



**Regional Ministerial Conference on People Smuggling, Trafficking in
Persons and Related Transnational Crime
(Bali II)**

Office of the United Nations High Commissioner for Refugees (UNHCR)

**Co-operation to Address the Irregular Movement of Asylum-Seekers and
Refugees: Elements for an International Framework**

I. Background

1. Population flows are rarely homogeneous. The phenomenon of globalisation, involving the movement of capital, goods and services across the world, coupled with the exponential growth in communication and transportation technologies, has contributed to an acceleration of migratory movement,¹ much of it irregular and undocumented, with an important component self-channelled into the asylum stream in developed countries. Serious human rights violations and armed conflict are a major cause of displacement and onward movement. Additional, or aggravating factors, including poverty, environmental degradation, population pressure and poor governance also influence the intricate dynamics of migration. The result is mixed migratory flows, comprised of groups of people following similar routes but for widely diverging reasons, and with very different needs. Addressing the root causes of forced population movements more robustly is clearly a key challenge for the international community. At the same time the complexity of these modern movement patterns makes it increasingly important to differentiate among the various types of migrants and consequently to develop responses appropriately tailored to specific needs.
2. Responses of States to date have tended, to the contrary, to rely overly on border migration management. They have been built around an array of general measures, including visa requirements, carrier liabilities and interception beyond national borders. Measures to combat smuggling and trafficking, and counter-terrorism mechanisms have also become a growing constituent element.
3. The first Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, (Bali I), focused on the challenges confronting States in their efforts to combat transnational crime, in particular smuggling and trafficking. UNHCR's concern was to ensure that the measures being considered took proper account of the human rights and protection dimensions of population movements,

¹ In his comments marking International Migrants Day, 18 December 2002, the Secretary-General of the United Nations stated that "Today, there are more people living outside their countries of birth than ever before. In 2000, an estimated 175 million lived outside their country of birth. Of these, about 159 million were deemed international migrants; approximately 16 million were recognized refugees fleeing a well-founded fear of persecution; and 900,000 asylum-seekers." Official UNHCR figures for 2001 put the global refugee population at an estimated 12 million and the total number of persons of concern to UNHCR at 19.8 million (Palestinian refugees are not included in UNHCR figures). The International Migration Report 2002, issued by the UN Population Division, contains further detailed information on migration trends and statistics.

properly informed by the complex underlying root causes. Bali II will provide an opportunity to reflect on follow-up to date and focus attention on the issues still to be tackled.

4. In this regard, UNHCR is committed to co-operating with efforts designed to address migratory strains on the asylum system. In so doing we hope to achieve better protection and solutions for all persons of its concern. UNHCR's participation in Bali I and subsequent contributions to the Action Plans of the Ad Hoc Expert Working Groups, in pursuit of a comprehensive approach to the irregular movement of asylum-seekers in the Asia-Pacific region, are illustrative of this commitment.
5. This paper sets out important features which UNHCR would like to see included as part of international arrangements to tackle the irregular movement of asylum-seekers.² The paper also presents the rationale behind UNHCR's thinking on the issue. The irregular movement phenomenon has been a feature of refugee displacement globally for many years, but manifests itself differently from region to region. For a comprehensive plan to be workable it must respond to regional specificities. The paper focuses on elements common across regions and aims to assist States, working together with UNHCR and other concerned agencies, to build principled and practical region specific approaches.

