

DRC RETURN POLICY

Positions and guiding principles for DRC's engagement in return of refugees, IDPs and rejected asylum seekers

Background

In a world marred by a high number of complex conflict situations, the number of displaced persons continues to rise, and the average duration of displacement keeps increasing. Low- and middle-income countries carry a disproportionate share of the world's responsibility for protecting and assisting displaced populations, while high-income countries retreat on their commitments to host refugees due to domestic politics, and also fail to deliver adequate support to hosting States and communities. Local integration meets resistance by many hosting States, and resettlement is an option for only a very small minority of refugees. As a consequence of uneven pressures, insufficient global responsibility-sharing and lack of prospects for durable solutions elsewhere, there is significant pressure on refugees, IDPs as well as rejected asylum seekers to return to their areas of origin.

For a displacement organization with presence on the ground in countries of origin, transit and destination and direct contact with rejected asylum seekers, refugees, IDPs and their hosting communities, DRC is confronted with, and must manage the political pressures for engaging in return processes on a daily basis. This comes with a lot of dilemmas and operational challenges.

DRC is mandated to protect and promote durable solutions for displacement affected populations. While return may be a durable and sustainable solution for some, in many cases it is not. Return to an insecure and volatile environment is not likely to result in a durable solution and in sustainable (re)integration. Yet, return to volatile areas is the rule rather than the exception - be it due to push factors ranging from deportations, restrictions on the protection space, low quality of asylum and rights violations or due to pull factors such as restoring property or positive perceptions of conditions in the home area. When returns happen in contexts where the driving factors are dubious and the outcomes questionable, and where the topic of return itself increasingly becomes a question of politics rather than principles, DRC's staff must manage the very difficult dilemma of whether or not to engage. The humanitarian imperative does not necessarily provide the full answer. Often, either option comes with a number of risks – for returning rejected asylum seekers, refugees and IDPs themselves and for DRC's integrity.

Definitions & legal frameworks

When engaging in advocacy and programme responses on return it is important to apply the correct terminology and to understand the legal basis for return. Thus, below are definitions and explanations of the international normative framework that pertain to refugees, IDPs and rejected asylum seekers respectively.

THE PRINCIPLE OF NON-REFOULEMENT: is a cornerstone of refugee protection and enshrined in the 1951 Convention¹. It entails the protection against the removal of a person to a territory or frontiers of a territory, when there are substantial grounds for believing that the persons' life or freedom would be threatened because of their race, religion, nationality, membership of a particular social group or political opinion. The duty of *non-refoulement* is also a principle of customary international law, and is therefore binding to all States whether or not they are parties to the 1951 Convention. Under refugee law, the principle applies to both refugees and asylum seekers. Protection against refoulement under human rights law implies that a person cannot be returned but does not necessarily lead to the person being granted refugee status.

REPATRIATION: refers to the voluntary movement of refugees back to their country of origin. More accurately, it refers to the return of refugees under the 1951 Refugee Convention and other persons with a complementary or temporary protection status.² Return on own initiative and without any formal assistance is also referred to as spontaneous return. Normatively, repatriation has its basis in the Universal Declaration of Human Rights Article 13.1 according to which *Everyone has the right to leave any country, including his own, and to return to his country*. Repatriation is per definition voluntary because the individuals concerned either have a residence permit or another legal basis for stay in their host country, which they willingly and voluntarily renounce. A variety of factors can however affect the decision to repatriate/return spontaneously, including pressure applied by authorities, deteriorating quality of asylum or circumstances in country of origin.

