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ON REFUGEES AND EXILES

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POSITION ON RETURN
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ECRE POSITION ON

RETURN

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Introduction

1. In formulating its position on return, the European Council on Refugees and Exiles (ECRE) has drawn upon the views of its member agencies, consisting of 74 non-governmental refugee assisting organisations in 31 European countries.
2. This position paper concerns the voluntary repatriation of persons who have refugee, complementary protection or temporary protection status; and persons who are still in the process of applying for asylum including those who have received a negative first decision and have lodged an appeal. It also concerns the mandatory return of three categories of persons: persons whose claim for asylum has finally been rejected; persons whose protection status has ceased; and persons whose temporary protection status has ended after they have had effective access to an asylum determination procedure or where they have chosen not to apply for asylum.
3. ECRE notes that in practice a distinction is rarely made between voluntary repatriation and mandatory return. Nor is a distinction made between different categories of persons subject to mandatory return. In order to ensure the adequate protection of persons who might be at risk of *refoulement*, we would recommend against treating all returnee categories alike. Rather, return proceedings should clearly distinguish between voluntary repatriation and mandatory return. They should also allow for a distinction to be made between persons who no longer have the right to remain in a country for protection-related reasons and persons who are subject to return as a result of changes to their (non-protection related) immigration status or because following irregular entry, they never sought any form of legal status.
4. ECRE defines “return” as being return to the country of origin or habitual residence.
5. Throughout this paper ECRE has provided recommendations for return practice covering the various stages of the return process including preparation (co-operation with countries of origin, information gathering and dissemination, and procedural safeguards); return (conditions during return and the return of specific and vulnerable groups) and follow-up to return (reintegration and monitoring).
6. This paper should be read in conjunction with ECRE's Positions on the Interpretation of Article 1 of the Refugee Convention (June 1995 and September 2000), Position on Temporary Protection (March 1997), Guidelines on Fair and Efficient Procedures (September 1999), Position on the Detention of Asylum Seekers (April 1996), Positions on Reception of Asylum Seekers (June 1997 and November 2001), Good Practice Guides on Reception and Integration (2002) and in the light of other ECRE policy statements.

Definitions

Voluntary repatriation

7. ECRE recommends that the term "voluntary repatriation" be used to describe the return of Convention refugees¹, 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. Voluntary repatriation should not be deemed to have taken place when an individual chooses to merely visit their country of origin.
8. Repatriation can only be classified as voluntary when:
 - an individual with a legal basis for remaining in a third country has made an informed choice and has freely consented to repatriate to their country of origin or habitual residence; and
 - has given their genuine, individual consent, without pressure of any kind; when such consent is elicited as a result of lack of effective protection in the host country or because of an imposition of sanctions, this cannot be classified as voluntary repatriation; and
 - the legal and procedural safeguards listed below have been fully respected.

Mandatory return

9. The term "mandatory return" is used for persons who no longer have a legal basis for remaining in the territory of a country for protection-related reasons and are therefore required by law to leave.² The term is being used to describe the situation whereby a person consents to return to his/her country of origin instead of staying illegally or being forcibly removed. It also applies to individuals who although not having freely consented to leave, they have been induced to do so by means of incentives or threats of sanctions.
10. The term "forced return" will be used to describe the return of persons who are required by law to leave but have not consented to do so and therefore might be subject to sanctions or force in the form of restraints in order to effect their removal from a country.

Human rights and refugee law framework

Voluntary repatriation

11. The right to return to one's own country is enshrined in a number of international instruments. The Universal Declaration of Human Rights, states that "everyone has the right to leave any country, including his own, and to return to his country".³ This is upheld in the International Covenant on Civil and Political

¹ See Executive Committee Conclusions on Voluntary Repatriation: No 18 (XXXI) 1980; No 40 (XXXVI) 1985; No 41 (XXXVII) 1986; No 46 (XXXVIII) 1987; No 55 (XL) 1989; No 74 (XLV) 1994.

² This term is used in preference to 'forced return'; a term, which implies physical coercion and does not reflect the fact that in some cases people may consent to return.

³Article 13(2), Universal Declaration of Human Rights, (1948)

- Rights,⁴ and the International Convention on the Elimination of all Forms of Racial Discrimination.⁵
12. The UNHCR Statute allocates the function of seeking permanent solutions for the problem of refugees to the High Commissioner who is expected to assist governments and private organisations in *inter alia* facilitating the voluntary repatriation of refugees.⁶
 13. There is no legal definition of the concept of voluntariness in relation to repatriation in international refugee law. The UNHCR Handbook on Voluntary Repatriation describes voluntariness as "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".⁷ A number of UNHCR Executive Committee (ExCom) Conclusions have stressed the importance of always respecting the "essentially voluntary character of repatriation".⁸
 14. The principle of non-discrimination should be applied to all aspects of voluntary repatriation. In addition, all refugees should have equal access to information to allow them to make individual decisions about repatriation.⁹

Mandatory return

15. Mandatory return policies need to fully reflect States' obligations under international human rights law. Of particular importance is Article 33 of the Convention Relating to the Status of Refugees which provides for protection from *refoulement* by prohibiting States from expelling or returning a refugee to the frontiers of territories where s/he would face persecution.¹⁰ Article 18 of the Charter of Fundamental Rights of the European Union reinforces the right to asylum.¹¹

⁴Article 12(4), International Covenant on Civil and Political Rights, (1966): No one shall be arbitrarily deprived of the right to enter his own country.