II. Challenges

6. Asylum-seekers constitute a portion of the global movement of people but crafting approaches which recognise and address their specific needs is a requirement. Persons in need of international protection have to be appropriately distinguished from those moving for other reasons within a mixed asylum and migration flow. Proper identification of refugees will often necessitate access to processes which can fairly and objectively assess the well foundedness of protection claims. Simultaneously, and no less important, national asylum systems have to be freed of claimants who are misusing the system, thereby undermining its functioning, just as systems need to be enabled to effectively exclude persons not deserving of international refugee protection.
7. Together with improving the working of their own national asylum systems, States also have the challenge of strengthening the capacity of asylum countries at points where asylum-seekers first seek international protection. Amelioration of asylum conditions in countries hosting major refugee populations and more accessible solutions from first asylum countries are prerequisites if the pressures driving onward movement, the so-called "secondary flows", are to be reduced. These are shared responsibilities in keeping with the principle of international solidarity and burden sharing. Achieving equitable mechanisms through which to realise burden and responsibility sharing is a priority challenge to be addressed.³
8. Effective disincentives to smuggling and trafficking go beyond measures which are exclusively control driven. Greater access to legal migration opportunities and channels, coupled with more reliable return of persons found not to be in need of international protection, would go some way towards disentangling asylum procedures from the profit driven objectives of smugglers and traffickers.

² Drawing on and buttressing existing policy, including *inter alia*, Executive Committee conclusion No. 58 (XL) of 1989 on the Problem of Refugees and Asylum-Seekers who Move in an Irregular Manner from a Country in Which they had Already Found Protection.

³ There is an important discussion ongoing in the Executive Committee on the burdens shouldered by States when hosting refugees. See EC/53/SC/CRP.4 for further information in this regard.

9. The Programme of Action of the Agenda for Protection, endorsed by UNHCR's Executive Committee in 2002, contains a number of objectives bearing directly on better management of the asylum/migration nexus. In addition to the foregoing broad directions for action, the Agenda promotes;

- Better data collection and research on the nexus between asylum and migration;
- Information strategies which would provide relevant information on available channels for legal immigration and warn of the dangers of human smuggling and trafficking;
- Comprehensive and systematic registration of asylum-seekers and refugees;
- Increased focus on the obligation of States under international law to re-admit their own nationals who have been determined not to be in need of international protection;
- Finding solutions for protracted refugee situations;
- Reducing pressures on premature return that is neither safe nor sustainable and could itself become a trigger for secondary movement;
- Development of an international co-operative framework to respond to the specific needs of asylum seekers and refugees rescued at sea, well as the provision of effective protection.⁴

10. Many, if not all, of these objectives are closely related to the central purposes of the Bali process – combating smuggling, trafficking and related transnational crime. UNHCR's existing programmes in the Asia-Pacific region and elsewhere already include activities directed at realising many of the above objectives. These activities would be strengthened if located within an international co-operative framework, characterised by a focus on burden sharing and on solutions for asylum-seekers and refugees.

III. The starting premises for UNHCR

11. UNHCR's involvement in international co-operative efforts to address the irregular movement of asylum-seekers and refugees starts from certain premises:

- (i) A better managed global system centred on multilateral co-operation and the equitable sharing of responsibilities and burdens (rather than unilateral responses which may well just shift burdens) is a positive ambition;
- (ii) Improved management of asylum does not require formal amendment of the current international legal framework, in particular the 1951 Convention and its 1967 Protocol, whose continued viability - and indeed need for strengthened implementation - is repeatedly and authoritatively asserted;
- (iii) What is required, though, are co-operative arrangements buttressing the international legal regime so as to facilitate the delivery of protection in complex scenarios whilst meeting State concerns about the effective management of borders;
- (iv) A genuine and concerted effort, in partnership with States and international and non-governmental organisations, to improve the quality and effectiveness of protection available within the countries in regions close to the source of refugee movements has to have an integral place in systems which might be developed;

⁴ The conclusions of two separate expert roundtables convened by UNHCR in 2002 to address rescue-at-sea and effective protection are attached to this paper as annexes 1 and 2 respectively.

- (v) Readmission arrangements to facilitate return are crucial to underpin international co-operative efforts;
- (vi) Effective protection for refugees and viable solutions which respect the dictates of equitable responsibility and burden sharing, must be as much the goals of better international co-operation as border control;
- (vii) State responsibility is a key concept, which must be maintained at all stages but can be fulfilled through international co-operation and the sharing of commitments;
- (viii) Practically speaking no action plan has a real chance of success unless it is reliably resourced for as long as is necessary;
- (ix) Interception en route is an increasingly prominent feature of State practice. As it can impede access of refugees to international protection, the matter will be considered by UNHCR's Executive Committee this year and should generate a conclusion setting out parameters that could then be built into any co-operative responses;
- (x) Detention of all asylum-seekers as a matter of course is inherently undesirable and costly. As outlined in Executive Committee Conclusion No. 44, and further elaborated in UNHCR's Guidelines on Detention, the limited restrictions permissible are those necessary, (i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based; (iii) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum; and (iv) to protect national security and public order.