VOLUNTARY RETURN³: refers to the free, informed and voluntary movement of refugees, back to their country/area of origin in safety and in dignity. While voluntary return movements are the ideal for which we are advocating, the reality is more often somewhere in the grey area between voluntary and involuntary return as consent to return is affected by a complex web of push and pull factors. For IDPs, as citizens of a country, the right to return to the place of origin is equal to the right to locally integrate or to settle in another part of the country. IDPs' rights to durable solutions (incl. return) are based on international human rights and humanitarian law and are set out in the Guiding Principles on Internal Displacement (GPID).⁴

FORCED RETURN: is defined by DRC (with reference to European Council for Refugees and Exiles (ECRE)) as the return of rejected asylum seekers or refugees for whom cessation of refugee status or temporary protection status apply, but who do not consent to return home and where, as a result, authorities are applying pressure through sanctions and/or are using physical force in conjunction with the departure. While forced return can be legally sanctioned in the case of rejected asylum seekers or refugees for whom cessation of refugee status or temporary protection status apply, this is not the case for IDPs as they, as citizens of a country, have a right to choose their place of residence. In practice however, IDP return processes are often time premature, politically motivated and do not meet international standards for safety, dignity, and voluntariness.

1) Article 33 of the Convention relating to the Status of Refugees

2) ECRE (2003): Position on Return by the European Council on Refugees and Exiles

3) The term voluntary return is not used in the European context, where instead the term "accepted return" is applied. See below for clarification of terminology.

4) Guiding Principles on Internal Displacement

ACCEPTED RETURN: is applied by DRC in the European context to describe the situation where rejected asylum seekers or refugees whose residence permit has been withdrawn, accept to cooperate with the authorities on the return process, but where a legal order and a threat of possible sanctions may have influenced their decision. The term is not applied by DRC outside the European context. The concept of “accepted return” has been part of the DRC policy on return since 2010 (reaffirmed with the revised policy in 2015) and was initially introduced to reflect the “sliding scale” between voluntary and involuntary return. Other actors refer to this as “mandatory return”⁵.

DURABLE SOLUTIONS: DRC has chosen to adopt and apply the definition of a durable solution to all displaced persons as it is defined in the Inter-Agency Standing Committee (IASC) Framework for Durable Solutions for Internally Displaced Persons⁶. According to this definition, *a durable solution is achieved when displaced persons no longer have any specific assistance and protection needs that are linked to their displacement and can enjoy their human rights without discrimination on account of their displacement*. The sustainability (or indeed durability) of a durable solution is determined by the quality of the (re)integration process. Related to this document, a key message is that return without sustainable reintegration is not a durable solution – or as phrased by the Regional Durable Solutions Secretariat (ReDSS): *Return is not a solution – reintegration is*.

REINTEGRATION: refers to a process, where previously displaced persons are gradually integrated, legally, economically, socially and culturally into their country and communities of origin. Linked to the definition of durable solutions, the end-state of a successful reintegration process is evidenced by the absence of vulnerabilities linked to displacement. Reintegration prerequisites include the ability and willingness of the receiving communities to integrate returnees, as well as basic levels of physical, material and legal safety

TRANSITIONAL SOLUTIONS: A policy term associated to the efforts by UNHCR, UNDP and the World Bank in the so-called Transitional Solutions Initiative launched in 2011⁷. The introduction of the term reflected the ambition to address displacement needs under the development agenda in order to ‘unlock’ protracted displacement for the benefit of both displaced populations and host communities. The term has survived and is generally used to describe an effort by multiple actors to transition an emergency response to displacement crisis towards a more sustainable, development-oriented response with focus on self-reliance. The Regional Durable Solutions Secretariat (ReDSS) uses the term “**early solutions planning**” to describe a similar approach. Related to return, a transitional solutions approach/early solutions planning can be applied to foster conditions conducive for return in the country / area of origin, or to promote local integration. As such, it is a dynamic concept used to describe an effort to increase the quality of life among displaced populations, hereunder gradually expanding access to rights – paving the way for and eventually leading to a durable solution.

COMPREHENSIVE SOLUTIONS: In context of the Global Compact on Refugees, comprehensive responses to refugee situations have been defined in Annex 1 to the 2016 New York Declaration. The Comprehensive Refugee Response Framework (CRRF) is framed around four pillars: reception & admission, immediate and ongoing needs, support for host countries and communities, and durable solutions. Much like the Transitional Solutions Initiative and the later Solutions Alliance (as well as other initiatives before that) it carries the ambition to respond to refugee crisis in a more holistic and long-term fashion where support from the international community is provided in a predictable and adequate manner. The CRRF has a strong weight on refugee inclusion and self-reliance, but also has strong emphasis on return, and the sustainability of returns.

