UNITED NATIONS HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Expert Meeting on

Protecting the human rights of migrants in the context of return

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Palais Wilson, Room 1-016

Background Paper

I. Introduction

Around the world, the human rights of millions of migrants[1] are insufficiently protected or at risk of abuse. This is especially true for migrants without the legal right to remain in the countries in which they reside, and who may be subject to forced returns or otherwise incentivised or coerced to return voluntarily. While States exercise a sovereign prerogative to govern the conditions of entry, stay and exit of non-nationals, this prerogative is not absolute. States must always govern their borders in light of their human rights obligations. This means that the human rights of all persons – including migrants in the context of return – must be respected.

The failure to safeguard migrants' rights in the context of return has been demonstrated to lead to a number of serious human rights concerns. In the absence of systematic monitoring and reporting it is difficult to know the scope of potential abuses, however reports indicate that migrants are at heightened risk of being returned to places where they may face torture or other cruel, inhuman or degrading treatment or punishment ('ill-treatment') in violation of the principle of non-refoulement.[2] Others face arbitrary or collective expulsion[3] or may be returned back to situations of internal displacement.[4] International experts have also highlighted that unsustainable return practices often heighten the vulnerability of migrants to precarious re-migration, putting them at risk of trafficking, exploitation and abuse.[5]

Concerningly, some States are taking steps to "disincentivise stay" by denying the human rights of migrants. For example, some European Union (EU) Member States have implemented migration policies that limit the right to work, curtail access to essential services, and restrict family reunification in an effort to increase voluntary return rates.[6] When migrants are cajoled, coerced or "disincentivised" into voluntarily returning[7], there have been reports of false promises,

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[1] OHCHR has stated that, in the absence of a universal definition, an international migrant (migrant) refers to "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence". In common usage, refugees are often distinguished from other migrants due to their specific entitlements under international refugee law. Similarly other groups such as trafficked persons, smuggled migrants, migrant workers, stateless persons, and persons with disabilities have also been recognized in specific international instruments.

[2] OHCHR/UNSMIL, *"Detained and Dehumanised" Report on Human Rights Abuses Against Migrants in Libya*, 13 December 2016.

[3] OHCHR (2015). Intervener Brief, *N.D. and N.T. v Spain,* Application Nos. 8675/15 and 8697/15.

[4] Oxfam (2017). Briefing Paper, *Returning to Fragility: Exploring the link between conflict and returnees in Afghanistan.*

[5] CEDAW, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, paras. 39-40, 18 October 2013.

[6] European Commission, EMN Inform, *The Return of Rejected Asylum Seekers: Challenges and Good Practices*, 4 November 2016.

[7] IOM defines Assisted Voluntary Return as "administrative, logistical, financial and reintegration support to rejected asylum seekers, victims of trafficking in human beings, stranded migrants, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin", available at http://www.iom.int/key-migration-terms.

misinformation, and wide disparities in the "relocation assistance" being provided to returnees, causing distrust and leading to more precarious re-migration.[8]

Once returned, child migrants and other long-term migrant residents may have "no ties whatsoever in the 'home' countries to which they are sent", may not speak the local language, and are "routinely ostracized."[9] Some researchers have noted a near "complete absence of post-deportation monitoring" and have suggested that "States' refusal to check what happens to these deportations indicates a preference to remain blind to the consequences of their actions."[10]

Yet despite the known human rights risks inherent to modern return practices, in recent years the topic has become increasingly prominent in migration governance discussions. Return has been promoted as the "preferred option" and an essential aspect of a "well-managed migration policy", largely because of its presumed, though largely unproven, deterrent effect on irregular migration, and other assumptions such as the links between returns and well-functioning asylum systems.[11] Globally, the total number of migrants being returned has been increasing, despite the fact that global migration figures remain relatively stable and are even decreasing in some countries.[12] For example, from 2009 to 2016, the United States returned record numbers of migrants—including 3,094,208 forcibly returned persons, and an additional 2,186,907 persons who were "voluntarily" returned at the border[13]—despite the fact that net migration to the United States during that same period was actually decreasing.[14]

States in the global north are also increasingly prioritising the return of migrants over other available policy options such as regularisation or expanded regular migration pathways, leading to year-over-year increases in the practice in many parts of the world. For example, in 2015, a total of 175,220 persons were either forcibly or voluntarily returned from Europe according to figures registered by Frontex,[15] representing a nearly 9 per cent increase over the previous year and the highest number of recorded returns from Europe since 2011.[16] Similarly, the International Organization for Migration (IOM) reported voluntarily returning 98,403 persons in 2016, representing a 41 percent increase from the previous year, the overwhelming majority of which were carried out from countries in the global north.[17]

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[8] See, e.g. Colin Freeman, The Telegraph, '*We might as well try to get to Europe after all': Migrants sent home by EU find broken promises in 'white elephant' repatriation scheme,* 7 January 2018; See also, See, Anne Koch, "Assisted Voluntary Return Schemes" in Refugee Studies Centre, *Forced Migration Review No. 44 – Detention, alternatives to detention, and deportation*, September 2013, ISSN 1460-9819.

