



Essentials of the Right to Voluntary Return: The Case of Refugees

Anteneh Geremew Gemedo

Lecturer, School of Law, Debre Markos University, Ethiopia.

ARTICLE INFO

Article history:

Received: 6 June 2019;

Received in revised form:

7 August 2019;

Accepted: 17 August 2019;

Keywords

Voluntary Return,

Refugees,

UNHCR,

Non-refoulement.

ABSTRACT

Voluntary return is the assisted or independent return to the country of origin, transit or another third country based on the free will of the returnee. Voluntary return is informed and unforced return of a refugee to his country of origin. Therefore, this paper is intended to deal the concept of voluntary return as a product of two main components: The right to return and the right not to be forced to return. The latter is concerned with voluntariness of repatriation. There are various pulling and pushing factors which instigate the return of refugees to their country of origin. The return of refugees and asylum seekers may be classified as voluntary repatriation, mandatory return of rejected asylum seekers who are required by law to leave, and forced return of rejected asylum seekers. It is dealt that voluntariness of returning to home country is an essential right of refugees.

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1. Introduction

It is the risk of human rights violations in their home country which compels refugees to cross international borders and seek protection abroad. However, various pulling and pushing factors instigate the return of refugees to their country of origin. Particularly, if conditions have fundamentally changed in the country of origin promoting and monitoring the safety of their voluntary return allows refugees to re-establish themselves in their own community and to enjoy their basic human rights.

The return of refugees and asylum seekers may encompass voluntary repatriation, mandatory return of rejected asylum seekers who are required by law to leave, and forced return of rejected asylum seekers. Definition of voluntary repatriation used by the European Council on Refugees and Exiles (ECRE), recommends that “voluntary repatriation shall be used to describe the return of Convention refugees, other persons with a complementary or temporary protection status, or persons still in the asylum procedure who freely choose to exercise their right to return to their country of origin or habitual residence”. According to International Organization of Migration (IOM), voluntary return is the assisted or independent return to the country of origin, transit or another third country based on the free will of the returnee. The definition used by ECRE differs from the one used by the IOM, which uses the concept of voluntary repatriation to cover a much wider group encompassing refugees, asylum seekers and rejected asylum seekers. For the purpose of this paper, voluntary return is informed and unforced return of a refugee to his country of origin.

Therefore, this paper is intended to deal the concept of voluntary return as a product of two main components: The right to return and the right not to be forced to return. The latter is concerned with voluntariness of repatriation. Voluntary repatriation is when the choice to return is made without any pressure from any outside source and where there is access to accurate information on the circumstances and conditions that refugees are returning to.

Refugees should be provided with complete, objective, up-to-date and accurate information, on physical, material and legal safety issues regarding their former homes, lands or places where they used to live. They should be able to live in their homes again free from fear. The right to return is not restricted by the passing of time and cannot be limited to a certain period of time.

For long the United Nations Higher Commissioner on Refugees (UNHCR), a non-partisan, non-political humanitarian organization responsible for the implementation of the 1951 Refugee Convention, consistently refused to accept the human right to return as the starting point for a consideration of voluntary repatriation. However, since 1980's the focus of international attention is mainly on voluntary repatriation and prevention of the mass exodus of refugees and the linkage between the two has been asserted in the international debates on the refugee problem. Thus the recent trend is towards facilitating the voluntary repatriation of the refugees by involving both the country of refuge and the country of origin and also the UNHCR.

2. The Right to Return

The human right to return has been included in a number of universal and regional instruments. It has been advocated that the human right to return forms part of customary international law. For most individuals the actual practice of returning to one's home or country is so commonplace a part of everyday living that the right of return as a legal concept is given little attention. The great majority of people in the world are able to exercise the customary right of return based upon state practice.

The right to return is considered part of the right to freedom of movement. A general right to free movement can be traced back to 16th century publicists of international law who had upheld this right. The Spaniard Francisco de Vitoria said: “it was permissible from the beginning of the world for anyone to set forth and travel wheresoever he would”.

