

LEGAL SAFETY ISSUES IN THE CONTEXT OF VOLUNTARY REPATRIATION

I. INTRODUCTION

1. Voluntary repatriation remains the durable solution sought by the largest number of refugees. Its realization in conditions of safety and with dignity is, however, complex and challenging. Ensuring sustainable return and the restoration of national protection is first and foremost the responsibility of the countries of origin towards their own people. It, however, also requires concerted and sustained action and support by the international community. UNHCR's overriding priorities when it comes to return are to promote the conditions conducive to voluntary repatriation, to ensure the exercise of a free and informed choice, and to mobilize support to underpin its sustainability.

2. It is against this background that voluntary repatriation was discussed during the Third Track of the Global Consultations on International Protection¹ on the basis of a background note on voluntary repatriation² which elucidates the meaning of the safety elements of the concept of return in safety and with dignity by describing its core components (physical safety, legal safety and material safety) and UNHCR's role in relation to each.

3. Following the recommendations emerging from the discussions during the Global Consultations on International Protection and the Executive Committee's deliberations, the Agenda for Protection foresees a number of pertinent activities relating to "Improved conditions for voluntary repatriation" under Goal 5 "Redoubling the search for durable solutions". Among these activities is the elaboration of an Executive Committee conclusion addressing legal safety issues, including property concerns, as a complement to Conclusion No. 40 (XXXVI) on voluntary repatriation.

II. LEGAL AND CONCEPTUAL FRAMEWORK

4. While the 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not deal with voluntary repatriation, the cessation clauses of the Convention have some

¹ Global Consultations on International Protection: Report of the Fourth Meeting in the Third Track (22-24 May 2002) (A/AC.96/961, p. 29), adopted at the 24th meeting of the Standing Committee on 25 June 2002.

² EC/GC/02/5 of 25 April 2002.

relevance in this respect, albeit indirectly.³ The 1969 OAU Convention Governing the Specific Problems of Refugees in Africa (“the 1969 OAU Convention”) remains the only binding instrument which explicitly covers voluntary repatriation. It recognizes the voluntary character of repatriation and specifies the responsibilities of both the country of asylum and the country of origin.⁴ In Latin America, the 1984 Cartagena Declaration contains basic principles concerning voluntary repatriation. These were further elaborated by the International Conference on Central American Refugees (CIREFCA) in 1989. The principles touch on a range of important issues, including the provision of adequate information to refugees, freedom of movement, non-discrimination, access of returnees to means of subsistence and land, as well as access by UNHCR to returnees.

5. Numerous agreements on voluntary repatriation have been signed over the years between States (as countries of asylum or countries of origin) and UNHCR. These agreements⁵ generally concern the more significant voluntary repatriation operations and set out the respective roles and responsibilities of the States concerned and UNHCR, the rights of refugees and returnees as well as certain operational modalities. Such agreements reinforce the legal underpinnings of voluntary repatriation, and it is through these agreements that many of the legal safety issues have been addressed, as arising in specific situations.

6. In international human rights law, the right to return to one’s own country is firmly established.⁶ This is crucial in that it provides the basis for requiring States to readmit their own people. International human rights law and standards are relevant more generally since they provide the yardstick against which to measure the restoration of national protection in the country of origin.

7. In terms of institutional responsibilities, facilitating and promoting voluntary repatriation are core and statutory functions of UNHCR.⁷ By virtue of Article 35 of the 1951 Convention, State parties are required to cooperate with UNHCR in this as well as other areas. The General Assembly has repeatedly reaffirmed and broadened UNHCR’s functions with regard to voluntary

³ Art.1C(4) stipulates that refugee status ceases if refugees voluntarily re-establish themselves in the country of origin.

⁴ See Article V of the 1969 OAU Convention; see also CM/Res. 399 (XXIV) Resolution on Voluntary Repatriation of African Refugees of the OAU Council of Ministers, Addis-Ababa, 1975.

⁵ A sample Tripartite Agreement can be found in Annex 5 of the *Handbook, Voluntary Repatriation: International Protection*, UNHCR, 1996.

⁶ See Article 13(2) of the Universal Declaration of Human Rights; Article 12(4) of the International Covenant on Civil and Political Rights; and Article 5(d)(ii) of the Convention on the Elimination of all Forms of Racial Discrimination. Those entitled not to be arbitrarily deprived of the right to return to one’s own country include nationals of a country but also certain aliens. In addition to nationals in the formal sense - that is, those who have acquired nationality by birth or conferral - “it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien”. This encompasses, inter alia, “categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence”. See Human Rights Committee, General Comment No. 27 (67), Freedom of Movement (Article 12), UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), paras. 19-21.

