

Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers

1. It is UNHCR's position that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them. This is also in line with general State practice.¹ The primary responsibility to provide protection rests with the State where asylum is sought.
2. Nonetheless, there are an increasing number of initiatives in various regions involving the transfer² of asylum-seekers from one country to another for the purpose of processing their asylum claims. Such arrangements have typically involved the transfer of asylum-seekers either: (a) to the State where they first sought (or could have sought) asylum; or (b) to other countries with which the asylum-seeker has no previous links. They have also involved both bilateral and/or multilateral (regional) arrangements.
3. The legality and/or appropriateness of any such arrangement need to be assessed on a case-by-case basis, subject to its particular modalities and legal provisions. However, this assessment is to be guided by the following principles:
 - i) There is no obligation for asylum-seekers to seek asylum at the first effective opportunity, yet at the same time there is no unfettered right to choose one's country of asylum. The intentions of an asylum-seeker, however, ought to be taken into account to the extent possible.³
 - ii) It is generally recognized that a State has jurisdiction, and consequently is bound by relevant international and regional refugee and human rights law obligations, if it has *de jure* and/or effective *de facto* control over a territory or over persons.⁴ This includes situations where a State exercises jurisdiction outside its territory.⁵
 - iii) In principle, States involved in bilateral or multilateral transfer arrangements should be parties to the 1951 Convention relating to the Status of Refugees (1951 Convention) and/or its 1967 Protocol,⁶ or otherwise party to relevant refugee and human rights instruments. Yet while being party to international and regional refugee and human rights instruments is an important indicator as to whether the receiving State meets the criteria outlined in this Guidance Note, review of the actual practice of

¹ UN High Commissioner for Refugees, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

² The term 'transfer' is used in this Guidance Note to refer to the range of methods and processes by which asylum-seekers are moved from one country to another under special bilateral and/or multilateral State arrangements. It excludes return to one's country of origin. This Guidance Note does not address other legal processes relating to the deportation, expulsion or extradition of asylum-seekers and/or refugees carried out on an individual basis.

³ UN High Commissioner for Refugees, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>, para. 11; UNHCR Executive Committee Conclusion No. 15 (XXX) (Refugees without an Asylum Country) (1979), paras. (h)(iii) and (h)(iv).

⁴ UN High Commissioner for Refugees, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>, paras. 9-10.

⁵ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>; UN High Commissioner for Refugees, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

⁶ 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, entry into force 22 April 1954; 1967 Protocol Relating to the Status of Refugee, 606 U.N.T.S. 267, entry into force 4 October 1967.

the State and its compliance with these instruments is an essential part of this assessment.⁷

- iv) Arrangements should be aimed at enhancing burden- and responsibility-sharing and international/regional cooperation, and not be burden shifting.⁸ Such arrangements should ideally contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole.⁹
- v) An arrangement between States for the transfer of asylum-seekers is best governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum-seekers. The arrangement would need to clearly stipulate the rights and obligations of each State and the rights and duties of asylum-seekers.
- vi) The transfer arrangement needs to guarantee that each asylum-seeker:
 - will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer.¹⁰ Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interest of the child must be a primary consideration;¹¹
 - will be admitted to the proposed receiving State;
 - will be protected against *refoulement*;
 - will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;¹²
 - will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted); and
 - if recognized as being in need of international protection, will be able to enjoy asylum and/or access a durable solution.¹³
- vii) Where these guarantees cannot be agreed to or met, then transfer would not be appropriate.

⁷ UN High Commissioner for Refugees, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>, para. 15(e). See also, e.g., *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>; and *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

⁸ UN High Commissioner for Refugees, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities*, 28 June 2011, available at: <http://www.unhcr.org/refworld/docid/4e9fed232.html>, para. 8.

⁹ UN High Commissioner for Refugees, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>, para. 48.

¹⁰ See, e.g., UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>, para. 13.

¹¹ See, e.g., Article 3, Convention on the Rights of the Child, 1577 U.N.T.S 3, entry into force 2 September 1990; UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>. See also, e.g., UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>.

¹² ExCom Conclusion No. 8 (XXVIII) (Determination of Refugee Status) (1977); UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

¹³ See further, e.g., ExCom Conclusion No. 85 (XLIX) (Conclusion on International Protection) (1998), para. (aa); ExCom Conclusion No. 58 (XL) (Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection) (1989), para. (f); UN High Commissioner for Refugees, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>.

- viii) The obligation to ensure that conditions in the receiving State meet these requirements in practice rests with the transferring State, prior to entering into such arrangements. As indicated above, it is not enough to merely assume that an asylum-seeker would be treated in conformity with these standards – either because the receiving State is a party to the 1951 Convention or other refugee or human rights instruments, or on the basis of an ongoing arrangement or past practice.¹⁴ Regular monitoring and/or review by the transferring State of the transfers and the conditions in the receiving State would also be required to ensure they continue to meet international standards.¹⁵
4. In terms of State responsibility post-transfer, at a minimum, and regardless of the arrangement, the transferring State remains, inter alia, subject to the obligation of *non-refoulement*.¹⁶ In addition, the transferring State may retain responsibility for other obligations arising under international and/or regional refugee and human rights law. This would be the case, for example, where the reception and/or processing of asylum-seekers in the receiving State is effectively under the control or direction of the transferring State.
 5. The receiving State, in exercising territorial jurisdiction, will likewise be subject to applicable refugee and human rights law obligations. It cannot use the transfer arrangement as an excuse to limit its responsibilities for persons on its territory.
 6. In summary, transfer arrangements of asylum-seekers for asylum processing need to take into account and ensure that: applicable refugee and human rights law standards are met, as outlined at paragraph (3); refugee status and/or other processing for international protection needs takes place fairly and efficiently; access to asylum and/or durable solutions are provided within a reasonable time; and/or the arrangement improves asylum space in the receiving State, the transferring State and/or the region as a whole. Such arrangements would not be appropriate where they represent an attempt, in whole or part, by a 1951 Convention State party to divest itself of responsibility; or they are used as an excuse to deny or limit jurisdiction and responsibility under international refugee and human rights law.

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¹⁴ UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>, para. 14; UN High Commissioner for Refugees, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>, para. 15(e); *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2>, para. 359.

¹⁵ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2>.

¹⁶ See generally, UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; UN High Commissioner for Refugees, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.