[9] Kanstroom D., Deportation as a Global Phenomenon: Reflections on the ILC Draft Articles on the Expulsion of Aliens, 30 Harv. Hum. Rts. J. 49 (Spring 2017), at 61.

[10] Karamanidou L. & Schuster L (2011), Deportation in International and Regional Law, p. 12

[11] See, e.g. "Return, readmission and reintegration are essential elements of a comprehensive approach to migration governance contributing to safe, humane and dignified migration." Global Forum on Migration and Development (GFMD), Background Paper: Roundtable Session 2.2, *Fostering the development impact of returning migrants.*

[12] According to the Population Division of the UN Department of Economic and Social Affairs (DESA), migrants have accounted for between 2.8 – 3.4 percent of the total population since 1990, with current migration figures at 3.4 percent. See, https://www.un.org/development/desa/en/news/population/international-migration-report-2017.html.

[13] Muzaffar Chishti, Sarah Pierce, and Jessica Bolter, Migration Policy Institute, *The Obama Record on Deportations: Deporter in Chief or Not?* (January 26, 2017), available at https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not.

[14] Pew Research Center, *More Mexicans Leaving Than Coming to the U.S.*, Washington, D.C. (November 2015).

[15] Frontex, Annual Risk Analysis Report 2016.

[16] IOM, 2015 Global Migration Trends Factsheet, available at https://publications.iom.int/system/files/global_migration_trends_2015_factsheet.pdf.

[17] IOM, AVRR 2016 Key Highlights, available at http://www.iom.int/sites/default/files/our_work/DMM/AVRR/AVRR-2016-Key-Highlights.pdf. Fully 72.9 per cent of IOM returns are carried out from the European Economic Area (EEA) and Switzerland. See, http://www.iom.int/sites/default/files/our_work/DMM/AVRR/AVRR-BULLETIN2017-3-1129.pdf.

However, returns are also being prioritised by countries in the global south, including in transit and acute humanitarian crisis contexts. Such returns are often due to financial and political pressure from neighbouring countries to limit or "combat" irregular migration.[18] For example, due in large part to pressure from the United States, Mexico adopted the *Programa Frontera Sur* and subsequently deported around 150,000 Central American migrants between October 1, 2015 and January 31, 2016, representing a 44 percent increase over the previous year.[19]

Returns have become an increasingly important topic of discussion through various non-normative regional and bi-lateral mechanisms such as the regional consultative processes on migration (RCPs).[20] As a result, returns have expanded globally—and largely absent of critical human rights discourse—to become a central feature of migration management regimes across North America, Europe, Australia and South Africa, among others.[21] According to some researchers, wrongful returns and returns lacking basic procedural safeguards are now taking place with "alarming frequency".[22] Given the known harms to migrants in the context of return, the stark increase in the size and scale of the phenomenon in recent years leads to a number of important human rights considerations.

In his September 2017 report to the Human Rights Council *on the compendium of principles, good practices, and policies on safe, orderly and regular migration in line with international human rights law*, the United Nations High Commissioner for Human Rights called upon States to "**ensure that all returns are only carried out in full respect for the human rights of migrants and in accordance with international law**."[23] Additionally, the Global Migration Group's (GMG) *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, recommend specific protection interventions for migrants in vulnerable situations,[24] including that **returns are sustainable**, and that States "**put long-term, independent reporting mechanisms in place to monitor the risk and occurrence of human rights violations**" when migrants are returned.[25]

This expert meeting seeks to build upon these prior recommendations by facilitating conversation around a number of key challenges and human rights protection gaps posed by current State return practices, and by helping to identify areas of focus for OHCHR's continued work on migration and human rights in the context of returns. While drawing upon international refugee law by analogy, this expert meeting is intended to be limited in scope, and does not attempt to discuss the human rights of refugees in the context of voluntary repatriation.

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[18] See e.g., The Libya Observer, *Libyan and Italian officials discuss joint cooperation to combat illegal immigration*, December 09, 2017, available at https://www.libyaobserver.ly/news/libyan-and-italian-officials-discuss-joint-cooperation-combat-illegal-immigration; Sudan Tribune, *Sudan vows continued cooperation with EU to combat illegal migration*, December 1, 2017, available at http://www.sudantribune.com/spip.php?article64151.