IV. The Issue of State Responsibility

12. The nature and extent of State responsibility for protection of refugees is determined by reference both to law and practice. Though there is a margin of flexibility as to how responsibilities are fulfilled, certain fundamental principles, including *non-refoulement* and non-discrimination, are not negotiable. International refugee law requires that a State presented with an asylum request, at its borders or on its territory, has and retains the immediate refugee protection responsibilities relating to admission, at least on a temporary basis. This responsibility extends to the provision of basic reception conditions and includes access to fair and efficient asylum procedures. The delivery of effective protection⁵ is first and foremost a State responsibility, but one which in practice invariably involves a range of actors, including UNHCR, other international organisations, and international and national non-governmental organisations, working in close co-operation with States.
13. A transfer of responsibilities between States for the handling of asylum applications is possible provided that certain conditions are met. International co-operative arrangements reliant upon such a transfer must be clear as to the division of responsibilities between the different actors involved and the continuation of such

⁵ The meaning and content of effective protection are currently the subject of analysis to which UNHCR has contributed by means of an expert roundtable convened in Lisbon in December 2002. There is a need to develop further consensus around the preliminary conclusions emerging from this meeting, as a common understanding of this question will underpin international co-operative measures. For further information see annex 2.

responsibilities until such time as an appropriate durable solution is achieved or, in the case of those found not to be in need of international protection, return to the country of origin takes place.

14. Consistent with international practice, a transfer of responsibility to another country normally occurs on the basis of links considered valid under international law, such as, for example, previous stay on the territory of the third country, previous issuance of an entry visa or close family ties. Subject to basic standards applying in relation to transfers, admission can be negotiated based on the first country of asylum or the "safe third country" concepts. In this connection, UNHCR's Executive Committee has stipulated that no asylum-seeker should be sent to a third country for determination of the claim without sufficient guarantees in each individual case that: i) the person will be admitted to that country; ii) will enjoy there effective protection, in particular against *non-refoulement*; iii) will have the possibility to seek and enjoy asylum; and iv) will be treated in accordance with accepted international standards⁶.

V. Elements of an International Co-operative Framework

15. On the basis of the foregoing, it is possible to develop an international co-operative framework to tackle irregular movement of asylum-seekers and refugees, which might incorporate the following components.

A. Strengthened protection capacity in host countries

16. The Agenda for Protection foresees more effective co-operation to strengthen protection capacities in refugee-receiving countries in regions of origin.⁷ During the Global Consultations process a number of strategies as well as some best practice examples were identified.⁸ UNHCR is already working in a number of countries to this end. In order to ensure that available protection is indeed effective protection, analyses of gaps in the treatment of specific groups of refugees in selected countries is being undertaken. This work should lead to the identification of inadequacies and encourage a willingness on the part of the host country to address them, as well as substantial financial and material investment to enable host countries, UNHCR and others to respond. In UNHCR's experience, refugees often move on because they are not allowed, or not given, the means to become self-reliant pending a durable solution. Self-reliance is therefore often particularly relevant to avert secondary movements. Using development assistance for this purpose would enable genuine progress in this area. The High Commissioner's proposal, "Development Assistance for Refugees" (DAR), not only aims, from a development assistance perspective, to enhance effective protection and promote durable solutions for refugees, but also to provide concrete support to, and burden sharing with, host countries in the developing world. DAR should be built into responses, particularly in protracted refugee situations, to better equip refugees for any of the three durable solutions.

