[487H] "WHEN TO RETURN HOME" UNDER INTERNATIONAL LAW

(ULUSLARARASI HUKUKA GÖRE "EVE NE ZAMAN DÖNMELİ?)

Dr. Öğr. Üyesi Ebru DEMİR [488*] [489]**

ABSTRACT

This article examines the challenges of refugee repatriation in post-conflict settings and essentially focuses on the principle of non-refoulement. While the end of armed conflict is often expected to facilitate refugee return, legal frameworks—including refugee law, international humanitarian law (IHL), and international human rights law (IHRL)—offer differing interpretations of when and how repatriation should occur. Through case studies of Burundi and Bosnia and Herzegovina, the article highlights the complexities of voluntary return, state legitimacy, and peacebuilding efforts. The examined cases show the need for a rights-based approach in order to ensure safe and sustainable refugee return. Using IHRL and refugee law, the study argues that repatriation should be voluntary and accompanied by legal protections. The article underscores the need for rights-based repatriation policies to ensure sustainable peace and stability for both sending and home countries.

Keywords: *non-refoulement principle; refugees; repatriation; International Humanitarian Law; International Human Rights Law; International Refugee Law.*

ÖZ

Eldeki çalışma, silahlı çatışmaların sona ermesinin ardından mültecilerin geri dönüşüne ilişkin zorlukları ele almakta ve özellikle geri göndermeme ilkesini (non-refoulement principle) incelemektedir. Her ne kadar silahlı çatışmaların sona ermesi ile birlikte mültecilerin geri döneceğine dair bir beklenti doğsa da, uluslararası mülteci hukuku, uluslararası insancıl hukuk

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[488*] Doktor Öğretim Üyesi, Ankara Yıldırım Beyazıt Üniversitesi Hukuk Fakültesi, Milletlerarası Kamu Hukuku Anabilim Dalı.

[489**] Yazarın ORCID belirleyicisi: 0000-0003-2529-3383.

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ve insan hakları hukuku bu geri dönüşün nasıl ve ne zaman gerçekleşmesi gerektiğine ilişkin farklı yasal çerçeveler ortaya koymaktadır. Çalışma, Burundi ve Bosna-Hersek örnekleri üzerinden, gönüllü geri dönüş, devlet meşruiyeti ve barış inşa süreci kavramlarını ele almaktadır. İncelenen Burundi ve Bosna-Hersek örnekleri, mültecilerin güvenli ve sürdürülebilir bir şekilde geri dönüşü için hak temelli bir yaklaşımın ehemmiyetine işaret etmektedir. Uluslararası insan hakları hukuku ve mülteci hukuku, mültecilerin geri dönüşünün gönüllü ve yasal bir koruma çerçevesinde olması gerektiğini ortaya koymaktadır. Çalışma genel olarak hak temelli bir dönüşün sağlanmasının hem gönderen hem de ev sahibi devlet için uzun vadeli barış ve istikrar anlamına geleceğini öne sürmektedir.

***Anahtar Kelimeler**: geri göndermeme ilkesi; mülteciler; geri gönderme; uluslararası insancıl hukuk; uluslararası insan hakları hukuku; uluslararası mülteci hukuku.*

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I. INTRODUCTION

A large number of the world's refugees have left their countries because of war or violent conflict.[490] After conflicts come to an end, the return of refugees is the most preferred option among states.[491] However, significant obstacles ranging from discrimination to imprisonment often hinder their return,[492] and even after the conflict has ended, enforcing the principle of non-refoulement can remain challenging. This article seeks to examine the tensions between the objectives of a post-conflict context and the principle of non-refoulement. Although the conditions under which refugees *can* return to their country of origin have been extensively examined in the literature; the conditions under which they *can* be returned by states have received less attention.[493] This article aims to fill this gap in the literature. By drawing on case studies from two different countries – Burundi and Bosnia and Herzegovina, the article illustrates how post-conflict conditions can complicate the application of this principle.

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[490] Karen Hulme, 'Armed Conflict and the Displaced', (2005) 17 *International Journal of Refugee Law* 91, 91.

[491] Richard Black, 'Return of Refugees: Retrospect and Prospect', in Michael Dumper (ed.), Palestinian Refugee Repatriation: Global Perspectives (Routledge, New York 2006), 27.

[492] Giulia Scalettaris and Flore Gubert, 'Return Schemes from European Countries: Assessing the Challenges', (2018) 57 *International Migration* 91, 95.

[493] Lori Beaman, Harun Onder and Stephanie Onder, 'When do Refugees Return Home? Evidence from Syrian Displacement in Mashreq', (2022) 155 *Journal of Development Economics* 1, 1.

Although the global community largely acknowledges the importance of refugees returning to their home countries, there is no uniform agreement on the precise circumstances under which return should occur.[494] A key issue of contention is whether the duty of non-refoulement ends as soon as hostilities come to an end. This prompts another critical inquiry: does the mere cessation of conflict automatically create conditions suitable for refugees to go back safely? More fundamentally, what constitutes a safe return? There is no set-in-stone response, as international refugee law, humanitarian law, and human rights law each offer unique interpretations.[495] These legal frameworks also vary in their understanding of what qualifies as a post-conflict state,[496] which creates differing criteria for repatriation. They propose distinct views on when a state's obligations under non-refoulement should be considered fulfilled. [497]

In the scope of this article, return means that a migrant, after spending some time abroad, returns to her/his country of origin.[498] The key issue rests on the conditions and timing of the return. Repatriation, on the other hand, is organized and carried out by states. International human rights instruments refer to 'the right to return', whereas international refugee law and international humanitarian law refers to the term as 'repatriation'.[499] Repatriation can be voluntary (voluntary repatriation) or not (involuntary repatriation). Involuntary repatriation, from a legal standpoint, should only be permitted if and when the circumstances that necessitated international protection no longer exist.[500] While this appears straightforward, different

[494] Jenny Poon, 'Non-Refoulement in the International Refugee Law: A Lex Specialis?', Cornell International Law Journal Blog, 7 August 2017, <https://cornellilj.org/2017/08/07/non-refoulement-in-the-international-refugee-law-regime-a-lex-specialis/> accessed 7 April 2025.

