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RESEARCH SERIES**

**Secondary Refugee Movements and the Return of  
Asylum Seekers to Third Countries:  
The Meaning of Effective Protection**

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## EXECUTIVE SUMMARY

Today's refugees are rarely able to travel directly from their countries of origin to their intended ultimate destinations. They are much more likely to stop in one or more "third countries" along the way, for varying lengths of time and under varying conditions. Many of those third countries are developing states that lack the resources to provide internationally acceptable levels of protection. In other cases, either the third country is able but unwilling to do so, or the refugee is eager to rebuild his or her life elsewhere, for any of a great number of reasons.

At the same time that countries of origin spawn millions of new refugees, third countries and ultimate destination countries alike are increasingly prone to devise new restrictions. In particular, destination countries have steadily erected procedural barriers to their asylum determination systems. Among those barriers is the practice of returning certain asylum seekers to third countries without deciding the substance of the claims – either on the ground that the third country was a "safe third country" and that the person therefore should have requested protection there, or on the ground that the third country was a "first country of asylum," having already granted protection. These restrictions might be adopted unilaterally or they might be part of a bilateral or multilateral agreement. Under any of those circumstances, the returns give rise to a host of serious problems for the refugees themselves, for the third countries, and for regional stability. The broad question is how much legal freedom refugees have to choose the countries that will decide their asylum claims.

This paper proposes criteria for determining when international law, and when sound policy, permit a country to return an asylum seeker to a third country without deciding the substance of his or her claim. It is argued, contrary to conventional wisdom, that the criteria for returning asylum seekers to "safe third countries" are precisely the same as the criteria for returning them to "first countries of asylum." In the course of constructing these criteria, the paper argues that various developments in international law now add up to a general "complicity principle." No country may send any person to another country, knowing that the latter will violate rights which the sending country is itself obligated to respect. That assertion is qualified: For purposes of the complicity principle, the degree of certainty encompassed by the word "knowing" may vary inversely with the importance of the right.

Section I supplies the necessary background information. It describes the concepts of safe third country, readmission agreements, agreements to allocate responsibility for determining asylum claims, and first countries of asylum, and it outlines the practical problems associated with each. Sections II and III make normative claims. Section II is general in scope. It first examines the third country question in the broader perspective of other important strategies for addressing the root causes of irregular secondary movements and for protecting refugees after the fact. It then develops the essential policy premises for the specific criteria formulated in the next section. Drawing on those premises, section III examines in detail a number of possible specific criteria for the permissibility of returns to third countries. It concludes with two lists – a list of proposed minimum requirements of international law and a list of proposed best practice criteria.



# SECONDARY REFUGEE MOVEMENTS AND THE RETURN OF ASYLUM SEEKERS TO THIRD COUNTRIES: THE MEANING OF EFFECTIVE PROTECTION \*

## INTRODUCTION \*\*

This paper is necessary because the shortest distance between a persecutor and a permanent safe haven is seldom a straight line. Perhaps it was never unusual for refugees to travel circuitous routes through several countries before reaching their intended final stops. It is certainly not unusual today.

A refugee's presence in one of these "third countries" might be a matter of hours or a matter of years. It might be legally sanctioned or irregular. The person might or might not formally request protection in the third country. If protection is requested, it might or might not be granted. If granted, protection might take any of several forms, ranging from some type of de facto stopgap protection to formal long-term residence. The person might or might not receive identity papers, or immigration papers, or travel documents. The person might be under the care of the government of the host state, or UNHCR, or an NGO, or some combination of the above, or the person might not be under anyone's care. The person might possess a single, continuing legal status or might change status along the way. He or she might enter with any number of intentions and might alter those intentions any number of times. The person might be part of a mass refugee influx or might be alone or part of a small group.

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\* Stephen H. Legomsky: Charles F. Nagel Professor of International and Comparative Law, Washington University, e-mail Legomsky@wulaw.wustl.edu. This paper was commissioned by the Department of International Protection of UNHCR for use in its Agenda for Protection. The analysis and recommendations provided the background and structure for a roundtable discussion convened by UNHCR and the Migration Policy Institute and hosted by the Fundacao Luso-Americana in Lisbon, Portugal on 9-10 December 2002. The roundtable participants – UNHCR officials, government and NGO representatives, legal practitioners, jurists, academics, and others – reached consensus on many of the recommendations in the paper, but not all. See UNHCR Lisbon Roundtable Conclusions, 2002. I am indebted to all three organizations and to all the roundtable participants for their ample and thoughtful reactions to the first draft of this paper. I am also grateful to UNHCR's Department of International Protection for sponsoring this project and to UNHCR's Bureau for Europe for hosting me for the duration of my work. I also appreciate the many others who generously shared their time, information, and original insights. They include Cindy Burns, Jeff Crisp, Damtew Dessalegne, Khassim Diagne, Claire Hamlich, Bela Hovy, Milton Moreno, Radhouane Nouicer, Michael Petersen, Hy Shelow, and Thomas Vargas. I must single out Erika Feller, Volker Turk, Jean-Francois Durieux, and James Hathaway for their exceptionally detailed and insightful feedback, and Katharina Lumpp for her superb editing. Except where a source is specifically cited or quoted, however, the views expressed here are solely those of the author and should not be imputed to UNHCR.

\*\* The sources that are cited in the footnotes of this paper are in shortened form. The full citations appear in the bibliography.

Under any of these scenarios, refugees often decide to leave the third countries and seek protection in more favorable places. Why do they do so?

In the case of people who never sought any protection from the third country, the question is often asked: “Well, why *didn't* they seek protection there?” There are a number of possible reasons. It might have been obvious that the other country would not grant protection. Conditions in that country might not have been hospitable or even acceptable. Possibly the person had always regarded that country as nothing more than a temporary stop or even just a point of transit, and the person had intended all along to seek protection in the ultimate destination country. Or, perhaps, the refugee recognition rates or reception arrangements or integration conditions were more favorable in the destination country.<sup>1</sup>

Even when the third country actually granted some form of temporary protection, people might move on for any number of reasons. Some move for the same reasons that inspire *voluntary* migrants – better life opportunities for themselves and their families, including educational or employment opportunities.<sup>2</sup> Or the person might have family members in the destination country, or at least an existing enclave from the person’s country of origin or a community of people with similar ethnic, religious, or cultural backgrounds.<sup>3</sup> Sometimes the person’s status in the third country was always meant to be temporary, and the person is eager to start rebuilding his or her life in a more durable environment. In many cases, the decisions as to itinerary are in the hands of professional smugglers or traffickers, and the refugees themselves have little or no say in the matter.<sup>4</sup> And, as noted below, the third countries are often developing nations in which the living conditions, personal freedoms, or physical safety levels fall far short of acceptable international standards or even basic subsistence.

Today, these “secondary movements” from third countries to final destinations are a major concern.<sup>5</sup> They are both caused and constrained by a convergence of ominous global forces. Countries of origin continue to spawn millions of new refugees. They have to go somewhere. At the same time, third countries and ultimate destination countries alike are increasingly prone to devise new restrictions.

The third countries have many reasons to do so. Frequently developing states, they lack sufficient resources even for their own nationals. Often they have already generously absorbed disproportionate shares of the world’s refugees, as well as their own internally displaced persons. They feel a growing frustration, and even resentment, that developed countries have not committed to resettle larger numbers of refugees or provided more generous funding to support resettlement in third countries. And, of course, third countries often face many of the same domestic political challenges as destination countries -- restive publics, compassion fatigue, and ethnic tensions.

The ultimate destination countries, for their part, in fact have accepted significant numbers of refugees. Still, those numbers constitute only a tiny proportion of the world’s total

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<sup>1</sup> Laghi, 2002; McClintock, 2002.

<sup>2</sup> UNHCR Ex. Com. Conc. 58 (1989), para. b.

<sup>3</sup> UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 1; European Commission Evaluation of Dublin Convention, 13 June 2001, at 18.

<sup>4</sup> UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 1; European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 29.

<sup>5</sup> See, e.g., Lubbers Statement, 13 Sept. 2002, at 1.



refugee population, and the destination countries have resisted substantial increases, major new resettlement initiatives, and responsibility-sharing agreements.<sup>6</sup> At the same time, they have been steadily erecting procedural barriers to their asylum determination systems. These barriers have included interdiction of vessels on the high seas, filing deadlines, safe country of origin restrictions, detention, denial of employment authorization, penalties for unfounded claims, visa requirements, and sanctions on commercial carriers.<sup>7</sup> Two other procedural barriers -- safe third country and first country of asylum restrictions – are the main focus of this paper.

The premise of both kinds of third country restrictions is that, *under certain circumstances*, an asylum seeker should be somebody else's responsibility. Immigration or refugee officials in the destination country are instructed to refuse to decide such cases and, instead, to return the applicants to the relevant third countries.

These cases subsume several contexts, but they have traditionally been grouped under two headings. One heading covers the so-called "safe third country" concept and related strategies. Under this approach, the state rejects asylum applications filed by individuals who have traveled through countries that are generally thought to be safe and where, it is felt, the person *should have requested* protection. This restriction might be imposed unilaterally or it might be part of an agreement with one or more other countries. The other heading, which covers people who *in fact received* some kind of protection in a third country, is termed "first country of asylum." The precise requirements vary. Both strategies are described in detail in section I below.

In theory, the two concepts are quite distinct; one is for the person who merely "should" have requested protection elsewhere, while the other applies when the person "actually received" protection. A basic thesis of this paper, however, is that in actual practice the two strategies occupy two points on the same continuum. I do not suggest the situations are identical; admittedly, an actual past grant of protection differs from protection that merely *could* or *might* have been granted. Given the wide-ranging forms that "protection" might take and the long list of elements it might comprise, however, the difference between first countries of asylum and safe third countries can best be envisioned as one of degree. In each case, the person spent some amount of time in a third country before arriving in the country where the asylum application was filed. The longer, the more meaningful, the more formal, and the more secure the person's stay in the third country, the more likely it is that the country will be described as a "first country of asylum" rather than a "safe third country."

That thesis affects the paper in two ways. First, it shapes the organization. Most of the law and literature on these two concepts have focused on either one or the other, in isolation. Because the difference between the two concepts is so elusive, and because almost every consideration that the paper discusses applies equally to both, this paper will break with tradition and analyze them together. There is one exception. Section I summarizes the major practical problems associated with the return of asylum seekers to third countries. As will be seen, the frequency with which particular problems surface tends to vary as between

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<sup>6</sup> This subject is discussed in section II.A below.

<sup>7</sup> See, e.g., UNHCR Global Consultations, 31 May 2001; UNHCR Europe Bureau Overview, Oct. 2000, ch. 1; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 1; Legomsky 2000, at 625-34.

the two contexts. For that reason, it is convenient to describe the two sets of problems separately in section I.

More important, the recommendations offered in this paper for determining when it is permissible to return asylum seekers to third countries do not vary as between “safe third country” and “first country of asylum.” Indeed, at least within the context of the return of asylum seekers to third countries, I see no reason for the law even to preserve that distinction. True, by providing some form of past protection, a first country of asylum might trigger treaty obligations that it owes to other states or even to the asylum seekers themselves. But the obligations that *the ultimate destination countries* owe to the asylum seekers are another matter. As to those, the real question in every case where return to a third country is contemplated is what treatment the particular person will receive in the relevant third country *now*, not what happened in the past. Past events might well shed light on what will happen now, but they should not be treated as conclusive. This point is considered more fully below.<sup>8</sup>

A word about terminology: The term “country of origin” will be used here to mean the country in which the applicant originally feared being persecuted and on which the applicant’s present asylum claim is based. The phrase “destination country” will refer to the country in which the applicant hopes to settle permanently and is now applying for asylum. The applicant might have traveled through several countries en route to the destination country, but the term “third country” will generally refer to the particular third country to which the destination country is contemplating return. Consistently with the thesis laid out earlier, “third country” will encompass both “first country of asylum” and mere “safe third country,” normally without distinction.

Destination countries that adopt third country return practices clearly have legitimate interests in reducing irregular migration and also in assuring that their asylum determination systems function smoothly and efficiently. The difficulty is that the returns can give rise to a host of other serious problems. Most are concerns for the asylum seekers. Many are concerns for the third countries. The problems are more fully elaborated in section I below. For now, they can be summarized briefly:

There is, first, the problem of “orbit” – refugees who have escaped from persecution or from other trauma, only to be shuttled consecutively from one country to another. There is the more serious problem of “chain” refoulement, in which the third country in turn refoules the person to his or her persecutors in the country of origin. The third country might not have a fair refugee status determination procedure in place. The third country might not be a party to the 1951 Refugee Convention. The third country might not provide formal refugee or other lawful status or might not provide the kind of documentation that the person needs to procure the necessities of life or to travel. The protection afforded by the third country might not be durable. The third country might be unable to protect the person from discrimination, or persecution, or other human rights violations; indeed, the government of the third country might engage in those practices itself. There might be threats to the applicant’s physical security or basic subsistence. The third country might practice indiscriminate or long-term detention or might otherwise inhibit essential freedom of movement. One recurring problem has been the return of asylum seekers to third countries to which they have no links or connections. There might be serious deficiencies

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<sup>8</sup> See section II.B.10 below.

in the procedures by which the *destination country* itself decides whether return is appropriate in a particular case. Finally, some of the more common destination state practices have the effect of distributing the responsibility for refugee protection inequitably, so that the obligations fall disproportionately on developing countries and on countries whose frontiers are geographically the most accessible.

As this paper will illustrate, there are a number of strategies for reducing the incidence of returns and for ameliorating the effects of such returns when they do occur. One highly respected UNHCR official has put the point eloquently: “For each refugee in this world, there must be one country that offers protection.”<sup>9</sup> Apart from minimizing forced migration in the first place, perhaps no strategic need is greater than to consummate international agreements to share responsibility for refugee resettlement. These and other strategies are among those included in UNHCR’s Agenda for Protection.<sup>10</sup> Although this paper will describe them, its main objective is to address a different question: When does international law, and when does sound practice, permit a country to return an asylum seeker to a third country?

It has generally been assumed that “effective protection” is the predicate for returning an asylum seeker to a third country. In recent years, UNHCR and others have used that term frequently in the present context.<sup>11</sup> Some of the writings discussed throughout the paper consider its meaning, but no comprehensive definition has been advanced. The principal challenge of the present paper is to flesh out a more complete definition. At the same time, effective protection is not the only relevant determinant of when return to a third country is permissible. Issues concerning the necessary links between the applicant and the third country also require discussion. In addition, there are some difficult questions concerning the procedural safeguards that destination countries should provide in deciding whether the relevant substantive criteria have been met. These too will be discussed.