⁵ Article 5, International Convention on the Elimination of All Forms of Racial Discrimination, (1965): In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following right:

(d)(ii) The right to leave any country, including one's own, and to return to one's country.

⁶ Statute of the Office of the United Nations High Commissioner for Refugees, paragraph 1.1

⁷ UNHCR Handbook on Voluntary Repatriation (1996), paragraph 2.3

⁸ ExCom Conclusion No. 18 (XXI) (1980) – paragraph (b). Also see, ExCom Conclusion No. 65 (XLII) (1991) – paragraph (j).

⁹ See ExCom Conclusions - Refugee Women and International Protection- No.39 (XXXVI) (1985) and No. 64 (XLI) (1990).

¹⁰ Article 33 (1) Prohibition on expulsion or return: No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, 1951 Convention Relating to the Status of Refugees.

¹¹ Article 18 states that the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community, Charter of Fundamental Rights of the

16. Individuals must also not be returned to face the risk of torture or cruel, inhuman or degrading treatment or punishment or other violations of their human rights under international human rights law including Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the Convention Against Torture (CAT). Article 19(2) of the Charter of Fundamental Rights of the European Union also states “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment”.
17. European States need to refrain from expelling, on a collective basis, persons who no longer have a legal basis for remaining in Europe.¹² Expulsions must involve a “reasonable and objective examination of the particular circumstances” of each individual concerned.¹³ In order to ensure full compliance with human rights obligations, they need to be carried out in conditions of transparency.¹⁴ Further, facilities should be provided which enable persons subject to expulsion orders to pursue their right to an effective remedy as set out in international law.¹⁵
18. ECRE notes the obligation of States to ensure the safety of persons subject to removal proceedings.¹⁶ This responsibility cannot be transferred, formally or informally, to organisations assisting in the return process such as airlines.¹⁷
19. Detention prior to removal must comply with Article 5, ECHR and Article 9, ICCPR and may only be used as a last resort. We would also argue that UNHCR ExCom Conclusions No. 44 on the Detention of Refugees and Asylum Seekers should apply to the detention of all returnees.¹⁸ This states that detention should normally be avoided and should only be resorted to in limited circumstances

European Union.

¹² See also Article 19(1) European Charter of Fundamental Rights of the European Union.

¹³ *Conka v Belgium*, Judgment of 5 February 2002, European Court of Human Rights, Application No. 51564/99.

¹⁴ Paragraph 12, Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter Council of Europe Member States and the enforcement of expulsion orders, 19 Sept 2001, CommDH/Rec (2001) 1

¹⁵ See Committee of Ministers Recommendation on the right of rejected asylum seekers to an effective remedy, Council of Europe, Recommendation No. R (98) 13. Also, Article 2 (3) ICCPR provides a right to an effective remedy to persons whose human rights may have been violated under the Covenant. Further, the Human Rights Committee has stated that non-nationals “must be given facilities for pursuing (their) remedy against expulsion so that this right will in all circumstances be an effective one”, Paragraph 19.2, *Hummel v Madagascar*, Communication No. 155/1983

¹⁶ The European Court of Human Rights criticized public authorities for their eagerness to pass off responsibility to others for their treatment of the Zairian girl being deported, see *Nsona v Netherlands*, judgment of 28 November 1996.

¹⁷ Whilst recognising the powers conferred on civil aircraft commanders under Chapter III of the Convention on Offences and Certain other Acts Committed on Board Aircraft (Tokyo, 14 September 1963).

¹⁸ ExCom Conclusions – Detention of Refugees and Asylum Seekers – No. 44 (XXXVII) (1986).

- prescribed by law.¹⁹ Laws or their application, including the length of detention, should not be arbitrary.²⁰
20. The right to challenge the legality of detention in court must be guaranteed in accordance with Article 5(4) ECHR and Article 9(4) ICCPR. Access to free legal advice and relevant organisations should be ensured.

PREPARING FOR RETURN

21. Reception programmes in the host country should have the dual aim of preparing asylum seekers to integrate and fully participate in the host country in the event of being recognised as refugees or granted other forms of international protection, or, to return to their country of origin if their application is unsuccessful or conditions in their country have changed in a way that would lead them to withdrawing their asylum claim. Integration programmes should also prepare refugees and persons with other forms of international protection for the possibility of voluntary repatriation. For example, several aspects of good reception and integration policies, including family tracing, training and employment programmes, and access to appropriate medical services, have the advantage of creating the conditions which could enable individuals to consider more readily the possibility of return.²¹
22. Repatriation is most likely to be successful where the individual concerned has been given sufficient time and resources to adequately prepare. Specific preparation programmes for those considering return should be established and information about them should be widely disseminated among all communities concerned.

Promotion of voluntary repatriation

23. Promotion of repatriation is defined by UNHCR as “the practical measures which can be taken to help refugees return voluntarily once the conditions for this exist”. It involves “actively undertaking broad and wide-ranging measures to advocate refugees’ return”.²² ECRE would advocate against the promotion of voluntary repatriation during the asylum procedure; promotion of repatriation should be confined to groups with a legal right to remain in the host country.
24. Promotion of repatriation can only take place when an assessment of the situation in the country of origin shows that conditions of “safety and dignity” can be upheld.²³ We fully endorse the core components of safety and dignity as defined by UNHCR.²⁴

¹⁹ Ibid, paragraph (b).