[495] ibid.

[496] Kirsten J. Fisher, 'Defining Relationship between Transitional Justice and *Jus Post Bellum*: A Call and an Opportunity for Post-conflict Justice', (2018) 16 *Journal of International Political Theory* 1.

[497] Tamás Molnár, 'The Principle of Non-Refoulement Under International Law: Its Inception and Evolution in a Nutshell', (2016) 1 *COJOURN* 51, 51.

[498] Stephan Dünnwald, 'Voluntary Return: The Practical Failure of a Benevolent Concept', in Martin Geiger and Antonine Pecoud (eds), Disciplining the Transnational Mobility of People (Palgrave Macmillan, London 2013) 228, 228.

[499] Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996) 8 *International Journal of Refugee Law* 532, 539.

[500] Michael Barutciski, 'Involuntary Repatriation when Refugee Protection is No Longer Necessary: Moving Forward after the 48th Session of the Executive Committee', (1998) 10 *International Journal of Refugee Law* 236, 251.

branches of international law offer different - and at times conflicting – interpretations of when international protection should come to an end. The article contributes to the literature by identifying these divergent approaches on the issue of return within international law.

The first section will clarify the post-conflict situations and the main goals of post-conflict justice. In the section, different approaches within the branches of international law (mainly international human rights law (IHRL), international humanitarian law (IHL), and international refugee law) regarding the repatriation of refugees will be scrutinised. In the second section, this issue will be analysed in greater depth through two case studies – Burundi and Bosnia and Herzegovina. The significance of voluntary repatriation for both the principle of non-refoulement and the post-conflict state will be highlighted.

II. Transition from Conflict to Post-conflict: When to Return Refugees?

Different legal frameworks—refugee law, IHL, and IHRL—approach the principle of non-refoulement in different ways. Consequently, each legal field holds different views on when it is appropriate for refugees to return to their home country. Ensuring the conditions necessary for refugees to return home has become a central concern in most post-conflict peacebuilding efforts.[501] One of the key reasons for this is that the continued presence of refugees poses a legitimacy challenge for post-conflict states.[502] From the standpoint of international law theory, a state's legitimacy and credibility are called into question when a portion of its population remains outside its borders. Another major reason is the political and symbolic importance of refugee return for both transitional governments and peacebuilding operations. States must demonstrate to the international community that they are capable of managing the post-conflict period effectively.[503] Furthermore, refugee repatriation is often regarded as a political necessity in

[501] Dominik Zaum, 'Post-Conflict Statebuilding and Forced Migration', in Alexander Betts and Gil Loescher (eds), *Refugees in International Relations* (OUP, Oxford 2011) 285, 287.
[502] Richard Black and Saskia Gent, 'Sustainable Return in Post-conflict Contexts', (2006) 44 *International Migration* 15, 17.
[503] Sarah Petrin, 'Refugee Return and State Reconstruction: A Comparative Analysis', UN High Commissioner for Refugees New Issues in Refugee Research, Working Paper No. 66, (2002), 5.

peacebuilding processes and the issue points out an important indicator for the success of such operations.[504]

This measure of success is frequently referenced in United Nations (UN) documents. For instance, An Agenda for Peace of the UN describes refugee repatriation as a factor that can "consolidate peace and advance a sense of confidence and well-being among people."[505] As known, the UN has a dedicated agency for refugee matters: the Office of the United Nations High Commissioner for Refugees (UNHCR). According to UNHCR's Statute, promoting voluntary repatriation is one of UNHCR's key objectives.[506] On multiple occasions, UN High Commissioners emphasized that addressing refugee issue is essential for ensuring lasting peace and stability.[507] As a result, it is evident that refugee return is viewed as an integral component of the broader peacebuilding process. As a result of the expectation of return, the concept of the "temporary refugee" emerged.[508] Under this concept, refugee status is granted for a limited period and is expected to end once the circumstances necessitating protection no longer exist.[509]

While the international community broadly agrees on the necessity of refugee return, there is no consensus on the specific conditions under which refugees should be repatriated. A central point of debate is whether the non-refoulement obligation ceases immediately after a conflict ends or not. This raises a further question: does a post-conflict environment necessarily fulfil the requirements needed for safe refugee repatriation? More importantly, what are those requirements? There is no single answer to these questions, since refugee law, IHL, and IHRL provide different perspectives. These legal frameworks also diverge on how a post-conflict state should be defined and this leads to differing conditions for refugee return. They hold distinct positions on when a state's non-refoulement obligations should come to an end.

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[504] Zaum (n 12) 287-288.

[505] Report of the Secretary-General, 'An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping' UN Doc A/47/277-S/24111, (1992), para 55.

[506] United Nations General Assembly Resolution, A/RES/428(V) (14 December 1950) article 8(c).

[507] See, for example, Sadaka Ogata, 'Opening Statement', (Healing the Wounds: Refugees, Reconstruction, Reconciliation, Princeton, 1996).