⁷ See General Assembly Resolution 428 (V) of 14 December 1950.

repatriation, including in the country of origin.⁸ Executive Committee conclusions⁹ also reaffirm the international principles and contain standards governing the voluntary repatriation process, including its core elements.¹⁰

III. CORE COMPONENTS

8. The search for solutions generally requires UNHCR to promote measures, with governments and with relevant international bodies, to establish conditions that would permit refugees, on the basis of a free and informed choice, to return peacefully to their homes and to rebuild their lives. In many instances, this work needs to be preceded by political processes, involving other actors than UNHCR, which address the causes of flight and lead, in particular, to the re-establishment of peace. From UNHCR's perspective, the core of voluntary repatriation is return in and to conditions of physical, legal and material safety, with full restoration of national protection the end product. These core components of "return in safety and with dignity", and UNHCR's role in relation to each, are set out below, with particular emphasis on legal safety issues.

A. Physical safety

9. Safety considerations will be the most serious initial concern. The safety of returnees must be assured by the authorities, supported as necessary by the international community and monitored, wherever return takes place. This, clearly, can best take place after violence and intimidation have ended and meaningful steps have been taken towards the (re)establishment of enforcement agencies that are compliant with human rights, as well as of a functioning, independent judiciary. The presence of mines and unexploded ordnance is often a prevalent threat in repatriation operations. De-mining and mine-awareness training programmes are therefore essential.

10. In post-conflict situations, UNHCR often needs to liaise with military forces, be they local military forces, forces deployed in the context of UN peacekeeping operations or other international forces, to ensure a safe return environment. Interaction between civil and military actors is most successful when based on a clear delineation of responsibilities between the two, which respects the distinction between military and humanitarian roles, and provides for an open information exchange and effective liaison arrangements that take into account the distinctly neutral and non-political character of humanitarian operations.

⁸ See in particular General Assembly Resolutions 49/169 of 23 December 1994, 52/103 of 12 December 1997.

⁹ The most relevant are Conclusions No. 18 (XXXI) of 1980 and No. 40 (XXXVI) of 1985, both re-affirmed by Conclusion No. 74 (XLV) of 1994. Conclusion No. 85 (XLIX) is also relevant.

¹⁰ Core elements include: (i) the importance of providing necessary information to refugees about conditions in their country of origin to facilitate decision-making; (ii) where appropriate, "go and see" visits without loss of refugee status; (iii) formal guarantees for the safety of returning refugees; (iv) UNHCR's returnee monitoring function, including UNHCR's direct and unhindered access to returnees at all stages; (v) the provision of necessary documentation and the restoration of citizenship; (vi) the need for reception arrangements and the provision of reintegration assistance by UNHCR and other United Nations agencies; (vii) the promotion of dialogue between the main actors; (viii) the establishment of consultative and tripartite mechanisms; (ix) UNHCR's leading role in promoting, facilitating and coordinating voluntary repatriation; and (x) States' primary responsibility in creating conditions conducive to voluntary repatriation as a solution to refugee problems.

B. Legal safety

11. In countries of origin, legal systems, including traditional legal structures, often need to be revived and/or reformed. In this context, UNHCR traditionally identifies and works towards removing legal and administrative barriers to return. In close cooperation with other organizations, UNHCR often provides expert advice and technical support for the drafting of legislation related to citizenship, property, documentation and return. The following paragraphs highlight the various legal issues that are of particular relevance in the context of return.

Amnesty laws or declarations

12. Amnesty laws and their enforcement are most important at an early stage of a voluntary repatriation process. They elaborate immunity from prosecution to encourage refugees to repatriate voluntarily and without fear of prosecution or punitive measures taken against them. Most amnesties exempt returnees from discrimination or punishment for the sole fact of having left the country, while dealing also with issues of draft evasion, desertion, or armed service, including in non-recognized armed forces. UNHCR's role is to promote the adoption of amnesties and to monitor their enforcement. Amnesties should not, however, be extended to returnees charged with serious violations of international humanitarian law or a serious common crime, committed prior to or during exile. This would include genocide, war crimes or crimes against humanity.

Effective nationality

13. Only with an effective nationality can individuals exercise their basic civil, political and economic rights. In the context of return, loss of nationality, unclear nationality status (for instance as regards foreign-born children of refugees) as well as changes in personal status through marriage, including with non-nationals of the country of origin, are the most common problems faced by returnees. Questions of dual nationality also require, at times, to be addressed when former refugees acquire the nationality of the country of asylum. Consistent with UNHCR's specific responsibilities for stateless persons, UNHCR works with States to resolve problems deriving specifically from statelessness, *de facto* or *de jure*.

Registration and documentation

14. Linked to nationality are questions of registration and documentation, that is, access to birth, marriage, adoption, divorce, custody or death certificates, as well as other documentation related to personal status. Particularly important in the context of return is their recognition by the authorities of the country of origin if these documents were issued by the country of asylum. In addition, UNHCR promotes the issuance of identity documents and other documents from public records (e.g. property registry). The recognition of equivalency of educational (academic and vocational) qualifications acquired by returnees while abroad is important for self-reliance and reintegration.