²⁰ *Bozano v France*, (1986) 9 EHRR 297; Paragraphs 117-188, *Chahal v UK*, (1996) 23 EHRR.

²¹ See ECRE’s Position on the Integration of Refugees in Europe, December 2002.

²² UNHCR Handbook on Voluntary Repatriation (1996), paragraph 3.1.

²³ Ibid.

²⁴ As stated in the Global Consultations on International Protection, fourth meeting, 25 April 2002, EC/GC/02/5, paragraph 15. These concepts are also defined in UNHCR Handbook on voluntary repatriation (1996), paragraph 2.4.

25. ECRE considers that physical safety can only be ensured when the circumstances which caused an individual to flee and claim asylum no longer exist, violence and intimidation have come to an end, and enforcement agencies ensure human rights compliance, including an independent police service and judiciary. Under conditions of physical safety, returnees are not at risk of physical attack or persecution either by the state or by non-state agents and the rule of law is upheld in a way which guarantees safety and non-discrimination. Risks to physical safety due to the presence of landmines need also to have been addressed.
26. We consider that legal safety requires the existence of infrastructure such as legal institutions and a legislative framework that guarantee the enjoyment of basic civil, political, economic and social rights and enables persons to exercise any other rights available to nationals of the country of origin including rights to citizenship, property, registration, documentation and return.
27. In our view, material safety would include access to basic services, such as health services and education, as well as measures necessary to promote sustainable reintegration including income generating activities, provision of basic training and reinstatement of professionals such as doctors and teachers into their occupations.
28. A preparation programme to promote voluntary repatriation should give priority to winning the trust of those considering return, and of building their confidence and motivation. It should provide the security and time to explore choices. It should include:
 - a. Assistance in acquiring relevant documentation.
 - b. Opportunities to “go and see” the conditions in the country of origin, where the right to re-enter the host country extends to a minimum period of one year after repatriation.²⁵
 - c. Training courses in preparation for return which may include landmine awareness, house - building, etc.
 - d. Family tracing.
29. Refugees who participate in “go and see” programmes must be provided with the necessary documents to ensure re-entry into the host country.

Facilitation of voluntary repatriation

30. The UNHCR Handbook on voluntary repatriation defines "facilitation" as respecting the refugees' right to return to their country at any time, when they have indicated a "strong desire to return voluntarily and/or have begun to do so on their own initiative".²⁶ UNHCR recommends that this term should only be used when repatriation is voluntary and not driven by coercion.
31. In ECRE's view, facilitation of return by the host state implies supporting and enabling individuals to return to their country of origin. We believe, that instances

²⁵ See ECRE paper: “A European Refugee Policy in the light of established principles”, April 1994.

²⁶ UNHCR Handbook on Voluntary Repatriation (1996), paragraph 3.1.

- of voluntary repatriation to less favourable conditions should not be used as examples to justify the promotion of repatriation of an entire group. Individuals should be informed of all the facts associated with their decision to repatriate, in particular the situation in the country of origin.
32. Where refugees and asylum seekers wish to repatriate, host countries should offer them individual support and advice that takes into account their particular circumstances. This should include negotiating with the country of origin for the protection of those who voluntarily repatriate. Attention should be paid to fully complying with the principle of confidentiality when negotiating with actors in the country of origin about individual returnees.
 33. Where large numbers wish to repatriate, there is likely to be a problem of absorption capacity in the country of origin. States should seek to establish mechanisms to promote the safety and dignity of those who repatriate in large numbers while at the same time advising them of the advantages of phased and co-ordinated repatriation.
 34. Where an individual can only repatriate if s/he relocates to an area in the country other than his/her place of origin, host states should consider, following comprehensive research of the situation and full consultation with refugees and community organisations, how far this would enable them to repatriate in safety and dignity.
 35. ECRE recommends that the mandatory return of people whose protection status has ceased should also be supported in accordance with paragraph 29 above. Although this category of persons would no longer have a legal right to remain in the host country, they may have legally resided there for a number of years and should therefore be entitled to adequate support in order to enable them to return to their country of origin.

The use of incentives for mandatory return

36. ECRE would define “incentives” as any initiative on the part of the host state designed to influence the behaviour of persons subject to mandatory return and encourage them to cooperate with return proceedings. Incentives might be positive or negative in nature.
37. Positive incentives may include payment for transport costs, resettlement grants, counselling or agreeing not to stamp passports in a way that would prevent individuals from returning to Europe for fixed periods of time. States may offer different incentives to different groups, for example rejected asylum seekers may be offered the least incentives to return. Negative incentives include the threat of sanctions such as the removal of benefits and social support.
38. All persons subject to mandatory return must be adequately supported through the provision of basic socio-economic benefits until they leave the host country. For persons who no longer have a legal basis for remaining in the country, these benefits should be available until their departure.
39. There is insufficient information available to be able to compare the effectiveness of different types of incentives used across Europe for different groups subject to

mandatory return. ECRE would consider that positive incentives are preferable to other measures for effecting mandatory return in dignity; it would therefore recommend that their use is prioritised over other measures.

