



**OFFICE OF UN RESIDENT AND HUMANITARIAN CO-ORDINATOR
FOR THE SUDAN**

**BACKGROUND NOTE ON RETURN OF IDPS AND REFUGEES
IN THE CONTEXT OF DARFUR**

Working Framework and Parameters

1. INTRODUCTION

1.1. The signing of the *Humanitarian Ceasefire Agreement on the Conflict in Darfur* (“Ceasefire Agreement”) and the *Joint Communiqué* between the Government of Sudan and the UN Secretary General have marked important milestones to address the immediate humanitarian needs of the affected population. It also serves as a step towards a comprehensive resolution of the conflict, leading to voluntary and dignified return of refugees and IDPs. Against this background, this note provides a working framework within which voluntary return should be undertaken in the current context of the Darfur crisis. At minimum, a condition conducive to voluntary return needs to embrace the following elements:

- (1) full respect for the international humanitarian law, international human rights law, the Ceasefire Agreement and undertakings of the Government including its commitments under the Joint Communiqué with the Secretary General;
- (2) effective, unrestricted humanitarian access;
- (3) voluntariness of return;
- (4) safety and dignity; and
- (5) confidence-building/reconciliation measures

1.2. The Government of Sudan must ensure that any return of displaced persons takes place voluntarily and with a view of safe and dignified return as stipulated in the Ceasefire Agreement, Joint Communiqué, the Guiding Principles on Internal Displacement and other international standards and norms. The above five criteria define a condition conducive to return in the Darfur context. The humanitarian community is ready to support the Government’s effort to achieve these five goals in order for the return process to be viable and sustainable.

2. FULL RESPECT FOR THE INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS LAW AND THE IMPLEMENTATION OF THE CEASEFIRE AGREEMENT AND JOINT COMMUNIQUE

2.1. The Government of Sudan has the primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction.¹ In this respect, various international instruments further define the Government’s obligations. Sudan is a signatory to, *inter alia*, the 1949 Geneva Conventions, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child (CRC), the Convention relating to the Status of Refugees and its Protocol (Refugee Convention) and African Charter on Human and Peoples’ Rights. Sudan has signed but not ratified the Rome Statute of the International Criminal Court (ICC) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). As

¹ Principle 3, the Guiding Principles on Internal Displacement.

a signatory, Sudan is expected to refrain from acts which would defeat the object and purpose of these treaties.²

- 2.2. The Refugee Convention prohibits forced return of refugees under the general principle of *non-refoulement*.³ The CAT also prohibits forced return of individuals to a State where they would face real risk of torture.⁴ The ICCPR also prohibits torture or cruel, inhuman or degrading treatment or punishment, according to which the States have obligations not to return individuals to another country or areas where there is such a risk.⁵ No derogation is allowed from these treaty obligations.
- 2.3. By analogy, the principle of *non-refoulement* enshrined in the Refugee Convention and the CAT IS applicable to IDPs. More directly, Article 7 of the ICCPR addresses the concern related to the forced return of the displaced population. The state authorities are expected to ensure the rights enshrined in the ICCPR in the territory.⁶ The State has an obligation not to expose the displaced population to any risk of torture or inhuman or degrading treatment or punishment. If the conditions in the places of origin are not conducive to safe and dignified return, any move on the part of the Government to return the displaced population would be tantamount to subjecting them to the risk for their life or of inhuman or degrading treatment. The prohibition of forced return of the displaced is further reinforced on the ground of freedom of movement and residence.⁷
- 2.4. The Guiding Principles on Internal Displacement, which is embraced by the Parties to the Ceasefire Agreement and its Protocol, also emphasises the voluntariness of return and the State's obligation to ensure safe and dignified return.⁸ (See para. 2.6. below.) By implications, if IDPs were to return involuntarily to unsafe conditions, the State should be considered neglect of its responsibility and duty. (See para. 5 below for "voluntariness".)
- 2.5. The recent signing of a ceasefire agreement between the Government of Sudan and SLA/JEM and the Joint Communiqué presents a window of opportunity. This is all the more relevant as the agreements contain crucial provisions directly or indirectly related to voluntary return of refugees and IDPs.
- 2.6. As a preamble to the *Protocol on Establishing Humanitarian Assistance in Darfur* ("Protocol") annexed to the Ceasefire Agreement, the Parties acknowledge as "principles" the humanitarian and human rights norms and standards contained in various international

² Article 18, the Vienna Convention on the Law of Treaties. Sudan is a signatory to this Convention.