[19] Alejandra Castillo, Council on Hemispheric Affairs, *The Mexican Government's Frontera Sur Program: An Inconsistent Immigration Policy*, available at http://www.coha.org/wp-content/uploads/2016/10/The-Mexican-Government%E2%80%99s-Frontera-Sur-Program-An-Inconsistent-Immigration-Policy.pdf.

[20] "Initially these dialogues placed most of their focus on immediate concerns such as return and readmission, border management, etc." Jill Helke, Director for International Cooperation and Partnerships, IOM, *The contribution of regional consultative processes on migration to the Global Compact on Safe, Orderly and Regular Migration*, presented to the Fifteenth Coordination Meeting on International Migration, 16 February 2017 (United Nations Headquarters, New York).

[21] Kanstroom D., Deportation as a Global Phenomenon: Reflections on the ILC Draft Articles on the Expulsion of Aliens, 30 Harv. Hum. Rts. J. 49 (Spring 2017), at 58.

[22] Ibid. at 61.

[23] A/HRC/36/42, Principle 6: Returns.

[24] Migrants in vulnerable situations are defined as "persons who are unable effectively to enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer's heightened duty of care." A/HRC/37/34, para. 12.

[25]A/HRC/37/34/Add. 1, Principle 6, Guideline 8.

II.   Key concepts

In the process of developing a global compact for safe, orderly and regular migration (GCM), States have made a number of substantive commitments regarding returns,[26] and are currently in the midst of further negotiations regarding a commitment to return and reintegration that is human rights-based. The Zero Draft of the GCM contains a specific objective on cooperation towards "safe, human rights-based and dignified return and readmission", including a commitment to:

> cooperate for safe, human rights-based and dignified return and readmission, ensuring that our returning nationals are duly received, as well as upholding the prohibition of collective expulsion and the principle of voluntary return over forced deportation. We further commit to create conducive conditions for personal safety, economic empowerment, inclusion and social cohesion in communities, in order to ensure that reintegration of migrants upon return to their countries of origin is sustainable. [27]

When States and other duty-bearers attempt to demonstrate a human rights-based approach to return, they often use terms or concepts implying human rights obligations—terms such as "safe", "dignified", or "sustainable". Yet, these terms are not always grounded in the international human rights framework, and many are in need of further definitional and conceptual clarity, especially from the perspective of States' human rights obligations. The following sections explore some of these key concepts.

A.   Return

There is no universal legal definition of return, and various words are used to refer to the related, but often distinct, legal and practical processes that may be grouped under the broad heading of return. For example: "independent departure", "supervised departure", "voluntary departure", "voluntary return", "forced return", "expulsion", "removal", "expedited removal", "repatriation", and "deportation" are all terms which may have specific legal meaning in a particular domestic context, but whose meaning and interpretation are not universally shared among States.[28] Furthermore, there are often significant differences—and consequences—under national immigration laws between these various terms. Return migration has been defined differently by relevant actors, even where there is significant overlap in jurisdiction,[29] and definitional issues are further complicated by the fact that some States periodically change terminology, or rely on euphemism when discussing return practices, making it difficult to track or compare practices across jurisdictions or even within the same jurisdiction over time.[30]

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[26] See, e.g. New York Declaration, paras. 23, 41, and 58.

[27] Zero Draft of the global compact for safe, regular and orderly migration, Objective 21, para. 35.

[28] The International Law Commission did adopt, at its sixty-sixth session in 2014, and submit to the General Assembly, as set of *Draft articles on the expulsion of aliens*, which provide a definition of "expulsion". However these *Draft articles* have not been formally adopted by member States.

[29] Compare OECD, Glossary of Statistical Terms, "Returning migrants are persons returning to their country of citizenship after having been international migrants (whether short-term or long- term) in another country and who are intending to stay in their own country for at least a year", with the EU Return Handbook, "the process of a third-country national going back - whether in voluntary compliance with an obligation to return, or enforced - to: 1) his or her country of origin, or 2) a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or 3) another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted."

[30] For example, new immigration legislation in the United States in 1996 departed from official use of the term "deportation", yet the Department of Homeland Security (DHS) continued using the term euphemistically in official publications and government websites into the 2000's. See, https://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf.

