‘Safe Repatriation’

Protection of Unaccompanied Minors and Separated Children

A UNHCR perspective\(^1\) presented by:

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\(^1\) All sources of information stem from UNHCR public documents found at [www.unhcr.org](http://www.unhcr.org)
1) Repatriation: a durable solution to the plight of refugees

UNHCR’s role is to promote and facilitate the voluntary repatriation of refugees and, in recognition of the importance of sustainable return, UNHCR seeks linkages with various stakeholders to ensure assistance for the rehabilitation of countries of return to deal with the consequences of the return of refugees (monitoring the safety and well-being of returnees; supporting national efforts to build legal and judicial capacity to create conditions for reconciliation; supporting rehabilitation, reconstruction and development assistance; facilitating sustainable reintegration; etc.).

Where peace and reconciliation are durable, UNHCR promotes voluntary repatriation. Under less ideal conditions (e.g. when the sustainability of the peace process is not assured, but refugees are returning on their own), UNHCR may facilitate the return process. Ensuring sustainable return, with support from the international community, is the primary responsibility of the countries of origin.

The core components of voluntary repatriation are physical, legal and material safety and reconciliation:

Physical safety
- Ebb of violence and intimidation;
- Steps taken towards re-establishment of police, judiciary and human rights agencies;
- Absence of mines and unexploded ordinances; and
- Improved overall security.

Legal safety
- Removal of legal and administrative barriers to return;
- Legislation related to enabling legal framework to ensure, inter alia, citizenship, amnesty, property, registration, documentation and return; and
- Existence of mechanisms to redress human rights abuses, including independent judiciary.

Material safety
- Access to means of survival and basic services in early stages of return (shelter, water, health and education) and access to employment opportunities;
- Non-discriminatory access to services (health services, education, etc.);
- Development of absorption capacity in areas of return; and
- Promotion of economic self-reliance and income-generating activities.

Reconciliation
- Promotion of equity between displaced persons and local residents; and
- Structures and mechanisms to promote confidence building and co-existence.
2) Protection in repatriation operations

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 relevance to voluntary repatriation, albeit indirectly. Article 1C(4) of the 1951 Convention stipulates that refugee status ceases if refugees voluntarily re-establish themselves in the country of origin. Furthermore, successful completion of voluntary repatriation programmes often indicates that circumstances which caused flight no longer exist. This is relevant for the purposes of declaring general cessation, as foreseen in Article 1C(5). Voluntary repatriation is therefore a process which, ultimately, leads to cessation of refugee status, be it on an individual basis or on a more general level.

The 1969 OAU Refugee 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. The principles of voluntary repatriation 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.

Numerous agreements on voluntary repatriation have been signed over the years between states (as countries of asylum or countries of origin) and UNHCR. These agreements generally concern the more significant voluntary repatriation operations and set out the respective duties and responsibilities, as well as the rights of refugees and returnees. Increasingly, peace agreements include these principles as well, and are becoming another source of legal authority for the basic repatriation framework.

In terms of institutional responsibilities, facilitating and promoting voluntary repatriation is a core and statutory function of UNHCR. By virtue of Article 35 of the 1951 Convention, State parties are required to co-operate with UNHCR in this as well as other areas.

The level of physical, legal and material safety possible in a country of origin will determine UNHCR’s involvement in return operations, which are as follows:

- Promotion by the Office of large-scale voluntary repatriation when conditions are considered conducive to return in safety and with dignity, and where the potential for a sustainable solution is sufficiently high;
- Spontaneous or self-organized return with UNHCR's assistance being offered in the country of origin, wherever access exists;
- UNHCR facilitation of the voluntary repatriation of individuals upon the specific and fully informed request of refugees, even when conditions are not fully conducive for most refugees to return;
- Return organized by UNHCR, or with which the organization cooperates, when the life or physical integrity of refugees in the country of asylum is threatened to the point that return is the safer option.
3) Children and Documentation

National documentation for individual returnees and influencing documentation procedures is a valid investment of UNHCR resources and may prove especially important where lack of ID documents prevent exercise of basic rights.

An illustration: the case of Guatemala:

The internal armed conflict resulted in the destruction of records in approximately 10% of the country’s civil registries, making it impossible to verify births, marriages or paternity for many who were once registered. In a society relying on official papers to exercise an array of human and civil rights, lack of personal documentation makes it impossible to have a legally recognized name and nationality, to legally marry and register births of children, to vote and to be elected. Lack of papers also seriously hinders the right to work, to have access to education and health benefits through the social services system, to the justice system, to credit, and to own and/or inherit land and property.