Those issues also generate several broader questions. Precisely how much freedom does a person have to choose the country that will decide his or her asylum claim? How far does the “primary” responsibility of the country in which the asylum application is lodged extend? These and similar questions will be explored at relevant points.

This paper has three sections. Section I supplies the necessary background information. It describes the concepts of safe third country, readmission agreements, agreements to allocate responsibility for determining asylum claims, and first countries of asylum, and it outlines the practical problems that have arisen with each. Sections II and III offer policy suggestions. Section II is general in scope. It first examines the third country question in the broader perspective of other important strategies for addressing the root causes of irregular secondary movements and for protecting refugees after the fact. It then lays out the essential policy premises for the specific criteria formulated in the next section. One of those premises, described in this paper as the “complicity principle,” is that no country may send any person to another country, knowing that the latter will violate rights which the sending country is itself obligated to respect. That premise, together with a qualifying

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<sup>9</sup> Letter from Jean-François Durieux to author, 27 Oct. 2002.

<sup>10</sup> UNHCR Agenda for Protection, 2002, Goal 3, at 13-16.

<sup>11</sup> See, e.g., UNHCR Global Consultations, 31 May 2001, paras. 15 (concerning safe third country), 50(b) (concerning first countries of asylum); UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 1, 6-7; Council of Europe Guidelines on Safe Third Country, 1997, paras. 1(d), 7.

principle under which the degree of certainty encompassed by the word “knowing” would vary inversely with the importance of the right, is developed in section II.B.12 below. Drawing on those premises, section III examines in detail the possible specific criteria for the permissibility of returns to third countries. It concludes with two lists – a list of proposed minimum requirements of international law and a list of proposed best practice criteria.

## SECTION I THE PROBLEMS IN PRACTICE

As the Introduction explains, the mission of this paper is normative – to propose criteria that *should* govern the decision by a destination country to return an asylum seeker to a third country. To be useful, however, the proposed criteria must address real problems, not just hypothetical ones. Moreover, the proposals will be irrelevant if they require more than states and the international community have the practical capacity to deliver.

For both reasons, this section describes some of the problems that have arisen in practice as a result of the involuntary return of asylum seekers to third countries. The present discussion is not a comprehensive account of the problems and practices in all the world’s destination countries and all the world’s third countries. Additional examples clearly exist. Rather, the goal is merely to highlight examples of the problems addressed in this paper so that the criteria discussed in the next two sections can be assessed in practical perspective.

The Introduction also explained that the paper would ultimately propose a common set of criteria to govern the return of asylum seekers to third countries generally. The thesis is that first country of asylum issues, on the one hand, and issues of safe third country, readmission agreements, and agreements to allocate responsibility for determining asylum claims, on the other hand, differ only in degree. The factual differences tend to concern the duration and significance of the protection seeker’s prior stay in the third country. Despite some considerable overlap, however, the frequency with which particular problems arise in practice admittedly varies between the two different settings. For that reason, the organization of this section reflects the traditional distinctions. Subsection A will summarize the problems that typically surface in connection with the concepts of safe third country, readmission agreements, and agreements to allocate responsibility for determining asylum claims. Subsection B will do the same with respect to first countries of asylum.

### **A. Safe Third Countries, Readmission Agreements, and Agreements to Allocate Responsibility for Determining Asylum Claims**

Here are synopses of each of these three concepts, followed by a summary of the problems they collectively pose for both refugees and states:

#### *1. Safe third countries*

In recent years, destination states have made increasing use of “safe third country” restrictions. The government prepares a list of countries that are thought to be “safe” in some generic sense. Typically, asylum adjudicators are then instructed to refuse to decide an asylum claim in substance if the person earlier passed through, and should have sought

asylum in, a third country that is on that “safe” list. The concept might be announced unilaterally by the destination country, or it might be part of a readmission agreement or an agreement to allocate responsibility for deciding asylum claims.<sup>12</sup>

Safe third country restrictions are most firmly embedded in western Europe and occupy a central place in the European Commission’s proposals for harmonized European Union asylum procedures. The Commission’s amended proposal of 18 June 2002 permits member states to classify a third country as safe if the country “consistently observes” international law standards for the protection of refugees and certain non-derogable international human rights standards.<sup>13</sup> The third country may be considered safe for a particular applicant only if the person has close links with that country or had an opportunity to seek protection there. In addition, there must be “grounds for considering” that the third country will indeed admit that applicant to its territory and no grounds for considering that the country is not safe “in his/her particular circumstances.”<sup>14</sup> If all those conditions are met, the EU destination country may declare the application inadmissible and decline to decide it on its merits.<sup>15</sup>

The concept has proliferated, however, beyond its historical western European confines. Many central and eastern European countries now employ safe third country restrictions, often in conjunction with bilateral readmission agreements.<sup>16</sup> In 1996 the United States Congress enacted a safe third country provision conditioned upon the United States entering into a relevant agreement with the third country.<sup>17</sup> In December 2002 the United States and Canada finalized such an agreement.<sup>18</sup> Moreover, as James Hathaway has pointed out, countries sometimes achieve the functional equivalent of a safe third country restriction by denying asylum claims on credibility grounds when the applicants had had the opportunity to apply for asylum in third countries but had failed to do so.<sup>19</sup>

## 2. *Readmission agreements*

In a readmission agreement, each state party promises to readmit certain individuals at the request of another state party. The agreement almost always explicitly obligates each party to readmit its own nationals upon request. Typically it also requires the readmission of certain third-country nationals who traveled through the requested state en route to the

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<sup>12</sup> See generally UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001; UNHCR Considerations on Safe Third Country, 8-11 July 1996; Council of Europe Guidelines on Safe Third Country, 1997; Byrne & Shacknove, 1996; Marx & Lumpp, 1996; Dunstan, Amnesty International, 1995; ECRE, 1995; Hailbronner, 1993.

<sup>13</sup> European Commission Amended Proposal on Asylum Procedures, 18 June 2002, Annex I.

<sup>14</sup> *Ibid.*, art. 28.

<sup>15</sup> *Ibid.*, art. 25(c).

<sup>16</sup> Petersen, 2002, at 353.

<sup>17</sup> 8 U.S.C. section 1158(a)(2)(A).

<sup>18</sup> See section I.A.3 below.

<sup>19</sup> Hathaway, 1991, at 48. In the United States, the Board of Immigration Appeals denied an asylum application on these grounds but the court of appeals reversed. See *Damaize-Job v. INS*, 787 F.2d 1332 (9<sup>th</sup> Cir. 1986). This technique is potentially quite dangerous, because the resulting rejection can give the misleading impression of having been on the substance of the claim rather than on admissibility. The third country might not feel obliged to render what it mistakenly thinks is a second decision on the substance.

requesting state and then either entered or remained irregularly.<sup>20</sup> Only the third-country nationals are the concern of this paper.

Since World War II, hundreds of readmission agreements have been concluded, more than 200 of them since 1990 as developed states began to regard them as strategic responses to irregular movements.<sup>21</sup> All but a few of these agreements are bilateral,<sup>22</sup> the major exceptions being the Dublin agreement (described in the next subsection), an agreement between the Schengen group and Poland,<sup>23</sup> and a recent readmission agreement between the European Union and Hong Kong (expected to be the first of many EU readmission agreements as the EU exercises powers newly granted by the Amsterdam Treaty).<sup>24</sup> The vast majority of the bilateral agreements are between two western European states, or between a western European state and either a central or an eastern European state, or between a central or eastern European state and one of its eastern neighbors.<sup>25</sup> There is also the recently concluded Canada-United States agreement; since it covers more than readmission, it is discussed in the next subsection. In addition, in 2000, Indonesia and Australia entered into a “regional cooperation agreement” that calls upon Indonesia to intercept and detain third country nationals – mainly Afghans, Iraqis, and Iranians – who try to leave Indonesia unlawfully for Australia. Readmission agreements can also consist of provisions contained within larger treaties or even informal bilateral arrangements.<sup>26</sup>

Governments usually envision readmission agreements, first and foremost, as border control strategies. The goal is to facilitate the return of people who have entered their territories or remained irregularly. But asylum seekers inevitably are part of any large irregular secondary movement, and therefore are among those affected by readmission agreements. As long as proper safeguards for asylum seekers are included (a major sticking point discussed below), UNHCR generally prefers readmission agreements over the unilateral application of safe third country notions that fail to guarantee readmission and access to an asylum-procedure in a third country. Properly drafted and implemented, readmission agreements make for a more orderly return process, thus adding at least some assurance that the person being returned to the third country will in fact be readmitted there. The result should be fewer cases in which individuals are forced into orbit by two countries bickering over which readmission.<sup>27</sup> The state party with a net inflow of undocumented migrants, not surprisingly, welcomes the added ease of returning them and might also believe that the readmission agreement gives the other state party added incentive to strengthen the patrol of

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<sup>20</sup> UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 1; Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, paras. 1.4, 4.1.B.

<sup>21</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, paras. 1.5, 1.6 & Annex 5.

<sup>22</sup> *Ibid.* paras. 1.6, 3.1, 3.2.

<sup>23</sup> *Ibid.* para. 4.1.E.

<sup>24</sup> European Commission Press Release on Hong Kong, 2001. In November 2002 the Council mandated the European Commission to negotiate readmission agreements with Turkey, Albania, Algeria, and China; it began debate on a request by Spain to do the same with Mali, Ghana, and Gambia. See Agence Europe (28 Nov. 2002). At this writing the Commission is also negotiating a readmission agreement with Russia. *EU Observer*, 24 Jan. 2003.

<sup>25</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, para. 1.6 & Annex 5; Petersen, 2002, at 353; Abell, 1999, at 65.

<sup>26</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, paras. 3.4, 3.5.

<sup>27</sup> UNHCR Position on Readmission Agreements, 1994, paras. 1, 4; UNHCR Ex. Com. Subcom. on International Protection, Background Note on the Safe Country Concept, 1991, para. 16.

its external border.<sup>28</sup> The latter usually accepts the imbalance either because it has little practical choice or because the other state party has provided incentives, such as good relations, visa-free entry for the nationals of the net outflow country, financial aid, or trade concessions.<sup>29</sup> In practice, readmission agreements are believed to have reduced the problem of orbit and possibly also the magnitude of irregular secondary movements,<sup>30</sup> presumably because there is less incentive to enter a country if one knows that he or she is more likely to be returned. The difficulties of verifying people's nationalities, travel routes, and duration of stay in transit countries, however, have engendered serious proof problems that have limited the intended benefits.<sup>31</sup>

### *3. Agreements to allocate responsibility for determining asylum claims*

A readmission agreement is merely that – an agreement to readmit a person into a state's territory. More ambitious is an agreement in which states settle not only the question of readmission of third country nationals but also the responsibility for determining the affected individuals' asylum claims. By far the farthest reaching and most famous of these agreements is the Dublin Convention,<sup>32</sup> ratified by all fifteen member states of the European Union. The Convention entered into force in 1997 and was extended to Iceland and Norway in 2001.<sup>33</sup>

In a world in which people frequently travel through and spend time in one state before applying for asylum in another, agreeing on responsibility criteria becomes both important and difficult. In Europe, at least two impending developments make the issues even more compelling. First, with the Amsterdam Treaty's integration of the Schengen Acquis into the European Union framework, the gradual abolition of internal border controls within the Schengen zone increases the potential for irregular secondary movements. Second, the enlargement of the European Union will expand the size of the area without internal border controls.<sup>34</sup>

The Dublin Convention laid out the following hierarchy: If the asylum claim was filed in a state where certain close family members legally resided, then that state was responsible for deciding the claim. If no qualifying family members resided legally in the application state, but the applicant had been issued a valid residence permit or visa to enter one of the states parties, then, with some exceptions, the state that issued the permit or visa was responsible for deciding the asylum claim. But in the absence of family members, a residence permit, or a visa, the Dublin Convention assigned responsibility to any member State whose territory the asylum claimant had entered irregularly (by land, sea, or air) from a non-member State. That responsibility lapsed, however, if the person then entered another member State and remained there for at least six months before applying for asylum. In that case, the latter state became responsible. Normally, the member state that was responsible for controlling the person's entry into the territory of the European Union was also responsible for deciding the asylum claim. Exceptionally, however, if a person was admitted to the first member State without a visa and then was similarly admitted to a

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<sup>28</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, para. 1.5

<sup>29</sup> *Ibid.* at 3.

<sup>30</sup> *Ibid.* para. 5.1.

<sup>31</sup> *Ibid.* para. 5.2.

<sup>32</sup> Dublin Convention, 1990.

<sup>33</sup> UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 3.

<sup>34</sup> See European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 11.

second member State without a visa, the latter was responsible. There are special rules for transit visas and for the admission of transit passengers without visas. If none of these criteria could be applied (for example, because of proof problems), the first state in which the person applied for asylum was responsible for determining the claim. Finally, upon the request of the responsible member State, another member State could voluntarily take the case for humanitarian reasons if the applicant so preferred.<sup>35</sup>

The Treaty of Amsterdam required that a Community instrument replace the Dublin Convention,<sup>36</sup> and the Council has now adopted a new regulation for that purpose.<sup>37</sup> The drafting process required the Commission to consider carefully both the benefits of the Dublin system and its weaknesses.

The European Commission staff clearly sees at least modest benefits. The Dublin system furthers the Commission's philosophy – one with which Amnesty International and others disagree<sup>38</sup> – that whichever member State permitted the person to enter the territory of the European Union should generally be responsible for determining the asylum claim.<sup>39</sup> The system improves the chance that some member State will actually decide the claim, thus diminishing the likelihood of orbit.<sup>40</sup> And the system is believed to have reduced the twin phenomena of so-called forum-shopping<sup>41</sup> and multiple asylum claims by the same individuals.<sup>42</sup>

UNHCR endorsed the Dublin Convention early on<sup>43</sup> and continues to applaud the general strategy of adopting agreed rules for states' responsibility to decide asylum claims.<sup>44</sup> Among other benefits, the certainty provided by agreed rules can help diminish the incidence of orbit.<sup>45</sup>

Yet all seem to agree that several practical problems have thwarted the full accomplishment of these aims. Differences among the asylum policies of the member states continue to spur irregular secondary movements; these will continue at least until EU member states' asylum

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<sup>35</sup> Dublin Convention, 1990, arts. 4-9.