In the absence of a universal definition, OHCHR has chosen to define return broadly as applying to the various ways that non-nationals—whether voluntarily, under coercion, or by force—return to their country of origin or another country to which they have previous ties. In this regard, return may be defined as:

> [an] umbrella term to refer to all the various forms, methods and processes by which migrants are returned or compelled to return to their country of origin or of habitual residence, or a third country. This includes, inter alia, deportation, expulsion, removal, extradition, pushback, handover, transfer or any other return arrangement. The use of the term "return" provides no determination as to the degree of voluntariness or compulsion in the decision to return, nor of the lawfulness or arbitrariness of the return.[31]

While broad, this definition is of limited scope and is not intended to include the repatriation of refugees where, for example, due to a change of circumstances in their home country they no longer require international refugee protection. In practice, refugee repatriation is typically a distinct process, both practically and legally, for which significant normative guidance already exists.[32]

However, according to the above definition, return migration pertains to at least three groups of persons whose experiences should be analytically distinguished: (1) migrants who return voluntarily on their own initiative and by their own means; (2) migrants who return voluntarily by incentive or under coercion, such as those receiving financial or other assistance to return, or those who return from places of detention; and (3) migrants who are forcibly returned by migration, law enforcement, or other State authorities.

B. Safety and dignity

The Universal Declaration on Human Rights (UDHR) recognizes that "all human beings are born free and equal in dignity and rights" and both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize that human dignity is the foundational right from which all other Covenant rights are derived. However, the right to dignity itself remains relatively ill-defined.

As a matter of international human rights law, safety is not a right itself, but rather a loosely defined concept that implicates a number of fundamental rights. At a minimum, these would include the rights to life (Art. 6 ICCPR), freedom from torture or ill-treatment (Art. 7 ICCPR), and liberty and security of person (Art. 9 ICCPR). These rights also give rise to other relevant norms in the context of return, such as the principle of *non-refoulement*, which like the rights to life, freedom from torture or ill-treatment, and prohibition on arbitrary detention, is an absolute and non-derogable norm of customary international law, or *jus cogens*.

Additionally, the concepts of safety and dignity should be seen as implicating access to migrants' fundamental economic, social and cultural rights. At a minimum, the Committee on Economic, Social and Cultural Rights (CESCR) has noted that the "essential minimum content" of Covenant rights must be preserved in all circumstances for all people under the State's effective control, without

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[31] A/HRC/37/34/Add. 1, glossary of key terms.
[32] See, e.g. UN High Commissioner for Refugees (UNHCR), *Handbook - Voluntary Repatriation: International Protection*, January 1996.

exception.[33] These "core obligations of the State" include freedom from hunger, access to water to satisfy basic needs, access to essential drugs, and access to education.[34]

Finally, safety and dignity should be understood as including access to a number of safeguarding principles, which are often critical to ensuring respect for the aforementioned rights and which may be non-derogable norms in their own right. These would include, *inter alia*, due process and procedural safeguards, *habeas corpus*, and the right to a remedy.

C. Voluntariness

As a matter of international human rights law, voluntariness is not a right itself, but is a principle that is based on a number of other foundational human rights principles, such as individual autonomy, self-determination, participation, and human dignity. For example, both the ICCPR and ICESCR state that all people have the right to self-determination and that "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[35] The UN Declaration on the Right to Development, also asserts that all people have a right to "active, free and meaningful participation" in the pursuit of their economic, social, cultural and political development.[36]

The right to "active, free and meaningful participation" is also specifically acknowledged within human rights instruments and treaty body jurisprudence with regard to groups who are more likely to be excluded from decision-making processes because they have historically been prevented from fully participating as equal members of society (e.g. children, women and persons with disabilities) and as a collective right (e.g. in relation to minorities and indigenous peoples) and as part of the right to development.[37]

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health observed that consent is not mere acceptance of a procedure, "but a voluntary and sufficiently informed decision", and a fundamental feature of respecting an individual's autonomy, self-determination and human dignity.[38] On the contrary, "forced interventions", which are often wrongfully justified by theories of necessity or as being in the "best interest" of the person concerned, raise concerns for the autonomy and dignity of the person, and may give rise to violations of the prohibition on torture and ill-treatment.[39]

Instructive by analogy is the way that voluntariness has been interpreted by the United Nations High Commissioner for Refugees (UNHCR) within the context of voluntary repatriation. UNHCR's handbook on voluntary repatriation states that for a return to be voluntary, a refugee must have the legal right to remain in the host country, must be free from detention and must have their rights respected.[40] However, "[if these] 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."[41]

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[33] Statement by the Committee on Economic, Social and Cultural Rights, *The Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2017/1, para. 9.
[34] Ibid. at para. 10.
[35] Art. 1.1.
[36] A/RES/41/128, art. 1-2.
[37] See, e.g. UN Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Art. 12 (the child's right to be heard); and UN Declaration on the Rights of Indigenous Peoples, A/61/L.67, Art. 10 (the right to free, prior and informed consent).
[38] A/64/272, para. 18.
[39] A/63/175, paras. 38, 40, 41.
[40] UN High Commissioner for Refugees (UNHCR), *Handbook - Voluntary Repatriation: International Protection*, January 1996.
[41] Ibid. at 2.3 Voluntariness.