Family unity

15. Given the importance of family unity, including for return and reintegration, UNHCR promotes mechanisms which permit spouses and family members of different nationalities to remain together as family units, including during and following voluntary repatriation.

Housing, land and property rights

16. Experience has shown that voluntary repatriation operations are likely to be less successful if housing and property issues are left too long unattended, and particularly if refugees are not able to recover their houses and property in the country of origin.¹¹ The right to return to one's own country¹² is increasingly seen as closely linked with the right to adequate housing.¹³ In this context, the rights to property and adequate housing are understood to embrace the right not to be arbitrarily deprived of housing and property in the first place. For refugees this means they have the right to return not only to their countries of origin but also to recover the homes from which they were previously evicted or which they had to leave behind (restitution). If this is not possible, the right to adequate compensation for any loss suffered should apply. In some situations, special efforts have been necessary to enable returning women to exercise property and inheritance rights. For return to be sustainable, it is also important that housing, property and land restitution issues are addressed at an early stage and in a more systematic manner than is often the case. UNHCR promotes, in this context, the establishment of impartial and independent institutions and has provided legal advice on fair and effective procedures for the restitution (or compensation) of property rights of which returnees were deprived in an illegal, discriminatory or arbitrary manner, or which they lost while in exile. In addition, it is important that landless returnees are provided with access to land and adequate housing as appropriate.

Rebuilding and supporting basic administrative and judicial infrastructure and rule of law

17. In post-conflict situations, the basic administrative and judicial infrastructure is often dysfunctional, lacks material, human and financial resources and may, in addition, have to overcome seriously flawed selection and appointment procedures, arbitrary and discriminatory legal actions and/or excessive fees and taxation. UNHCR therefore works closely with the Department of Peacekeeping Operations of the United Nations Secretariat, other relevant United Nations bodies, such as OHCHR and UNDP, and international and non-governmental organizations with mandates and expertise in rule of law, with a view to removing legal and administrative obstacles to return. UNHCR is, for example, engaged in capacity-building involving training programmes for local judges and lawyers, the facilitation of traditional conflict-resolution mechanisms and modest material support for building administrative and judicial structures, in close cooperation with other actors. UNHCR has often been instrumental in creating legal advice centres to ensure returnees have access to effective recourse in case of

¹¹ The link between housing and property restitution in the context of the return of refugees and internally displaced has been explicitly addressed in resolution 1998/26 (E/CN.4/Sub.2/RES/1998/26 (1998), adopted by the Human Rights Sub Commission on Prevention of Discrimination and Protection of Minorities on 26 August 1998.

¹² See Article 13(2) of the Universal Declaration of Human Rights; and Article 12 of the UN Covenant on Civil and Political Rights.

¹³ See Article 11 of the 1966 UN Covenant on Economic, Social and Cultural Rights.

problems upon their return. UNHCR also closely cooperates with independent national human rights institutions.

C. Material safety

18. Material safety implies notably access in the early phases of return to means of survival and basic services, such as potable water, food, health services and education, followed by measures to underpin sustainable reintegration. UNHCR thus aims to:

- first increase the availability of basic services in situations where such services have collapsed, are of poor quality, or are insufficient for large segments of the population, including returnees;
- ensure non-discriminatory access to available public utilities.

19. UNHCR's voluntary repatriation programmes necessarily take into account the absorption capacity of the receiving location. Premature returns to areas with little or no absorption capacity could lead to competition for scarce resources among returnees or between returnees and local communities.

D. Transitional justice

20. Sustainable return depends on sustainable peace after conflict, massive violence or systematic abuses of human rights have occurred. This requires a comprehensive set of rule of law strategies, dealing both with the past and the future, in order to prevent the recurrence of the causes of refugee flight. Transitional justice addresses these, whether in the form of peaceful coexistence projects; prosecution of perpetrators; revelation of the truth about past crimes; reparation and restitution; reformation of abusive institutions; promotion of reconciliation; or a combination of these.

IV. CONCLUDING OBSERVATION

21. Based on the outlined core elements, in particular legal safety standards, UNHCR is working towards agreements on voluntary repatriation among States, as countries of asylum or countries of origin, and UNHCR. As mentioned earlier, these are aimed at translating the standards of voluntary repatriation into operational modalities and setting out the respective roles and responsibilities of the different actors involved, as well as the rights of refugees. Such agreements would benefit from an Executive Committee conclusion in which the pertinent legal safety issues are addressed. This would also facilitate other important UNHCR activities in the context of voluntary repatriation: it would assist in setting the parameters for an analysis of the obstacles to return and facilitate systematic returnee monitoring¹⁴ to identify protection issues and assistance needs. Additionally, the above elements could also be among the key indicators for the purpose of planning of voluntary repatriation and its promotion.

¹⁴ Executive Committee Conclusion No. 40 (XXXVI) considers as inherent in UNHCR's mandate that the organization "be given direct and unhindered access to returnees so that (it) is in a position to monitor fulfilment of the amnesties, guarantees or assurances on the basis of which the refugees have returned".