Documentation for the protection of children

Prior to repatriation, all basic documents must be obtained, and at least the following:

- birth certificates
- adoption papers
- fostering/care arrangement background documentation
- death certificates (of parents, for example)
- school certificates
- family tracing background documents
- health certificates, vaccination booklets

These documents will facilitate the child’s access to basic rights:
- continued family tracing
- access to social and health services
- access to schooling and at an appropriate level
- family claims to land and property
- access to national identity documents
4) Issues of Family Tracing

UNHCR action promoting the reunification of dispersed refugee families

In seeking to promote the reunion of separated refugee families, the High Commissioner is guided by basic humanitarian considerations and also by the Statute of his Office which entrusts him, inter alia, with the functions of improving the situation of refugees, and facilitating the assimilation of refugees within new national communities. Since the separation of refugees’ families invariably leads to hardships and sometimes to tragic consequences, and may indeed be the cause of serious obstacles to a refugee’s assimilation and integration in his new homeland, the High Commissioner has devoted particular attention to this problem.

In the field of family reunification, UNHCR works in close co-operation with other organizations, both intergovernmental and non-governmental. Special mention must be made of the International Committee of the Red Cross (ICRC) which has traditionally played an important part in the tracing of family members and in family reunification. UNHCR has also maintained its close co-operation with the Intergovernmental Committee for Migration (ICM) which, in the majority of cases, makes the necessary travel arrangements.

The co-operation of the authorities of the countries receiving such refugees remains vital. The States concerned should therefore facilitate as much as possible the registration and tracing activities of voluntary agencies and NGOs, such as the national Red Cross societies, in favor of refugees staying in their respective territories.

The success rate for tracing depends on many contingent factors, such as length of time children have been separated from their families, distance traveled from their homes by the fleeing families and their access to information in their new location. In contrast, family tracing for babies and very young children has been less systematic. Lacking methodologies and tools specifically designed for this age group, child protection staff often direct tracing efforts first to the easier caseload, the older children, and may only turn their attention to the youngest several months into an emergency.

While tracing the families of very young children is complex and challenging, it is possible. In numerous cases, the families of seemingly untraceable children were found, thanks to the creativity and perseverance of emergency workers. Because the choice of methods depends on the context, emergency workers may not need to use all methods in their particular setting.

The family tracing process can be divided into four components: identification, registration and documentation, tracing activities and family reunification. Some of these activities can be carried out simultaneously and a follow-up is recommended but not always feasible due to geographical distance.

c) Identification

- It is important to speak to people in the community who can help locate these children. These include community leaders, teachers, health workers, nurses, social workers, women in the market or religious leaders. Community groups – such as women’s organizations, local police, Red Crescent or Red Cross societies and sports or youth organizations – should be consulted to identify where unaccompanied and separated children might be.

- Consulting with national or refugee staff is imperative. They are an invaluable source of information, and it is usually easy for them to find out where some of these children are.
d) Potential risks during the identification process

The process of identifying separated children is not a neutral exercise. There is a risk that finding a separated child may disrupt a family care arrangement or raise unrealistic expectations. Communities that learn about the systematic identification of separated children may think an orphanage is going to be built. They may assume this is best for the children, and either take their foster child there if the orphanage is constructed, or, worse, have their own children masquerade as unaccompanied children so that the institution will accept them. Foster families may assume some assistance will follow identification and registration interviews, and claim that their own children are unaccompanied. When assistance is not forthcoming, they may even reject fostered children.

The corollary is also possible. Families that are deeply attached to their foster baby or young child, anxious that they may be taken away by the tracing agency, may declare them as their own. Unless this pretence is detected, the child and their biological family may never be reunited. From the outset, it is critical to explain to foster parents that the identification process does not intend to undermine current care arrangements that are beneficial to unaccompanied children. Emergency workers must clearly explain that the purpose is to ensure children are well cared for and that tracing biological families must begin as soon as possible. They should also be prepared to resolve misunderstandings and false expectations, which often occur during the identification process despite careful explanation by emergency workers.

e) Registration and documentation

An unaccompanied child should be registered as soon as possible after identification. Unaccompanied babies and very young children are highly likely to have no formal identity documents in their possession. They depend on adults to document their existence. Registration is the first step towards regaining an identity and establishing a legal process for their protection. Information on separated children must be registered in order to commence family tracing and make a complete assessment of their care situation.

