands the limit is three years; in Norway four years; in Switzerland four years; in Denmark two years; in Sweden one year; and in the United Kingdom seven years.

220. See KALIN, *supra* note 56, at 51 (“107 out of 184 armed conflicts between 1945 and 1994 lasted less than five years”).

habitual residence.²²¹ In reality, however, the majority of people who returned to Bosnia-Herzegovina were able only to go to the places designated by the Bosnian Government, based on the “ethnic majority principle.”²²² Although a return to the place of former habitual residence should be the guiding principle when temporary protection is lifted,²²³ international refugee law does not prohibit an “internal settlement alternative” if safety in a certain area of the State of origin is at an acceptable level and people concerned “could be reasonably expected to go there.”²²⁴ With respect to temporary protection, an individual can reasonably be expected to return to a safe part of his home country that is not his habitual residence if the requirements of safety and dignity are fulfilled.²²⁵ Such “reasonable expectations” should not be applicable to the process of return to Bosnia-Herzegovina, as such a provision is contrary to the principle set forth by Article 1, paragraph four of Annex Seven.²²⁶

The reality of the process of return to Bosnia-Herzegovina clearly showed that the determination of the host countries to terminate temporary protection and to send people to the country of origin was stronger than arguments based on the principle of truly voluntary repatriation, and consequently UNHCR’s efforts.²²⁷ Thus, embodied in the concept of temporary protection, the right of return to one’s country, if exercised prematurely, may become a double-edge sword.

A peace process should not be seen simply as a mechanism enabling society to end hostilities and return to “normal.” Rather, the very nature of the process may transform an economy and society in unexpected ways and engender new forms of economic, social and

221. See Dayton Peace Accord, *supra* note 11.

222. See, e.g., Sopf, *supra* note 197.

223. KALIN, *supra* note 56, at 48.

224. GOODWIN-GILL, *supra* note 24, at 252.

225. McGinley, *supra* note 19, at 1466-68.

226. See 1951 Convention, *supra* note 3, Annex 7, ¶ 4.

Choice of destination shall be up to the individual or family, and the principle of the unity of the family shall be preserved. The Parties shall not interfere with the returnees’ choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking basic infrastructure necessary to resume a normal life.

Id.

227. Sopf, *supra* note 197, at 310.

physical insecurity. It is essential that policy makers concerned with issues of peace and rehabilitation recognize and anticipate this possibility.²²⁸

In the context of return to Bosnia-Herzegovina, UNHCR's position clearly stated: "these early returns will only consolidate ethnic division and will virtually eliminate the voluntary nature of the returns guaranteed in Annex [Seven]. Furthermore, forced returns are a direct assault on the UNHCR's authority to organize and implement an orderly and phased repatriation according to the Operational Plan."²²⁹

Summarily, under the principles of "non-refoulment," of the "right of return" incorporated into the concept of temporary protection, UNHCR's Operational Plan, and Annex Seven of the Dayton Peace Accords the planned return of the genuine 1951 Convention refugees will further the "ethnic division" of the Bosnian society. It will also truly override the principle of non-refoulment that should be applied, especially to protect this category of people granted temporary protection.

V. CONCLUSION

Temporary protection, as used in Europe in the context of mass migrations from the Former Yugoslavia, is a part of the broader spectrum of activities the international community used to address the problem of that conflict. This concept was meant to bridge two gaps: between the binding principle of non-refoulment and the discretionary character of asylum; as well as between the strict European approach granting protection to 1951 Convention refugees and the need for protection to the larger group of people not fulfilling the requirements of the 1951 Convention, but who nonetheless are forced to flee their countries due to the dangers of armed conflict or human rights violations.

Temporary protection is appropriate in situations involving mass

228. Peter Utting, *Linking Peace and Rehabilitation in Cambodia*, in BETWEEN HOPE AND INSECURITY—THE SOCIAL CONSEQUENCES OF THE CAMBODIAN PEACE PROCESS (Peter Utting ed., 1994).

229. Statement by Soren Jesen-Petersen, UNCHR Special Envoy for Former Yugoslavia (Sept., 1994) (on file with author).

influxes of people seeking refuge abroad, where most of these people are not 1951 Convention refugees and where the international process is aimed at the reestablishment of the conditions allowing for a safe and dignified return.²³⁰ In Bosnia-Herzegovina, particularly, temporary protection was merely a part of the International Peace Process aimed at preventing mass exoduses of civilian populations, at securing basic political and military conditions for the restoration of the democratic and multi-ethnic society, and at leading to the return of those people who fled the country and found shelter in European countries.²³¹

In reality, however, the efforts to provide security and to maintain peace in Bosnia-Herzegovina failed, thereby resulting in a large number of civilians seeking refuge abroad. The first founding element of temporary protection proved unworkable, and the “right not to become a refugee” was not protected for a large number of citizens of Bosnia-Herzegovina.²³² Furthermore, based on different interpretations of the war in Bosnia-Herzegovina, those forced to flee were characterized as defacto refugees and automatically excluded from the protection available under the 1951 Convention. Sadly, the majority of these people were indeed genuine 1951 Convention refugees but were only given temporary protection status.²³³

At the end of temporary protection, these genuine 1951 Convention refugees from Bosnia-Herzegovina were either forced to return to their home country or to apply for permanent resettlement in overseas countries.²³⁴ However, neither premature and involuntary return to the home country nor permanent resettlement in overseas countries produces the future stability and peace needed in Bosnia-Herzegovina. These were the international community’s original goals at the beginning of the war, developed upon application of the concept of temporary protection. The actual possibility of return to the home country is based on the principle of return to the “majority areas,” in which people do not return to their original homes but to

230. McGinley, *supra* note 19, at 1466-67.

231. *Id.* at 1466-69.

232. See Gutman, *supra* note 16, at 20-23.

233. See McGinley, *supra* note 19, at 1466-69.

234. See *id.*

the areas of their ethnic majority as designated by government. This principle serves the final ethnic division of the country but is contrary to the basic principles of the Dayton Peace Accords and UNHCR's repatriation plan.²³⁵

Most genuine 1951 Convention refugees from Bosnia-Herzegovina spent over five years under temporary protection in various European states. As a result, they should be granted regular 1951 Convention refugee status and, thus, given the opportunity to remain in the countries where they have already integrated their lives and established intentional residences. They should not be forced to return to their home country or to resettle in some other country. Both the goal of temporary protection and the ideal end of 1951 Convention refugee status is voluntary repatriation to the home country. This category of people should be given the opportunity to exercise their right of return to their homes in a dignified way that would protect their individual rights and bring more stability to the future of Bosnia-Herzegovina.

Finally, granting 1951 Convention refugee status and timely application of the 1951 Convention's cessation clauses will better protect the rights of individuals and serve the goals of both the international community and the Republic of Bosnia-Herzegovina.

235. See Gutman, *supra* note 16, at 7-18.