[508] Guy S. Goodwin-Gill, 'Non-Refoulement, Temporary Refuge, and the 'New' Asylum Seekers', in David James Cantor and Jean-François Durieux (eds), Refuge from Inhumanity? War Refugees and International Humanitarian Law (Brill, Leiden 2014), 441.

[509] ibid.

It is important to note that the legal status of the non-refoulement principle remains widely debated. While some scholars argue that it has attained jus cogens status,[510] this claim for some scholars is less than convincing.[511] However, what is indisputable is that non-refoulement is a fundamental tenet of refugee law.[512] Enshrined in the 1951 Convention Relating to the Status of Refugees (hereafter referred to as "the 1951 Convention" or "the Convention"), the principle is a cornerstone of international refugee protection. According to the Convention, as long as an individual's life or freedom is at risk, the host state is prohibited from returning them under any circumstances.[513] The Convention defines the threshold for such a threat as the presence of persecution.[514] In contrast, under IHRL, this threshold is lower and extends to the risk of "torture, inhuman, or degrading treatment or punishment." Major IHRL treaties—including the International Covenant on Civil and Political Rights (ICCPR),[515] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[516] and the European Convention on Human Rights (ECHR)[517]—prohibit returning individuals to situations where they would face torture, inhuman, or degrading treatment or punishment.

Moreover, the exceptions to the non-refoulement principle are stricter under IHRL than under refugee law. In international refugee law, a person may be returned to their home country if they are deemed "a danger to the security of the [host] country."[518] By contrast, IHRL does not allow for any

[510] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement', (2001) 13 *International Journal of Refugee Law* 533, 534.
[511] Aoife Duffy, 'Expulsion to Face Torture? Non-Refoulement in International Law', (2008) 20 *International Journal of Refugee Law* 373, 373.
[512] James C. Simeon, 'What is the Future of Non-Refoulement in International Refugee Law?', in Satvinder Singh Juss (ed.), Research Handbook on International Refugee Law (Edward Elgar, Cheltenham 2019) 183, 183.
[513] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, article 33(1) (hereinafter 1951 Convention).
[514] ibid article 1(A)(2).
[515] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 7 (hereinafter ICCPR).
[516] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, article 3 (hereinafter CAT).
[517] European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (hereinafter ECHR).
[518] The 1951 Convention (n 24) article 33(2).

exceptions to the non-refoulement principle. This was made clear in *Chahal v. the United Kingdom*, where the European Court of Human Rights (ECtHR) ruled that repatriating Mr. Chahal, despite the UK Home Secretary's refusal to grant him asylum, would violate Article 3 of the ECHR (prohibition of torture or inhuman or degrading treatment).[519] The Court held that the ECHR provides absolute protection against torture, inhuman, or degrading treatment, regardless of the individual's conduct.[520] Similarly, in *N. A. v. Finland*, the ECtHR found that Finland had violated Article 2 (right to life) and Article 3 by deporting an Iraqi asylum seeker who was allegedly killed shortly after returning to Iraq.[521] The ruling was based on the principle of non-refoulement and in this case the Court held that Finland had failed to properly assess the risk of serious harm to the individual upon return.[522]

The ECtHR went even further and affirmed that there are no exceptions or derogations from this right—even in cases where the individual is considered a threat to society.[523] Similar cases have been brought before the Committee Against Torture, including *K.H. v. Denmark*, where the Committee ruled that an individual cannot be repatriated if they face a "consistent pattern of gross, flagrant, or mass violations of human rights."[524] This decision effectively broadened the definition of torture, suggesting that any serious threat to human rights should prevent refugee repatriation under IHRL. As a result, IHRL offers the most protective framework, ensuring that refugees can fully exercise their fundamental rights and freedoms. In this sense, non-refoulement under IHRL provides absolute protection.

On the other hand, IHL's primary aim is to prevent civilians from becoming refugees in the first place.[525] When displacement occurs, IHL underscores the importance of voluntary repatriation during the conflict

[519] *Chahal v UK*, App. No 22414/93, (ECHR, 15 November 1996), para. 26.
[520] ibid para. 79.
[521] *N. A. v Finland*, App. No 25244/18, (ECHR, 13 October 2021).
[522] ibid.
[523] *Chahal v UK* (n 30) para. 80.
[524] *K.H v Denmark*, Communication no 464/2011, (Committee against Torture, 3 December 2012), para. 8.3.
[525] Vincent Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP, Oxford 2013) 700, 704.

itself.[526] However, after the conflict ends, the legal situation becomes less clear. The Fourth Geneva Convention states that once hostilities have ceased, internees must be repatriated.[527] According to Chetail, the legal gap concerning civilians can be addressed through the combined application of the 1951 Convention and IHRL.[528] While this interpretation aligns with a human rights-oriented approach to IHL, it is evident that IHL alone does not provide strong protections for refugees. Another possible interpretation of IHL suggests that, since IHL primarily governs situations of armed conflict, it does not extend to post-conflict scenarios; thus, IHL implicitly assumes that once a conflict ends, peace is restored.[529] In this view, refugee status may automatically terminate once hostilities cease, as the risk of persecution is presumed to have ended. Under both of these perspectives, the threshold for repatriation is relatively low.