B. Comprehensive durable solutions arrangements

17. Comprehensive plans of action to arrive at solutions for targeted refugee groups, particularly those in protracted situations, could be developed, drawing also on gaps

⁶ See *inter alia*, EXCOM Conclusion No. 15 (XXX) on Refugees Without an Asylum Country and EXCOM Conclusion No. 58 (XL) on the Problem of Refugees and Asylum-Seekers who Move in an Irregular Manner from a Country in Which They Had Already Found Protection.

⁷ Goal 3, Objective 2 of the Agenda.

⁸ See UN doc. EG/GC/01/19 of 4 September 2001.

analyses to be undertaken for specific caseloads. Such plans of action might variously include arrangements of the following sort:

- Active promotion of **voluntary repatriation and sustainable reintegration**. The Agenda for Protection promotes strengthened co-operation to make repatriation possible and sustainable. In post-conflict situations, the High Commissioner has proposed an integrated approach, the “4 Rs” (Repatriation, Reintegration, Rehabilitation and Reconstruction) which aims to bring together humanitarian and development actors in order to facilitate sustainable reintegration and bridge the transition period between emergency relief and long-term development.
- Strategic use of targeted development assistance to achieve more equitable burden-sharing for countries hosting large numbers of refugees and to promote **self-reliance** of refugees. Self-reliance is an important precursor to any of the three durable solutions. An integrated approach which anchors refugee issues within national, regional and multilateral development agendas is called for.
- “Development through Local Integration” (DLI) as a strategy in circumstances where the **local integration of refugees** in countries of asylum is a viable option. DLI aims at soliciting additional development assistance to underpin this durable solution.⁹
- Multilateral commitments to expand **resettlement** as a protection tool, a durable solution as well as an instrument of burden-sharing. Expanded resettlement options might be made available in the form of a multi-lateral pool administered by UNHCR.

C. A co-operative approach to the handling of asylum applications

18. Region specific arrangements can contribute to the expedient and fair processing of asylum applications. These arrangements should be humane for the individuals concerned; entail shared responsibility for determining the claims of people who move on in an irregular manner from one asylum country to another; and contribute effectively to reduction of such movements and their exploitation by smugglers and traffickers. The facilitation of re-admission to countries of first asylum would be one element, as would be the acceptance by countries of origin of the return of persons found not to be in need of international protection. How the various elements are combined would vary according to specific regional circumstances, the States involved, the compatibility of their asylum systems and whether or not individual processing is necessary in the country of first asylum. The elements would include:

- An admissibility/pre-screening procedure, the purpose of which would be the prompt differentiation and subsequent channelling of claims to one of several possible locations for consideration on their merits. Pre-screening should distinguish claims presumed to be protection related from those presumed to be motivated primarily for economic or migratory reasons, which would be an important determinant of the modalities for further processing. Other relevant factors, including links to a particular country or previous stay in a country offering effective protection would also be identified during pre-screening and would determine the subsequent handling of claims. Pre-screening of this sort could take place;
 - (i) in the country of chosen destination or
 - (ii) in a transit country.

⁹ There are close linkages between DLI and DAR, described at paragraph 16, since both aim to tap the potential of development funds in securing durable solutions for refugees.

- A process to handle claims would have to be adjudicated within a set and short timeframe. The location for such processing would have to depend on factors identified during the pre-screening. Possibilities include as appropriate:
 - (i) the country where the claim for asylum is first presented;
 - (ii) a transit country, either within the framework of an existing domestic asylum system or, absent this, in a specifically provisioned and resourced centre;
 - (iii) a country deemed to offer effective protection, should processing be necessary in the context of a durable solutions strategy.
- Acceptance of State responsibility: The adjudication of cases would normally be undertaken by States with UNHCR providing guidance and support. One formula might be co-operative arrangements among several States who agree to participate in a jointly administered process, through pooling of resources and responsibility. UNHCR could catalyse and facilitate the process.
- Agreement on “effective protection” requirements: There has to be a shared understanding on the types of situations guaranteeing effective protection, leading to timely and genuine solutions.
- Properly equipped and resourced centres: Where protection requires formal adjudication of claims in countries in regions of origin or in transit countries, such processing may require centres specifically established, equipped and supported for this purpose. This would in turn require guaranteed investment in infrastructure, reception conditions and training programmes in countries hosting such processing centres, in addition to investment in protection and sustainable and dignified stay in host countries in the region of origin until solutions are realised.
- Readmission arrangements: The prompt return to their countries of origin of those found not to be in need of international protection would have to be feasible.¹⁰ Readmission agreements, assistance schemes and other supportive incentives are crucial components. In particular, readmission agreements would need to be in place beforehand, to ensure that individuals who are to be returned either to their countries of origin, or to countries offering effective protection, can be transferred promptly and under acceptable conditions, in full compliance with relevant international standards.