40. In the context of the European Union, common standards for incentives and support to be provided to returnees would be welcome. We would encourage any efforts to identify best practice in the use of incentives for effecting mandatory return in Europe.

Co-operation with countries of origin

41. ECRE considers that international cooperation with countries of origin in a spirit of solidarity is a pre-requisite to achieving durable return. The importance of international solidarity and responsibility sharing has been a constant and core element of the international refugee protection framework. The Preamble to the 1951 Convention Relating to the Status of Refugees acknowledges that “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international cooperation”. The principle has also been reaffirmed in a number of ExCom Conclusions.²⁷
42. ECRE believes that the international community and/or responsible governments have to maintain political, financial and economic support to countries of origin, especially in post conflict situations to ensure sustainable return with adequate guarantees of protection.²⁸ Part of the international community’s commitment to countries of origin must be the allocation of sufficient resources for development so as to provide a foundation for reintegration.
43. Return programmes, affecting large numbers of returnees, should be co-ordinated in order to ensure the sustainability of return. Countries of origin that have produced large refugee flows have generally experienced a period of instability where there has been an absence of law and order, basic infrastructure and functioning institutions as well as food and water shortages. The destabilising effect of returning large numbers of people to these countries *en masse* may lead to further internal displacement and to large groups being forced to once again leave. ECRE believes that such situations require a careful and staged approach to return by host countries in co-operation with countries of origin.
44. Host countries should engage in dialogue with countries of origin to establish whether they are willing to accept persons returning as part of voluntary repatriation or mandatory return programmes, and if so, under what conditions. Negotiations should aim at ensuring that any appropriate legal or bureaucratic requirements relating to the return of individuals to the country of origin are met.

²⁷ See ExCom Conclusions No. 11 (XXIX) 1978, No. 15 (XXX), 1979; No. 19 (XXXI), 1980, No. 22 (XXXII), 1981, No.52 (XXXIX), 1988, No. 61 (XLI), 1990, No. 62 (XLI), 1990, No. 67 (XLII), 1991, No. 68 (XLIII), 1992, No. 71 (XLIV), 1993, No. 74 (XLV), 1994, No. 77 (XLVI), 1995, No. 79 (XLVII), 1996, No. 80 (XLVII), 1996, No. 81 (XLVIII), 1997, No. 85 (XLIX), 1998, No. 87 (L), 1999, No. 89 (LI), 2000.

²⁸ See also UNHCR, Global Consultations on International Protection, Voluntary Repatriation, 4th Meeting, 25 April 2002, EC/GC/02/5

This might involve establishing that a person without documents is a citizen of a designated country of origin, or that refugee descendants can have access to their parents' citizenship. The principle of confidentiality should be upheld throughout in order to ensure that individuals are not at risk upon return because they sought asylum in Europe. Host countries should not contact countries of origin regarding the mandatory return of an individual until that person has exhausted all legal remedies within the host state.

45. Co-operation can be assisted by identification of and networking between key governmental and non-governmental actors both in European countries and in the countries of origin. Host countries should aim to build good working relationships with countries of origin and between officials involved in the implementation of return programmes.
46. ECRE is strongly opposed to the use of punitive measures, such as the removal of development aid and support, to pressurise countries of origin to accept back persons subject to mandatory return. It also considers this to be incompatible with sustainable voluntary repatriation.

Tripartite agreements in the context of voluntary repatriation

47. Tripartite agreements should set out the mechanisms to ensure the voluntariness of repatriation, as well as to provide impartial information and counselling prior to departure. They should further set out the conditions for safe, dignified and sustainable repatriation as a requirement, not just a consideration, of voluntary repatriation. They should include all relevant procedural safeguards as described below along with the rights of returnees with regard to property.
48. Tripartite agreements should identify vulnerable groups (see below) with special assistance or protection needs along with special measures to care for these groups during their return and reintegration process.²⁹
49. Tripartite agreements should not prejudice the granting of asylum to those who chose not to repatriate.
50. In all circumstances, the terms of such agreements, should be respected by all parties.

Readmission agreements in the context of mandatory return

51. Human rights safeguards and a guarantee against *refoulement* in compliance with the ECHR and other human rights instruments should be included in any readmission agreements made with countries of origin. These should provide for return to take place in safety and dignity, the procedural safeguards set out below and the rights of returnees with regard to property reconstitution or compensation.
52. Agreements should not be used to prejudice the treatment of particular categories of asylum claimants.
53. Procedural safeguards must be applied on an individual basis. These should be upheld in all circumstances including when political agreement has been reached

²⁹ See UNHCR, *Handbook on Voluntary Repatriation: International Protection*, 1996, Chapter 3.6

to return large groups of people. Specific safeguards should apply in the case of vulnerable groups (see below).

54. Where returns in the context of readmission agreements have led to human rights abuses or *refoulement* they should be suspended until the risk of such treatment can be eliminated.