Both IHL and refugee law provide protection in situations characterised by extreme violence, suffering and lawlessness and their criteria for protection remain very high.[530] Compared to IHL and refugee law, IHRL provides a more comprehensive framework for refugee protection. Under refugee law, protection ceases when the conditions that initially forced refugees to flee no longer exist.[531] However, this approach poses potential risks in post-conflict settings. Premature repatriation, based solely on the absence of ongoing persecution, may undermine long-term peace and stability.[532] Historically, refugee repatriation has often been linked to renewed instability, whether immediately after a conflict or even long after a

[526] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, article 49(1) (hereinafter Fourth Geneva Convention).
[527] ibid article 134.
[528] Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents', (2004) 23 *Refugee Survey Quarterly* 1, 10.
[529] Elizabeth Salmon, 'Reflections on International Humanitarian Law and Transitional Justice: Lessons to be Learnt from the Latin American Experience', (2006) 88 *International Review of the Red Cross* 327, 327.
[530] Jennifer Moore, 'Protection against the Forced Return of War Refugees: An Interdisciplinary Consensus on Humanitarian Non-Refoulement', in David James Cantor and Jean-François Durieux (eds), Refuge from Inhumanity? War Refugees and International Humanitarian Law (Brill, Leiden 2014), 413.
[531] The 1951 Convention (n 24) article 1(C)(5).
[532] Patrick Johansson, 'Refugee Repatriation as a Necessary Condition for Peace', in Ashok Swain *et al*. (eds), *Globalization and Challenges to Building Peace* (Anthem Press, London 2007) 91, 94.

peace agreement has been reached.[533] This is because returning refugee populations often include "spoilers"—individuals or groups who oppose the post-conflict settlement. Additionally, prolonged exile can lead to the politicization of refugee communities.[534] However, the approach of IHRL—and to some extent refugee law—seeks to establish minimum human rights standards that can prevent future conflicts arising from the failure to uphold refugees' rights. Without the assurance that returnees will enjoy their fundamental rights, they cannot contribute to the peacebuilding process and may instead become a source of renewed conflict.

The differing perspectives of refugee law, IHL, and IHRL also have direct implications for how the transition from conflict to post-conflict is understood. As each legal system interprets the non-refoulement principle differently, they also conceptualize the distinction between conflict and post-conflict in distinct ways. Under IHL, the transition from conflict to post-conflict is typically marked by the cessation of hostilities and the signing of a peace agreement. However, in practice, clear-cut distinctions between war and peace, especially after the end of the Cold War, are often rare, as noted by Sadaka Ogata.[535]

Similarly, under refugee law, the end of persecution signals the beginning of a post-conflict period and the termination of non-refoulement obligations. In contrast, IHRL takes a broader approach. For a state to transition into a genuine post-conflict phase and no longer be bound by non-refoulement obligations, it must ensure that returning refugees are not subjected to torture, inhuman, or degrading treatment.[536] If these conditions are not met, the state cannot be considered post-conflict and remains in a state of ongoing instability. In sum, each legal framework defines post-conflict differently and this makes it difficult to draw a clear line between conflict and post-conflict situations.

III. Challenges of Refugee Return to Post-conflict States: Lessons Learnt

[533] Sonja Fransen, 'The Socio-Economic Sustainability of Refugee Return: Insights from Burundi', (2017) 23 *Population, Space and Place* 1.
[534] James Milner, 'Refugees and the Regional Dynamics of Peacebuilding', (2009) 28 *Refugee Survey Quarterly* 13, 15.
[535] Ogata (n 18).
[536] Eman Hamdan, The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Brill, Leiden 2016).

Distinguishing between a conflict and a post-conflict situation is not always straightforward. Different legal frameworks define post-conflict status in different ways. The article continues with an analysis of refugee repatriation in Burundi and Bosnia and Herzegovina, highlights key challenges, and proposes solutions based on IHRL. Post-conflict situations are often viewed as processes to restore a country to its pre-war state, following the principle of *status quo ante bellum*.[537] However, this perspective overlooks the lasting effects of conflicts. At times, returning refugees may intensify existing problems rather than resolving them. This issue is particularly evident in Burundi, where the failure to reintegrate refugees has been a persistent problem for decades.

a) Burundi: A Case of Premature Repatriation

The Burundian refugee crisis began in 1972, with approximately 300,000 Hutu refugees fleeing to Tanzania.[538] By the 1990s, this number had risen to nearly one million.[539] Over time, tensions between Burundian refugees and the Tanzanian population escalated and this eventually led to security concerns, cross-border attacks, and assaults on humanitarian workers.[540] After the Arusha Peace and Reconciliation Agreement (APRA) was signed on 28 August 2000, Tanzania adopted a policy of repatriating Burundian refugees to their home country.[541]

Initially, the APRA seemed to provide a strong foundation for the reintegration of returning refugees. Like many other peace agreements, it included various provisions aimed at ensuring refugees' successful return.[542] Moreover, it promised assistance in reclaiming lost property[543] and ensured

[537] Samir Elhawary and Sara Pantuilano, 'Land Issues in Post-conflict Return and Recovery', in Jon Unruh and Rhodri C. Williams (eds), *Land and Postconflict Peacebuilding* (Earthscan, London 2013) 115, 116.

[538] Sonja Fransen and Katie Kuschminder, 'Back to the Land: the Long Term Challenges of Refugee Return and Reintegration in Burundi', UN High Commissioner for Refugees New Issues in Refugee Research, Working Paper No. 242, (2012), 6.

[539] ibid.

[540] Clayton Boeyink, 'Tanzania's Threat to Expel Burundians Sets a Dangerous Precedent', *Foreign Policy* (15 November 2023).

[541] USCRI Situation Report, 'Returning to Partial Peace: Refugee Repatriation to Burundi', 13 June 2002, <https://reliefweb.int/report/burundi/returning-partial-peace-refugee-repatriation-burundi> accessed 4 April 2025.

[542] Arusha Peace Agreement and Reconciliation Agreement for Burundi Protocol IV, Chapter 1, (28 August 2000), article 4(b).