D. Partnerships

19. Co-operative partnership arrangements would have to underpin the international framework, drawing upon the specific expertise of different actors, including UNHCR, IOM and non-governmental organisations. They should be formalised through memoranda of understanding at the country level, which would feed into broader regional arrangements. Ideally co-operation would be built around existing programmes managed by partner organisations, including for example IOM’s assisted

¹⁰ The return of rejected asylum-seekers is a matter that will be addressed by the Executive Committee in 2003.

voluntary return programmes, or existing programmes to respond to the needs of victims of trafficking.¹¹

VI. Outlook

20. This paper flags important challenges confronting States in managing the asylum and migration nexus. It highlights the importance of ensuring that migration management tools, including measures to combat trafficking and smuggling, are compatible with the goal of providing international protection to refugees.
21. Not all the elements set out in this paper are necessarily new. Many are drawn directly from understandings generated during UNHCR's Global Consultations process and carried forward within the Agenda for Protection. States are encouraged to give active consideration to the timely platform offered by the Agenda for Protection and the Convention Plus initiative¹², as enabling mechanisms for the development and implementation of an effective international framework to address the irregular movement of asylum-seekers and refugees. Convention Plus provides a basis for transforming ad hoc or unilateral responses to the causes and effects of irregular migration and forced displacement into multilateral special agreements to bring this international framework into working effect.

**Office of the United Nations High Commissioner for Refugees (UNHCR)
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¹¹ At Headquarters level a co-operative mechanism is emerging between UNHCR, IOM, UNHCHR and ILO, as a forum to discuss issues of common concern relating to the asylum/migration nexus.

¹² The Global Consultations process focused on the *tools of protection* - those presently available and those in need of development - as the means to achieve better global management of refugee issues through more reliable and effective international responses incorporating greater equity in the sharing of responsibilities and burdens. The High Commissioner has identified the development of multi-lateral special agreements, termed Convention Plus, as an appropriate way to craft such tools of protection, complementing and buttressing the 1951 Convention regime.

Annex 1

Rescue-at- Sea Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees

Expert Roundtable, Lisbon 25 – 26 March 2002.

Summary of Discussions

This Expert Roundtable addressed the question of rescue-at-sea and specific aspects relating to the protection of asylum-seekers and refugees, basing the discussion on UNHCR's *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (March 2002). The roundtable was composed of 33 participants from governments, the shipping industry, international organisations, non-government organisations, and academia. The first day was organised around two expert panels, while the second day was divided into two working groups to consider (1) guidelines on rescue-at-sea and disembarkation and (2) an international cooperative framework.

The following propositions relate principally to specific aspects of rescue-at-sea by non-State vessels. They do not represent the individual views of each participant, but reflect broadly the tenor of the general discussion.