³ Refugee Convention, Article 33 (1): "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."

⁴ CAT, Article 3: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger being subjected to torture."

⁵ ICCPR, Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...."

⁶ ICCPR, Article 2.1.: "Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁷ ICCPR, Article 12.1.: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Article 12.3. allows exceptional measures to restrict the freedom of movement and residence under stringent conditions. However, this exceptional clause should not override the non-derogable rights to life and not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

⁸ Principle 28.1., Guiding Principles on Internal Displacement: "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, to allow internally displaced persons to return voluntarily, in safety and dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons."

instruments such as the Geneva Conventions, International Covenant on Civil and Political Rights and the Guiding Principles on Internal Displacement. This is significant in that the Parties have explicitly pledged to “conform to” these standards, in particular, the Guiding Principles on Internal Displacement. The Protocol further provides for voluntary return of IDPs and refugees in safety and with dignity.⁹ In this regard, therefore, it is important to note that the parties have accepted the principle of voluntary return in safety and with dignity.

- 2.7. Most importantly, the ceasefire agreement contains a monitoring mechanism in the form of a Ceasefire Commission overseen by a Joint Commission. To date, this is the only mechanism available to monitor the security of the Darfur region and address/redress activities threatening the security of the region and its inhabitants.
- 2.8. Within the context of the recent United Nations Secretary General’s visit to Sudan, a Joint Communiqué between the Government of Sudan and the United Nations was issued. In this Communiqué, the Government undertakes specific commitments in relation to the situation in Darfur, including its pledge to ensure the voluntary nature of return.

3. HUMANITARIAN ACCESS

- 3.1. The issue of humanitarian access continues to be an important focus of humanitarian actors. Access to the affected population is crucial in ensuring not only the delivery of much needed humanitarian assistance but also the protection of the civilian population, including IDPs and returnees. It is important to note that humanitarian access has a considerable weight in the ceasefire agreement.¹⁰
- 3.2. In this connection, it is encouraging to note that the situation has reportedly improved recent weeks and it is hoped that it will further follow the same path in future. In sum, it should be highlighted that any form of humanitarian access should be (1) predictable, (2) consistent and (3) immune from bureaucratic requirements in order for it to be considered “effective”.

4. VOLUNTARINESS OF RETURN

- 4.1. Arguably, the voluntariness is the most important element in the process of return. It hinges upon a free and informed choice of an individual IDP or refugee. The choice has to be free from coercion, manipulation or undue enticement. No matter how free the decision making environment may be, if the person does not have sufficient, objective information on the situation of his/her place of return, the choice cannot be regarded as “voluntary”. The individual needs to have a reasonably clear idea of the conditions upon his/her return and its implications. Hence, voluntariness of return is ensured only if there is an environment free of coercion, manipulation or enticement and the IDP or refugee has good understanding of the conditions of his/her place of origin. The best possible way to gauge the voluntariness of return is constant dialogue and interaction with the population concerned. The authorities also have the duty and responsibility to create a condition for IDPs and refugees to make a free and informed choice. It is also mainly the responsibility of the authorities to create the conditions necessary for durable and sustainable return. On its turn, the international community stands ready to assist the Government in its genuine attempt to create such conditions.

⁹ Protocol, Article 10: “the parties will facilitate the return of the refugees and the displaced to their origin (sic) communities on a voluntary basis and under security and dignity conditions. [The parties] will put in place adequate protection measures and their property will be restored or their losses compensated.”

¹⁰ Under Article 2 of the Ceasefire Agreement, the parties shall “ensure humanitarian access”. This is listed along with provisions of more military nature such as “refrain from any military action”. Thus, it is reasonable to argue that humanitarian access is subject to the scrutiny of the Ceasefire Commission. The same argument can be made with regard to the security of civilians and freedom of movement of goods and people. Article 7 of the Protocol also ensures “unrestricted” humanitarian access.

5. RETURN IN SAFETY AND WITH DIGNITY

5.1. Refugees and IDPs should be able to return in and to conditions of physical, legal and material safety, with full restoration of national protection as the end product. These core components of "return in safety and with dignity" and the role of the Government and humanitarian actors in relation to each are discussed below.

Physical Safety

5.2. Safety considerations will be the most serious initial concern. The safety of returnees must be assured by the authorities, supported as necessary by the humanitarian actors, wherever return takes place. This, clearly, can best take place after violence and intimidation are at an end, meaningful steps have been taken towards the (re)establishment of enforcement agencies that are compliant with human rights, as well as of an independent judiciary. First and foremost, in today's Darfur context, bringing militias under control and their disarmament would be the most important precondition for safe return of the displaced population.