The principle of Free, Prior and Informed Consent (FPIC) is also instructive by analogy to the situation of voluntary return of migrants (See Figure 1). Originally a bottom-up participation and consultation framework for indigenous peoples in the context of removal from their lands or territories, FPIC is beginning to be adapted to other contexts. For example, the Kampala Convention states that "States Parties shall enable internally displaced persons to make a free and informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring their participation in finding sustainable solutions."[42]

Figure 1: The principle of Free, Prior and Informed Consent (FPIC)[43]

Free implies that there is no coercion, intimidation or manipulation.
Examples of coercion would, at a minimum, include withholding access to basic services such as housing, healthcare and education; the use or threat of prolonged, indefinite or otherwise arbitrary detention, including detention in conditions that are not for purpose or that fail to meet minimum standards; discriminatory or arbitrary withdrawal of a right to remain; and physical intimidation, use of force, or other actions that may amount to torture or ill-treatment.
Prior implies that consent is sought sufficiently in advance of any authorization or commencement of activities.
Sufficient time would, at a minimum, include that migrants are given sufficient time to consider all other options available and to ready themselves for their return, including time to explore other options to remain legally in the country; time to depart the country independently and voluntarily at a future date of their choice (independent voluntary departure); time to collect their belongings and wrap up any personal/financial affairs; and time to say goodbye to friends and family members.
Informed implies that individuals are provided with accurate, timely information communicated in a language and format that is accessible and understood.
Timely and accurate information would, at a minimum, include information on the political, economic and social conditions they can expect to find upon their return; on their rights in their country of residence; and on the return process itself.
Consent implies a freely given choice.
In particular consent must be sought and granted, with the possibility of withholding one's consent, or withholding consent according to conditions. The process of seeking consent may, therefore, result in a "Yes", a "No", or a "Yes with conditions". Consent must also include the ability to reconsider one's consent if the proposed activities, circumstances, or available information change. Consent may therefore be given or withheld in phases, for specific periods of time only, or for distinct stages of the project only. It is not a one-off process.

A countervailing view of voluntariness may be found in the way that IOM has historically distinguished between three types of return: "(i) voluntary without compulsion, when migrants decide at any time during their sojourn to return home at their own volition and cost; (ii) Voluntary under compulsion, when persons are at the end of their temporary protected status, rejected for asylum, or are unable to stay, and choose to return at their own volition; and (iii) involuntary, as a result of the authorities of the host State ordering deportation."[44]

In a 1997 policy document, IOM further explained that "voluntariness exists when the migrant's free will is expressed at least through the *absence of refusal to return*, e.g. by not resisting to board

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[42] African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 22 October 2009, art. 11(2).

[43] Adapted from OHCHR, *Free, Prior, Informed Consent of Indigenous Peoples*, September 2013 available at http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf.

[44] Koch, A. 2014, p 911.

transportation or not otherwise manifesting disagreement" (emphasis added).[45] According to IOM, assisted voluntary return programs may, for example, "provide a viable and humanitarian response to migrants who are stranded and are often destitute, with no other alternatives."[46] However, the difficulties in labelling such returns "voluntary" have seemingly been acknowledged by some States, including Austria, Norway and the United Kingdom, who have opted to re-label their past AVR programmes simply "assisted return".[47]

D. Sustainability

Sustainability has not, as of yet, been defined legally and is perhaps the term most in need of conceptual and definitional clarity from a human rights perspective. To date, only three human rights treaty bodies have used the expression "sustainable return" in their concluding observations, all of whom were commenting on the sustainable return of refugees and internally displaced persons (IDPs), which may be instructive by analogy but are not precisely concerned with return as defined in this background paper.[48] That said, treaty body recommendations generally express concern for discrimination faced by returnees, especially with regard to their access to fundamental civil, political, economic, social, and cultural rights.