<sup>36</sup> European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 8.

<sup>37</sup> European Community, Council Regulation on Dublin II, 18 Feb. 2003.

<sup>38</sup> Amnesty International Comments on EC Proposal Determining Responsible State for Deciding Asylum Applications, 2002, section 3; Hurwitz, 1999.

<sup>39</sup> European Commission Staff Working Paper on Dublin Convention, 21 March 2000, paras. 13(4), 24-26; European Commission Proposal on Determining Responsible State for Deciding Asylum Application, 26 July 2001, explanatory memorandum sections 2.1, 2.2, 3.1.

<sup>40</sup> European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 13(2).

<sup>41</sup> *Ibid.* paras. 13(5), 27-30.

<sup>42</sup> *Ibid.* paras. 13(3), 21-23 (and hoping the Eurodac system will facilitate identification of multiple claims).

<sup>43</sup> UNHCR Ex. Com. Subcom. on International Protection, Background Note on the Safe Country Concept, 1991, para. 14.

<sup>44</sup> UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 14; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2; UNHCR Ex. Com. Conc. 15 (1979), para. h.

<sup>45</sup> UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 2. The European Commission staff agrees the Dublin Convention has somewhat reduced the orbit problem. European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 53.



policies are more thoroughly harmonized.<sup>46</sup> Proving which member State first allowed the person to enter the territory of the European Union can be exceedingly difficult; even when documentary evidence of the person's first entry point once existed, it is often destroyed.<sup>47</sup> The process of identifying the responsible country is painfully slow.<sup>48</sup> The administrative costs are substantial.<sup>49</sup>

Perhaps most striking of all, only in a miniscule proportion of asylum cases did the Dublin process result in actual transfers. The European Commission staff collected aggregate data for a two-year period that covered calendar years 1998 and 1999. In theory, every asylum case filed in a Dublin Convention state first had to be examined for the purpose of identifying the responsible state. Yet, only in 6% of the cases filed during that time span did the state in which the application was filed even request another member state to accept the case. Approximately 70% of those requests were granted, with the result that about 4.2% of all asylum claims were approved for transfer. Then, only about 40% of the approved transfers were actually effected; in many cases, upon learning of the transfer decisions, the applicant disappeared. Consequently, only 1.7% of all asylum claims filed in Dublin states during the period studied were actually transferred.<sup>50</sup>

In the light of those disappointments, the European Commission staff acknowledged candidly that "there seems to be widespread agreement that it is not functioning as well as had been hoped."<sup>51</sup> Indeed, the Commission staff concluded "It is not clear whether, at present, the Convention is producing sufficient benefits to justify the resources which are devoted to its implementation."<sup>52</sup>

Apart from doubts about its effectiveness, the Dublin Convention generated potential dangers for refugees. Along with similar problems emanating from the safe third country concept and readmission agreements, the impact of Dublin-style agreements on refugees is examined in the next subsection.

These difficulties have led some, particularly within the NGO community, to wonder whether it would not be better simply to scrap the current Dublin criteria entirely and instead assign responsibility to the country in which the asylum application is lodged. The European Commission grants that such a "clear, viable system [would meet] a number of objectives; rapidity and certainty; no 'refugees in orbit'; resolution of the problem of

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<sup>46</sup> UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 2; UNHCR Position on Dublin and Schengen, 1991, at 2; European Commission Proposal on Determining Responsible State for Deciding Asylum Application, 26 July 2001, explanatory memorandum section 2.2; European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 53; see generally Noll, 2001.

<sup>47</sup> UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 2; European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 53.

<sup>48</sup> European Commission Staff Working Paper on Dublin Convention, 21 March 2000, paras. 16, 19, 53.

<sup>49</sup> European Commission Evaluation of Dublin Convention, 13 June 2001, at 17-20.

<sup>50</sup> *Ibid.* at 2-3; see also European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 39.

<sup>51</sup> European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 1.

<sup>52</sup> *Ibid.* para. 53.

multiple asylum applications; and a guarantee of family unity.”<sup>53</sup> The Commission dismissed that option, however, as unrealistic at a time when harmonization had not yet been attained.<sup>54</sup> The Commission staff’s working paper added that this alternative neither addresses the problem it calls “forum-shopping” nor comports with the Dublin philosophy of linking responsibility for deciding the asylum claim with “responsibility for controlling the external frontier.”<sup>55</sup> UNHCR has urged the Commission to consider that alternative more fully.<sup>56</sup>

The European Commission’s proposal on the allocation of responsibility for determining asylum claims retains the essence of the Dublin system but with some modest changes. The proposed changes are designed mainly to expand the family-related allocation criteria (particularly by making special provision for unaccompanied minors) and to speed the process of identifying the responsible state.<sup>57</sup> The (separate) European Commission proposal on asylum procedures adds that asylum applications are to be considered inadmissible once a decision has been taken to transfer the case to another member state.<sup>58</sup> In December 2002 the EU member states reached an informal consensus on the Commission proposal, but with some politically sensitive compromises that attach time limits to the responsibilities of the states in which the applicants irregularly entered EU territory.<sup>59</sup>

On the other side of the Atlantic, the United States and Canada have now concluded an agreement to allocate responsibility for examining refugee status claims.<sup>60</sup> Not surprisingly for a bilateral agreement, the text is much shorter and simpler than that of the Dublin Convention. The agreement will govern only those refugee status claims that are lodged at land borders<sup>61</sup> – not those lodged at airports or seaports, not those lodged at non-authorized crossing points, and not “inland” claims filed by those who have already entered the territory.<sup>62</sup> The general principle is that the “country of last presence” – defined to mean either Canada or the United States when the person was physically present there immediately before claiming refugee status at a land border port of entry – is responsible for examining the asylum claim.<sup>63</sup> Exceptions apply in certain cases that involve family unification, transit passengers, arrivals with valid non-transit visas, and arrivals of individuals who are permitted to enter without visas.<sup>64</sup> As with Dublin, the agreement allows either state to examine any claim filed with it even though the other state would

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<sup>53</sup> European Commission Proposal on Determining Responsible State for Deciding Asylum Application, 26 July 2001, explanatory memorandum section 2.2.

<sup>54</sup> *Ibid.*

<sup>55</sup> European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 56.

<sup>56</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 4.

<sup>57</sup> European Commission Proposal on Determining Responsible State for Deciding Asylum Application, 26 July 2001.

<sup>58</sup> European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 25(a).

<sup>59</sup> See Agence Europe (6 Dec. 2002); Reuters (6 Dec. 2002), now European Community, Council Regulation on Dublin II, 18 Feb. 2003.

<sup>60</sup> Canada-United States Agreement, 2002.

<sup>61</sup> *Ibid.* art. 4.

<sup>62</sup> Some have observed that that limitation creates an incentive to enter Canada irregularly rather than present oneself at the frontier. The result, therefore, could be increased resort to professional smugglers. See, e.g., Frelick, 2000, at 1408; Lawyers Committee for Human Rights, 2002, at 4.

<sup>63</sup> Canada-United States Agreement, 2002, arts. 1.1(a), 4.1.

<sup>64</sup> *Ibid.* arts. 4.2, 5.

otherwise be responsible.<sup>65</sup> Unlike Dublin (as discussed below), once a state refers a person to the other state, the agreement requires the latter to examine the application itself, rather than return the person to yet another safe country.<sup>66</sup>

In the year 2001, about 60% of the individuals who filed asylum claims at Canada's ports of entry (i.e., excluding inland claims) arrived in Canada from the United States. The corresponding mid-year figure for 2002 was 72%.<sup>67</sup> In absolute numbers, approximately 15,000 people per year apply for asylum in Canada after passing through the United States; in contrast, only about 200 per year do the reverse.<sup>68</sup> Several explanations have been offered for this imbalance: Asylum-seekers tend to prefer Canada because Canada has higher refugee recognition rates and more favorable reception conditions, including fewer detentions, more liberal access to government assistance, and fewer restrictions on employment.<sup>69</sup> For French-speakers from Haiti or Rwanda, Canada is also linguistically more hospitable.<sup>70</sup> And for those Central American asylum seekers who prefer to file their applications in Canada, the scarcity of direct flights to Canada requires transit through the United States.<sup>71</sup> Thus, the agreement will result in Canada returning more refugee status applicants to the United States than vice versa, a significant consequence in the light of the differences in approval rates and reception conditions.

#### *4. The problems: Safe third countries, readmission agreements, and agreements to allocate responsibility for asylum claims*

The preceding passages have separately described the concepts of safe third country, readmission agreements, and agreements to allocate responsibility for determining asylum claims. Discussion focused on their workings, their intended benefits, and the practical limitations on their accomplishments. What problems have they spawned for refugees and for third states?

##### a. Orbits and chains

These are the two most frequently recurring themes in any discussion of the return of asylum seekers to third countries. The fears are that the person being returned to the third country will then be subjected either to a sequence of cumulatively lengthy involuntary exiles to various other countries before his or her refugee status claim is eventually determined or, worse, to indirect chain refoulement to the country of origin. The fears are real, and they can materialize in any of several ways.

One scenario involves readmission agreements. Designed principally to resist irregular movements, the typical bilateral readmission agreement focuses on returning those who are unlawfully present. Rarely do such agreements make any mention at all of asylum seekers, except indirectly through general language that reminds the parties of their obligations

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<sup>65</sup> Ibid. art. 6.

<sup>66</sup> Ibid. art. 3.

<sup>67</sup> McClintock, 2002; Laghi, 2002.

<sup>68</sup> Frelick, 2002, at 1406.

<sup>69</sup> Frelick, 2002, at 1407; McClintock, 2002; Laghi, 2002.

<sup>70</sup> Frelick, 2002, at 1407.

<sup>71</sup> Ibid. at 1406.

under the 1951 Refugee Convention.<sup>72</sup> Without any specific procedures for asylum seekers, there is always the risk that the country to which the person is returned will chain refole him or her to the country of origin. This risk is quite high. As noted earlier, many of the newer readmission agreements are between a central or eastern European state and one of its eastern neighbors. Many of the latter either do not (yet) have fully developed refugee status determination procedures in place or take impermissibly narrow views of the substantive eligibility criteria for refugee status.<sup>73</sup> In addition, the recent readmission agreement between the European Commission and Hong Kong makes no specific provision for asylum seekers.<sup>74</sup> As noted earlier, the Commission is pursuing similar agreements with such other countries as Turkey, Algeria, Albania, China,<sup>75</sup> and Russia.<sup>76</sup> The Council has additionally decreed that readmission clauses should be “included in all future Community agreements and in agreements between the EC, its Member States and third countries.”<sup>77</sup> The specimen provision that it drafted for this purpose says nothing about refugees and asylum seekers.<sup>78</sup>

The converse problem is the safe third country provision without a readmission agreement. When a country invokes a unilateral safe third country provision to attempt to return an asylum seeker to a third country with which it does not have a readmission agreement, and the third country has not specifically consented to readmit the particular individual, there is at least the potential for orbit. Depending on the third country, a further risk is chain refolement to the country of origin. This scenario has been a longstanding concern of UNHCR and others.<sup>79</sup>

One recent episode will serve to illustrate. In August 2002 a group of nineteen Guatemalans who expressed fear of persecution on grounds of political opinion (and, in some cases, race) arrived by plane at London’s Heathrow Airport, apparently after stopovers in the United States and Spain. The U.K. authorities returned them to Spain, which in turn sent them off to Miami International Airport. From there, United States immigration officials immediately refoled them to Guatemala. At no point in the process did any country assess their refugee claims, despite urgent pleas from Amnesty International to all three governments.<sup>80</sup>

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<sup>72</sup> UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 1; UNHCR Position on Readmission Agreements, 1994, para. 2.

<sup>73</sup> Petersen, 2002; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1, UNHCR Position; see also UNHCR Background Information on Bulgaria, 1999, at 2 (Bulgaria’s readmission agreements with several European countries make no mention of asylum seekers).

<sup>74</sup> European Commission Press Release on Hong Kong, 2001.

<sup>75</sup> See Agence Europe (28 Nov. 2002).

<sup>76</sup> EU Observer, 24 Jan. 2003.

<sup>77</sup> European Council Press Release on Readmission Clauses, 1999, Annex I.

<sup>78</sup> Ibid.

<sup>79</sup> For other illustrations, see Dunstan, Amnesty International, 1995, at 610-12; see also UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 38; UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 3; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1, UNHCR Position, section A.1.c; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2; UNHCR Position on Readmission Agreements, 1994, para. 5; Fullerton, 2001, at 243-50; Abell, 1999, at 66; Goodwin-Gill, 1996, at 90; Marx & Lump, 1996, at 426-27.

<sup>80</sup> Frelick, 2002, at 1404-05.

The Dublin Convention, as already noted, makes ample provision for the assignment of responsibility for determining refugee claims; indeed, that is its very purpose. But even Dublin can give rise to problems of orbit and chain refoulement. UNHCR and others have observed with concern that article 3(5) allows states parties to return asylum seekers to non-party, non-EU Member States that are deemed safe.<sup>81</sup> Thus, the state in which the asylum application is lodged might return the person to a “safe” nonparty state rather than to the state party otherwise responsible under Dublin. Or, the state party in which the asylum application is lodged might return the person to the responsible state party, only for the latter state in turn to send the person on to a nonparty state. The nonparty state might be one that the responsible state regards as safe but that the application state does not. Interestingly, the Canada-United States agreement does not permit the state party to which the person is returned to transfer him or her again to another safe country for determination of the claim; the state to which the person is transferred must decide the claim itself.<sup>82</sup> Nothing in the agreement, however, prohibits either state from returning the person directly to a safe third country rather than to the other state party.

Finally, chain refoulement can result when a person is returned to a country that does not consciously practice refoulement but which lacks a fair refugee determination system. In such a case, an inaccurate determination can result in refoulement. This problem is taken up in the next subsection.

#### b. Denials of fair refugee status determinations by third countries

Many of the third countries to which asylum seekers are returned under safe third country provisions or readmission agreements are assumed to be safe because they are not likely to persecute the particular applicants and do not consciously refoule people to their persecutors. As just suggested, though, refoulement can also result when an inadequate refugee status determination procedure prevents an actual Convention refugee from establishing his or her status to the satisfaction of the refouling state. This has been a major problem.<sup>83</sup>

Readmission agreements to which the central and eastern European states are parties have raised two sets of concerns. In the case of agreements with European Union member states, the main problem has been that many of the eastern and central European states do not (yet) have sufficiently developed asylum procedures in place. Particular problems have included very short filing deadlines, impermissibly broad use of accelerated procedures for “manifestly unfounded” claims, and classifying “safe third country” cases as manifestly unfounded, thus foreclosing substantive determinations of those claims.<sup>84</sup> At the same time, many of the eastern and central European states have concluded readmission agreements

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<sup>81</sup> UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 2; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.2. The European Commission staff acknowledges this problem. European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 20.