5.3. The presence of mines and unexploded ordinance is an often prevalent threat when refugees and IDPs return. De-mining and mine-awareness training programmes are therefore essential.

5.4. In the present context of the situation in Darfur, unless there is an effective stop to the Sexual and Gender Based Violence (SGBV) and support for the survivors, no return should be contemplated as a viable option.

5.5. The overall security situation is a major factor which will influence if and how the humanitarian actors are involved in return operations. They should not in principle assist return to unsafe areas, which are characterised by ongoing hostilities or a general breakdown in law and order. By the same token, humanitarian actors cannot be involved in involuntary return. Should the security situation in countries of asylum/places of displacement become more dangerous than the situation in places of origin, humanitarian actors may decide to assist the return in conditions which do not meet minimum standards of safety. This then becomes an evacuation to save lives.

Legal Safety

5.6. In places of origin, legal systems, including traditional legal structures, often need to be revived and/or reformed. In this context, the national and local authorities should identify and work towards removing legal and administrative barriers to return. In particular, amnesty laws or declarations and their enforcement are most important at an early stage. Most amnesties exempt returnees from discrimination or punishment for the sole fact of having fled the country or their places of origin, while dealing also with issues of military conscription, desertion, or armed service, including in non-recognised armed forces.

5.7. Experience has shown that voluntary return operations are likely to be less successful if housing and property issues are left too long unattended, and particularly if houses and agricultural land are occupied by others including IDPs. For sustainable return, it is also important that housing, property and land restitution issues are addressed at an early stage in the cycle of displacement and in a more systematic manner. In this context, it should be noted that Article 10 of the Protocol does indeed refer to the issue of property in the context of restitution and compensation.

5.8. In post-conflict situations, the basic administrative and judicial infrastructure is often dysfunctional, lacks material, human and financial resources and may, in addition, have to overcome seriously flawed selection and appointment procedures, arbitrary and discriminatory legal actions and/or excessive fees and taxation. As an effort to create a conducive condition for return, there is a need for training programmes for local judges and lawyers, the facilitation of traditional conflict-resolution mechanisms.

Material Safety

5.9. Material safety implies notably access in the early phase of return to means of survival and basic services, such as potable water, health services and education, followed by measures to underpin sustainable reintegration. The competent authorities, with support from humanitarian actors, should aim at the following:

(i) first increase the availability of basic services in situations where such services have collapsed, are of poor quality or are insufficient for large segments of the population, including returnees;

(ii) ensure non-discriminatory access to available public utilities.

5.10. Voluntary return of refugees and IDPs necessarily takes into account the situation of the receiving location. Premature returns to areas with little or no basic services to receive returnees may endanger further the not only material but also physical security of returnees.

5.11. For return to be sustainable, promoting self-reliance and reducing the need for continuing external support is crucial. Returnees generally require assistance to reintegrate through livelihood activities. Where the majority of returnees are rural, recovery of land (for cultivation or animal husbandry) are crucial to reestablishment of livelihoods after return. Smaller inputs, such as the distribution of seeds or tools, should also be provided by the humanitarian Actors, while larger developmental schemes are the task of other actors. Increased efforts are required to ensure that multilateral and bilateral development agendas are co-ordinated in such a way that the transition between relief, rehabilitation and development is effectively addressed to ensure the sustainability of return.

6. CONFIDENCE-BUILDING/RECONCILIATION

6.1. Given the magnitude of destruction and human suffering in Darfur, this is a colossal and long-term challenge. At the same time, it will be much needed in communities that are deeply divided along political or ethnic lines. It is fundamentally an internal process between and within communities, but one which can benefit from national and international support, where the people and/or their political leaders are unable or unwilling to take first steps towards reconciliation. Reconciliation can rarely be achieved rapidly. In this regard, it is noted that the Government committed itself under the Joint Communiqué with the Secretary General to take immediate actions in rebuilding the confidence of the vulnerable population in Darfur with the view of assuming their position in their communities as full and equal members.

6.2. Humanitarian and development actors can assist the Government in this process through measures built into the planning, programming and funding for return. They can be directed to members of different parties to the conflict in the distribution of resources and participation in public life. Structures and mechanisms which promote confidence-building and co-existence should be increasingly part of humanitarian programmes as the security conditions improve.