1. The integrity of the global search and rescue regime already in place and governed by the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) was fully recognised, and needs to be scrupulously protected.
2. Rescue-at-sea is first and foremost a humanitarian issue, with the fact of distress the priority defining feature, and rescue and alleviation of distress the first and absolute imperative, regardless of who the people are and how they came to be where they are.
3. The undertaking to rescue is an obligation of ships' masters, provided for under maritime law, and an old humanitarian tradition. The duty of the master begins with the actual rescue and ends when the rescue is complete which necessitates delivery to a place of safety.
4. The duty of the master does not entail other responsibilities, such as determining the character or status of the people rescued.
5. To ensure full and effective discharge of duties with respect to rescue, it is important that the professional judgment of the master is respected, with regard to the determination of when and where to land the persons rescued. Factors influencing the exercise of this judgment will be the safety and wellbeing of the ship and its crew, and the appropriateness of the place of landing, defined by one or a combination of factors, such as its safety, its closeness, and its location on the ship's schedule.
6. The master has the right to expect the assistance of coastal States with facilitation and completion of the rescue, which occurs only when the persons are landed somewhere or otherwise delivered to a safe place.
7. A non-State vessel, under a competent master and crew, is not an appropriate place in which to screen and categorize those rescued or devise solutions for them, whatever these might be. Nor is it appropriate to use the ship as, in effect, a "floating detention centre".

8. On completion of the rescue, following delivery to a place of safety, other aspects of the matter come to the fore. These include screening for protection needs, conditions of stay and treatment, and realisation of solutions. Their resolution will depend variously on factors such as, or considerations relating to, the preceding situation of the persons concerned and their mode of transport, as well as on how best to achieve a balancing of responsibilities of all concerned.
9. International law does not prescribe how such additional aspects of the problem must be resolved, though certain provisions of international maritime law, considered as customary international law, are of great importance. The legal gaps concern where disembarkation should take place and which parties are responsible for follow-up action and effecting solutions. International law does, however, more generally give indicators of how they might be resolved. It offers a framework for resolution of the situation, albeit that there are important gaps to be filled by evolving practice together with further development of the law.
10. In terms of the law, human rights principles are an important point of first reference in handling the situation. This body of law requires certain rights to be respected regardless of the formal status of the persons concerned. The law also imposes some general constraints on how the people can be treated. In other words, human rights law prescribes that, wherever and by whomever, certain standards must be upheld and certain needs addressed. Refugee law is similarly prescriptive as regards the refugee component in the rescued caseload.
11. Practice and State policies help to fill the legal gaps, with the laws likely to follow rather than precede practice. The International Maritime Organisation is encouraged to undertake a legal gaps analysis (within its focal point structure), with a view to encouraging positive development of the law.
12. Policy makers are encouraged to recognise:
 - The issue of “boat people” is best approached as a challenge, not a crisis.
 - Signals are important and the wrong ones should not be sent either to States generally or to ships’ masters, which would have the effect of undermining the integrity of global search and rescue activities.
 - Any measures to combat people smuggling must not undermine international refugee protection responsibilities.
 - The issue is multi-disciplinary and must be approached as such.
13. General responsibilities concerning rescue should be accepted as including that:
 - Coastal States have a responsibility to facilitate rescue through ensuring that the necessary enabling arrangements are in place.
 - Flag States are responsible for ensuring that ships’ masters come to the assistance of people in distress at sea.
 - The international community as a whole must cooperate in such a way as to uphold the integrity of the search and rescue regime.
14. Determining the character or status of those rescued by non-State vessels must normally be undertaken on dry land. If asylum-seekers and refugees are found to be among them, the State providing for disembarkation will generally be the State whose refugee protection responsibilities are first engaged. This entails in principle ensuring access to fair and efficient asylum procedures, and the provision of adequate conditions of reception. The transfer of responsibility for determining refugee status to another State is permissible under international law under

certain conditions and provided that appropriate protection safeguards are in place. Furthermore, disembarkation, particularly when it involves large numbers of people rescued, does not necessarily mean the provision of durable solutions in the country of disembarkation.

15. International cooperative efforts to address complex rescue-at-sea situations should be built around burden-sharing arrangements. These arrangements could encompass the processing of asylum applications and/or the realization of durable solutions, such as resettlement. They should furthermore address, as appropriate, the issue of readmission to first countries of asylum and/or safe third countries, as well as return arrangements for those found not to be in need of international protection. Preventative action concerning people smuggling is another important aspect of any international cooperative framework.
16. In follow-up to this expert roundtable, there was support for the more systematic compiling of empirical data on the scale and the scope of the problem. This, coupled with an analysis of the data, should be done by the varying actors from their various perspectives. UNHCR, for its part, would consolidate guidance on rescue-at-sea involving asylum-seekers and refugees. The International Maritime Organisation's inter-agency initiative will be informed of the outcome of this Expert Roundtable and IMO is encouraged to utilise its existing mechanisms to address any inadequacies in the law. UNHCR's Executive Committee and the UNHCR, IOM consultative mechanism, Action Group on Asylum and Migration (AGAMI) were considered as other appropriate fora to take the discussion further.