<sup>82</sup> Canada-United States Agreement, 2002, art. 3.

<sup>83</sup> See, e.g., UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1, UNHCR Position; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 1 (generally), 6 (might be foreclosed by filing deadlines).

<sup>84</sup> Petersen, 2002, at 353; UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 1-2; UNHCR Background Information on Bulgaria, 1999; UNHCR Background Information on Poland, 1999; UNHCR Background Information on Romania, 1999.

with their own eastern neighbors, whose refugee status determination procedures are often even newer and more problematic.<sup>85</sup>

A related problem is the use of readmission agreements to return asylum claimants to countries that are not parties to the 1951 Convention. All the eastern and central European countries, as well as all the Baltic states, are now parties, but, as of 1 January 2002, some of their eastern neighbors were not.<sup>86</sup> In those and other nonparty states UNHCR has less access to refugees, less opportunity to supervise, and less capacity to verify and promote the safety of those refugees who are returned there.<sup>87</sup> These problems are more fully examined in section III.A.5 below.

#### c. Violations of privacy and confidentiality

A narrower and more isolated problem has been the occasional tendency of third countries to reveal the applicant's identity, whereabouts, or asylum claim to officials of the applicant's country of origin. There have been reported instances, for example, in which Poland has notified the applicant's embassy.<sup>88</sup> Other reports are anecdotal. The dangers to the applicant and his or her family – particularly if protection is ultimately denied and the applicant is returned to the country of origin – are obvious.

#### d. Denials of human rights and human needs

A recurring problem has been the return of asylum seekers, under safe third country provisions, readmission agreements, or agreements to allocate responsibility for determining asylum claims, to countries in which certain fundamental human rights or other basic human needs are systematically denied. One specific and highly controversial issue has been detention. UNHCR has laid out careful and detailed standards on detention,<sup>89</sup> but many countries, including prominent third countries, have not yet met them. The central and eastern European countries again have been problematic in this regard.<sup>90</sup> They are by no means alone, however. Detention practices have been questionable throughout large regions of the world.<sup>91</sup> The Canada-United States agreement has focused renewed attention on both the mandatory detention and indefinite detention policies of the United States.

Detention issues aside, asylum seekers are frequently returned to third countries in which other human rights and human needs are not fully observed. Safe third country provisions seldom take housing and other basic subsistence needs into account.<sup>92</sup>

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<sup>85</sup> Petersen, 2002, at 370.

<sup>86</sup> See 20 Refugee Studies Quarterly No. 4 at 218 (2001).

<sup>87</sup> See UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 35.

<sup>88</sup> UNHCR Background Information on Poland, 1999, at 3.

<sup>89</sup> UNHCR Advisory Opinion on Detention, 2002; UNHCR Revised Detention Guidelines, 1999; UNHCR Ex. Com. Conc. 44 (1986).

<sup>90</sup> In this region generally, detention has frequently been for far too long and under unacceptable conditions. See, e.g., Petersen, 2002, at 354; see also UNHCR Background Information on Romania, 1999, paras. 13-16.

<sup>91</sup> UNHCR Ex. Com. Note on Internat'l Protection, 13 Sept. 2001, at 82; see also UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 6 (calling attention to problem of return to safe third country that detains asylum seekers without access to counsel or to UNHCR).

<sup>92</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c.

e. Absence of links between the applicant and the third country

By confining themselves to questions of safety, the third country return mechanisms described in this subsection tend generally to ignore the applicant's comparative ties to the third country and the destination country. Often, the applicant's brief travels through a third country can result in his or her return there for purposes of the asylum determination. UNHCR has expressed its concerns about the absence of attention to the applicant's ties, both in the safe third country context<sup>93</sup> and (except for family factors) in the Dublin context.<sup>94</sup> The draft Canada-United States agreement similarly assigns no weight to the applicant's connections or lack of connections to any of the relevant countries, again with the important exception of family.<sup>95</sup> Both the Dublin Convention<sup>96</sup> and the Canada-United States Agreement<sup>97</sup> have been criticized for taking inadequate account of these and other links.

f. Deficient procedures for deciding whether to return to third countries

The serious consequences of the return decision make accuracy vital. UNHCR has expressed general concerns about the adequacy of some of the procedures proposed by the European Commission for determining whether an asylum seeker should be returned to a third country.<sup>98</sup> Indeed, the Commission's amended proposal for asylum procedures permits the use of accelerated procedures for this purpose.<sup>99</sup> Moreover, the EU regulation for determining the state responsible for determining asylum claims provides that appeals against the decision to transfer the person to a third country shall have no suspensive effect.<sup>100</sup> UNHCR has objected to that provision both on efficiency grounds and on the ground that it results in unnecessary hardship when the appeal is meritorious.<sup>101</sup>

g. Inequitable distribution of burdens among states

The return policies of destination countries have consequences not only for the protection seekers themselves, but also for the third countries to which the individuals are returned. As UNHCR has observed, unilateral measures such as safe third country domestic legislation are contrary to the spirit of international cooperation and responsibility-sharing.<sup>102</sup> Moreover, they inevitably yield disproportionate responsibilities for the states

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<sup>93</sup> Ibid. ch. 2, sections A.1.a, A.1.c.

<sup>94</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 7 (meaningful links important and should include family, cultural and language ties, and prior residence).

<sup>95</sup> Canada-United States Agreement, 2002, art. 4.2(a,b,c).

<sup>96</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.2.

<sup>97</sup> Lawyers Committee for Human Rights, 2002, at 1, 5-6.

<sup>98</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.2.

<sup>99</sup> European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 23.1(a) allows the use of accelerated procedures for admissibility decisions. Article 25, subsections a, b, and c, in turn classify Dublin determinations, first country of asylum determinations (the focus of section I.B of this paper), and safe third country determinations, respectively, as part of the admissibility decision.

<sup>100</sup> European Commission Proposal on Determining Responsible State for Deciding Asylum Application, 26 July 2001, art. 20.2.

<sup>101</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 12; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.2.

<sup>102</sup> UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 3.

closest to regions of origin<sup>103</sup> – in the case of Europe, the southernmost and easternmost countries.<sup>104</sup>

But even bilateral or multilateral return instruments can raise questions of equity because, in practice, they too inevitably generate highly skewed distributions. Under the Dublin Convention, for example, member states with land and sea borders, especially those in the southeastern reaches of the European Union, have been net recipients of transfers.<sup>105</sup> UNHCR has criticized this imbalance on equitable grounds.<sup>106</sup>

These distributional patterns have potential implications beyond the question of equity. UNHCR has pointed out that, when refugees are returned involuntarily to less developed countries, they tend to move on, usually irregularly. Those secondary movements can have destabilizing effects.<sup>107</sup> In the case of the central and eastern European countries, the returns can also exert dangerous pressure on already fragile asylum determination systems.<sup>108</sup> At a certain point, the burden might reach such a level that the affected third states become tempted to respond with unduly harsh measures of their own.<sup>109</sup>

## **B. First Countries of Asylum**

This subsection will highlight the major refugee movements that involve first countries of asylum, the laws and policies of selected destination countries concerning return to those countries, and the problems encountered by those who are returned.

### *1. Multistate migratory movements*

The itineraries of refugees and asylum seekers, especially those routes that take in one or more third countries, are far too varied to permit comprehensive, or even coherent, description in this paper. There are almost as many refugee travel permutations as there are permutations of countries of origin, third countries, and destination countries in the world. Moreover, not every country can be placed neatly into one of those three categories. A given country might simultaneously be a significant country of origin for some people, a significant third country for others, and a significant destination country for still others; or it might be none of the three. Finally, while UNHCR has compiled excellent data on the refugee populations of individual host countries and even breakdowns by country of origin,<sup>110</sup> there are very few hard data that segregate refugee populations by travel route. Nor are there available data on the *return* of asylum seekers to third countries. By necessity, therefore, this brief discussion of multistate migratory movements will be anecdotal. Most of the major first country of asylum phenomena will be noted, but

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<sup>103</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 6-7.

<sup>104</sup> Marx & Lumpp, 1996, at 434-38.

<sup>105</sup> See European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 35. For subsequent supporting data, see European Commission Evaluation of Dublin Convention, 13 June 2001, at 17.

<sup>106</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 8; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.2.

<sup>107</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 6-7.

<sup>108</sup> Petersen, 2002, at 369.

<sup>109</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 8.

<sup>110</sup> UNHCR Asylum Seeker Statistics 2001.



completeness is not claimed. In this subsection (I.B.1), all the examples of refugee movements that involve first countries of asylum have been distilled from a variety of documents and sources, including discussions with UNHCR officials.

#### a. Africa

Generally, Africa has hosted a heavily disproportionate share of the world's refugees.<sup>111</sup> Many have traveled through multiple third countries before arriving in what are still countries of temporary refuge. In Africa, asylum seekers from neighbouring countries in mass influx situations are generally considered prima facie refugees for the purposes of protection and assistance in the receiving country. The refugee problems in Africa are typically described as concentrated in four regions – west Africa, southern Africa, the Great Lakes region, and the Horn of Africa.<sup>112</sup>

In west Africa, Guinea hosts large numbers of refugees from neighbouring Sierra Leone and Liberia. Ghana too hosts refugees from other west African states; a considerable number of them ultimately seek permanent resettlement in the United States. In southern Africa, a significant number of Congolese, Burundian and Rwandan refugees frequently stay temporarily in Mozambique, Malawi, Zambia, and Zimbabwe before continuing on to South Africa. At the same time a number of Angolans similarly head ultimately to South Africa, often remaining for lengthy periods in Namibia and Zambia; the latter hosts the largest numbers of Angolan refugees. In the Great Lakes region, Kenya and Uganda both host large numbers of Sudanese and (generally long-term) Somali refugees, and Uganda additionally hosts refugees from other Great Lakes countries. Tanzania hosts large numbers of refugees from the Democratic Republic of Congo and Burundi. And in the Horn of Africa, Ethiopia (like Uganda and Kenya) hosts Somalis, while Sudan and Djibouti host Eritreans. A significant number of each of these groups eventually move on to Egypt, Yemen, or more distant Gulf states.

#### b. Central and Southwest Asia, North Africa, and the Middle East

This region, pieced together for UNHCR organizational purposes by the acronym "CASWANAME," has become the site of some of the world's most compelling refugee crises. Pakistan and Iran (the eastern portions of the latter) have each provided temporary refuge to several million Afghans, although with the help of UNHCR many have returned voluntarily since the fall of the Taliban. The former Soviet Central Asian republics have also accepted significant numbers of Afghan refugees.

The western portions of Iran have hosted and continue to host large numbers of Iraqi refugees. Significant numbers of Afghans from Pakistan and Iran as well as Iraqis from Iran pursue the arduous and dangerous journey to Indonesia, and ultimately to Australia. Other Afghan and Iraqi refugees in Iran choose instead to head for Europe, often with stops in either Cyprus or Turkey. Still others prefer to travel to Middle Eastern countries – to Saudi Arabia and Kuwait in the case of the older refugees from the 1980s and the 1991 Gulf War, and to Syria, Jordan, Lebanon, and Egypt in the case of the newer refugees. At the same time, Iraq itself gives protection to Iranian, Turkish, Somali, and Sudanese refugees. Iraq, Jordan and several other Arab states of course also host millions of Palestinians.

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<sup>111</sup> For precise figures, see Crisp, 2002, at 1-2; see also Rutinwa, 2002.

<sup>112</sup> E.g., Crisp, 2002; Rutinwa, 2002.

### c. Europe

The refugee movements in Europe have generally been from southeast to northwest. Refugees from the Balkans, the former Soviet republics, North Africa, Central Asia and the Middle East, among other regions, have frequently made prolonged stops in the central and eastern European countries en route to western Europe.

### d. The Americas

As a result of the agreement between Canada and the United States, attention has focused on the movement of refugees between those two countries. As noted, far more refugees use the United States as a first country of asylum, en route to Canada, than vice-versa. Many Central Americans, Cubans and Haitians have transited through or stayed for lengthy periods in Mexico before traveling to the United States; the same applies to a small but increasing number of extra-continental refugees. More might do the same now that Mexico has become a party to the 1951 Convention. Elsewhere, the mass exodus of Colombians has turned Venezuela, Panama, and Costa Rica into first countries of asylum (as well as destination countries in many instances).

### e. Asia and the Pacific

Indonesia has been at least a transit country for large numbers of Afghans and Iraqis, many of whom have transited through or stayed in other contiguous countries such as Thailand and Malaysia, headed ultimately to Australia. The rigorous interception policy in Australia as well as, possibly, the changes in Afghanistan, which have permitted large scale voluntary repatriation from Pakistan and Iran, have reduced the movement of Afghans to Indonesia. Iraqis continue to come, but the recent interdiction agreement between Indonesia and Australia has diminished that refugee flow as well.

Like others in the region, Malaysia - not a signatory State to the 1951 Convention and without national law and asylum procedures - continues to serve as a substantial first country of asylum, in part because nationals of most Muslim countries do not require entry visas. Thus, it is reportedly common for Iraqi and other Arab refugees to stay in Malaysia and then travel on, including to Australia, sometimes after another stop in Indonesia.

India has become a first country of asylum for Sri Lankan Tamils who want to seek refugee status eventually in either Europe or North America. Cambodia and the Philippines have become significant first countries of asylum as well.