Information gathering and dissemination

55. ECRE supports the UNHCR view that "only an informed decision can be a voluntary decision".³⁰ Provision of adequate information is a necessary prerequisite for ensuring that repatriation does in fact take place on a voluntary basis and with the full consent of the individuals concerned. Persons subject to mandatory return also require and should be given adequate information in order to enable them to consent to return.
56. Information should cover whether or not conditions for safe and sustainable return are in place in the country of origin, the rights guaranteed there, as well as any options for exercising the right to remain in the host country. Such information should be impartial, independently corroborated, evidence based, and open to public scrutiny.
57. In the case of mandatory returns, information should also be provided on the organisations involved in return proceedings and the rights and obligations of returnees during such proceedings.
58. Rigorous and comprehensive mechanisms are required to conduct risk assessments of conditions in the country of origin as a prerequisite to formulating and promoting voluntary repatriation policies. This could include fact-finding missions by the host state to the country of origin to collect information on conditions in different regions and in relation to the situation of different ethnic and social groups. Information should be shared across different European countries that host refugees. Consideration should be given to supporting independent bodies and NGOs to collect data.
59. Information should be disseminated widely and provided in accessible formats. This might include mass information campaigns, mother tongue information, and use of the media and the internet.
60. Individuals should have access to information provided by organisations such as UNHCR or NGOs.
61. Information should be provided as early as possible. This would allow individuals sufficient time to decide on whether or not to choose voluntary repatriation or consent to mandatory return, and to receive the necessary advice and assistance to support their choice.³¹
62. Recognition should be given to the role of refugees and their community organisations as important sources of reliable information on the country of

³⁰ Ibid, paragraph 4.2.

³¹ Ibid, paragraph 8.

origin. Efforts should also be made to assist persons to gain information directly through contact with family and friends in the country of origin. Information could further be elicited from refugees who have made “go and see” visits to the country of origin as part of preparation programmes for voluntary repatriation.

Procedural safeguards

Access to advice

63. Individuals must have access to independent legal advice, to be provided free of charge before signing any documents relating to voluntary repatriation, mandatory return or their legal status in the host country; if required, interpreters must be provided.
64. NGOs and UNHCR must have "free and unhindered access to refugees"³². The host state should also facilitate returnee access to UNHCR and NGOs. The involvement of these actors, rather than the mere possibility of their involvement if it is thought necessary, should be guaranteed.

The decision to return

65. The decision to repatriate must be a personal one; each individual member of a returning family must agree to the decision and not only heads of households or community leaders. ECRE fully supports UNHCR's view that repatriation should be voluntary and individual in character and only take place at the “freely expressed wish” of the person concerned.³³

The right to family unity

66. Return programmes should be in full accordance with the principle of family unity³⁴. Where family members make a choice to return they should not be separated prior to, or during return. In deciding upon the timing for voluntary repatriation or mandatory return programmes, priority should be given to education, especially for minors, which should not be unnecessarily interrupted.

The right to international protection in the context of voluntary repatriation

67. The right to international protection must be safeguarded, such that individuals may continue to receive the protection of the host country, or in the case of asylum seekers, to pursue their applications for asylum if they decide not to pursue the option of voluntary repatriation.
68. ECRE would advocate against participation in repatriation preparation programmes being seen as committing individuals to returning. Participation in such programmes should not be used to prejudice the outcome of asylum

³² Ibid, paragraph 4.1.

³³ Executive Committee Conclusions – Voluntary Repatriation – No. 40 (XXXVI) (1985) – paragraph (b).

³⁴ The principle of family unity is included as an element of safety and dignity in the UNHCR Handbook on voluntary repatriation, paragraph 2.4. Protection of the family is a fundamental human right, Article 16 (3), Universal Declaration of Human Rights, (1948) and Article 23, International Covenant on Civil and Political Rights, (1966) (ICPPR). The right to respect for family life is included in Article 8, European Convention on Human Rights, (1950) (ECHR).

applications of persons still in the procedure nor should it lead to a withdrawal or non-renewal of refugee, complementary or temporary protection status.

Right of appeal against a decision of mandatory return

69. The right of appeal with suspensive effect for all persons subject to mandatory return must be guaranteed; without a suspensive effect, appeals against decisions to return individuals would be meaningless. There can be no limitations to this right, for example in relation to particular nationalities or ethnic groups who European States believe are not at risk of human rights violations. Individuals must be informed of their appeal rights and be given effective access by means of provision of free legal advice. They must also be given adequate time to prepare for an appeal; unrealistic time constraints should not be imposed on them as they risk rendering the right of appeal ineffective.
70. A right of appeal is not effective without the provision of basic socio-economic rights during the appeal period. This would require social benefits to ensure that the individual is able to survive in dignity while still waiting for a decision on their appeal.

Detention prior to return

71. ECRE would advise against any automatic assumption that because an individual no longer has a legal basis to remain in a European country they are likely to abscond and should therefore be detained. Detention should only be used as a last resort and be in full compliance with international human rights law. Vulnerable groups, in particular unaccompanied minors, should never be detained. (See below).
72. Detention prior to removal, when "action is being taken with a view to deportation or extradition",³⁵ should be clearly regulated by law and be subject to effective review, in a manner compatible with Article 5, ECHR. The purpose of Article 5 is to protect the individual from arbitrariness;³⁶ this entails that the law must be sufficiently accessible and precise³⁷. We would argue that the grounds and conditions for detention prior to removal should be comprehensively set out in primary legislation.
73. Where detention is unavoidable, its duration should be for the minimum period necessary, to be determined on a case-by-case basis and in the light of all circumstances of the particular case.³⁸ The principle of proportionality should apply.
74. Detention pending removal for indefinite and unduly prolonged periods, where there is no prospect of removal³⁹ or where removal proceedings are not being

³⁵ Article 5(1)(f), ECHR.