[543] ibid 4(h).

the fair distribution of resources.[544] However, the reality was much different. The repatriation process encountered several major challenges: One key issue was that the repatriation of Burundian refugees was not always voluntary. In certain instances, the Tanzanian government forcibly closed refugee camps and thus effectively forced refugees to return.[545] This reflects a common assumption that once a conflict ends, states are no longer bound by their non-refoulement obligations. However, this assumption proved problematic in Burundi, since the peace agreement did not put an end to violence. In 2002, ongoing clashes in certain provinces triggered a new wave of refugees fleeing back to Tanzania.[546]

Additionally, other serious concerns emerged in Burundi, including rising crime rates, reductions in food aid, and restrictions on refugees' freedom of movement.[547] The return process also heightened land tenure disputes and exacerbated pre-existing tensions over land ownership.[548] In countries with limited economic resources, land is often the primary means of survival, and this makes disputes over land allocation particularly dangerous in such contexts.[549] Without proper legal frameworks and structural preparations, refugee repatriation can pose a serious threat to the stability of the post-conflict country. Stephanie Schwartz's ethnographic research shows that early repatriation to Burundi in 2003 and 2004 resulted in violent rivalries between returnees and non-migrants from 2014 to 2016.[550] One of the major problems was land dispute between *repatriés* and *résidents*; due to the land conflict, returnees faced harassment, violence, physical assault, and murder on a daily basis in Burundi.[551]

The case of Burundi challenges the assumption that the end of an armed conflict marks the beginning of stability and peace. Barbra N. Lukunka's research shows that Burundian returnees faced exploitation and exclusion

[544] ibid 4(f).
[545] Fransen and Kuschminder (n 49) 9.
[546] ibid 8.
[547] Human Rights Watch, 'Tanzania: Burundians Pressured into Leaving', 12 December 2019, < https://www.hrw.org/news/2019/12/12/tanzania-burundians-pressured-leaving> accessed 4 April 2025.
[548] Fransen and Kuschminder (n 49) 9.
[549] Elhawary and Pantuilano (n 48) 117.
[550] Stephanie Schwartz, 'Home, Again: Refugee Return and Post-Conflict Violence in Burundi', (2019) 44 *International Security* 110, 110.
[551] ibid 130.

upon return.[552] They were stigmatised by fellow citizens for having "left the home" during the war.[553] Many returnees stressed that staying in Tanzania or returning to Burundi made little difference, as in both places they were deprived of their human rights and freedoms.[554] From an IHL standpoint, Burundi could be classified as a post-conflict state since there was an official peace agreement. A similar conclusion might be reached under refugee law, since there was no immediate threat of persecution. However, from an IHRL perspective, the situation was a case of premature repatriation. Although there was a ceasefire in Burundi, in some regions intense fighting persisted.[555] UNHCR reported in 2003 that there was fighting between rebels and government troops in Gitega (capital of Burundi).[556] However, the Tanzanian Government stated that Burundian refugees were aware of the firefight and they chose to leave.[557] Human Rights Watch's interviews with the Burundian refugees showed that the refugees left since the conditions of life had deteriorated in Tanzania for them.[558] The Tanzanian Government had forbidden the Burundian refugees to leave the camps, "a measure to cut the supplementary income that many had earned by cultivating fields for local farmers or by trading in local markets."[559] This renders the "voluntary repatriation programme" open to debate. Tanzania should have upheld its non-refoulement obligation and should have ensured that refugees were not forcibly returned to unsafe conditions. Even if Burundian refugees were perceived as a security risk, as noted in the *Chahal v. the United Kingdom* case, this did not justify their forced expulsion. Furthermore, as established in the *K.H. v. Denmark* case, repatriating individuals without safeguarding their basic human rights amounts to inhumane treatment. Consequently, Burundi's refugee

[552] Barbra N. Lukunka, '"They call us witches": Exclusion and Invisibility in the Burundian Returnee Reintegration', (2018) 24 *Journal of Peace Psychology* 315.
[553] ibid.
[554] Theodore Mbazumutima, '"Staying in Tanzania or retuning to Burundi is all the Same": Re-imagining the Reintegration of Burundian Returnees', (2023) 42 *Refugee Survey Quarterly* 336.
[555] UN High Commissioner for Refugees Briefing Notes, 'Burundi: Refugees Return Despite Reports on Intense Fighting', 23 January 2003, <https://www.unhcr.org/africa/news/briefing-notes/burundi-refugees-return-despite-reports-intense-fighting> accessed 6 April 2025.
[556] ibid.
[557] ibid.
[558] Human Rights Watch, 'The Return of Refugees from Tanzania', <https://www.hrw.org/reports/2003/burundi1203/11.htm > accessed 6 April 2025.
[559] ibid.

repatriation process violated both human rights principles and the non-refoulement doctrine. In summary, in the Burundian case, the principle of voluntary return was a major issue. This principle is closely linked to the right to freedom of movement, which guarantees individuals the ability to travel and choose their place of residence.[560] In IHRL, the right of refugees to return voluntarily is recognized as an extension of this fundamental freedom.[561] Moreover, voluntary repatriation is seen as an essential component of human dignity, as forced returns contradict the principle of individual autonomy.[562] Thus, under IHRL, voluntary repatriation is considered an absolute right.