## *2. The responses of the destination states*

For many years, European states have had laws that permit the rejection of asylum claims when the applicants had enjoyed variants of first asylum in other countries. Sometimes the mere fact that the person had applied for asylum elsewhere was enough to trigger the first country of asylum constraint. More typically, the first country of asylum limitation applied when asylum or some other form of protection, even temporary, had been granted.<sup>113</sup> The European Commission's amended proposal for asylum procedures declares asylum applications inadmissible when a non-member state is regarded as a first country of asylum

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<sup>113</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.a.

for the particular applicant.<sup>114</sup> A first country of asylum, in turn, is defined as one in which the applicant has been admitted on refugee or other protection grounds and can still obtain protection there that accords with “the relevant standards laid down in international law.”<sup>115</sup>

The closest United States analog to first country of asylum constraints is the notion of “firm resettlement.” Anyone who was “firmly resettled” in another country before arriving in the United States is ineligible for asylum.<sup>116</sup> The administrative regulations define the term “firmly resettled” to require an offer of some form of permanent resettlement. Even with an offer, however, the person will not be regarded as firmly resettled if his or her entry there was “a necessary consequence of his or her flight from persecution,” the person remained only long enough to arrange onward travel, and he or she established no “significant ties.” Substantial restrictions on the person’s stay will also preclude firm resettlement. Factors that will determine the substantiality of the restrictions include the living conditions for the country’s other residents, housing, employment, property rights, and other rights, such as entry, reentry, public assistance, and naturalization.<sup>117</sup> Interestingly, neither the statute nor the regulations expressly require a showing that the third country would *now* readmit the person and allow permanent resettlement.

In Australia, the 1999 Border Legislation Amendment Act, which amends the 1958 Migration Act, bars a grant of protection to anyone who enjoys “effective protection” elsewhere. The restriction applies when the person was offered the opportunity to reside in a third country even temporarily and had no well-founded fear of persecution there or of refoulement from there to another country.<sup>118</sup> Alternatively, asylum will be barred if the person stayed more than seven days in a country that was declared safe under other legislation.<sup>119</sup>

All of these policies raise questions of international law. Those questions and the official positions taken by UNHCR will be explored in section III.

### 3. *The problems: First countries of asylum*

People who enjoy some measure of protection in one country might migrate irregularly to another country for any of several reasons noted in the Introduction. Whatever the precise motives, there is no doubt that irregular secondary movements have become a growing concern for destination countries, first countries of asylum, the international community, and, most importantly, the refugees themselves.<sup>120</sup> Here are the major problems associated with the return of asylum seekers to first countries of asylum:

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<sup>114</sup> European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 25(b).

<sup>115</sup> *Ibid.* art. 26.

<sup>116</sup> 8 U.S.C. section 1158(b)(2)(vi). The same is true of the offshore refugee resettlement program. See *ibid.* section 1157(c)(1).

<sup>117</sup> 8 C.F.R. section 208.15 (2002).

<sup>118</sup> Migration Act 1958, section 36 (3, 4, and 5).

<sup>119</sup> Migration Act 1951, section 91N.

<sup>120</sup> UNHCR Ex. Com. Conc. 58 (1989), paras. a, e; Lubbers Statement, 13 Sept. 2002, at 1.

#### a. More orbits and chains

As UNHCR's Director of International Protection has recently observed, "non-acceptance of returning irregular movers" by asylum countries has become increasingly frequent, for a variety of reasons.<sup>121</sup> It is probably now the norm for first countries of asylum at least to resist, if not firmly refuse, the readmission of so-called "irregular movers." Syria, Jordan, Lebanon, Iran, and Pakistan routinely refuse readmission to those who enjoyed protection in their territories, left in an irregular manner (for example, without exit visas, a common occurrence because a promise not to return is often required for exit visas), and then were sent back by their destination countries. (Analogous practices are less common in Africa, largely because border control problems are so overwhelming.) When destination countries attempt to return asylum seekers to third countries that will not readmit them, there is at least the risk of orbit and, depending on what the particular third country does next, the further risk of refoulement.

Sometimes refoulement results because faulty procedures lead the third country to conclude erroneously that the person is not a refugee.<sup>122</sup> And sometimes the third country provides a procedurally fair refugee status determination but rejects the application based on an impermissibly restrictive substantive interpretation of the refugee definition, for example because the risk of persecution emanates from non-state agents.

#### b. Lack of formal protection

Many first countries of asylum provide only de facto protection, not formal protection enshrined in law. They might or might not be parties to the 1951 Convention, they might or might not have domestic refugee legislation, they might or might not offer refugee status determinations, and they might or might not have arrangements in place that permit UNHCR to conduct such determinations. Refugees might or might not receive any official immigration status, and they might or might not receive documents that would verify their identity, their status, or their eligibility for work, school, or government assistance. They might or might not receive travel documents. In several countries, the births, deaths, and marriages of refugees and their children go unrecorded. In some cases, nonetheless, even de facto protection has met immediate basic needs. In other cases it has not. A few examples will give a flavor of the variety of arrangements in place.

Throughout Africa, refugee status is normally granted under the OAU Convention rather than under the 1951 Convention; in many such instances, however, the country has enacted no implementing legislation. In Guinea, for example, at least as of the end of 2000, neither the UNHCR-recognized refugees nor the few government-recognized refugees were generally receiving identity documents, and the government was not registering the births of the children of refugees. In Kenya, refugee legislation was pending as of 31 December 2001; documentation has been a major problem.

The Middle East countries tend not to be parties to the 1951 Convention, and actual refugee policies vary. Jordan has no refugee law, but it hosts more than 1,000,000 Palestinian

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<sup>121</sup> Feller, 2000, at 404-05.

<sup>122</sup> Several central and eastern European countries, for example, return asylum seekers to eastern neighbors whose refugee status determination procedures are inadequate. See Petersen, 2002. In some other third countries whose governments do not provide refugee status determinations, UNHCR has taken on this function.

refugees and a large Iraqi refugee population as well. Refugees typically receive documentation, but only as visitors. Syria has no refugee law but generally provides Arab refugees with adequate de facto protection. In contrast, the de facto protection accorded by Lebanon has reportedly not been adequate.

In Asia, as in the Middle East, many of the significant third countries – particularly in South Asia – are not parties to the 1951 Convention. Pakistan, which has received more than 3 million Afghan refugees, is not a party and has no domestic refugee legislation. UNHCR performs refugee status determinations for non-Afghan asylum seekers. Difficulties in registering the births of refugees' children have often produced protection problems. Indonesia and Thailand similarly are not parties to the 1951 Convention and have no domestic refugee laws, although Thailand has received more than 200,000 refugees from Myanmar, many formally registered and others not. Children born in Thai refugee camps often receive no birth certificates; urban refugee births are reportedly more carefully registered. China is a party to the 1951 Convention but has no refugee laws; UNHCR performs refugee status determinations.

#### c. Exposure to persecution

In many first countries of asylum refugees face persecution that rivals the persecution in their countries of origin. In Pakistan, there have been reports of discriminatory enforcement of the immigration laws against certain groups of Afghans, harassment by local police and segments of the population, and reports of Taliban threatening and jeopardizing the safety of individual Afghan refugees. The situation of Afghan refugee women in Pakistan can also be quite dangerous, particularly for educated women and for women heads of households. In several other countries, including Indonesia and Kenya, urban refugees have been harassed and assaulted by local populations, with little or no protection from the police.

#### d. Threats to human rights and human needs

In a number of first countries of asylum, refugees face the loss of fundamental human rights and threats to basic human needs. Physical security has become increasingly fragile. Refugees in leading third countries have experienced a rather sudden escalation in violence, particularly in camps but in urban areas as well. The problem is worldwide but has been worst on the African continent, where refugees have been subjected to military attacks by national security forces and enemy forces, as well as assaults by local authorities, local populations, and common criminals. There have also been violent ethnic feuds within the refugee community, and refugee camps have, in some instances, become breeding grounds for both sexual assaults and domestic violence against women refugees.<sup>123</sup>

In recent years some of the worst violence has taken place in Rwandan refugee camps in the Democratic Republic of the Congo.<sup>124</sup> Refugees in Guinea have also had to fear for their lives. After cross-border attacks from Sierra Leone and Liberia, local populations drove thousands of refugees from their homes; other refugees dared not venture outside their camps. In the past, Kenyan refugee camps similarly became highly dangerous places, with

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<sup>123</sup> See, e.g., UNHCR Ex. Com. Note on International Protection, 13 Sept. 2001, at 76-78; Crisp, 2002, at 6-7; Rutinwa, 2002, at 26-27.

<sup>124</sup> Rutinwa, 2002, at 26-27.

frequent episodes of ethnic and tribal fighting, criminality, abusive detention, domestic violence, and rape, as well as female genital mutilation and child marriages.

But it is not just a matter of physical security. Basic subsistence is a major issue, particularly in the many third countries that are struggling to sustain their own native populations. In part, the problem is the lack of employment opportunities. Governments of third countries, like those of destination countries, are anxious to reserve jobs for their own nationals. The legal status and documents problems noted earlier are related obstacles. In many of the most important third countries, the laws do not permit refugees to work; nonetheless, not surprisingly, large numbers work illegally and are essentially tolerated. That is the case, for example, in Africa generally, Syria, Jordan, Iran, Thailand, Indonesia, China, and Pakistan.

Subsistence thus continues to be a central concern in temporary refugee populations. In African states, where extraordinary generosity had been the rule throughout the 1960s, 1970s, and 1980s, there is universal agreement that that is no longer the case.<sup>125</sup>

The education of refugee children has been a major problem in many of the first countries of asylum, though in others either the governments or UNHCR, sometimes with help from NGOs, provide either education or funding. Often, of course, the particular country is one that fails to provide education for its own nationals. In other cases, refugee children do not have access to schools attended by the country's own nationals. Here again, the lack of formal status and documentation can be a fatal obstacle. Sometimes education is offered within refugee camps, but safety, cultural barriers, and UNHCR funding shortages have hampered those efforts.<sup>126</sup>

In Africa generally, a majority of first countries of asylum provide no education at all to refugee children; for the continent as a whole, only about 40% of refugee children receive primary education. In Pakistan, UNHCR and NGOs are funding formal primary education for approximately 134,000 refugee children and special programs for refugee girls, whose education often meets cultural resistance. Iran permits documented refugee children to attend school, but many of the refugees are undocumented and therefore cannot attend. Indonesia provides no free public education to refugee children, but often UNHCR is able to pay the fees. And in Thailand a majority of refugee children attend school, but a sizeable minority do not, frequently because of language difficulties.

Freedom of movement remains a huge issue in first countries of asylum. The most obvious restriction on freedom of movement is detention, which remains widespread in numerous countries in the Americas, Europe, and Asia.<sup>127</sup> Conditions of confinement are frequently unacceptable, especially for children.<sup>128</sup> The United States policy of detaining various categories of asylum seekers has raised fresh concerns in the light of the recent readmission agreement between Canada and the United States. Indonesia reportedly often detains asylum seekers whom Australia returns.

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<sup>125</sup> The historical forces that have generated this dramatic attitudinal change are well summarized in Crisp, 2002, at 4-6; Rutinwa, 2002, at 13.

<sup>126</sup> UNHCR Ex. Com. Note on Internat'l Protection, 13 Sept. 2001, at 88.

<sup>127</sup> *Ibid* at 82.

<sup>128</sup> *Ibid*.

Even refugees who are not detained are often seriously restricted in their movements within the country. Many first countries of asylum forbid refugees to leave their camps without special permission.<sup>129</sup> In Africa generally, these restrictions are frequently enforced with roadblocks, searches, and interrogations; without documents, refugees can find those practices formidable. Kenya in particular rarely allows camp refugees into urban areas; many refugees go anyway but, if apprehended, are arrested for unlawful presence. Iran puts significant curbs on refugees' freedom of internal movement. Thailand restricts refugees from leaving camps without permission and is reported to have deported violators.

General discrimination issues have also become more pressing. UNHCR has recently observed that racism and xenophobia are causing renewed discrimination by both authorities and local populations against refugees, with implications not only for safety, as discussed earlier, but also for successful integration. The report went on to say that "the authorities in many States have subjected refugees and asylum seekers to arbitrary arrest, beatings, extortion, harassment and deportation on the basis of their physical appearance, skin colour, nationality or ethnic origin," in addition to reports of discrimination in the issuance of work permits and medical care.<sup>130</sup>

In many third countries, gender discrimination has been particularly serious. In Jordan, for example, discrimination against women is perfectly legal. Nationality laws are discriminatory. A woman – including a citizen woman, not just a refugee – may not leave the country or obtain travel documents without her husband's consent. When a man kills his wife or other close female relative as punishment for her alleged illicit sexual relations, the man is not punished. Analogous problems exist elsewhere.<sup>131</sup>

Child refugees face especially acute dangers in many of the third countries that host refugee populations.<sup>132</sup> In Pakistan, for example, apart from the deprivations of education noted earlier, children are often exploited through "forced or bonded labour, sexual abuse, early marriage, domestic violence, kidnapping and alleged incidences of trafficking." In Iran, more and more child refugees without families become street children.

#### e. Absence of durable solutions

Durable solutions – meaning solutions that will last for at least as long as the refugees need international protection – are in extremely short supply. For the most part, third countries make clear that the refugees are welcome only for temporary stays, with no expectation of local integration. They typically lack the resources for local integration and also fear its magnet effects. Since the late 1980s, African states have generally disavowed local integration.<sup>133</sup> The same is true, to give just a few examples, in Jordan (except for Palestinians), Thailand, Indonesia, and China (except for older Indochinese refugees of Chinese ethnicity).

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid, at 80.

<sup>131</sup> See generally UNHCR Refugee Women Guidelines; UNHCR Ex. Com. Conc. 64 (1990); UNHCR Ex. Com. Conc. 60 (1989); UNHCR Ex. Com. Conc. 54 (1988); UNHCR Ex. Com. Conc. 39 (1985).

<sup>132</sup> See generally UNHCR Ex. Com. Conc. 84 (1997); UNHCR Ex. Com. Conc. 59 (1989); UNHCR Ex. Com. Conc. 47 (1987).

<sup>133</sup> See, e.g., Crisp, 2002, at 3; Rutinwa, 2002, at 13.