³⁶ Paragraph 122, *Kurt v Turkey*, (1998) 27 EHRR 91; see also *Chahal v United Kingdom*, (1996) 23 EHRR 413.

³⁷ Paragraph 50, *Amuur v France*, (1996) 22 EHRR 533.

³⁸ See ECRE's Position on the Detention of Asylum Seekers, April 1996, paragraphs 35-49.

³⁹ *Ali v Switzerland*, (1999) 28 EHRR 304.

conducted with due diligence⁴⁰, may be deemed disproportionate and not in compliance with Article 5, ECHR.

75. Alternatives to detention should include: bail, guarantee and supervision systems that provide for individuals to be supervised by an NGO, and a system of incentives and penalties that are used to ensure co-operation.⁴¹ Restrictions on freedom of movement or place of residence, with reporting requirements could also be considered provided that forcing them to reside in isolated areas does not violate individuals' human rights.

THE RETURN PROCESS

Conditions during return

76. The physical process of return should take place under dignified conditions. Returnees should be allowed sufficient time to return, but states should also endeavour to avoid delays. They should be offered choices about the timing of return, means of transport etc. and be made aware of all appropriate information relating to the journey.
77. The security of those travelling back to their country of origin should be assured by the host state. This responsibility cannot be transferred to other organisations such as airlines.⁴² Assistance should be given to ensure the safe return of possessions held in the host country to the country of origin.

The use of restraints to effect mandatory return

78. ECRE is concerned that in some States across Europe practices used to effect forced return may amount to inhuman or degrading treatment contrary to Article 3, ECHR and Article 7, ICCPR or may lead to violations of Article 2, ECHR.⁴³
79. We would recommend that forced return should be effected in accordance with the standards set out in the Recommendation on the return of rejected asylum seekers of the Council of Europe's Committee of Ministers.⁴⁴ This states that return should take place "in a humane manner with full respect for fundamental human rights" and "without excessive use of force".
80. The type of restraints used to effect forced return vary considerably across Europe, and according to the status of the individual(s) being removed. Restraints range from the use of escorts during the return journey to handcuffs, however there have been examples of the use of physical restraints that have resulted in death.⁴⁵

⁴⁰ *Quinn v France*, (1997) EHRLR 167.

⁴¹ See ECRE's Position on the Detention of Asylum Seekers, April 1996.

⁴² See *Supra* 17.

⁴³ See 'Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity', a Report by the Council of Europe committee on Migration, Refugees and Demography, Doc 9196, 10 Sept 2001. In particular paragraph 23, where it states at "the use of violence during expulsions, in breach of Article 3 of the European Convention on Human Rights is plainly all too frequent".

⁴⁴ Recommendation No. (99) 12.

⁴⁵ *Supra* 43, paragraph 24 provides details of all returnees who have died during deportation. Since the report was written two people have died in France during deportation, Ricardo Barriento and Mariame Getu

81. The use of force should be no more than absolutely necessary,⁴⁶ any use of physical restraints must be justified by the person's own violent behaviour⁴⁷ and be proportionate⁴⁸. Proportionality is to be determined in each particular case in the light of all circumstances, including the personality and condition of the returnee. It must be ensured that individuals are treated with respect and dignity. In particular, extreme caution should be exercised in the use of physical force against vulnerable persons.
82. The use of escorts and other restraints that respect the physical integrity of the person being returned may in certain circumstances be justified. Restraints such as handcuffs and physical restraint however should only be used in the most exceptional circumstances. Other restraints which may physically harm an individual or violate their dignity, such as the infliction of violence during deportation or the use of tape, gags, helmets, cushions, incapacitating or irritant gas and restraints which may induce asphyxia, must be prohibited. Tranquillizers or injections, without medical examination or doctor's prescription, must also be prohibited.⁴⁹ In addition, we are firmly against the use of belts, straitjackets and strapping deportees into their seats, to effect return. Medical experts should be made available during the return process.
83. We would recommend that a system for human rights observation should be developed for the process of forced returns to ensure human rights compliance. For example, an Ombudsman, appointed at national level could report on compliance with human rights standards during removals taking into account individual reports from human rights observers. A code of conduct would also help to ensure that treatment during the removals process is compliant with international human rights obligations.⁵⁰

Return of specific and vulnerable groups

Voluntary repatriation of skilled workers

84. The voluntary repatriation of skilled refugees who can contribute to rebuilding their country of origin is often seen as a priority both by the country of origin and the international community. ECRE considers that the same safeguards should apply to this category of people as to all other returnee groups to ensure the voluntary nature of their repatriation. Those who choose to return should be able

Hagos, who died in December 2002 and January 2003, respectively.

⁴⁶ See Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 25 February 1998, 3 July 1998, CPT/Inf (99) 4 (EN), paragraph 68.

⁴⁷ *Tomasi v France*, (1992) 15 EHRR 1.

⁴⁸ *Hurtado v Switzerland*, (1994) A 280-A.

⁴⁹ As recommended in paragraph 17 of the Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe Member States and the enforcement of expulsion orders, 19 Sept 2001, CommDH/Rec (2001) 1.