UNHCR
11 April 2002



Annex 2

Lisbon Expert Roundtable
9 and 10 December 2002

*organised by the United Nations High Commissioner for Refugees
and the Migration Policy Institute
hosted by the Luso-American Foundation for Development*

Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers

1. The December 2002 Lisbon expert roundtable reviewed the concept of “effective protection” in the context of secondary movements of asylum-seekers and refugees. The question of what constitutes effective protection in a third country usually arises in the implementation of what is commonly referred to as the concept of first country of asylum, “safety elsewhere” or the “safe” third country concept. The discussion was based on a background paper by Prof. Dr Stephen Legomsky, Washington University in St. Louis, United States, entitled “Returning Asylum-Seekers to Third Countries: The Requirements of Effective Protection”. Participants included 30 experts from 18 countries, drawn from governments, NGOs, academia, the judiciary and the legal profession.

2. The roundtable is in direct follow-up of the “Agenda for Protection” (A/AC.96/965/Add.1 of 26 June 2002), which defines as one of its six goals “protecting refugees within broader migration movements”. One of the activities foreseen to work towards this goal is: “Bearing in mind ExCom Conclusion No. 58 (XL) of 1989 on the *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in which They had already Found Protection*, UNHCR, in co-operation with relevant partners, to analyse the reasons for such movements, and propose strategies to address them in specific situations, predicated on a more precisely articulated understanding of what constitutes effective protection in countries of first asylum, and taking into account international solidarity and burden-sharing.”

3. The objective of this roundtable was to identify the principles, grounded in law, around which policy parameters could be built to address issues concerning the secondary movement of asylum-seekers and refugees and which would have a practical value for decision- and policy-makers. The principles should be practical and holistic, that is, they should take account of physical, material and legal safety considerations.

4. The following Summary Conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

Overall context

5. The rationale behind examining “effective protection” in the context of the return of asylum-seekers and refugees to third countries is fourfold:

- to enhance international co-operation to share the burdens and responsibilities of admitting and hosting refugees;
- to strengthen protection capacities in host countries;
- to foster international solidarity and support for generating solutions;
- to address issues related to “irregular movement”, including people smuggling, people trafficking, multiple applications and “orbit” cases.

6. The causes of secondary movements are manifold and include lack of durable solutions; limited capacity to host refugees and provide effective protection for protracted periods of time; as well as lack of access to legal migration opportunities. It was recommended that such causes required further careful study in relation to specific situations to provide a clearer understanding on which to build comprehensive strategies to reduce such movements.

7. Return to a third country of asylum is only one element in an interrelated comprehensive framework, aimed at reducing (the need for) secondary movement. Other elements of such an integrated framework were identified as including: addressing root causes of forced displacement; strengthening protection capacities in host countries; enabling access to durable solutions, including local integration and enhanced resettlement; concluding responsibility-sharing agreements; opening up more channels for regular entry in the context of resettlement, labour migration and, importantly, family reunification; as well as criminal law enforcement measures.

8. Operationalising international solidarity and international co-operation to share the burdens and responsibilities of hosting refugees is crucial to effecting the return of asylum-seekers and refugees to third countries under certain circumstances. Hosting large numbers of refugees is a major contribution by developing countries, which should be properly recognised when considering the removal of persons who could have sought protection there.

Framework considerations

9. While the 1951 Convention relating to the Status of Refugees and its 1967 Protocol constitute the core framework, other sources of rights and obligations in international law may be relevant for informing the appreciation of whether or not it is permissible to return an asylum-seeker or refugee to a third country. It is important not to exclude any source of law (treaty obligations, customary international obligations, interpretative guidance such as Executive Committee Conclusions) and to appreciate the specific circumstances of a case. An assessment of effective protection requires an individualised case-by-case examination.