5) E.g. European Council for Refugees and Exiles (ECRE), see ECRE policy brief: “Voluntary Departure and Return: Between a rock and a hard place” (August 2018).

6) IASC Framework on Durable Solutions for Internally Displaced Persons is based in international human rights and international humanitarian law.

7) For further information on the Transitional Solutions Initiative (TSI), see TSI’s Concept Note available at: <http://www.unhcr.org/4e27e2f06.html>

DRC's Core Positions on Return

The following eight positions outline the framework for DRC's engagement in return processes – applicable in all returns situations including asylum seekers, refugees and IDPs⁸.

#1: All forcibly displaced persons have a right to be protected against refoulement, to receive protection and assistance in accordance with international human rights law⁹ and should not be forced or pressured through i.e. untenable conditions in the host country to return to the area of origin under unsafe circumstances and conditions non-conducive for reintegration.

ASYLUM SEEKERS: all human beings have the right to seek protection for their life and liberty and apply for asylum in another country. Applications for asylum must be processed in accordance with International Refugee Law and/or equivalent national legislation through transparent, effective and fair procedures with safeguards and appeal options that protect the individual from arbitrary treatment. Asylum seekers should never be forced or pressured to return before the asylum procedure is concluded in a fair manner.

REFUGEES: As per the 1951 Refugee Convention, a refugee may not be expelled or returned to the frontiers of territories where his/her life or freedom would be threatened. Cessation of refugee status must have a firm basis in international human rights law and international refugee law and must comply specifically with the Refugee Convention and UNHCR ExCom Conclusions on International Protection. States have an obligation to deliver protection as long as required, i.e. by upholding the asylum space for refugees. In 2016, States, including non-signatories to the 1951 Refugee Convention, have reaffirmed their joint commitment to international refugee and human rights law, incl. commitment to voluntary, safe and dignified returns with the UN General Assembly New York Declaration on Refugees and Migrants.

IDPs: As per the human rights standards expressed in the Guiding Principles on Internal Displacement, IDPs, as citizens of a country, have the right to choose their place of residence. Further, IDPs have the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk. The authorities have the primary duty and responsibility to establish conditions, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.

#2: DRC respects the right of States to return individuals without legal residence provided the decision to deny asylum or to withdraw refugee status has been made with due regard to national and international human rights standards¹⁰. However, DRC finds that refugees should not be subject to constant or regular reviews of their refugee status. The right to family unity should be respected and minors should never be returned in contravention of the best interest of the child, and the possibility to grant a humanitarian residence permit or similar to vulnerable groups for health-related or other humanitarian reasons should be promoted.

DRC recognizes that to preserve the legitimacy of the international asylum regime, States' right to return individuals without legal residence must be respected - provided that the decision has been made with due regard to national and international human rights law and standards, and underlines that a premature or insufficiently grounded cessation of refugee status can have extremely serious consequences and can ultimately lead to refoulement.

8) The global positions will when relevant be supplemented with regional guidance notes that addresses contextual circumstances and challenges in specific return situations.

9) International Human Rights Law and international refugee law, Refugee Convention and UNHCR ExCom Conclusions on International Protection.

10) The Convention Relating to the Status of Refugees and the Convention against Torture; UNHCR ExCom Conclusions on International Protection, as well as with the recommendations of the UN.

#3: Inclusion and dignity of all concerned individuals must be upheld in the return process.

Every return process must be carried out in a humane and dignified manner, where people concerned are given a chance to prepare and influence the return process.

REJECTED ASYLUM SEEKERS, INDIVIDUALS WITHOUT RESIDENCE PERMIT INCL. REFUGEES

WHOSE STATUS HAS BEEN WITHDRAWN: The ability of displaced persons to participate in the return process is central, which as a minimum requires counselling free of coercion. Preferably, participation should include the ability to take decisions and be engaged in the planning of the return process. Family unity must be respected and minors (all persons under the age of 18) should never be returned in contravention of the best interest of the child.