Interestingly, the 1951 Refugee Convention does not explicitly grant refugees an absolute right to voluntary repatriation.[563] However, the principle of non-refoulement has been interpreted by some scholars to encompass the right to voluntary return. For instance, as noted by Chetail, there is and there should be a clear connection between the concepts of voluntary repatriation and non-refoulement.[564] Essentially, if the 1951 Convention prohibits forced repatriation, it implicitly affirms that refugees cannot be returned without their consent.[565] This interpretation aligns with a human rights-oriented approach to non-refoulement principle. While voluntary repatriation is recognized by the UNHCR, in practice, the scope of voluntary return and non-refoulement may vary under different fields of international law.[566]

The UNHCR's 1996 Handbook provides further clarification on voluntary repatriation, and states that returns should only take place when conditions in the country of origin are safe and return is dignified.[567] However, this definition weakens the importance of voluntariness, as it implies that once safety and dignity are ensured, repatriation—whether voluntary or involuntary—is permissible. The UNHCR Executive Committee has also emphasized the requirement of safety in its

[560] ICCPR article 12, Universal Declaration of Human Rights (adopted on 10 December 1948) (hereinafter UDHR), article 13.
[561] The Human Rights Committee General Comment 27 on freedom of movement, Article 12 ICCPR (1999), para. 4.
[562] ibid para 19.
[563] The 1951 Convention (n 24) article 33(2).
[564] Chetail (n 39) 19.
[565] ibid.
[566] The Statute of UN High Commissioner for Refugees, A/RES/428(V), (1950), article 1.
[567] UN High Commissioner for Refugees Handbook 'Voluntary Repatriation: International Protection' (1 January 1996), para. 3(1).

recommendations,[568] but as Chimni points out, prioritizing "safe return" can diminish the emphasis on refugees' free will.[569] This shift creates a legal loophole and potentially allows states to force refugees to return under the pretext of safety, even when substantial risks remain.[570] This, in turn, can lead to forced repatriation and might violate both the principle of non-refoulement and the right to freedom of movement.

A key issue in refugee law is whether individuals can voluntarily relinquish their refugee status.[571] The 1951 Convention states that refugee status ceases when a refugee voluntarily seeks the protection of their home country.[572] However, under IHL, it is uncertain when there is a 'cessation of hostilities' and whether this requires a peace agreement or a lack of violence.[573] While refugee law permits refugees to renounce their status, IHRL adopts a stricter approach. According to IHRL, voluntary repatriation does not justify the withdrawal of refugee status.[574] The appropriate time for repatriation is not determined by refugees' willingness to return but by whether their fundamental rights can be guaranteed upon return.[575]

Based on this discussion, it can be concluded that Burundi's reintegration process was unsuccessful. An IHRL analysis suggests that Tanzania's non-refoulement obligation did not end with the signing of the peace agreement. At that time, Burundi was still unable to provide returning refugees with their fundamental rights and freedoms. Additionally, many Burundian refugees did not repatriate voluntarily; they essentially faced significant difficulties in Tanzania and therefore they were pressured to leave. Consequently, their freedom of movement was violated, and this led to an overall disregard for their dignity.

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[568] See, for example, UN High Commissioner for Refugees EXCOM Conclusion No 40 (XXXVI) 'Refugee Repatriation' (1985).
[569] B. S. Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation', (1993) 5 *International Journal of Refugee Law* 442, 454.
[570] ibid.
[571] The Fourth Geneva Convention (n 37) article 1(C).
[572] The Fourth Geneva Convention (n 37) article 1(C)(1).
[573] Eman Amad, 'International Refugee Law and International Humanitarian Law: Regime Interaction and Overlap', Diplomacy, Law and Policy (DLP) Forum, 9 March 2023, <https://www.dlpforum.org/2023/03/09/international-refugee-law-and-international-humanitarian-law-regime-interaction-and-overlap/> accessed 5 April 2025.
[574] Berna Gündüz, 'Non-refoulement Principle in the 1951 Refugee Convention and Human Rights Law', (2018) 10 *ASSAM UHAD* 13, 17.
[575] ibid.

Ignoring the voluntary nature of repatriation also complicates the distinction between conflict and post-conflict situations. As the Burundian case demonstrates, cyclical conflict may arise both during and after armed conflicts.[576] The transition from conflict to post-conflict is a complex process that requires structural changes.[577] If these changes do not occur, the peace process remains fragile.[578] The first step toward a stable transition is ensuring that returning refugees receive fundamental human rights, particularly property and land rights.[579] IHRL has played a crucial role in securing such rights, as evidenced by legal developments in the case of Bosnia and Herzegovina.

b) Bosnia and Herzegovina: A Case of Problematic Repatriation

At the conclusion of the ethnic war in the Balkans, the Dayton Peace Agreement (DPA) was signed by representatives of Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia. Like the APRA and many other peace treaties, the DPA included provisions aimed at protecting around one million refugees. Annex 7 of the DPA established the 'right to return' for all displaced persons.[580] However, the DPA uniquely granted refugees the specific right to return to their original houses. Furthermore, it recognized the refugees' right to have their property reinstated, and if restoration was not possible, to receive financial compensation.[581]

Difficulties also occurred during the implementation of the DPA. Premature and involuntary repatriation posed a significant threat to the fragile peace process in Bosnia and Herzegovina, just as it did in Burundi. While the Bosnian repatriation process was comparatively more aligned with human rights principles than the Burundian case, certain fundamental challenges led to a failure to respect refugees' right to

[576] Janvier D. Nkurunziza, 'Timing and Sequencing of Post-conflict Reconstruction and Peacebuilding in Burundi', Political Economy Research Institute, Working Paper No. 406, (2015), 3.
[577] Graham Brown, Arnim Langer and Frances Stewart, 'A Typology of Post-Conflict Environments', Center for Research on Peace and Development (CRPD), Working Paper No. 1, (2011), 5.
[578] ibid.
[579] Jon Unruh and Rhodri C. Williams, Land and Post-Conflict Recovery, (Routledge, New York 2013).
[580] General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement) Annex 7, (14 December 1995), article 1 (hereinafter DPA).
[581] ibid.