It is said to be particular in that “unlike many other human rights and freedoms, its exercise does not produce

effects only within a single State, but often affects at least two communities, that of the country to be left and that of the State to which ingress is sought”.

While the rights to leave and return are closely connected, in that the existence of one allows for the effective exercise of the other, they respectively respond to different needs of the individuals exercising them. The person leaving his or her country may be doing so out of a desire to travel, to emigrate, or to seek refuge. The person seeking to return to his or her country is usually motivated by a desire to return home, to the place where he or she belongs, to his or her roots.

This ‘natural desire for a base or homeland’ has been said to demonstrate ‘the logical connection’ of freedom of movement with the right to a nationality, and in this sense the right to return is closely connected with the legal concept of nationality. Besides, the right to return can be closely linked with other human rights, such as the right to property, the right to privacy and the right of admission for nationals.

The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, is the foundation of the right to return in human rights law. Article 13 of the Universal Declaration phrases the right to return broadly and simply, as follows: Everyone has the right to leave any country, including his own, and to return to his country. This provision recognizes the inherent relationship between a person and his country and is termed in unconditional wording. The exercise of the right, like others in the Universal Declaration, is only subject under Article 29 to “such limitations as are determined by law solely for the purpose of seeking due recognition and respect for the right of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

The International Covenant on Civil and Political Rights, the instrument that was meant to give conventional binding force to many of the rights proclaimed in the Universal Declaration, incorporates the right to return, stating in Article 12(4): No one shall be arbitrarily deprived of the right to enter his own country. The Covenant is the most important universal human rights treaty concerned with the right to return and its interpretation may therefore provide the best means of identifying more precisely the contemporary content of the right to return under international law.

Like Article 13 of the Universal Declaration, Article 12(4) of the Covenant is also termed in unconditional words. It is not subject to the derogation clauses of Article 12(3) which refer only to the rights mentioned in the previous two paragraphs, containing the right to liberty of movement and the right to leave. One may conclude therefore, that the right to return, as it is regulated in the Covenant, seems to have a more absolute nature than the other rights in Article 12. It was even argued that the case of exile as punishment should be the only exception, although even this was not stated explicitly.

In terms of the right to return, the Human Rights Committee, a body of experts which monitors the implementation of the Covenant, has given authoritative interpretation to the meaning of the term ‘arbitrarily’. General Comment 27 clarifies the meaning of this qualifying term stating the following principles categorically in paragraph 21:

The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the

[ICCPR] and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

In terms of the right to return, the Human Rights Committee has also given authoritative interpretation to the meaning of the phrase ‘own country.’ The Committee states that the right applies even in relation to disputed territories, or territories that have changed hands. In paragraph 20 of General Comment 27, the Human Rights Committee determined that:

The scope of ‘his own country’ is broader than the concept ‘country of his nationality’. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by 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 would be the case, for example, of nationals of a country who have been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them.

Various specialized universal instruments adopted under the auspices of the UN specify the provision of the Covenant in different contexts. The Convention on Elimination of Racial Discrimination (CERD) guarantees a right ‘to return to one’s country’ as an aspect of a State’s obligation to avoid racial discrimination; thus a State is forbidden to deny entry to a national on racial or ethnic grounds.

3. The Case of Refugees

Refugees need to be guaranteed the right to return voluntarily and in safety to their countries of origin or nationality. The U.N. Security Council has affirmed “the right of refugees and displaced persons to return to their homes”. In a similar vein, the Sub-Commission on Prevention of Discrimination and Protection of Minorities has affirmed “the right of refugees and displaced persons to return, in safety and dignity, to their country of origin and or within it, to their place of origin or choice”.

