

Background paper No.1

Legal and practical aspects of the return of persons not in need of international protection

The scope of the challenge Within the broader context of managing international migration, the return of persons not in need of international protection is certainly one of today's most difficult global challenges. There is a need to identify, within a framework of international co-operation, appropriate legal and operational responses to the issues involved, which are clearly not covered by the 1951 Convention and 1967 Protocol relating to the Status of Refugees (hereinafter: the Convention).

A discussion of return-related issues presupposes a common understanding of who is, and who is not, in need of international protection. The adequacy of procedures for the identification of international protection needs, and of the legal criteria defining these needs, is beyond the scope of this paper. These are, nonetheless, critical elements in the debate, which probably require a greater degree of harmonisation than has been achieved so far among States Parties to the Convention.

Unsuccessful asylum seekers are not a homogeneous group. Some fail to meet the legal definition of a "refugee", although they genuinely believe to have a refugee claim. Others are denied refugee status because of a restrictive application of the relevant criteria. Still others are would-be migrants who move as a result of adverse economic conditions, fragile social structures, pressures from poverty, environmental factors or the scarcity of natural resources. The ability and/or willingness to return these persons to their home countries, and to receive them back, are uneven, creating pressures on both receiving countries and countries of origin.

The overstaying of persons rightly identified as not in need of international protection poses many problems to States. UNHCR is also concerned that the non-removal of such persons may negatively affect the integrity and credibility of asylum systems. The lack of a removal "end" to asylum processes may, furthermore, constitute a "pull-factor" for more irregular migrants, adding to the burden of countries of destination and transit.

Return to the country of origin/ nationality is not, of course, the only adequate or available consequence of a denial of the asylum claim. It is, however, in many cases the most logical one. It is, in any event, more in line with the principles of international protection and State responsibility than "non-arrival" or "deflection" policies, to which States have, at times, resorted, out of frustration with their inability to return unsuccessful asylum applicants to their countries of origin.

Migration control measures, including deportation, must be part of a comprehensive policy of migration management, at regional and global levels, bearing in mind the individual responsibilities of States of origin, destination and transit, within a framework of international solidarity and co-operation. While States have the right, as a matter of well-established international law, to control the entry, residence and expulsion of aliens, they are also bound to respect their international human rights obligations. Therefore, any measures or strategies in this area must contain elements

to deal humanely with those individuals whose return is envisaged or carried out, in accordance with international human rights standards.

Definitional issues

At the outset, it is essential to define who are “persons not in need of international protection”. At its third meeting in May 1996, UNHCR’s Standing Committee adopted the following definition:

“persons who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status on the basis of the criteria laid down in the 1951 Convention, nor to be in need of international protection on other grounds, and who are not authorised to stay in the country concerned for other compelling reasons”.

The UNHCR-IOM Memorandum of Understanding of May 1997 provides a similar definition, the key consideration being that the rejection has taken place in accordance with the protection standards promoted by UNHCR. It is equally clear that this definition does not encompass persons whose claims to asylum have been rejected on purely formal grounds, such as the “safe third country” notion.

In assessing whether a need for international protection exists on other grounds than those laid down in the 1951 Convention, States will consider, inter alia, the prohibitions on return embodied in international human rights instruments to which they are party, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and the United Nations Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

The international legal framework

At the individual level, the right of everyone to return to his or her own country is fully recognised in international law. While this human right is unlikely to be invoked by persons who are unwilling to return, it provides a sound underpinning for the promotion and facilitation of voluntary return.

At the level of States, the General Assembly of the United Nations has underlined the responsibility of countries of origin vis-à-vis the return of their nationals who are not refugees (Resolution 45/150 of 14 December 1990, 46/106 of December 1991, 47/105 of 16 December 1992).

The need for States to co-operate in the adoption of measures regarding the orderly return of migrants to their countries of origin has been highlighted by the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (not yet in force). The same instrument lays down basic standards of treatment for all migrant workers, irrespective of their legal situation.

The matter of the treatment of unsuccessful asylum-seekers has, throughout the years, received the attention of UNHCR’s Executive Committee. In its most recent Conclusion No. 85 (XLIX) of 1998, the Executive Committee

“(z) Reaffirms the fundamental right of all people to leave and to return to their own countries as well as the obligation of States to receive back their own nationals, and remains seriously concerned, as regards the return of persons not in need of international protection, that some countries continue to restrict the return of their nationals, either outright or through laws and practices which effectively block expeditious return”;

“(bb) Deeply deplores the use of those practices for the return of asylum-seekers and persons not in need of international protection which seriously endanger their physical safety, and reiterates in this regard that, irrespective of the status of the persons concerned, returns should be undertaken in a humane manner and in full respect for their human rights and dignity and without resort to excessive force.”

In May 1999, the Committee of Ministers of the Council of Europe adopted Recommendation R(99)12, which provides Member States with guidelines on how best to facilitate the return of rejected asylum-seekers to their countries of origin. These guidelines cover the treatment of the unsuccessful asylum applicant by both the host country and the country of origin, as well as the necessary co-operation between these two countries and, generally, between Member States of the Council of Europe.