voluntary return. Following the signing of the DPA on 14 December 1995, a specialized body was established to handle property disputes: the Commission on Real Property Claims of Refugees and Displaced Persons (CRPC).[582] The overall success of the repatriation process was heavily reliant on securing property rights and prompted significant efforts to facilitate the return of properties to displaced persons.[583] However, despite these efforts, within the first five years, only 120,000 refugees managed to return to their original homes in Bosnia and Herzegovina.[584]

One major obstacle to return was the predicament of minority refugees, who faced the possibility of becoming an ethnic minority in their former communities. While those belonging to the majority ethnic group were generally willing to return, minority returnees hesitated due to concerns over economic and social security, as well as fears of physical violence.[585] Moreover, local authorities actively resisted the return of minority refugees, and they believed that allowing them back would undermine their legitimacy among the local population.[586] However, the core objective of the DPA was to reverse the consequences of ethnic cleansing and restore the pre-war multi-ethnic demographic structure. Therefore, ensuring the return of minority groups was in fact essential for sustainable peace. To address this issue, international organizations attempted to facilitate the return of Serbs to the Federation (where Bosnians and Croats are the majority) and Muslims and Croats to Republika Srpska (where the Serbs are the majority).[587] However, these efforts, combined with the reluctance of host states to continue accommodating refugees for an extended period, led to critical problems.

The DPA contained detailed provisions on refugee repatriation. The framework, that aimed to ensure a safe and voluntary return, appeared even

[582] Hans van Houtte, 'Commission for Real Property Claims of Displaced Persons and Refugees', Max Planck Encyclopaedias of International Law, 2019, <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1320.013.1320/law-mpeipro-e1320 > accessed 6 April 2025.

[583] Catherine Phuong, 'At the Heart of the Return Process: Solving Property Issues in Bosnia and Herzegovina', (2000) 7 *Forced Migration* 5, 6.

[584] ibid 7.

[585] Lene Madsen, 'Homes of Origin: Return and Property Rights in Post-Dayton Bosnia and Herzegovina', (2001) 19 *Refuge* 8, 9.

[586] ibid.

[587] Catherine Phuong, 'Freely to Return: Reversing Ethnic Cleansing in Bosnia-Herzegovina', (2000) 13 *Journal of Refugee Studies* 165, 173.

more protective than the 1951 Refugee Convention.[588] The DPA specified that returns should occur 'without risk of harassment, intimidation, persecution or discrimination'[589] and with 'full respect for the human rights and fundamental freedoms' of returnees.[590] These provisions seemed highly aligned with IHRL. However, the agreement also contained clauses that allowed host countries to push for early repatriation. For instance, the DPA identified 'early return' as a central objective of the settlement and instructed the UNHCR to prioritize early repatriation.[591] The DPA mandated the UNHCR to carry out, inter alia, an early repatriation.[592] As a result, rather than emphasizing voluntariness, the focus shifted to ensuring a safe return. Under these conditions, repatriation would be considered lawful if safety was guaranteed; this is because refugee status would cease and the non-refoulement obligation would no longer apply.

In practice, once conditions were deemed sufficiently safe, host countries began pressuring the UNHCR to accelerate repatriation efforts. This created tensions between the UNHCR and host states (mainly Croatia, Serbia, Montenegro), as the UNHCR argued that Bosnia and Herzegovina was not yet equipped to accommodate returning refugees.[593] One of the key concerns was the challenge of resolving property disputes within a short timeframe. If repatriation occurred too soon, returnees would be unable to reclaim their properties, thereby their ability to exercise their property rights would be threatened. The UNHCR's concerns materialized when, within a few years, some host countries repatriated approximately 800,000 refugees back to Bosnia and Herzegovina.[594] This mass repatriation led to critical issues, as many returnees were unable to reclaim their homes and were instead forced into internal displacement. As a result, they were deprived of their fundamental human rights and freedoms due to forced repatriation. This situation not only created humanitarian concerns but also complicated the peacebuilding process and weakened the prospects for long-term stability and peace in the country.

[588] The DPA (n 91) article 1(3).
[589] ibid article 1(2).
[590] ibid article 1(3).
[591] ibid article 1(1).
[592] ibid article 1(5).
[593] Elizabeth Andersen, 'The Role of Asylum States in Promoting Safe and Peaceful Repatriation under the Dayton Agreements', (1996) 7 *European Journal of International Law* 193, 203.
[594] Madsen (n 96) 7.

Between 1995 and 2001, returnees in Bosnia and Herzegovina faced ethnically based violence and intimidation on a daily basis in Bosnia and Herzegovina.[595]The attacks against the returnees varied in severity, ranging from murder and arson to property destruction, including bombings and landmines.[596] This was particularly pronounced in the Repuklika Srpska, where the genocide had taken place. Returnees - mostly Bosniaks - returned as minorities and often found their properties damaged.[597] In addition, they faced violent demonstrations, physical assaults, and even killings.[598] Wartime violence thus transformed into post-war violence, manifesting as daily physical attacks against Bosniaks.[599] Therefore, research shows that return to Bosnia and Herzegovina during this period was not yet safe for returnees.