Yet, the other two traditional durable solutions – voluntary repatriation and permanent resettlement elsewhere – are also either unreliable or scarce. Thus, in first countries of asylum like Pakistan, Iran, Thailand, Indonesia, China, Jordan, and Syria, for example, the percentages of refugees accepted for permanent resettlement elsewhere is negligible in relation to the entire refugee populations of those countries. Consequently, there is heavy reliance on voluntary repatriation, often well before countries of origin are able to absorb large influxes of returnees. The combination of severe limitations on all three traditional avenues leaves refugees who are in first countries of asylum with tenuous futures.

f. Inadequate procedures for deciding returns to first countries of asylum

Section I.A.4.f discussed the procedures that destination countries sometimes use for deciding whether to return asylum seekers under safe third country provisions, readmission agreements, or agreements to allocate responsibility for determining asylum claims. Essentially the same procedures are normally used for deciding whether to return asylum seekers to first countries of asylum. Thus, the same concerns apply.

g. Inequitable distribution of international responsibilities

Similarly, most of what has been said about the inequitable distribution of international responsibility in the context of safe third country provisions and related agreements<sup>134</sup> applies with at least equal force to first countries of asylum. Return policies often contravene the spirit of international collaboration and equitable responsibility-sharing that the 1951 Convention and modern reaffirmations envision. They also impose disproportionate burdens on the regions of origin, because refugees invariably transit nearby countries en route to their ultimate destinations. To make matters worse, the regions of origin tend typically to be developing regions with overwhelming social and economic problems of their own. Equity aside, returns can exert pressure on already fragile refugee protection systems in first countries of asylum, with unpredictable and destabilizing effects. Reversing decades of generosity, African countries have already responded with drastic restrictive measures, for reasons that were noted in the Introduction to this paper.

## SECTION II POLICY PRESCRIPTIONS – GUIDING PRINCIPLES

Section I suggests that the involuntary return of asylum seekers to third countries can have serious consequences, both for the individuals concerned and for the states to which they are returned. What can be done?

### **A. Solutions in Perspective**

The main task of this paper is to suggest criteria for the return of asylum seekers to third countries. Perspective is required. Identifying the conditions under which return should be permitted is vital, but it should be just one element of a comprehensive framework that also aims to do two other things -- reduce the number of cases in which the issue of return even arises and minimize the adverse effects of those returns when they do occur. This package of initiatives embodies both current, ongoing strategies and possible new ones.

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<sup>134</sup> See section I.A.4.g above.



To visualize that framework, one might think of the return problem in four parts. The first segment is the primary movement from the country of origin to the third country. The second segment is the secondary movement, frequently irregular, from the third country to the destination country. The third segment is the person's involuntary return from the destination country back to the third country. And the fourth segment is the period that follows the return.

The policy framework for solving the problems associated with third country returns can be seen as tracking these four phases of the return sequence. The strategies should be to attack the root causes of primary forced migration to third countries; diminish the need for irregular secondary movement to destination countries; reduce the incentives of destination countries for forced return of asylum seekers to third countries; and, when such returns nonetheless occur, develop and implement strategies for minimizing their adverse effects. So ambitious an undertaking requires an elaborate partnership of states, NGOs, UNHCR, and the rest of the international community.

### *Segment 1: Reducing primary forced migration*

In actual fact, most of the relevant strategies are already in place or at least familiar. The root causes of primary forced migration surely include, for example, human rights violations, armed conflict, natural disaster, economic collapse, and other serious disturbances of public order. The commonly prescribed policy responses – peacemaking and peacekeeping efforts, development aid, disaster relief, and carrots and sticks intended to curb human rights abuses – are equally well known. The principal impediments to success have been finite international resources and lack of political will.

### *Segment 2: Making irregular secondary movements unnecessary*

Once primary forced migration has occurred, the most viable tools for reducing irregular secondary movement include the three traditional durable solutions to refugee flows – voluntary repatriation to the country of origin when conditions permit, local integration in the first country of asylum, and (orderly) permanent resettlement elsewhere.<sup>135</sup>

#### a. Voluntary repatriation

UNHCR has long emphasized voluntary repatriation as the preferred alternative and the solution desired by the largest number of refugees.<sup>136</sup> It enables refugees to return home when the conditions that required their escape no longer exist, provides an opportunity for them to help rebuild their countries of origin, and relieves pressure on both third countries and destination countries. More relevant here, effective voluntary repatriation programs diminish the need for the kinds of irregular secondary movements that give rise to issues of return to first countries of asylum. Yet the difficulties are often formidable. The traumas that impelled refugees to flee their original homelands might prevent them from resuming their lives there in a successful way. Refugees might already have begun rebuilding their lives and establishing close bonds with their host countries. The countries of origin,

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<sup>135</sup> See, e.g., UNHCR Ex.Com. Conc. 22 (1981), para. 1.2 (concerned with large-scale influxes); UNHCR Ex. Com. Standing Com., *New Directions*, 2001, 13 *Internat'l J. Refugee L.* at 690-91.

<sup>136</sup> E.g., UNHCR Ex. Com. Conc. 58 (1989), para. d(ii).

typically developing countries to start with, might not have recovered from the events that spawned the flow of refugees and might lack the economic resources to support a large returnee population. Under such circumstances, large-scale repatriation can be destabilizing. Moreover, political pressures within both destination countries and third countries might tempt those governments to lobby for repatriation to the countries of origin before conditions in the latter have sufficiently improved.

#### b. Local integration

Local integration in first countries of asylum could also serve to reduce irregular secondary movement, but this tool is frequently even more problematic than voluntary repatriation. As discussed in the Introduction, most countries of first asylum are developing countries that lack the resources to support large refugee populations, have nonetheless displayed exceptional generosity in hosting a disproportionate share of the world's refugees already, and are growing increasingly exasperated with what they perceive as an inequitable allocation of the burdens associated with refugee flows. In recent years, consequently, they have become far less inclined to accept new refugees or maintain past levels of generosity. Still, as the discussion below suggests, there might well be legitimate inducements for first countries of asylum to resume their traditional generosity and practical ways to strengthen their capacities for local integration. UNCHR has actively promoted capacity-building in this and other contexts.<sup>137</sup>

#### c. Permanent resettlement in destination countries

The third traditional durable solution – permanent resettlement elsewhere – is similarly relevant here. Expanded opportunities for orderly resettlement hopefully would diminish (admittedly not eliminate) the incentive or the need for irregular secondary movements. In addition, when refugees nonetheless move irregularly from countries of first asylum to participating resettlement countries, perhaps the latter will be more willing to decide the cases in substance if the number of asylum approvals counts toward the figure the country has agreed to resettle from overseas.

Ideally, commitments to accept refugees for permanent resettlement would be pursuant to international responsibility-sharing agreements (discussed below in more detail). Even unilateral commitments, however, are highly beneficial. In recent years, therefore, UNHCR has renewed its efforts to expand the number of permanent resettlement opportunities for refugees currently in first countries of asylum.<sup>138</sup> Those efforts have borne fruit. Since 1997, UNHCR has expanded the number of resettlement countries from ten to eighteen.<sup>139</sup>

Once a country commits to resettlement, the process can take any of several forms. These include taking applications for international protection at embassies or other designated foreign sites, including countries of origin, first countries of asylum, and transit countries.

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<sup>137</sup> See, e.g., UNHCR Global Consultations, 19 April 2002; UNHCR Global Consultations, 16 April 2002, section IV.

<sup>138</sup> UNHCR Ex. Com. Standing Com., *New Directions*, 2001.

<sup>139</sup> Until 1997 the only ten resettlement countries were Australia, Canada, Denmark, Finland, the Netherlands, New Zealand, Norway, Sweden, Switzerland, and the United States. The eight new ones are Argentina, Benin, Brazil, Burkina Faso, Chile, Iceland, Ireland, and Spain. *Ibid.* at 693 nn. 1,2; see also UNHCR Ex. Com. Note on International Protection, 13 Sept. 2001, 20 Refugee Survey Quarterly, issue 4, at 69, 99 n.51 (2001).

The resulting documentation might be a humanitarian visa, an entry permit, or some other document, but the key is that the resettling country approves the person's admission and issues the necessary documentation *before* that person travels to its frontier. Dubbed "protected entry procedures," their virtues have been extolled.<sup>140</sup>

As discussed earlier, destination countries have discovered ever more creative ways to deny access to their "onshore" asylum determination systems. The combination of visa regimes, carrier sanctions, safe third country and first country of asylum constraints, filing deadlines, vessel interdiction, and other devices have precluded substantive determinations of asylum claims in large numbers of cases.<sup>141</sup> Resettlement assumes heightened importance in such a world. If the only way to apply for international protection is to appear physically at the frontier of the requested state, and if that requested state either blocks physical access to the frontier or erects procedural barriers to those who gain physical access, then those in need of protection lose all meaningful opportunities to have their claims decided in substance. While not a substitute for asylum, orderly resettlement thus becomes a critical supplement.

The other benefits, as well as the risks, of protected entry procedures are thoughtfully discussed by Noll and Fagerlund.<sup>142</sup> Probably the chief benefit is that of "identifying deserving beneficiaries at the earliest stage possible, which may assist in cutting fiscal, social and other costs both for the potential host country and for the protection seeker." The applicant avoids the costs and physical risks associated with human smuggling, which for many applicants would be the practical alternative. To the extent these procedures restrict the market for smugglers, they also spare destination states some of the costs of anti-smuggling enforcement operations. In addition, orderly external procedures constructively shift the emphasis of individual determinations away from travel itinerary issues and toward issues of protection needs. They also minimize the reception costs for destination states pending determination of the claims, and they permit the integration process to start the moment the approved applicant arrives in the destination state. Nor need destination states worry about the return of rejected applicants; they become the problem of the country in which the application process occurs. Finally, these and other resettlement mechanisms contribute to international collaboration generally and responsibility-sharing particularly. Those contributions are greatest when they are part and parcel of an international agreement, but the benefits are appreciable even when the resettlement offers are unilateral.<sup>143</sup> In the words of UNHCR, resettlement is "an expression of international solidarity and burden or responsibility-sharing."<sup>144</sup>

Noll and Fagerlund also acknowledge costs and risks. Depending on where the applicant is situated, waiting for a decision outside the destination state might entail security risks. Destination states might be tempted to rely on these external procedures to further restrict access to their domestic asylum systems. The reception costs that the destination state avoids are passed on to the country in which the application is processed – either the country of origin or a third country. The same is true of the problem of rejected protection

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<sup>140</sup> See, e.g., Noll & Fagerlund, 2002; Petersen, 2002, at 355-56; ECRE Conference Statement, 2002. Speaking specifically about refugees who come from countries that do not normally generate refugees, the High Commissioner recently suggested protected entry procedures at EU member state embassies in countries of origin or regions of origin. See Lubbers Statement, 13 Sept. 2002, at 3.

<sup>141</sup> Legomsky, 2000, at 625-34.

<sup>142</sup> Noll & Fagerlund, 2002, at 18-21.

<sup>143</sup> *Ibid.*

<sup>144</sup> UNHCR Ex. Com. Standing Com., *New Directions*, 2001, at 691.

seekers. They too become the problem of the typically less affluent state where the application is processed. And for various reasons the procedural safeguards are typically weaker in external processing than in traditional internal processing.<sup>145</sup>

*Segment 3: Dampening the incentives for returns after irregular secondary movements*

Despite the best efforts by all concerned, some substantial level of primary forced migration will occur, and some substantial level of irregular secondary movements will follow. As one element of permanent resettlement, and as one form of responsibility-sharing, measures to entice destination states to return fewer of the protection seekers who arrive from third countries are yet another strategy to be investigated. The burdens that destination states should be encouraged to assume include, among many other possibilities, two that are of special relevance here. The first is to accept responsibility for deciding the protection claim rather than return the person to a third country for a substantive determination. The second is to grant protection in the event the claim is found to have merit. The types of inducements and agreements that might prove acceptable to destination states are discussed below, under the heading “Inducements for Destination States and Third States.”

*Segment 4: Minimizing the adverse effects of returns when they do occur*

One must assume that there will always be a certain number of returns. Hopefully states will not return asylum claimants to third countries without adequate guarantees of effective protection. The specific criteria formulated in section III of this paper are meant to facilitate that determination. In this imperfect world, however, one cannot assume universal conformity to this desired practice. Returns will take place, and inevitably some returns will take place even when effective protection is unlikely. A separate set of strategies, therefore, should aim to minimize the adverse effects of those returns that do occur. These strategies might entail encouraging third countries to grant readmission, to resettle these individuals for the duration of their protection needs or at least until a more durable solution can be found, and to provide effective protection in all other essential respects. The strategies should also strengthen the strained capacities of these third countries to do all these things. As noted earlier, UNHCR has encouraged a range of capacity-building efforts along these lines.<sup>146</sup>

*Strategies that cut across two or more segments*

Some strategies for addressing the problems associated with returns of asylum seekers to third countries cannot be so neatly correlated with exactly one phase or segment of the return chronology. Here are a few of them:

a. Harmonization

Efforts to harmonize the asylum laws of the various destination states within a particular region are firmly linked to issues of irregular secondary movements and therefore to returns to third countries. Harmonization is most advanced, and the subject is most topical, in the European Union. There are also elements of harmonization within Africa, mainly as a

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<sup>145</sup> Noll & Fagerlund, 2002, at 18-21.

<sup>146</sup> See UNHCR Global Consultations, 19 April 2002; UNHCR Global Consultations, 16 April 2002, section IV.

result of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the comprehensive implementation plan adopted by the special OAU-UNHCR meeting of experts in Conakry in March 2000.<sup>147</sup> The same can be said of Latin America, though to a lesser degree, in the light of the 1984 Cartagena Declaration on Refugees and the 1994 San JosJ Declaration on Refugees and Displaced Persons.<sup>148</sup> With the new readmission agreement between Canada and the United States,<sup>149</sup> harmonization could become a key issue in North America as well.

UNHCR has endorsed the concept of harmonization as a way to strengthen refugee protection.<sup>150</sup> UNHCR generally prefers universal interpretation of refugee law instruments, believes that harmonization can actually elevate refugee standards in some of the affected countries, and in the specific context of the EU notes that *some* of the proposed EU standards might even exceed the requirements of international refugee law. At the same time, UNHCR support is conditioned upon harmonization conforming to international refugee law and not lowering refugee protection standards.<sup>151</sup>

Aside from these generic benefits and concerns, harmonization might well be a sound policy response to the problems posed by irregular secondary movements and returns to third countries. With respect to segment 2, harmonization should be expected to discourage some of the irregular secondary movement both into and within a given region -- particularly within Europe,<sup>152</sup> where harmonization is more advanced and where inter-country living standards are less differentiated than in many other regions. With respect to segment 4, harmonization should make returns to third countries located *within the harmonized region* (admittedly not returns to third countries outside the region) less problematic. Without harmonization, both the probability of being recognized as a refugee and the treatment during and after the asylum determination process hinge on which country is the decisionmaker.