IDPs: Inclusion in the return process is a human right, as reflected in the GPID, which constitutes DRC's reference point for IDP protection. The GPID (art 28.2) establishes that *"special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration."*

#4: The right to return "all the way home" must be guaranteed. The return of all concerned individuals must be based on their right to return "all the way home" if they so wish. If the returnee wishes to be housed and reintegrated in other areas of the country of origin, this must be respected and supported on equal terms as the right to return home.

Political pressure on returnees and IDPs to resettle in certain areas and restrictions to access in other areas must be challenged and opposed through targeted advocacy.

#5: Forced return, even if legally sanctioned, should be avoided as it often comes with measures that undermine human dignity, incl. detention and the use of force.

REJECTED ASYLUM SEEKERS, INDIVIDUALS WITHOUT RESIDENCE PERMIT INCL. REFUGEES

WHOSE STATUS HAS BEEN WITHDRAWN: It should be recognized that individuals without legal residence who refuse to return are often in distress and may have difficulties understanding the legal and practical implications of their position. Sanctions are not the answer. Instead, thorough professional counselling prior to return as well as non-discriminatory access to reintegration programs/assistance should be granted. In addition to core considerations for human rights and dignity, research and DRC's own experiences bring ample evidence to avoid return by force for reasons of social, economic and psychological sustainability – both for the individuals affected as well as for the communities who receive them.

IDPs: IDPs are citizens, therefore, they have the legal right to choose their place of residence. All movement should be entirely voluntary, and there is no legal recourse to force their return or resettlement in predefined areas.

#6: Return must not be viewed as the mere physical movement of people back to their area of origin but should always be accompanied by post-return monitoring and meaningful reintegration support.

Even though return (or repatriation) is established as a durable solution in terminology, it is important to insist that the return movement in itself is not a durable solution.

As per the IASC definition of a durable solution (applied by DRC also for refugees), return can only be considered as such when returnees no longer have any specific protection needs that are linked to their displacement and can enjoy their human rights without discrimination on account of their displacement.

11) Since early 1980's DRC has been engaged in return counselling of rejected asylum seekers, and since 2014 through a targeted return counselling program. Annual evaluations of the return counselling program is available since 2014.

12) IASC Framework for Durable Solutions of IDPs

In almost all cases, return only results in a durable solution if coupled with reintegration efforts. Comprehensive and holistic reintegration efforts are instrumental for assisting returnees to re-establish themselves in their country/area of origin and for ensuring that their return is sustainable in the long term.

#7: Refugees and IDPs must be supported in building capacities and develop skills while in exile to enable dignified life and improve the chances for sustainable return. Skilled, knowledgeable and empowered individuals and families stand a much better chance to successfully reintegrate in their area of origin. Returnees, especially after years and even decades in displacement, do not merely have the task of resuming their lives prior to displacement; they typically must reinvent their lives in a vastly changed society. Old skills and livelihood strategies may no longer apply. Trauma and loss may well be associated with the return. Hence, it is important to promote a high quality of asylum¹³ where displaced persons are not merely offered 'care & maintenance', but are offered opportunities to heal, transform, and become empowered to master a new reality.

#8: Return should not be seen or promoted in isolation. In a protracted crisis, all three durable solutions should be pursued simultaneously and a host-government's potential preference for return should never dilute DRC's programming and advocacy to promote local solutions and resettlement¹⁴. An excessive focus on return can be an obstacle to promote other solutions. With reference to the perpetuating violence in complex conflicts and the very low number of refugees and IDPs returning to their countries of origin, it is important to identify and work towards transitional/early solutions. In order not to leave millions in limbo for years, efforts to improve the quality of asylum and support refugee inclusion and self-reliance in hosting communities should be prioritized. An exclusive focus on return may be contradictory to this.