Emergency workers should check whether a rapid assessment of the situation has been undertaken, and, if not, conduct such an assessment during the registration process. They must also be prepared to act rapidly and decisively in the event a child requires emergency nutrition or medical assistance, or a transfer to a more caring and safer family. Working in cooperation with ICRC and the Red Cross and Red Crescent societies is essential. Unaccompanied children should be registered with the ICRC and/or the Red Cross or Red Crescent Societies. ICRC generally is able to register children and circulate information to adults who have registered their children within the organization’s tracing network.
5) Child’s volition and the principle of the child’s best interest

a) The United Nations Convention on the Rights of the Child

Since its adoption in 1989 after more than 60 years of advocacy, the United Nations Convention on the Rights of the Child has been ratified more quickly and by more governments than any other human rights instrument. This Convention is also the only international human rights treaty that expressly gives non-governmental organizations (NGOs) a role in monitoring its implementation.

The basic premise of the Convention is that children (all human beings below the age of 18) are born with fundamental freedoms and the inherent rights of all human beings. Many governments have enacted legislation, created mechanisms and put into place a range of creative measures to ensure the protection and realization of the rights of those under the age of 18. Each government must also report back on children's rights in their country.

Guiding principles of the Convention

Definition of the child (Article 1)
The Convention defines a ‘child’ as a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger. The Committee on the Rights of the Child, the monitoring body for the Convention, has encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18.

Non-discrimination (Article 2)
The Convention applies to all children, whatever their race, religion or abilities; whatever they think or say, whatever type of family they come from. It doesn't matter where children live, what language they speak, what their parents do, whether they are boys or girls, what their culture is, whether they have a disability or whether they are rich or poor. No child should be treated unfairly on any basis.

Best interests of the child (Article 3)
The best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers.

Right to life, survival and development (Article 6)
Children have the right to live. Governments should ensure that children survive and develop healthily.

Respect for the views of the child (Article 12)
When adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions taken into account. This does not mean that children can now tell their parents what to do. This Convention encourages adults to listen to the opinions of children and involve them in decision-making -- not give children authority over adults. Article 12 does not interfere with parents' right and responsibility to express their views on matters affecting their children. Moreover, the Convention recognises that the level of a child’s participation in decisions must be appropriate to the child's level of maturity. Children's ability to form and express their opinions develops with age and most adults will naturally give the views of teenagers greater weight than those of a preschooler, whether in family, legal or administrative decisions.

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In 2005, the **Committee on the Rights of the Child** issued General Comment No. 6, "Treatment of unaccompanied and separated children outside their country of origin" which recommends measures that States should take to protect the rights of unaccompanied and separated children.

**b) Considerations regarding the consent of children and adolescents**

*Although this case is speaking to a purely medical context, an analogy can be drawn with the context of decision-making for repatriation:*

The (Australian) Court determined that there were circumstances in which a child could consent to their own medical treatment. In order to do so, the child must have a sufficient understanding and intelligence to enable him or her to understand fully what is being proposed, including an understanding of the nature and effects of any procedures. This is often referred to as ‘Gillick competence’. The judgment held that:

“Provided the patient, whether a boy or girl, is capable of understanding what is proposed and of expressing her or his own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorize the medical man (or woman) to make the examination or give the treatment which he (or she) advises. The level of maturity required to provide consent will vary with the nature and complexity of the medical treatment.”

**Essential Characteristics of Consent**

Consent is a legal concept defined by law. It is composed of three elements - capacity, information, and volition. **Capacity** refers to the ability to do something. It is defined with respect to a person’s age, a person’s competence, and the particular situation. Generally, a person below the age of 18 is deemed legally incompetent. Instead, parents, a legal guardian or persons standing in loco parentis (as a parent) are empowered by law to give or withhold consent on the minor’s behalf. Even though a minor’s consent may be given by a substitute or surrogate consentor, the standards governing consent – capacity, information and volition – still apply. The particular situation where consent is required may dictate the degree of ability necessary to make a decision or consent to an act. A person’s ability to consent, must take into account his/her adaptive behavior and measured intelligence.