The more elements of a region's asylum laws are harmonized, the more likely it is that the harmonization will discourage irregular secondary movement and the less impact a return will have on the outcome of the asylum determination. The European Union is pursuing harmonization on an impressive range of fronts. The Council has already adopted a directive on minimum standards for the reception of refugees pending asylum determinations<sup>153</sup> and a regulation on identifying the responsible state for deciding asylum

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<sup>147</sup> See UNHCR Ex. Com. Note on Internat'l Protection, 7 July 2000, at 65.

<sup>148</sup> *Ibid.* at 66.

<sup>149</sup> See section I.A.2 above.

<sup>150</sup> UNHCR Global Consultations, 31 May 2001, para. 18; UNHCR Ex. Com. Note on Internat'l Protection, 7 July 2000, at 65.

<sup>151</sup> Petersen, 2002, at 361.

<sup>152</sup> See especially the recent comment of the High Commissioner on this subject. Lubbers Statement, 13 Sept. 2002, at 2 ("I agree with the Danish Presidency that differing eligibility standards, resulting in differing recognition rates, are a major cause of secondary movements within the EU.")

<sup>153</sup> European Community, Council Directive on Reception of Asylum Seekers, 27 Jan. 2003; see also UNHCR Ex. Com. Conc. 93 (2002).

claims;<sup>154</sup> the European Commission has proposed additional Council directives on the substantive criteria for qualifying as a refugee<sup>155</sup> and on procedures.<sup>156</sup>

There has been widespread support for harmonizing the substantive criteria for qualification as a refugee.<sup>157</sup> The issue took on new importance in 2000 when the European Court of Human Rights decided *Matter of T.I.*<sup>158</sup> There, a Sri Lankan asylum seeker who alleged persecution by non-state actors applied for asylum in Germany, lost his case principally because Germany does not normally recognize claims based on non-state persecution, and went on to the United Kingdom, a country that normally does recognize such claims. Rather than determine his claim, the UK government ordered him returned to Germany under the Dublin Convention. The European Court of Human Rights held that the European Convention's prohibition of torture or "inhuman or degrading treatment or punishment" did not bar his return to Germany. The Court found that under German domestic law there was no "real risk" of Germany re-fouling him to Sri Lanka. If the Court's factual finding was correct, T.I. will avoid the harm that the European Convention is meant to prevent. But the Court's ruling means that in future cases the Dublin Convention or its successor regimes could cause the outcome of an asylum claim to hinge on where the claim is decided. Consequently, there remains an incentive for irregular secondary movement of asylum seekers and the potential for disparate treatment in cases in which return is permitted. Conversely, on those occasions when national courts have blocked Dublin Convention returns because of substantive differences,<sup>159</sup> the objectives of Dublin are to that extent impeded. Either way, the gaps in harmonization have negative effects.

There is similar support for harmonizing other features of national asylum laws – particularly procedures,<sup>160</sup> the now adopted rules for determining the responsible asylum state,<sup>161</sup> reception conditions for asylum seekers, and the integration of recognized refugees

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<sup>154</sup> See section I.A.3 above; see also UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002.

<sup>155</sup> European Commission Proposal on Qualifications for Refugees, 9 Dec. 2001; see also ECRE Comments on EC Proposal on Qualifications for Refugees, March 2002.

<sup>156</sup> European Commission Amended Proposal on Asylum Procedures, 18 June 2002; see also UNHCR Observations on EC Proposal on Asylum Procedures, July 2001 (commenting on European Commission's original proposal of 20 Sept. 2000).

<sup>157</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 3; UNHCR Position on Dublin and Schengen, 1991, at 2.

<sup>158</sup> *T.I. v. United Kingdom*, Decision as to the Admissibility of App. No. 43844/98 (Euro. Ct. Human Rights 2000).

<sup>159</sup> See, e.g., European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 51; see also Noll, 2001, at 10-16, discussing the T.I. case and a U.K. case, *R. v. Secretary of State for the Home Dept.*, ex parte Adan and Aitseguer (House of Lords, 19 Dec. 2000).

<sup>160</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 3; UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, paras. 14, 15.

<sup>161</sup> See section I.A.3 above; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 3; UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, paras. 14, 15 (especially the responsibility rules that authorize returns to safe third countries); European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 20 (concerned that differing applications of safe third country concept could lead to chain refoulement).

into their host societies.<sup>162</sup> Experts at UNHCR have called attention to one problem of particular concern to Africa – the tendency of some countries to select refugees for permanent resettlement on the basis of which African country has given them first asylum. Refugees who discern those patterns might tend to seek temporary asylum in whichever countries appear to offer the best hope for eventual transfer to permanent resettlement countries. The result can be so-called “forum-shopping” for the most promising first countries of asylum, either during the primary movement or by means of secondary movement. Ideally, resettlement countries should not select their refugees on the basis of where they enjoy first asylum. Under less than ideal conditions, however, the preferences of resettlement countries are clearly relevant. Moreover, not all first countries of asylum treat refugees equally; unusually hard conditions in a particular first country of asylum might be a perfectly valid basis for special priority.

#### b. Responsibility-sharing agreements

At a time when the burdens and responsibilities that flow from the massive displacement of people have been distributed so unevenly among the world’s regions and countries, the concept of equitable “burden-sharing” agreements has attracted growing interest. The term has been recognized to be an unfortunate one, since focusing primarily on the burdens of protection seems inappropriate when the human tragedy is so compelling. Moreover, refugees bring not only “burdens” but also benefits and opportunities. As the United Nations High Commissioner for Refugees, Mr. Ruud Lubbers, has forcefully emphasized, refugees should be recognized as “agents of development” in their host countries.<sup>163</sup> Finally, burdens do not eliminate obligations. It is useful to have terminology that makes that point. For these reasons, many people now prefer the term “responsibility-sharing.”<sup>164</sup>

By whatever name, these agreements embody mutual commitments to contribute to solutions. The most common discussion context is an agreement by participating states to accept specified numbers of refugees for permanent resettlement, but other forms of “burden-sharing” are also possible. These might include agreements to accept responsibility for deciding asylum claims, to give money or in-kind aid to sustain refugee populations elsewhere, to share information, to control one’s external borders, or to take preventive measures by contributing to training, peacekeeping, diplomatic, or even military

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<sup>162</sup> In Africa, for example, UNHCR is interested in harmonizing OAU Convention implementation practices related to integration, such as registration, identification documents, education, and employment.

<sup>163</sup> Lubbers Speech, 5 July 2002. UNHCR has made this theme an important component of its global strategy and has discussed several promising partnerships along those lines. See, e.g., UNHCR Ex. Com. Standing Com., Economic and Social Impact of Refugee Populations, 2002; UNHCR Ex. Com. Standing Com., Economic and Social Impact of Refugee Populations, 2001.

<sup>164</sup> UNHCR Ex. Com. Chairman’s Summary of International Solidarity, 12 Oct. 1998, 17 Refugee Survey Quarterly No. 4 at 37; UNHCR Copenhagen Paper on Burden-Sharing, 15-16 June 1998, at 1.

efforts.<sup>165</sup> An agreement could also allow different parties to make “differentiated” kinds of contributions.<sup>166</sup>

Whether or not one wants to highlight the burdens of refugee resettlement vis-à-vis the contributions of refugees or the obligations of states, it must be frankly acknowledged that refugees do generate burdens, at least in the short term. These burdens include pressure on the host nation in such areas as infrastructure, food, energy, transportation, employment, education, health, water supply, administration, and the environment, and they can pose challenges for social harmony, peace, and security.<sup>167</sup>

Exacerbating the problem is the sad reality that the burdens have tended to fall disproportionately on developing countries of first asylum.<sup>168</sup> Responsibility-sharing has also been a persistent issue in Europe, however, as those states whose geographic location makes them the first points of arrival for most refugees end up receiving disproportionate percentages of asylum seekers.<sup>169</sup> The problems are especially acute in cases of mass influx. It is in these cases that states have been the most receptive to burden-sharing agreements.<sup>170</sup>

While international law imposes no obligation on states to accept refugees for permanent resettlement,<sup>171</sup> agreements to share responsibility for doing so are highly beneficial and therefore strongly encouraged by UNHCR and others.<sup>172</sup> The principal gains are equity among states, humane solutions for refugees, and the orderly predictability that formal agreements permit.

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<sup>165</sup> UNHCR Ex. Com. Conc. 22 (1981), section 4, para. 4; UNHCR Copenhagen Paper on Burden-Sharing, 15-16 June 1998, at 7; European Commission Proposal on Determining Responsible State for Deciding Asylum Application, 26 July 2001, arts. 3.1, 22; European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 36 (concerning European Refugee Fund); Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, at 46-53.

<sup>166</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, at 53-54.

<sup>167</sup> UNHCR Ex. Com. Background Paper on International Solidarity, 7 Sept. 1998, 17 Refugee Survey Quarterly No. 4 at 30-32; UNHCR Copenhagen Paper on Burden-Sharing, 15-16 June 1998, at 2; UNHCR Ex. Com. Note on Internat'l Protection, 13 Sept. 2001, 20 Ref. Survey Quarterly No. 4 at 72.

<sup>168</sup> UNHCR Copenhagen Paper on Burden-Sharing, 15-16 June 1998, at 2.

<sup>169</sup> These “upstream” states are mainly the ones situated in the southern and eastern reaches of the European Union. European Commission Evaluation of Dublin Convention, 13 June 2001, at 17.

<sup>170</sup> See generally Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998; see also UNHCR Copenhagen Paper on Burden-Sharing, 15-16 June 1998, at 9.

<sup>171</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, at 7.

<sup>172</sup> The UNHCR Executive Committee made responsibility-sharing its annual theme for 1998. See generally 17 Refugee Survey Quarterly No. 4 at 1-221 (1998); see also UNHCR Ex. Com. Conc. 22 (1981), section IV (specifically in the context of mass influx). The concept has also been lauded by the European Commission, see, e.g., European Commission Staff Working Paper on Dublin Convention, 21 March 2000, para. 36 (specifically concerning financial burden-sharing, but citing the Amsterdam Convention more generally for pursuing equitable balance), and by the Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998. Other calls for various forms of responsibility-sharing can be found in Anker, Fitzpatrick & Shacknove, 1998; Hathaway & Neve, 1997; Open Society Institute, 1995; Martin, Schoenholtz & Meyers, 1998, at 559-66; Schuck, 1997; United States Commission on Immigration Reform, 1997, at 20-25.



Of particular relevance here, responsibility-sharing agreements could address the problem of returns to third countries in several ways. With respect to segment 1, a responsibility-sharing agreement that includes processing of ‘protection visa’ applications in countries of origin could at least channel some proportion of primary forced migration into the ultimate resettlement countries in an orderly way, rather than relegate the refugees to frenetic flights to the nearest available temporary refuge. With respect to segment 2, coordinated promises to resettle refugees who are in countries of first asylum or other third states can similarly permit more orderly movements to the resettlement countries. As for segment 3, if a person does move irregularly from a country of first asylum to a resettlement country that is a party to a responsibility-sharing agreement, the latter country might be less prone to return the person to the third country than if there were no agreement, at least if the agreement permits the resettlement country to count the person toward the number it agreed to accept. (Admittedly, the agreement could also have the opposite effect. A resettlement country might take the view that, since a mechanism for orderly transfer is in place, refugees should be expected to use that mechanism rather than resort to irregular secondary movement.) And finally, with respect to segment 4, even if a refugee is returned to the third country, the destination state’s agreement to resettle *other* refugees frees up slots that the other parties to the responsibility-sharing agreement might use for some of the people returned to the third country. In addition, if the third country is also a party to the agreement, then even those refugees who are returned there will be more likely to receive durable effective protection, assuming the agreement incorporates basic protection requirements.

Responsibility-sharing agreements can take different forms. They might be ad hoc or permanent.<sup>173</sup> The parties might be from the same region,<sup>174</sup> or they might constitute what Hathaway and Neve have called “interest convergence groups.”<sup>175</sup> The parties might or might not establish or designate a centralized agency to implement the agreement, settle disputes, or even assign numerical obligations.<sup>176</sup>

Despite their advantages, comprehensive responsibility-sharing agreements face challenging obstacles. As resources are always scarce and domestic political resistance is often formidable, states start out generally reluctant to accept appreciable numbers of refugees for resettlement. And even if they are otherwise willing to consider a multilateral agreement, there can be barriers to consensus on the formulas for allocating the numbers. Possible factors that a formula could embody – all of them reasonably debatable -- include population, area, habitable area, population density, natural resources, economic output, the state’s previous level of generosity, and perhaps regional proximity and even cultural, racial, or religious ties to refugees that are part of a mass influx. Not all states will agree on the relevance or the weight of particular criteria. Obviously, different states have different interests in competing formulas; hence, the appeal of the interest-convergence approach of Hathaway and Neve.

Still, past examples of successful responsibility-sharing agreements do exist. They include such familiar examples as the Comprehensive Plan of Action [CPA] in Southeast Asia,

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<sup>173</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, at 41-42.

<sup>174</sup> UNHCR Ex. Com. Chairman’s Summary of International Solidarity, 12 Oct. 1998, at 40; Schuck 1997.

<sup>175</sup> Hathaway & Neve, 1997.

<sup>176</sup> Schuck, 1997 (also suggesting possibility of free trade in quotas).

CIREFCA in Central America, various OAU efforts in Africa,<sup>177</sup> and more recently the cooperation in receiving refugees from Kosovo.

The elements that made these projects successful are neatly synthesized in a UNHCR background paper.<sup>178</sup> They include close consultation and genuine consensus among states, inter-agency cooperation, a clear and well coordinated plan, a lead agency to coordinate implementation, and careful monitoring. In addition, the successful responsibility-sharing arrangements have all tailored the national obligations to the particular caseload and have guaranteed certain basic refugee rights. These arrangements also benefited from the participation of some nations that were located outside the region of origin.

Recent writing on responsibility-sharing has been thoughtful and abundant. In addition to the sources cited in this discussion, readers with more specific interest in this subject are referred to two comprehensive bibliographies.<sup>179</sup>

### c. Inducements for destination states and third states

For better or for worse, returns to third countries will always be part of the overall international response to asylum seekers. In Europe, the combination of safe third country constraints, readmission agreements, and the Dublin Convention and its successor regimes make returns to third countries inevitable. Returns are increasingly on the Asian agenda as well. Smuggling and trafficking in that region have resulted in higher levels of irregular secondary movement – frequently by boat and often under life-threatening conditions -- from third countries to destination countries. Some Asian nations have responded with intercept-and-return agreements.