⁵⁰ As recommended in paragraph 12 by the Committee on Migration, Refugees and Demography, Supra 43, that a "code of good conduct" should include an exhaustive list of human rights standards applicable to those being returned; a list of minimum principles regarding monitoring, supervision and support of potential deportees with regard to safety and dignity; guidelines on restraint techniques; and guarantees for individuals involved in expulsion that responsibility lies fully with the public authorities.

to maintain their legal status in the country of asylum if their repatriation is promoted as part of specific reconstruction and development programmes in the country of origin.

Voluntary repatriation of vulnerable groups

85. Certain groups are especially vulnerable to external pressure to repatriate; particular attention should be paid to their rights and welfare in order to ensure that the principle of voluntariness is not compromised in repatriation programmes.
86. The special needs of children, particularly unaccompanied children, should be carefully considered in relation to voluntary repatriation and reintegration. The best interests of the child in accordance with Article 3 of the UN Convention on the Rights of the Child (CRC), should govern policymaking and case based decision-making.⁵¹
87. In the case of unaccompanied children, a legal guardian in the host country should ensure that voluntariness is safeguarded and decisions are in the child's best interests.⁵² The process must take into account Article 12 CRC⁵³ and other relevant provisions, and ensure repatriation to the legal guardianship of a family member or foster parent in the country of origin.⁵⁴
88. Specialist counselling should be made available to persons who have undergone traumatic experiences in their country of origin and who may as a result suffer psychological problems. These persons are likely to find deciding whether or not to repatriate especially difficult. An assessment of the availability of suitable medical services in the country of origin should be undertaken prior to repatriation.
89. Steps should be taken to ensure the safety of women returnees, especially women-headed households. Repatriation programmes should comply with all relevant provisions of the UN Convention on the Elimination of All Forms of Discrimination Against Women. In particular, attention should be given to women returnees' ability to meet basic needs and provide for dependent children in their country of origin, to exercise their rights and to participate in reconstruction efforts. Special protection might need to be provided to victims of domestic violence or trafficking.

⁵¹ See paragraph 42 of ECRE's Position on Refugee Children, November 1996, for conditions on when an unaccompanied child may be returned to his/her country of origin.

⁵² See, ECRE Guidelines on Fair and Efficient Procedures for Determining Refugee Status, para.80

⁵³ Article 12 CRC:

1. State Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

⁵⁴ See ECRE Position on Refugee Children, November 1996.

90. Experience suggests that older refugees sometimes wish to repatriate to their country of origin. Particular attention should be given to their reintegration needs, the availability of adequate health services and the likelihood of family reunion. Transfer of pension benefits must be ensured.

Mandatory return of vulnerable groups

91. Vulnerable groups that may require special protection during the return process include: children, women, the elderly, and people with disabilities or serious health conditions. As with voluntary repatriation, unaccompanied minors should only be subject to mandatory return when it is in their best interests, in compliance with the CRC, and when they can be returned to the legal guardianship of a family member or foster parent in the country of origin. Circumstances should be effectively monitored to ensure compliance with standards. People with special needs should have access to particular services, such as medical care prior to and during the removal process. The use of escorts should also be considered for vulnerable groups.

FOLLOW-UP TO RETURN

Reintegration policies

92. Successful reintegration in the country of origin is a key factor in ensuring the sustainability of return.⁵⁵ To ensure this, it is important that the involvement of host countries does not end once return has been effected.
93. While it is important that support packages recognise and address the different needs of individuals, it can be destabilising to the process of reintegration if returnees from different host countries are in receipt of significantly different levels of support, particularly where there are differing levels of cash allowance paid. ECRE supports efforts to harmonise packages of support provided to returnees by different European countries in line with best practice.
94. ECRE considers that policies that benefit the community as a whole rather than only those returning are more conducive to achieving the acceptance of returnees by other groups. It recommends that assistance should be integrated in development aid programmes already provided to the communities receiving returnees, which may help to address tension between returnees and the rest of the population receiving support.
95. The transfer of savings, returns on taxes or pensions should be guaranteed upon return in the country of origin.

⁵⁵ Executive Committee Conclusions – No. 40 (1985) – paragraph (k):

“Assistance for the reintegration of returnees provided by the international community in the country of origin is recognised as an important factor in promoting repatriation. To this end, UNHCR and other United Nations agencies as appropriate, should have funds readily available to assist returnees in the various stages of their integration and rehabilitation in their country of origin”.

Executive Committee Conclusions – No. 74 (1994) – paragraph (a):

“For repatriation to be a sustainable and thus truly durable solution to refugee problems it is essential that the need for rehabilitation, reconstruction and national reconciliation be addressed in a comprehensive and effective manner”.

96. The country of origin should officially acknowledge any changes in the legal status of returnees due to the occurrence of births, marriages, deaths, adoptions and divorce, since they left the country of origin.

Voluntary repatriation

97. The investment of money and skilled personnel is necessary to provide both immediate and long-term assistance to persons participating in voluntary repatriation programmes. Reintegration assistance is likely to entail a combination of aid to individual returnees and general development aid to address basic conditions in the country of origin.

98. Reintegration programmes should provide individuals with information and advice to assist their orientation in the country of origin. This should include information on their rights and responsibilities.

99. Arrangements should be made for accommodating returnees and this includes recognition of property titles, mechanisms for property requisition and compensation for those who lost property on leaving the country of origin.

100. Family reunification is one of the first priorities of returnees on arrival in the country of origin, and should be considered an essential element of reintegration policies. Host countries can assist by supporting agencies with appropriate skills and experience in family tracing and reunification. The entrance and stay of family members from third countries should be facilitated.