For example, the Committee on the Elimination of Racial Discrimination (CERD) has recommended that States focus on "eliminating economic and social disparities" between returnees and other nationals.[49] Likewise, the Human Rights Committee (CCPR) has called upon States to combat discrimination, ensuring "the social re-integration of returnees and their equal access to employment, education, and social and public services."[50] The CESCR, has also stressed that sustainability requires States to ensure returnees' equal enjoyment of Covenant rights, especially in the fields of social protection, health care, housing, education and employment.[51]

UNHCR has also adopted guidance on the sustainable return and reintegration of refugees and IDPs, which may be instructive by analogy. In UNHCR's 2003 *Framework for Durable Solutions for Refugees and Persons of Concern*,[52] they defined sustainable return as "the ability of returning refugees to secure the political, economic and social conditions needed to maintain life, livelihood and dignity."[53] UNHCR's 2004 *Handbook for Repatriation and Reintegration Activities* further stated that "the 'end state' of reintegration is the universal enjoyment of full political, civil, economic, social and cultural rights."[54]

Similarly, a number of "basic conditions" for sustainability are contained in the 2006 Protocol on Voluntary and Sustainable Return agreed between the United Nations Interim Administration Mission in Kosovo (UNMIK), the Provisional Institutions of Self-Government in Kosovo, and the Government of Serbia:

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[45] IOM Council document MC/INF/236, *IOM Return Policy and Programmes: A Contribution to Combating Irregular Migration*, 5 November 1997, fn. 3.

[46] IOM (2013). *Assisted Voluntary Return and Reintegration Handbook for the North African Region.*

[47] Kuschminder, K. (2017).

[48] CERD in 2009 (CERD/C/HRV/CO/8) and 2010 (CERD/C/BIH/CO/7-8); CESCR in 2008 (E/C.12/NPL/CO/2 and E/C.12/UNK/CO/1) and 2012 (E/C.12/BIH/CO/2); and the Human Rights Committee in 2012 (CCPR/C/BIH/CO/2).

[49] CERD/C/HRV/CO/8 (2009), paras. 19 and 20.

[50] CCPR/C/BIH/CO/1 (2006), para. 20; CCPR/C/BIH/CO/2 (2012), para. 16.

[51] CESCR E/C.12/BIH/CO/2 (2012) , para. 11.

[52] UN High Commissioner for Refugees (UNHCR), *Framework for Durable Solutions for Refugees and Persons of Concern*, May 2003, available at: http://www.refworld.org/docid/4124b6a04.html.

[53] Macrae J. (1999). *Aiding peace … and war: UNHCR, returnee reintegration, and the relief-development debate.* New Issues in Refugee Research, Working Paper No. 14, December 1999.

[54] UN High Commissioner for Refugees (UNHCR), *Handbook for Repatriation and Reintegration Activities*, May 2004, 1.2. Reintegration.

> Four basic conditions are required to ensure sustainability of the returns: (1) security and freedom of movement, (2) access to public services (public utilities, social services, education and health care), (3) access to shelter (i.e. through effective property repossession or housing reconstruction assistance where appropriate) and (4) economic viability through fair and equal access to employment opportunities.[55]

In the context of the return of non-refugee migrants, IOM has noted that, "although return is often seen simply as a matter of removing the migrant concerned from a given territory, problems may arise if the return is not sustainable and if little is done to facilitate the reintegration of the returning migrant."[56] IOM has historically defined sustainable return and reintegration in terms of the return's "positive long-term impact on the prevention of illegal migration"[57] but more recently, the organisation has made links between sustainable return and human rights. For example, in a 2015 position paper on effective reintegration, IOM noted that "reintegration is closely linked to the protection of migrants' rights and the development of opportunities in the country of origin, particularly those that address the root causes of irregular migration."[58] Therefore, sustainability should be based upon the returnee's ability "to enjoy the same safety and rights as the wider population in the country of origin."[59]

In recent years, the OHCHR has turned increasing attention to the human rights of migrants in the context of returns, including the concept of sustainability. In a report on the "Situation of migrants in transit", OHCHR noted that "returns that are not sustainable can lead not only to further abuse and exploitation, but also to more cycles of insecure and irregular migration, with human rights implications for the people moving."[60] More recently, as co-Chair of the GMG Working Group on Human Rights and Gender Equality, OHCHR has led an effort of the UN System to develop a set of *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, which recommend that States:

> Ensure that return is sustainable by mitigating the risks returnees face in their countries of origin. Implement all possible measures that could enable returning migrants to enjoy their human rights, including their entitlements to social protection, health care, an adequate standard of living, decent work, education, and justice. Returning and receiving States should as relevant provide effective and tailored reintegration programmes that address the different needs of returnees, on the basis of age, gender and other factors. As far as possible for all returns, and as a matter of course for each child being returned, prepare a plan for sustainable reintegration and continued evaluation. Such a plan should include targeted measures such as effective access to justice, education, health, family life, and protection against all forms of violence. Return should not cause children to become homeless; nor should they be housed in orphanages, residential care facilities, or any situation that will compromise their development or lead to social exclusion. Migrants should not be returned to areas that are experiencing extreme weather or slow onset climate events. After