7. PARAMETERS FOR THE INVOLVEMENT OF HUMANITARIAN ACTORS

7.1. The level of physical, legal and material safety possible at the places of origin will determine the involvement of humanitarian actors in return operations. Five different types of return are conceivable in the context of Darfur. These are:

(i) Spontaneous or self-organised return with humanitarian assistance being offered in the places of origin, wherever access exists;

(ii) Facilitation of the voluntary return of individuals upon the specific and fully informed request of refugees or IDPs, even when conditions are not fully conducive for most refugees and IDPs to return;

(iii) Promotion of large-scale voluntary return when conditions are considered conducive to return in safety and with dignity, where the potential for a sustainable solution is sufficiently high;

(iv) Return organised by humanitarian actors, or with which the organisation co-operates, when the life or physical integrity of refugees in the country of asylum or IDPs in the places of displacement is threatened to the point that return is the safer option;

(v) Involuntary return by use of force (or threat thereof), enticement or manipulation.

7.2. For the involvement in the situation described in point (i), it is imperative to ascertain whether return is taking place based on one's free and informed choice. Refugees and IDPs often return on their own without sufficient information or based on misguided information. This is especially relevant for spontaneous return during a conflict or at the early stage of a post-conflict situation.

7.3. For the involvement in situations described in points (ii) to (iii) above, parameters are determined by the level of physical, legal, and material safety, consistent with what is desirable as described in the preceding section. An additional important parameter is the extent to which return can take place to the places of origin. In principle, the authorities and humanitarian actors should facilitate voluntary return only when it is possible to return to previous places of residence. Return to areas other than the refugee's/IDP's place of origin or previous residence may impact adversely on the protection situation of the returnees themselves, that of others in the place of return and more generally on the processes of stabilisation, reintegration, and reconciliation. Return to locations other than previous places of residence should only be countenanced if relocation is based on a free and informed choice, is not the result of obstacles to return in the area of origin, proves viable and does not infringe the rights of others, including property rights.

7.4. As for return described in point (iv), the authorities and humanitarian community has to strike a delicate balance between upholding the protection principles (voluntariness of return and conducive conditions at the place of origin) and humanitarian imperative (immediate threat to life and security at the place of displacement). Where return is imposed, minimum conditions which humanitarian actors require to be present for its involvement include the absence of an individualised well-founded fear of threat to one's life and freedoms at the place of origin, acceptance of the return by concerned authorities and reception arrangements and basic conditions to sustain the return. Access of international actors to the returnees is also a basic stipulation.

7.5. Under the scenario (v), in principle, the humanitarian community should take no part in organising or facilitating physical movement of refugees or IDPs as long as it is deemed involuntary.

8. ACTIVITIES

8.1. The national and local authorities, in collaboration with the humanitarian community, should work both in the places of displacement and in the places of origin to create an acceptable framework within which to implement voluntary return of the displaced population. The following are some of the suggested activities to ensure the above-mentioned five conditions to ensure voluntary return in safety and dignity:

In general:

- Include references in agreements to the right to return and to other standards relating to voluntary return (e.g. the Ceasefire Agreement and Joint Communiqué);
- Work towards agreements on voluntary return with the authorities, which translate the standards of voluntary return into operational modalities;

- Ensure involvement of the local authorities, as well as use of local capacities and resources;
- Ensure free humanitarian access to the displaced and returnees and vice versa during all stages of the voluntary repatriation process, including a necessary period after return;
- Facilitate fair, expeditious, simple, transparent and non-discriminatory arrangements for the actual return;
- Provide immediate material or financial support, as necessary, to enable return and reestablishment during an initial phase;

In the places of displacement/countries of asylum:

- Enable planning for return with other actors by establishing a profile of the IDP/refugee populations;
- Ensure a free and informed choice by providing accurate and objective information and access to counselling;
- Enable the participation of different age- and gender groups in the decision-making process on return of their families and/or communities by appropriate dissemination of information;
- Continued protection and assistance for those unwilling and/or unable to return voluntarily;

In the places of origin/country of origin:

- Undertake an analysis of the obstacles to return;
- Ensure that return is accepted by the country of origin, including the local authorities on the ground;
- Encourage the promulgation of amnesties;
- Establish substantial humanitarian field presence on the part of the Government and other humanitarian actors to promote actions required at the national and local levels to enable actual return in safety; to organise assessment visits; to promote confidence-building measures, including dialogue between community leaders and local authorities; to intervene in favour of conditions conducive to return; and to help to prevent the occurrence of security incidents directed against returnees, or at least to enable an appropriately documented follow up with the authorities;
- Undertake systematic returnee monitoring to identify issues related to their physical, legal and material safety and ensure appropriate intervention.

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