The 1951 Convention relating to the Status of Refugees and the 1967 Protocol do not address the question of repatriation of refugees directly. However, the Convention makes it clear that refugee status is a transitory condition which will cease once a refugee resumes or establishes meaningful national protection. Article 1/C explicitly defines the various situations in which the cessation of refugee status is warranted. When relating to voluntary repatriation, one may broadly distinguish two categories of cessation clauses:

A. Paragraphs (1), (3) and (4) of Article 1/C reflect a change in the situation of the refugee that has been brought about by himself, namely: voluntary re-availment of national protection; voluntary re-acquisition of nationality and voluntary re-establishment in the country where persecution was feared.

In practice, these cessation clauses are not automatically invocable upon repatriation, because the circumstances which provoked the original flight often still subsist. The “ceased circumstances” cessation clauses (5) referring to nationals and (6) referring to stateless persons, are based on the consideration that:

B. International protection is no longer justified on account of changes in the country where persecution was feared, because the circumstances in connection with which a person has been recognized as a refugee have ceased to exist. Thus the person can no longer refuse to avail himself or herself of the protection of the country of his or her nationality/country of former habitual residence.

"Circumstances" refer to fundamental changes in the country of origin, which can remove the basis of the fear of persecution. A mere - possibly transitory - change in the facts surrounding the individual refugee's fear of persecution, which does not amount to a fundamental change of circumstances, is not sufficient to make this clause applicable. A refugee's status should not in principle be subject to frequent review to the detriment of his or her sense of security, which international protection is intended to provide. Even when the circumstances in the country of origin have undergone a fundamental change, individual refugees may continue to have a well-founded fear of persecution or compelling reasons not to return arising out of previous persecution. Has this been determined, the "ceased circumstances" cessation clauses should thus not apply to them. The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.

The Executive Committee, in Conclusion 65 (XLII) of 1991, underlined the possibility of use of the cessation clauses of the 1951 Convention in situations where a change of circumstances in a country is of such a profound and enduring nature that refugees from that country no longer require international protection, and can no longer continue to refuse to avail themselves of the protection of their country, provided that it is recognized that compelling reasons may, for certain individuals, support the continuation of refugee status. This statement reflects a more general humanitarian principle, recognizing that a person who - or whose family - has suffered atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his or her past experiences, in the mind of the refugee.

In its Conclusion 69 (XLIII) of 1992, the Executive Committee elaborated on the above and, so as to avoid hardship cases, recommended further that states seriously consider an appropriate status, preserving previously acquired rights, for persons who have compelling reasons arising out of previous persecution to re-avail themselves of the protection of their country. The Executive Committee further recommended that appropriate arrangements, which would not put into jeopardy their established situation, be similarly considered by relevant authorities for those persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links.

4. Voluntariness

The principle of voluntariness is the cornerstone of international protection with respect to the return of refugees. While the issue of voluntary repatriation as such is not addressed in the 1951 Refugee Convention, it follows directly from the principle of non-refoulement: the involuntary return of refugees would in practice amount to refoulement. A

person retaining a well-founded fear of persecution is a refugee, and cannot be compelled to repatriate.

The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa is the only international refugee instrument to date formally elaborating the principles of voluntary repatriation and also stresses the voluntary character of repatriation. According to the OAU convention, the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will. The 1979 Arusha Conference, on the situation of Refugees in Africa, went a step further and recommended that appeals for repatriation and related guarantees should be made known by every possible means.

The principle of voluntariness must be viewed in relation to both: conditions in the country of origin (calling for an informed decision) and the situation in the country of asylum (permitting a free choice). Voluntariness means not only the absence of measures which push the refugee to repatriate, but also means that he or she should not be prevented from returning, for example by dissemination of wrong information or false promises of continued assistance. In certain situations economic interests in the country of asylum may lead to interest groups trying to prevent refugees from repatriating.