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[55] Danish Refugee Council, *Recommendations for the Return and Reintegration of Rejected Asylum Seekers: Lessons Learned from Returns to Kosovo*, May 2008, p. 36.
[56] International Organization for Migration (IOM), *Essentials of Migration Management: A Guide for Policy Makers and Practitioners*, 2004, ISBN 978-92-9068-214-1, 3.9 Return Migration, p. 9.
[57] Ibid. at p. 12.
[58] International Organization for Migration (IOM), *Position Paper: Reintegration – Effective Approaches*, 2015, p. 19.
[59] Ibid.
[60] OHCHR (2015). *Situation of Migrants in Transit,* para. 27, p. 13.

migrants return, put long-term, independent reporting mechanisms in place to monitor the risk and occurrence of human rights violations.[61]

Finally, academics and civil society organisations have undertaken significant research and reporting to broaden the understanding of sustainability. In a 2015 study that involved fieldwork in 15 countries, Koser and Kushminder defined sustainable return as when:

> the individual has reintegrated into the economic, social and cultural processes of the country of origin and feels that they are in an environment of safety and security upon return.[62]

This definition of sustainability, importantly, incorporates both objective and subjective criteria. Sustainability is not merely objective economic, social and cultural reintegration factors, but also seeks to account for the migrant's own feelings of safety and security upon return. The importance of considering the subjective reality of the migrant is consistent with other academic findings that returnees with a sense of belonging to the community of return are more likely to be successfully reintegrated, and conversely, that when reintegration efforts do not address, for example, the migrant's feelings of shame over a "failed migration project" that reintegration is less likely to be successful and therefore "sustainable".[63]

Subjective understandings of sustainability are also consistent with the findings of Cassarino that the sustainability of return migration is contingent on the migrant feeling that her migration cycle is "complete", in contrast to situations where it is perceived as "incomplete" or "interrupted".[64] This implies that sustainability should take into account migrants' goals and aspirations while, at the same time, ensuring they have access to adequate resources to allow them to successfully "complete" their migration cycle, even when it results in return.[65] Evidence from return programs that fail to fully understand and account for the subjective experiences of returnees, suggest that such approaches lead to high drop-out rates, effectively undermine the positive impact of any assistance provided to returnees, and at best only delay the cycle of irregular migration from being repeated.**[66]**

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[61]A/HRC/37/34/Add. 1*,* Principle 6, Guideline 8.

[62] Koser, K. and Kushminder, K. (2015).

[63] See e.g. Triandafyllidou and Bartolini (2017).

[64] For Cassarino (2014), the migration cycle encompasses four stages, namely the initial impetus for migration; the migration experience; the return experience; and post-return conditions – all of which influence the sustainability of return. As a result, he proposes a threefold typology of the migration cycle:

(1)   The migration cycle is *complete* if migrants return, among other reasons: to run a business concern in the country of origin; after the termination of a job contract; to complete training/studies at home; having achieved their migration objective (e.g. successful completion of studies); after the situation in the country of origin has improved.

(2)   The migration cycle is *incomplete* if migrants return, among other reasons, because of: job precariousness in the destination country; family and personal problems; adverse social and cultural environment/racism/discrimination abroad; the failure of migration objectives (e.g. studies not completed).

(3)   The migration cycle is *interrupted* in the case of: non-renewal of residence permit in the destination country; expulsion/readmission; administrative/financial hurdles; loss of job; serious health problems; family pressures; forced marriage; war/conflict.

[65] Such resources can include both tangible (i.e. financial capital) and intangible (i.e. contacts, relationships, skills, acquaintances) resources mobilised either during their experience abroad or brought with them from their country of origin. Cassarino (2004)

[66] See, Nassim Majidi, "Shortcomings in assistance for deported Afghan youth" in Refugee Studies Centre, *Forced Migration Review No. 44 – Detention, alternatives to detention, and deportation*, September 2013, ISSN 1460-9819, available at http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/detention.pdf.

III.   Key topics for discussion

With these key concepts in mind, we now turn to three topics identified by OHCHR for discussion during this expert meeting. While not intending to be comprehensive, these three topics build on the previous work of OHCHR in exploring the legal and practical aspects of return, and seek to identify and further explore critical human rights protection gaps.