DRC's Guiding Principles for Return Engagement

Based on the above, the following seven guiding principles apply to DRC's *operational* engagement in return. In combination with the operational tools and risk assessment for DRC's return engagement, they provide a framework for determining and explaining what DRC does and what DRC does not do in return processes in specific contextual return situations, and a compass up against which any well-informed and conscious departure from the principles must be based.

#1: Refugees and IDPs must be supported in building capacities and develop skills while in exile to enable dignified life and improve the chances for sustainable return. DRC's assistance to returnees serves to ensure their safety, protection, and dignity without discrimination before, during and after the return to their country / area of origin. As such, DRC's engagement in return is motivated solely by humanitarian and protection concerns for displaced people who are often in a very vulnerable situation. Acknowledging the highly political nature of return processes, DRC bases its engagement in return processes on a balanced and well-informed analysis of potential risks of incentivizing returns and unintendedly serving political agendas.

13) By quality of asylum, DRC means the overall comprehensive package of support offered to refugees and IDPs by host governments and the international community, including legal protection and socio-economic assistance. While we recognize that asylum is a legal state that can be offered only to refugees, we intend for the phrase quality of asylum to pertain to both refugees and IDPs.

14) Note that reference to durable solutions does not apply to the legal category of rejected asylum seekers.

#2: DRC does not engage in physical return of individuals. In the frequent cases of non-voluntary and/or unsafe return, or where the voluntariness and/or safety can be questioned, DRC will not be the enabling factor for returns. Any returnee must be able to arrive and enter the country/area of origin safely and independent of DRC's presence and assistance. DRC is an NGO and will not assume the responsibilities of States to manage borders and immigration or be an instrument to execute States' decisions. As a rule of thumb, therefore, DRC does not partake or assist in the physical return of individuals to their country and area of origin.

#3: DRC offers pre- and post-return assistance to returnees. DRC's assistance to returnees takes place in the pre-return and post-return phases only. More specifically, DRC offers three types of assistance in return processes: 1) impartial and non-directive pre-return counselling and/or information sharing; 2) assistance that can enhance the prospects for sustainable return (protection, economic & social capacity- and skills-building); and 3) post-return reception and reintegration assistance which also includes efforts to make areas of origin suitable for safe and dignified return.

#4: DRC's return assistance is allocated based on needs and vulnerabilities. In accordance with DRC's operational principles, the most vulnerable individuals and groups and those most at risk must be targeted in proportion to need and without discrimination. DRC is observant to the premise of differentiation in return assistance provided by host governments but work to ensure that financial incentives and targeted return packages from host governments does not compromise safety and/or the principle of needs-based assistance.

#5: DRC's return engagement always includes advocacy for safe and dignified return as well as clear and transparent communication on the premise for our engagement. DRC advocate for the best solution for the displaced, including promoting local solutions and resettlement if that is in the best interest of the displaced. As an integrated part of DRC's return engagement, DRC advocates to uphold the principles on return by pointing out when principles are being compromised and serves to mitigate risks for people concerned, inform decision-making and administrative practices of State authorities. DRC's return advocacy transmits preferences of affected communities and evidence on conditions in the areas of origin (e.g. from protection monitoring).

#6: DRC does not engage in return assistance if individuals concerned are exposed to a credible risk of becoming IDPs/displaced again. Returns should be motivated by the prospect for a durable solution. If returns happen prematurely, they often result in secondary displacement. DRC will not support or legitimize returns that are likely to result in further displacement but may in accordance with the principle of needs-based assistance in areas of operation include returnees as part of the beneficiary caseload. Due considerations must be afforded to return processes that are not at the same stage across the areas of origin (i.e., some areas in a country of origin may be safe for returns while others are not).

#7: DRC's engagement in post-return assistance is contingent on an Agreement or similar arrangement (bilateral, tripartite or other) between the country of origin and the hosting country that ensure and govern a safe and dignified return process. Exceptions include areas of DRC operation where returnees returning spontaneously are part of the beneficiary caseload.