Obstacles to return and factors positively influencing return policies

Obstacles to the orderly and humane return of persons not in need of international protection are numerous. They include the following:

- logistical problems in enforcing returns, including transit through third countries
- disappearance/ failure to report of the persons concerned
- bureaucratic delays
- lack of financial resources to cover the return travel
- non-issuance of travel documents by the country of origin
- staggering of returns required by the country of origin
- denial or non-recognition of citizenship
- inadequate reception/re-integration facilities in the country of origin.

From the perspective of the prospective returnee, a number of elements may hinder or, on the contrary, facilitate the implementation of a return measure. The perceived advantages and disadvantages of a continued illegal stay are necessarily weighed against the advantages and disadvantages of return. Relevant factors include the degree of integration in the sending State (which may depend, e.g., on the length of the asylum procedure itself); the anticipated responses to return of the authorities in the country of origin, of family, friends, etc.; and the need to preserve one's own dignity and self-respect. Access to proper and thorough information, and sensitive counselling, often appear to be keys to a successful implementation of return.

Sending States often find that their return policies are positively influenced by

- the geographical proximity of, and the existence of a broader political and/or economic dialogue with, the country of origin/ return
- the availability of financial, human and organisational resources to promote voluntary return
- the existence of re-admission agreements
- the existence of a multilateral co-operation framework involving several potential sending States
- the assistance of international organisations, in particular IOM and, where appropriate, UNHCR.

A comprehensive approach to the question of return

The efficient and humane return and re-integration of persons not in need of international protection appears to be a key element in the prevention of irregular migration and of migrant smuggling.

UNHCR's Executive Committee advocates the idea of a comprehensive approach to the return of persons not in need of international protection, based on a dialogue between the countries concerned, and involving, where appropriate and useful, international organisations such as IOM and UNHCR. Some key elements of a comprehensive approach are outlined below.

A comprehensive approach is premised on the recognition that migration control and deterrence alone can have little lasting impact when the need or the desire to migrate prevails. Return-oriented measures must, therefore, be part of a broad range of migration management policies that go beyond short-term reactions to a perceived or real misuse of asylum systems. In this connection, it must be noted that the majority of those migrants entering Europe in an irregular manner probably go underground and do not file asylum applications – unless and until they are apprehended.

Even persons with genuine claims to international protection may prefer to avoid presenting their claims for fear of being detained and/or deported. This fact calls for an overall improvement in the asylum “climate”, whereby the purpose, implications and outcomes of asylum procedures would be clearly understood and trusted by all parties concerned.

A comprehensive approach to migration management, including effective and humane return, cannot ignore the causes of departure and, where applicable, secondary movement, of the persons concerned. Likewise, the financial implications of migration, return and re-integration need to be analysed in a spirit of international co-operation, bearing in mind the roles and responsibilities of national institutions, international organisations and non-governmental agencies.

It must be acknowledged that some obstacles will continue to stand in the way of return, or to delay it, which may give rise to specific problems in respect of a population of “overstayers” with no defined status. To leave such persons in a legal limbo risks leading to a host of social problems, and possibly to irregular movement between European States. Such problems can only contribute to a negative public perception of migrants in general, and of asylum-seekers and the institution of asylum in particular. They also, inevitably, constitute irritants in inter-State relations.

There are also particular problems faced by persons whose legal status in the country of return is unclear. Such persons may be stateless, or their citizenship may be difficult to prove. Their problems range from a lack of identity and travel documents to prolonged, and in some cases indefinite, detention. Whatever the genesis of the uncertainty, the solution will require a range of mechanisms in a comprehensive framework, some of which may be implemented by the country of return, some by the country in which the person finds him or herself. It is important to recognise that, in order to avoid never-ending cycles of migration and displacement for such persons, the individual concerned must, at some point, be able to benefit from a legal status somewhere.

Practical measures and programmes

Greater international co-operation is clearly needed, and it needs to be translated into innovative mechanisms and programmes. Technical assistance, capacity-building measures and advisory services may also be required and made available by national, regional or international institutions.

International co-operation can also take the form of a transparent exchange of information, based on compatible analysis and reporting systems. The issuance of travel documents and other practical modalities of return, as well as the necessary guarantees for the individuals concerned, can be better regulated by re-admission agreements – though in some cases improvements may also be needed in domestic legislation regarding, e.g., evidentiary requirements for proof of citizenship.

It is essential that the persons concerned by a return measure be prepared for such an eventuality. Sensitive counselling is recommended, at all stages of the asylum procedure. Non-governmental organisations have an important contribution to make in this area, and should be involved as much as possible. Unsuccessful asylum seekers must be helped to retain or regain their self-esteem and self-respect. For return to succeed, they must also be assisted in maintaining contact with their families and friends in the country of origin; and in acquiring or developing skills and knowledge that they can take back home.

Asylum seekers often develop links with the country in which they lodge a claim, even though this claim may eventually fail. Once back in their country of origin, they could be given, in recognition of such links, priority in labour recruitment programmes run by the country in which they used to seek asylum, or in the granting of scholarships by the same country.

Image matters: States must make deliberate efforts to counter the current negative image of asylum seekers as abusers or cheaters. Persons may have no need for

international protection, yet full respect is still due to their persons, their aspirations and their trials. It is, therefore, not advisable to label them as “rejectees”, a term which evidently carries an image of failure and contempt.

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