101. Returnees may require practical assistance in a range of other areas to enable them to integrate successfully. These include:

- a. Reconstruction of housing, roads and public buildings and restoration of regular supplies of water, electricity etc.
- b. Mine clearance.
- c. Provision of temporary subsistence allowances to meet basic needs.
- d. Training in skills to help them find work and adapt to conditions in the country of origin.
- e. Development of post return counselling programmes.

102. Reintegration is also facilitated if the circumstances of internally displaced people returning to their local communities are taken into consideration, and parity is sought in the provision of support packages for IDPs and returning refugees.

103. The length of time during which support is provided should depend on an assessment of what is required to ensure the sustainability of return, and be decided on a case-by-case basis.

Mandatory return

104. It is in the best interests of both individuals concerned and European governments that mandatory returns are carried out in a way that guarantees sustainability. If individuals are sent back to unstable conditions where they are at

risk of human rights violations not only will this put them at risk but it may also necessitate their re-entry into the territory of the host country to make further protection claims.

105. Support may be necessary on return; it may include aid to ensure adequate housing or to facilitate employment creation, it should also include information on individual rights and responsibilities in the country of origin and on how to obtain any necessary advice for reintegration or family reunion.

Monitoring

Voluntary repatriation

106. The security of returnees and the voluntariness of repatriation can only be consistently safeguarded by effective monitoring procedures. Equally, the success of reintegration efforts, the sustainability of repatriation and the impact of returnees on the country of origin should be evaluated over time. There are examples where monitoring has been suggested as a contributory factor to the durability and success of repatriation programmes.⁵⁶

107. Monitoring should take place until the situation in the country of origin can be regarded as “stable, national protection is again available, and refugees reintegrated”.⁵⁷ We endorse UNHCR’s view that it is preferable to avoid arbitrary deadlines, the best approach is to assess the situation in relation to the human rights protection provided to the individual on an ongoing basis until such time as monitoring becomes unnecessary. Facilities that enable individuals to make complaints in relation to their protection, including complaints of persecution and discrimination could also be included as part of monitoring programmes.

108. Monitoring should include:
- a. Systems for recording detailed statistical information on returnees – for example numbers, age, skills, needs, capabilities, ethnic, political or religious background.
 - b. Systems for collecting information on the situation in the country of origin, to be used to provide information to returnees in the host country and for status determination purposes.
 - c. Clear procedures on how the findings of monitoring will be reported and acted upon, including effective access by all actors involved including returnees, NGOs and policy-making staff in the host country and country of origin.

109. ECRE believes that the rights of returnees are best served where a number of appropriate actors are involved in monitoring. The governments of host states are responsible for ensuring the safety of returnees and should establish their own monitoring systems to evaluate the impact of repatriation and reintegration

⁵⁶ The Return and Reintegration of Rejected Asylum Seekers and Irregular Migrants, IOM Migration Research Series, No. 4, May 2001.

⁵⁷ UNHCR Handbook on voluntary repatriation, paragraph 6.1.

- policies and the work of partner agencies. They should also promote independent monitoring by UNHCR and other actors, and provide resources to this end.
110. NGOs in both the country of origin and the host state should monitor returnee welfare following repatriation and contribute information towards assessments of safety for returnees, the voluntariness of repatriation and the quality and effectiveness of repatriation and reintegration programmes. Organisations which have experience of co-ordinating voluntary repatriation programmes in host countries and reintegration programmes in countries of origin can help in the implementation and development of policies.

Mandatory return

111. In appropriate cases, procedures should be set in place to check that returnees have reached their destination safely, particularly where there are no border controls.
112. In order to ensure that there is no risk of persecution, follow-up monitoring and access to embassies, UNHCR and refugee-assisting NGOs is necessary for persons subject to mandatory return.
113. ECRE believes that any involvement by UNHCR in mandatory return must have at its heart UNHCR's protection mandate. Involvement in mandatory return that necessitates a broadening of the UNHCR mandate might risk compromising the agency's protection focus.⁵⁸
114. Information elicited through monitoring exercises by governments, UNHCR and NGOs can serve as the basis when assessing the possibility of future mandatory returns to particular countries.
115. Host states should seek to maintain good working partnerships with civil society and UNHCR alike, to learn from their experience and consult them in the development of good practice. However we would stress that the involvement of such organisations does not absolve States from their international legal responsibilities to ensure protection from *refoulement*.
116. NGOs should work co-operatively together to ensure that the wide range of skills and expertise required in this complex field are co-ordinated efficiently and to develop standards of good practice.
117. Some organisations can offer specialised roles - for example, the International Committee of the Red Cross can provide material assistance, facilitate family tracing and family reunion, and monitor the implementation of the Geneva Conventions. Small local NGOs have been successful in running projects to promote acceptance by local communities. Host states should develop an understanding of the relative expertise of such organisations and build partnerships with them in order to implement policies and monitor their work.

⁵⁸See the Executive Committee of the High Commissioner's Programme, Agenda for Protection, 26 June 2002, goal 2, point 6: UNHCR is called upon to "develop strategies ...to promote return and readmission of persons not in need of international protection" and to co-operate "in removing obstacles to the speedy return of asylum seekers found not to be in need of international protection".

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