10. From the point of view of identifying the elements of effective protection in the context of return to third countries, the distinction between the so-called “safe” third country and the country of first asylum concepts is not relevant.¹ The distinction is, however, relevant when it comes to an appreciation of the links between an asylum-seeker or refugee and the destination country, in which the person is now applying for asylum, or the third country, as well as for procedural issues in destination countries. In addition, readmission obligations are clearer in respect of countries that have already provided effective protection to an individual.

11. There is no obligation under international law for a person to seek international protection at the first effective opportunity. On the other hand, asylum-seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account.²

12. States could craft bi- or multilateral arrangements, consistent with international refugee and human rights law standards, according to which asylum-seekers would be encouraged and enabled to seek international protection at the first available opportunity. This could be done by agreeing to mechanisms and criteria to allocate responsibilities for the determination of asylum applications and the provision of effective protection. Such arrangements should take account of meaningful links, such as family connections and other close ties, between an asylum-seeker and a particular country. They should also include procedural safeguards, including for example, a notification to the receiving country that an asylum application has not been examined on its

¹ See, UNHCR, “Asylum Processes (Fair and Efficient Asylum Procedures)”, EC/GC/01/12, 31 May 2001, paragraphs 10–18.

² Executive Committee Conclusion No. 15 (XXX) 1979, Refugees without an Asylum Country, paragraph (h) (iii).

merits. The effectiveness of such arrangements needs careful assessment and regular review both in terms of their operational efficiency and their resource implications.

13. Besides considerations of burden-sharing with countries hosting large numbers of refugees, several participants questioned the appropriateness, from a protection perspective, of returns outside the context of countries with equivalent asylum systems. In this regard, the wide disparity and poor levels of protection in many countries were noted.

14. Family and other links between a person seeking asylum and the destination country or the third State are important and should be given weight. The protection of the family as the natural and fundamental group unit of society is a widely recognised principle of human rights.

Critical factors for the appreciation of “effective protection” in the context of return to third States

15. The following elements, while not exhaustive, are critical factors for the appreciation of “effective protection” in the context of return to third countries:

- a) The person has no well-founded fear of persecution in the third State on any of the 1951 Convention grounds.
- b) There will be respect for fundamental human rights in the third State in accordance with applicable international standards, including but not limited to the following:
 - ◆ there is no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the third State;
 - ◆ there is no real risk to the life of the person in the third State;
 - ◆ there is no real risk that the person would be deprived of his or her liberty in the third State without due process.
- c) There is no real risk that the person would be sent by the third State to another State in which he or she would not receive effective protection or would be at risk of being sent from there on to any other State where such protection would not be available.
- d) While respecting data protection principles during the notification process, the third State has explicitly agreed to readmit the person as an asylum-seeker or, as the case may be, a refugee.
- e) While accession to international refugee instruments and basic human rights instruments is a critical indicator, the actual practice of States and their compliance with these instruments is key to the assessment of the effectiveness of protection. Where the return of an asylum-seeker to a third State is involved, accession to and compliance with the 1951 Convention and/or 1967 Protocol are essential, unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.
- f) The third State grants the person access to fair and efficient procedures for the determination of refugee status, which includes – as the basis of recognition of refugee status – grounds that would be recognised in the destination country. In cases, however, where the third State provides *prima facie* recognition of refugee status, the examination must establish that the person can avail him- or herself of such recognition and the ensuing protection.
- g) The person has access to means of subsistence sufficient to maintain an adequate standard of living. Following recognition as a refugee, steps are undertaken by the third State to

enable the progressive achievement of self-reliance, pending the realisation of durable solutions.

- h) The third State takes account of any special vulnerabilities of the person concerned and maintains the privacy interests of the person and his or her family.
- i) If the person is recognised as a refugee, effective protection will remain available until a durable solution can be found.

**Department of International Protection
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