Voluntariness is more than an issue of principle. Repatriation which is voluntary is far more likely to be lasting and sustainable. The requirement of voluntariness therefore constitutes a pragmatic and sensible approach towards finding a truly durable solution. The issue of voluntariness as implying an absence of any physical, psychological, or material pressure is, however, often clouded by the fact that for many refugees a decision to return is dictated by a combination of pressures due to political factors, security problems or material needs.

The difficulty of identifying true voluntariness necessitates objective scrutiny of the refugees' situation. One of the most important elements in the verification of voluntariness is the legal status of the refugees in the country of asylum. If refugees are legally recognized as such, their rights are protected and if they are allowed to settle, their choice to repatriate is likely to be truly free and voluntary. If, however, their rights are not recognized, if they are subjected to pressures and restrictions and confined to closed camps, they may choose to return, but this is not an act of free will. The positive pull-factors in the country of origin shall be an overriding element in the refugees' decision to return rather than possible push-factors in the host country or negative pull-factors, such as threats to property, in the home country.

Collateral to the requirement of voluntariness of the decision to return is the principle of non-refoulement. When a person is compelled to flee his country of origin or nationality his immediate concern is protection against refoulement. Such protection is necessary and at times, the only means of preventing further human rights violations. The prohibition of sending, expelling, returning or otherwise transferring (refoulement) a refugee to "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group" is recognised by Art.33 of the 1951 UN Convention on the Status of Refugees. The importance attached to this principle means that it long ceased to be part of convention law and became part of international customary law. This is due to the large number of international conventions that formalize the principle; the fact that over 169 states have signed conventions that formalize the principle in one format or another; the fact that over 80 states have included it in their

domestic law; the interpretation of the principle formulated by the UN High Commissioner for Refugees; and from resolutions that have been repeatedly ratified by the General Assembly of the United Nations. This rule derives its existence and validity from the twin concepts of 'international community' and 'common humanity' and must be seen as an integral part of that foundation of freedom, justice and peace in the world which is human rights.

Legal basis for protection against forced return of refugees to countries where they apprehend danger to their lives, safety, security and dignity can also be found in the law relating to the prohibition of torture and cruel or inhuman treatment. Thus Article 7 of the ICCPR which prohibits torture and cruel, inhuman or degrading treatment casts a duty on state parties not to expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return 'to another country by way of their extradition, expulsion or refoulement'. Indeed, as the European Court of Human Rights has held, the decision of a state to extradite, expel or deport a person "may give rise to an issue under Article 3 (European Convention of Human Rights), and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country". During armed conflict, international humanitarian law prohibits involuntary transfer of civilian population. Article 49 of the Fourth Geneva Conventions clearly proscribes the forced displacement and arbitrary transfer of the civilian population from and into an occupied territory. Violation of this rule would also amount to an international crime and those individuals who commit such acts could also be held criminally liable under the rubric of either Genocide, Crimes against Humanity, or War Crimes.

5. Ensuring Return in Safety and with Dignity

A number of protection issues need to be examined on every aspect of the return to ensure that returns take place in conditions of safety, dignity and security. Return in safety is a return which takes place under conditions of legal safety (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return), physical security (including protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites), and material security (access to land or means of livelihood). The concept of dignity is less self-evident than that of safety. The dictionary definition of "dignity" contains elements of "serious, composed, worthy of honour and respect." In practice, elements must include that refugees are not manhandled; that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.

Some of the elements of "safety and dignity" need to be considered are:

- ✓ the refugees' physical safety at all stages during and after their return including en route, at reception points and at the destination,
- ✓ the need for family unity,
- ✓ attention to the needs of vulnerable groups,

- ✓ the waiver or, if not possible, reduction to a minimum of border crossing formalities,
- ✓ permission for refugees to bring their movable possessions when returning,
- ✓ respect for school and planting seasons in the timing of such movements, and
- ✓ freedom of movement.