A.   Lawfulness of returns

The international legal framework governing the return of migrants encompasses relevant provisions of both international human rights and refugee law,[67] and is increasingly being codified in legally binding regional instruments, such as the EU Returns Directive. Issues touching on the legality of returns are also found with increasing frequency in bilateral readmission agreements or memoranda of understanding governing cooperation on return between States within and across regions. The question of legality is often reduced to one of who has a "right to remain" vs. who the State can legally return, which itself often becomes a proxy for determining who is eligible for asylum vs. who is not. However, this is an incomplete and misleading understanding of the current binding legal obligations of States. State obligations in the context of return must encompass both those obligations which prohibit return (such as *non-refoulement*), as well as those obligations which constrain State actions when seeking to legally return a person (such as due process, family unity or the lawful use of force).

Discussion:
* *Protections against removal:* What are the limitations on States in returning migrants, taking into account both situational and personal factors which may create vulnerability to human rights abuses in the context of return?
* *Due process and procedural guarantees*: What are the specific due process guarantees to which all migrants are entitled in the context of pre-removal and return procedures?
* *Access to justice and right to a remedy*: What rights do returnees have *vis-à-vis* the returning and receiving State following an unlawful return?

B.   Voluntariness of returns

Whereas previously States may have given preference to the use of forced removals, this trend seems to be changing, with increased focus, attention, and resources now being given to voluntary returns.[68] The principle of voluntariness is central not only to the issue of voluntary return; it also appears to be a critical component of sustainability, as it informs migrants' preparedness for return as well as their perceptions and expectations of safety and dignity upon return to the "home" country.

While voluntarily returning migrants generally exercise more decision-making power over the decision to return than migrants who are forcibly returned, this may not always be the case. When migrants must be assisted to return, they are by definition unable to exercise the same level of control or agency over their return decision as a person who independently departs. When migrants accept voluntary return under duress, coercion or threat—for example, of torture or ill-treatment, or of prolonged or arbitrary detention—such decisions cannot accurately be described as "voluntary" at all. States and other duty-bearers will, therefore, have heightened obligations to respect and protect migrants' human rights in cases of assisted voluntary return, including principally that such returns are truly voluntary. As recommended in the GMG *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*:

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[67] Including, *inter alia*, the Universal Declaration on Human Rights, the 1951 Convention relating to the Status of Refugees (the "1951 Refugee Convention") and its 1967 Protocol, the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and various regional instruments, including the European Convention on Human Rights (ECHR), the African Charter on Human and Peoples' Rights (ACHPR).

[68] See Karamanidou L. & Schuster L. (2011). Deportation in International and Regional Law, p. 10.

Any migrant who is asked to consent to a voluntary return process must be fully and meaningfully informed of the choice they make, having access to up-to-date, accurate and objective information, including in relation to the place and the circumstances to which they will be returning. Consent must be given free of any coercion. This means, inter alia, that the migrant must not be subject to violence or ill-treatment intended to force compliance, to an actual or implied threat of indefinite or arbitrary detention, or to detention in inadequate conditions.[69]

Discussion:

- *The meaning of "voluntary":* A human-rights based approach to migration views migrants as rights holders who should be empowered to make migration decisions as a matter of free and informed choice, ensuring their rights are upheld. What does voluntariness require from a human rights perspective?
- *Incentivising or coercing voluntary return:* Decisions around whether to voluntarily return are often based upon limited choices or incentivised through financial or other means. When do such measures effectively negate the voluntariness of return?

C. Sustainability of returns

Assuming that sustainable return is more than simply a matter of removing migrants from a given territory and returning them "home", a human rights-based approach to sustainable return should identify both rights-holders (i.e. migrants) and duty-bearers (i.e. both the returning and receiving states, as well as other actors, including private actors, involved in the return process), and establish accountability between the two groups. This means that duty-bearers are answerable for ensuring that any returns are truly sustainable, and that appropriate monitoring and accountability mechanisms are established to hold duty-bearers to account where they fail to do so. Hence, there should be structures in place so that migrants can seek redress, including through complaint mechanisms, appropriate proceedings and access to an effective remedy.

Discussion:

- *Access to human rights:* What measures should States take to ensure the equal enjoyment of human rights by all returning migrants, including with regard to social protection, health care, housing and an adequate standard of living, education and decent work?
- *Effective reintegration*: What does effective reintegration require beyond the mere provision of cash and/or livelihood assistance?
- *Monitoring, accountability and redress*: How can States—including both returning and receiving States—ensure adequate and ongoing post-return monitoring and evaluation? What are mechanisms to ensure accountability for abuse and violations of human rights as a result of the return?

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[69] A/HRC/37/34/Add. 1, Principle 6, Guideline 3.

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