For Adults, those 18 or older, capacity is usually determined by cognitive processes and references to whether the person has the ability to manage his/her affairs with ordinary or reasonable prudence, has demonstrated rational understanding or intellectual comprehension, or has substantial ability to understand and appreciate the nature and consequences of a specific act. Capacity includes the ability to communicate one’s choices. Without communication, cognitive processes can not be determined and, thus, intellectual ability will be negated.

Consent is ineffective unless the person or surrogate consent giver has sufficient **information** upon which to make a rational and informed decision. Information as a prerequisite for consent consists of two elements: the substance of the information and the manner in which the information is communicated. Thus, the focus is on “what” information is given and “how” it is given.

**Voluntariness** is normally presumed unless it is shown that the person giving consent

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was unable to exercise freedom of choice. The person should have sufficient autonomy to make a choice without duress. There must be an absence of overbearing coercion, duress, threats, inducements or undue influence. For persons with a cognitive disability, the voluntariness of consent may be suspect because of his/her placement in a facility, his/her lack of experiences for independent action, his/her eagerness to please and be accepted and his/her susceptibility to authority figures. Voluntariness also incorporates the notion that the consent giver is aware that the requested consent may be withheld or if given, it may be withdrawn.
7) Issues of responsibility

Tripartite agreements in the context of returning refugees are usually structured along the responsibilities of three key actors: the country of origin or the returning refugee, the country of asylum and UNHCR. To oversee the repatriation agreement, a Tripartite Commission is usually established. In short, contractual obligations are created to ensure the full enjoyment of rights of refugees, regardless of age and gender, in deciding to repatriate.

Rights of returning refugees

Based on the fundamental right of every citizen to leave and return to his/her country, tripartite agreements also recognize that repatriation is the best durable solution to the problems of refugees.

- scope: defining who are the refugees covered by the agreement
- voluntary character of repatriation
- enabling refugees to make an informed decision
- safe and dignified returns
- spontaneous returns
- monitoring of returns
- measures for returnees with special needs: UAMs, SCs, elders
- family unity and reunification (best interests), mixed nationality families

Key responsibilities

a) Government of country of asylum

- assuring voluntary character of the decision to repatriate
- continued protection to refugees opting not to repatriate
- access to refugees by UNHCR to implement repatriation
- issuance of legal and social documents (including birth, adoption, marriage, death certificates)
- facilitating immigration, customs, and health formalities
- ensuring safety and security during repatriation movements

b) Government of country of origin

- general amnesties, formal guarantees and public assurances of absence of punitive measures for returning refugees
- avoiding statelessness
- safety and security of returning refugees, including access to administrative, judicial and legal structures
- fostering conditions conducive to sustainable repatriation
- freedom of movement
- ensuring land and property rights
- recognition of personal status and equivalency (births, adoptions, marriages, academic qualifications)
- issuance of national documentation
- access of returnees to UNHCR
- ensuring safety and security of returnees, including in transit areas and while proceeding to their final destinations.

c) UNHCR
- verification of voluntary character of repatriation
- information and sensitization campaigns
- registration for repatriation
- facilitation of safe and dignified returns
- special protection needs
- funding mobilization
- repatriation and reintegration assistance to returnees
- rehabilitation of refugee-impacted areas
8) Re-Integration Process

The re-integration process assumes that refugees return to societies that are more or less stable. It should be stressed that communities in areas of return can benefit a great deal from returnees, as they can bring new skills, resources, higher standards of education, health and gender equality, which they may have acquired during their displacement and exile. However, one of the challenges in reintegration is to preserve gains made in exile when refugees return to more traditional social structures. Reintegration, therefore, is a collective responsibility under government leadership; UNHCR and other humanitarian agencies, which play a lead role in the earlier stages, while development agencies play a greater role later in the reintegration process.

The facets of reintegration are:

- **Legal**: Access to legal processes; legal support for ownership of property, land and housing;
- **Political**: Stable government; full participation in political processes; gender equality in all aspects of political life; freedom of thought and expression; protection from persecution;
- **Economic**: Access to productive resources (e.g. land, agricultural inputs and livestock); and
- **Social**: Access to services; security; absence of discrimination; community-level dispute resolution, etc.