1. Stakeholders

6.1. The Country of Asylum

The country of asylum is bound by the fundamental principle of non-refoulement not to return refugees in any manner whatsoever to territories, or to the frontiers of territories, where their life or freedom would be threatened. The country of asylum is also shall continue to treat refugees according to internationally accepted standards as long as they are on its territory. International organizations shall be allowed to take part in the exercise of its international protection functions, to supervise the well-being of asylum-seekers and refugees. The country of asylum should contribute to the promotion of voluntary repatriation as a durable solution. The country of asylum should ascertain the voluntary character of the repatriation, with regard to individual refugees and with regard to large-scale movements. The country of asylum should facilitate the accurate and objective information flow on conditions in the country of origin to the refugees.

6.2 The Country of Origin

The country of origin should allow its nationals to return in safety and with dignity without any fear of harassment, discrimination, arbitrary detention, physical threat or prosecution on account of having left or remained outside the country, and should provide guarantees and amnesties to this effect. It should also take all measures to ensure the restoration of full national protection. The country of origin should provide repatriating refugees with the necessary travel documents, entry permits, and any other documentation required for return. Where refugees have lost their nationality, the country of origin should arrange for its restoration as well as for its granting to children born outside the territory and, as appropriate, to non-national spouses. The country of origin should seek lasting solutions to refugee problems, inter alia by assuming responsibility for the elimination of root causes of refugee flows and the creation of conditions conducive to voluntary return and reintegration.

6.3. UNHCR

The UNHCR Executive Committee re-examined the subject of voluntary repatriation at its 1985 session. The Executive Committee noted that "the existing mandate of the High Commissioner is sufficient to allow him to promote voluntary repatriation by taking initiatives to this end". These include promoting dialogue between all the main parties, facilitating communication between them, and by acting as an intermediary or channel of communication from the outset of a refugee situation, the High Commissioner should at all times keep the possibility of voluntary repatriation for all or for part of a group under active review. Whenever the High Commissioner deems that the prevailing circumstances are appropriate, he should actively pursue the promotion of this solution. The other conclusions dealt with the establishing of a tripartite commission, assistance for the re-integration of returnees in the country of origin to be provided by the international community and the involvement of the UNHCR in assessing the feasibility, planning, and implementation. Of particular significance was the recognition of the importance of spontaneous return of refugees to their countries of origin.

Conclusion

There are various pulling and pushing factors which instigate the return of refugees to their country of origin. The return of refugees and asylum seekers may be classified as voluntary repatriation, mandatory return of rejected asylum seekers who are required by law to leave, and forced return of rejected asylum seekers.

Voluntary return is when the choice to return is made without any pressure from any outside source and where there is access to accurate information. Since 1980's the focus of international attention is mainly on voluntary repatriation and prevention of the mass exodus of refugees. We have seen the right to voluntary return constituting the right to return and its voluntariness.

The human right to return has been included in a number of universal and regional instruments and it is related to the natural desire for a base or homeland. Refugees are also need to be guaranteed the right to return voluntarily and in safety to their countries of origin or nationality. The 1951 Convention relating to the Status of Refugees and the 1967 Protocol do not address the question of repatriation of refugees directly. However, refugee's status may be ceased by different circumstances related to return. These are voluntary re-availment of national protection; voluntary re-acquisition of nationality and voluntary re-establishment in the country where persecution was feared; but mainly when international protection is no longer justified on account of changes in the country where persecution was feared. Here a change of circumstances in a country shall be of such a profound and enduring nature.

The principle of voluntariness is the cornerstone of international protection with respect to the return of refugees. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa is the only international refugee instrument to date formally elaborating the principles of voluntary repatriation and also stresses the voluntary character of repatriation. Return to the country of origin shall be conducted in absence of any physical, psychological, or material pressure. A refugee shall not be compelled to be returned to a country in which he may face danger to his life, dignity and security. Besides, it must be ensured that returns take place in conditions of safety, dignity and security.

Finally, all stakeholders shall be cognizant of their respective roles for smooth transition of refugees from host to home country.

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