Another significant challenge in Bosnia and Herzegovina was that the exercise of property rights was tied to physical return. Although the DPA did include provisions for 'just compensation'[600] and established the CRPC to handle compensation claims, in practice, the CRPC primarily facilitated the buying, selling, leasing, and mortgaging of properties rather than providing direct financial compensation.[601] This approach aligned with the broader peacebuilding strategy, which aimed to reverse the effects of ethnic cleansing. However, it also meant that refugees who chose not to return were denied their property rights. For many, particularly those from minority groups, there were legitimate reasons to refuse return. If they returned voluntarily, they faced potential persecution from majority returnees. Moreover, some were forced into internal displacement because conditions did not allow for the restoration of their homes. For this reason, compensation should not be treated as a mere consequence of return but rather as a mechanism for ensuring refugees' fundamental rights. The

[595] Mats Berdal, Gemma Collantes-Celador and Merima Zupcevic, 'Post-War Violence in Bosnia and Herzegovina', in Astri Suhrke and Mats Berdal (eds.), The Peace in Between: Post-War Violence and Peacebuilding, (Routledge, London 2012), 9.
[596] ibid.
[597] Walpurga Englbrecht, 'Bosnia and Herzegovina, Croatia and Kosovo: Voluntary Return in Safety and Dignity?', (2004) 23 *Refugee Survey Quarterly* 100, 104.
[598] ibid.
[599] Hamza Preljevic and Ibrahim Fevzi Guven, 'The Continued Challenges of the Bosniak Returnees in Republika Srpska and the Threat of Secessionism', (2024) 24 *Romanian Political Science Review* 41, 73.
[600] The DPA (n 91) arts 11 and 12.
[601] Miriam Anderson, 'The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (The Pinheiro Principles): Suggestions for Improved Applicability', (2011) 24 *Journal of Refugee Studies* 304, 309.

principle of voluntary return in international human rights law means that repatriation is a right, not an obligation.[602]

Over time, this approach has evolved, largely due to the adoption of the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, commonly referred to as the Pinheiro Principles.[603] These principles establish that return and compensation should be treated as separate entitlements.[604] Although some challenges remain in their implementation, this shift represents a significant advancement in human rights. By separating compensation from return, the Pinheiro Principles have the potential to eliminate the discriminatory treatment towards minority refugees. Under this framework, the bias favouring majority returnees over minority returnees can be addressed and rectified.

Whereas the situations in Burundi and Bosnia and Herzegovina share notable similarities, they also share differences as well. One key difference was the level of international involvement. Bosnia and Herzegovina received substantial financial support, and over a hundred international organizations participated in monitoring and assisting the repatriation process. By contrast, Tanzania—where many Burundian refugees were hosted—remains one of the poorest countries in the world. This economic disparity played a significant role in shaping the Burundian repatriation process. As Chimni has argued, the repatriation policies of Western countries are often driven by a lack of burden-sharing rather than economic constraints alone.[605] In both cases, however, the principle of non-refoulement was violated. This is because, in both contexts, the risk of persecution persisted. This article has showed that populations were still recovering from the impact of violent conflict and slowly transitioning into post-war reconstruction. As a result, human rights violations continued, and in some cases, conditions deteriorated further after repatriation.

The principle of non-refoulement has evolved under IHRL and expanded its scope beyond protection from persecution to include safeguards against torture and inhuman or degrading treatment. Therefore, any decision to

[602] UDHR article 13, ICCPR article 12(4).

[603] United Nations Economic and Social Council, Housing and property restitution in the context of return of refugees and internally displaced persons, E/CN.4/Sub.2/2005/17, 28 June 2005.

[604] Giulia Paglione, 'Individual Property Restitution: From Deng to Pinheiro – and the Challenges Ahead', (2008) 20 *International Journal of Refugee Law* 391,405.

[605] B. S. Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems', (2004) 23 *Refugee Survey Quarterly* 55, 66.

repatriate refugees must consider these broader protections. A fundamental requirement for repatriation is an 'objective and impartial assessment of the human rights situation in the country of origin.'[606] In both Burundi and Bosnia and Herzegovina, it is questionable whether such assessments were conducted carefully and objectively. Property rights play a central role in return processes, but they cannot be viewed in isolation from other fundamental rights and freedoms. Whereas restoring property rights to returnees may create the appearance of a successful peace process, depriving them of broader human rights undermines long-term stability and peace.

IV. Conclusion

This article has argued that the principles of non-refoulement and post-conflict recovery depend on the legal and policy perspective taken. The article has shown that from the standpoint of IHL and refugee law, the threshold for defining a 'post-conflict situation' is relatively low. However, under IHRL, a state's transition out of conflict requires more extensive criteria. Therefore, from IHRL's perspective, the non-refoulement principle does not conflict with post-conflict objectives. If a state can guarantee the fundamental human rights of returning refugees, repatriation does not contradict non-refoulement, as the risks of persecution and rights violations are considerably eliminated. However, in situations where the risk of persecution and human rights abuses persist, the non-refoulement principle remains a crucial safeguard against premature repatriation.

The cases of Burundi and Bosnia and Herzegovina show that refugees' return is an essential component of the peacebuilding process. Whereas it is often assumed that the end of a conflict should mark the beginning of return, legal, political and economic frameworks are necessary to ensure a safe and sustainable repatriation. These cases highlight that the protection of refugees' fundamental rights and freedoms must serve as the foundation of any return process. The reluctance of host states to continue accommodating refugees might prompt premature repatriation. When and if return is carried out hastily and without adequate preparation, it might jeopardize the post-conflict situation and might threaten the broader peace process. The cases further demonstrate that refugees, belonging to a particular ethnicity, religion, or a race, might have a significant impact on the post-conflict

[606] Saul Takahashi, 'The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection', (1997) 9 *International Journal of Refugee Law* 593, 594.

state's dynamics. Therefore, their return should be conducted carefully, gradually, and vigilantly.

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