Factors that determine how UNHCR and partners assist reintegration include:

- The character of the state and the context of the breakdown in national protection (reasons for displacement and whether the state can be characterized as weak, contested or repressive);
- The nature of the conflict (the extent of the damage to property and infrastructure, the duration and intensity of the conflict and the level of militarization);
- The length and nature of exile (extended periods in exile can make reintegration more challenging);
- The dynamics of displacement (both internal and external, including the characteristics of the displaced);
- The provisions of the peace agreement (the extent to which agreements address underlying grievances that led to the conflict); and
- The repatriation process (may either facilitate or endanger the reconciliation process and undermine peace building).
- In the early phases of reintegration, returnees (and where applicable, other relevant population groups, such as IDPs) should have access to basic services (health, education, shelter, etc.) and assistance to quickly re-establish themselves.

Beyond this point, however, several questions arise:
How to build sustainable livelihoods and enhance economic opportunities for returnees, local residents and IDPs and ensure that the reintegration process is sustainable;

How to ensure that returnees, local communities and IDPs benefit from long-term development efforts; and

How to link early humanitarian activities with long-term development programmes, institutions, policies and actors.

Planning reintegration programmes must take into account:

- The time and pace at which refugees, IDPs and other people of concern return;
- The legal, administrative and other barriers to return;
- Whether the causes of the conflict have been removed;
- What reception returnees, IDPs and others receive from the resident population;
- What capacity the national and local authorities have to implement and/or sustain reintegration activities;
- What skills, assets and lifestyle changes returnees and other displaced populations are bringing back with them;
- The extent to which the country’s political and economic situations are likely to become more or less stable as repatriation and reintegration continue;
- The types of communities into which returnees, IDPs and other populations of concern re-integrate;
- Whether any other groups (e.g. ex-combatants) are returning.

Monitoring of re-integration of repatriated refugees:

In a return and reintegration setting, monitoring aims to:

- Assess how well returnees are doing in their communities;
- Guide UNHCR policy formulation with respect to durable solutions and protection;
- Promote interventions and programmes addressing challenges to return and reintegration;
- Inform UNHCR public advocacy work on behalf of returnees (IDPs and refugees).

The objectives are as follows:

- To identify needs and the level of assistance interventions (with a view to ensure that basic needs are met during an initial period of reintegration and beyond);
- To support returnees to enjoy their basic human rights (namely those in the declarations of amnesty) through returnee and local authorities awareness raising;
- To generate information on the situation in the country of origin and of asylum;
- To assess access to and recognition of public documents; access to health services, education and public services; confidence in policy and the judiciary, etc.; and
- To provide development partners with information on reintegration needs.

UNHCR strives to situate its repatriation and reintegration work within a broader context of transition from conflict to peace, linking with other institutions and actors to build peace and bridge the gap between relief and development so as to avoid creating a dependence of returnees on humanitarian assistance and to ensure returnees’ early and sustainable reintegration.
9) Best Practices for safe repatriation of children

- Early identification of separated or unaccompanied minors
- Individual documentation of children and women
- Early efforts for family tracing, as well as linkages between tracing actors
- Cross-border information sharing.
- Sound knowledge of national legal frameworks regarding nationality, adoption and fostering, registration and documentation, protection of children.
- Early involvement of local government authorities; capacity should be built not only in displacement related ministries but also in all state agencies with longer-term responsibilities.
- Refugee community participation: communities should be at the heart of the process, participating in identification and response to the needs of separated and unaccompanied children.
- Ensuring Tripartite agreements for repatriation include precise protection guarantees for children.
- In mass repatriation operations, ensuring coordination and information sharing specifically for SC/UAM.
- Ensuring appropriate protection staff are on the ground and actively identifying the specific needs of SC and UAM in preparing repatriation, in minimizing risks during travel, and linking with other protection actors after repatriation.
- Availability and accessibility of resources: flexible funds must be made available to the development agencies in transition situations to act as quickly as the more emergency-oriented agencies to set up joint planning structures, open sub-offices (or share in the cost of joint offices), initiate early capacity building and mobilize communities.
- Multi-agency collaboration, BID panels, coordination in finding solutions, and in family tracing efforts; common information management systems where possible.
- Consistent messages and guidelines are essential to ensure that parallel processes are prevented

Where family tracing and reunification efforts have not been successful and special and coordinated arrangements can not be put in place to facilitate safe and orderly return, return for unaccompanied children therefore exposes them to exploitation and risk.
Sources and Hyperlinks, Research on the Safe Repatriation of Children

www.unhcr.org

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