Apart from the strategies summarized on the preceding pages, there might be ways both to reduce the number of returns and to ensure effective, durable protection when they do occur. Protecting returned asylum seekers is simply a specific application of UNHCR's longstanding admonition that governments (and UNHCR itself) should support refugees and asylum seekers in first countries of asylum until durable protection can be found.<sup>180</sup> The hard part is fashioning the right inducements.

One possibility – in effect, a form of responsibility-sharing – is a package deal among destination countries and third countries. Destination countries would undertake to do three things: accept greater numbers of refugees for resettlement; return fewer of the refugees who migrate irregularly from third countries; and contribute to a fund that would be used to strengthen third countries' capacities to readmit and provide effective protection, including to refugees and asylum seekers. The last point is especially critical. The United Nations High Commissioner for Refugees, Mr. Lubbers, has stressed that it is very much in the interest of destination countries “to increase aid to countries hosting large refugee populations, and to spend more on building up the reception, protection and integration capacities of countries of first asylum,” so that they can better “provide effective protection

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<sup>177</sup> These projects are summarized nicely in UNHCR Ex. Com. Chairman's Summary of International Solidarity, 12 Oct. 1998, 17 Refugee Survey Quarterly No. 4 at 32-34 (1998).

<sup>178</sup> UNHCR Copenhagen Paper on Burden-Sharing, 15-16 June 1998, at 8-9.

<sup>179</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, at 127-30; UNHCR, 17 Refugee Survey Quarterly No. 4 at 187-201 (hard copy), 202-21 (internet resources) (1998).

<sup>180</sup> UNHCR Ex. Com. Conc. 58 (1989), para. d(1).

to those who need it.”<sup>181</sup> For their part, the third countries would undertake to readmit greater numbers of those asylum seekers who are returned to them when the relevant criteria (formulated in section III of this paper) are satisfied; provide them effective protection; and accept UNHCR monitoring that would be funded by the same source. It would also have to be understood that the proposed agreement – like any resettlement regime -- is meant to supplement asylum regimes, not to replace them.<sup>182</sup> Among other things, this last point assumes appropriate safeguards to assure that destination countries do not regard resettlement agreements as reasons to withhold asylum determinations from spontaneous arrivals.<sup>183</sup>

A multilateral agreement along these lines would be ideal but most likely unattainable at present. Bilateral agreements between particular destination countries and particular third countries would probably be more realistic and still highly useful. While neither set of concessions would likely be embraced unilaterally, the mutual character of these commitments would hopefully make them more appealing. Referring to the effective protection of refugees in first countries of asylum (not referring specifically to individuals returned to those countries), UNHCR has stressed the need for “parallel” pursuit of resettlement and local integration.<sup>184</sup> The additional element that I would emphasize is the use of the above quid pro quo as an inducement.

To make such agreements both more palatable to adopt and more likely to be successfully discharged, NGOs could be recruited as partners in implementation. In recent years UNHCR has forged many such tripartite partnerships with NGOs and governments and has found these arrangements “strikingly successful.”<sup>185</sup> By way of example, one element of effective protection in the third countries will be provision for fair asylum determinations. NGOs could assist applicants to prepare and present their cases, either by using their own staff directly or by recruiting volunteer student interns from the world’s law schools and myriad refugee studies programmes. Such assistance would benefit not only the applicants, but also the host governments, because well prepared cases make the process faster and more efficient. NGOs could also continue to work, and to recruit volunteers to work, in education, health, and other efforts. NGOs could also assist UNHCR in monitoring compliance with these agreements, a concession that third countries might well be willing to make in exchange for destination countries’ pledges to increase resettlement quotas and reduce returns. It is not suggested that NGOs assume decisionmaking functions.

These, then, are some of the strategies that UNHCR and other players can pursue to minimize both the number of instances in which destination countries return asylum seekers to third countries and the adverse consequences of those returns when they do occur. With

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<sup>181</sup> Lubbers Speech, 5 July 2002; see also Lubbers Statement, 13 Sept. 2002, at 4 (suggesting “special agreements” among countries of origin, transit countries, and potential destination countries).

<sup>182</sup> UNHCR Ex. Com. Standing Com., *New Directions*, 2001, 13 *Internat’l Journal of Refugee Law* at 696, para. 24.

<sup>183</sup> See, e.g., *Matter of Pula*, 19 I. & N. Dec. 467, 472-74 (U.S. Board of Immigration Appeals, 1987) (holding that asylum applicant’s failure to utilize orderly resettlement procedures will not normally be valid basis for denying claim).

<sup>184</sup> UNHCR Ex. Com. Standing Com., *New Directions*, 2001, 13 *Internat’l Journal of Refugee Law* at 696-97, para. 25.

<sup>185</sup> *Ibid.* at 695-96, 698, paras. 18-22, 28(f).

that perspective, it is possible to address the more specific subject of this paper: Under what conditions should return be permissible?

## **B. Formulating Criteria for Returns to Third Countries: Some General Premises**

Any set of criteria for the return of asylum seekers to third countries reflects certain assumptions. This paper assumes twelve general premises:

1. Refugees have rights. They are rooted in both domestic and international law. With respect to international law, the most important of the refugee-specific rights flow from obligations that states willingly undertook when they became parties to refugee and human rights conventions. These rights attach the moment the person in fact meets the definition of refugee. Any subsequent formal recognition of refugee status is merely declaratory.<sup>186</sup>
2. With some narrow exceptions, article 33 of the 1951 Convention prohibits the refoulement of refugees to the frontiers of territories where their lives or freedom would be threatened on account of any of the five Convention grounds. Other human rights conventions prohibit related forms of refoulement.<sup>187</sup>
3. In contrast to the explicit right of nonrefoulement in article 33 of the 1951 Refugee Convention, the Convention nowhere creates a right to receive asylum (despite a passing reference, in the preamble, to “international cooperation” with respect to asylum.) Similarly, several other international human rights instruments refer to asylum but stop short of obligating states to grant it.<sup>188</sup> In the words of Professor Goodwin-Gill, “States have so far not accepted an obligation to grant asylum to refugees.”<sup>189</sup> Admittedly, article 14(1) of the Universal Declaration of Human Rights reads “Everyone has the right to seek *and to enjoy* in other countries asylum from persecution” (emphasis added). Even if one regards the Declaration as a source of binding legal obligations,<sup>190</sup> however, it seems doubtful that this one vague provision was meant to mandate grants of asylum.

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<sup>186</sup> These principles are well settled. See, e.g., UNHCR Handbook, para. 28; UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 12; UNHCR Position on Readmission Agreements, 1994, para. 3; UNHCR Note on Treatment at Port of Entry, 1991, para. 3.1; Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, at 22.

<sup>187</sup> See the examples discussed in section II.B.12 below.

<sup>188</sup> E.g., paragraph 2 of the Council of Europe Declaration on Territorial Asylum, 1977, referred to the right of member states to grant asylum but pointedly refrained from creating an obligation to do so. Article II of the OAU Convention, entitled “Asylum,” admonishes member states to “use their best endeavours . . . to receive refugees” but again imposes no obligation to grant asylum. Article III of the Asian-African Legal Consultative Committee Principles on Refugees, 1966, recognizes a state’s “sovereign right to grant or refuse asylum in its territory to a refugee” (emphasis added).

<sup>189</sup> Goodwin-Gill, 1996, at 88.

<sup>190</sup> The Universal Declaration of Human Rights has acquired special moral status in the international community, but debate persists over how much of the Declaration, if any, has become binding international law. Three theories for giving legal effect to some or all of its provisions have circulated in recent years – that the Declaration is an authoritative interpretation of the UN Charter; that the Declaration, or at least selected articles, have now attained the status of customary international law; and that its provisions reflect general principles of law. Some of the relevant literature is cited in Buergenthal, Shelton & Stewart, 2002, at 39-43, and in ALI, Restatement of Foreign Relations, sections 701 (Reporter’s Note 4), 702.

Further, whether or not the Declaration or any other sources create a right to *apply* for asylum *somewhere*,<sup>191</sup> no international instrument establishes an absolute right to receive a decision on the substance of an asylum claim *by the country of one's choosing*.<sup>192</sup> To put the point another way, no rule of international law establishes a per se prohibition on diverting asylum applicants to third countries.

Nonetheless, international law imposes limits. Professor Hathaway points out that the 1951 Convention nowhere requires refugees to apply for asylum in the first possible place, under pain of forfeiting all opportunity to seek asylum. Nor, as he notes, does the Convention require “direct” travel from the country of origin to the country in which durable protection is sought.<sup>193</sup> UNHCR Ex. Com. Conclusion 15, adopted in 1979, says explicitly that “asylum should not be refused solely on the ground that it could be sought from another state.”<sup>194</sup>

Beyond those observations, much remains unclear. The precise parameters of the relevant state obligations are difficult to glean from either the text (article 31) or the negotiating history of the 1951 Convention, as Professor Goodwin-Gill carefully demonstrates.<sup>195</sup> The subject is more fully explored in section III.B below.

4. Individuals who qualify as refugees under the 1951 Convention acquire more than the right of nonrefoulement. They acquire a bundle of associated rights to fair and humane treatment. As Professors Goodwin-Gill and Hathaway have both perceptively observed, however, not all refugees receive all the rights granted by the Convention. There is a hierarchy. States parties must grant certain rights to all refugees physically within their territory, additional rights to those who are “lawfully” within their territory, further rights to those lawfully “staying” within their territory, and still greater rights to those who achieve a more durable residence.<sup>196</sup> For this purpose, Professor Hathaway suggests, a person who requests refugee status and submits the information necessary to decide the claim is “clearly lawfully present” in the state.<sup>197</sup>

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<sup>191</sup> See, e.g., Marx & Lumpp, 1996, at 428.

<sup>192</sup> At the Lisbon roundtable (see opening footnote), this point generated vigorous debate that proved to be largely semantical. The initial draft of this paper had suggested that international law provided no right to apply for asylum in the country of one's choosing. That choice of words was regrettable. In the physical sense, of course, one can always request asylum wherever he or she might be. Nothing can prevent a person from uttering the necessary words. The practical question is whether one has a right to receive a decision on the substance of the claim from the country of one's choosing. If the answer to that question were yes, the present paper would be irrelevant; there would be no criteria for the permissibility of returning asylum seekers to a third country without deciding the substance of their claims, because such returns would never be allowed at all. As the discussion below will demonstrate, sometimes a desination country may legally return the asylum seeker to a third country without deciding the substance of the claim, and sometimes it may not. The challenge is to elaborate the relevant criteria.

<sup>193</sup> Hathaway, 1991, at 46.

<sup>194</sup> UNHCR Ex. Com. Conc. 15 (1979), para. h(iv).

<sup>195</sup> Goodwin-Gill, 1996, at 88-91.

<sup>196</sup> *Ibid.* at 307-11; Hathaway, 2002, at 6-11; see also UNHCR Reception Standards, July 2000, at 5 (summarizing the gradations). The nature and significance of these rights are more fully discussed in section III.A.3.b below.

<sup>197</sup> Hathaway, 2002, at 20-21.

5. Refugees also derive rights from various international human rights conventions. These are discussed below.<sup>198</sup> Here, the traumas and special needs of refugees might well affect the scope of those rights. Those traumas and needs are obviously important elements in any sound and humane policy decisions on refugee issues, and they are core rationales for the 1951 Convention. In addition, it is suggested, the traumatic pasts of refugees – and therefore many asylum seekers – seem relevant to the application of various broadly worded provisions of human rights instruments. Whether the treatment to which a person will be subjected is “inhuman or degrading” for purposes of the European Convention, for example, requires consideration of all material factors, and in this context past persecution might be highly material. Treatment that is innocuous to one person might be “inhuman” when inflicted on someone who is recovering from torture. How this point should shape the criteria for returns of asylum seekers to third countries is considered in section III.A.4 below.

6. Every state has the sovereign power to regulate the admission and stay of noncitizens within its own territory and a valid interest in resisting illegal immigration.<sup>199</sup> Like any other state powers, however, these must be exercised compatibly with international law, including norms that protect the rights of refugees.

7. The country in which an asylum application is lodged is and remains ultimately responsible for assuring nonrefoulement,<sup>200</sup> even if that country transfers the person to a third country.<sup>201</sup> It cannot escape that duty by delegating it. UNHCR has described the responsibility of the country in which the asylum application is lodged as “primary;” that country thus bears the burden of ensuring the safety of any third country to which it is contemplating transfer.<sup>202</sup>

8. Third countries – especially those that are parties to the 1951 Convention -- also have responsibilities to refugees. They might owe additional obligations to the destination states.<sup>203</sup> But many third countries are developing states with limited resources, a long record of hosting disproportionate shares of the world’s refugees, compassion fatigue, and meagre abilities to meet the basic needs of even their own nationals. Those circumstances do not, of course, eliminate international legal obligations. If the requirements for effective protection in third countries are too fastidious or too rigid, however, there are practical risks. Third countries might well be antagonized. They might ignore the standards entirely. Or they might refuse to host as many refugees in the first place. Any of those results would be regrettable, since the protection that first countries of asylum provide, albeit imperfect, remains essential.

But the issue addressed in this paper is a different one: What conditions must prevail in a particular third country before a *destination country* may return asylum seekers there? The relevant criteria, in other words, constrain the destination countries, not the third countries

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<sup>198</sup> See section III.A.4 below.

<sup>199</sup> See, e.g., Nafziger, 1983.

<sup>200</sup> UNHCR Handbook, Foreword.

<sup>201</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2; UNHCR Position on Readmission Agreements, 1994, para. 3; Hyndman, 1994, at 251-52.

<sup>202</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 36; UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 5.

<sup>203</sup> See section II.B.11 below.

to which the return of asylum seekers is contemplated. That being so, the practical difficulties faced by third country hosts are no reason to dilute the standards that govern *destination countries'* decisions to return asylum seekers.

9. The 1951 Convention is unmistakably about the protection of refugees, but it is also about international cooperation and solidarity.<sup>204</sup> UNHCR and other international authorities have consistently embraced that interpretation.<sup>205</sup> Other leading international instruments similarly prioritize international solidarity in solving refugee problems.<sup>206</sup> And as earlier discussion suggested, responsibility-sharing agreements are a desirable means to avoid some of the problems associated with the return of asylum seekers to third countries.

But there is no reason that the existence or nonexistence of a responsibility-sharing agreement should alter the minimum criteria for the return of asylum seekers to third countries. With or without such an agreement, certain minimum safeguards must be assured before return is permitted.<sup>207</sup> The absence of a responsibility-sharing agreement should not tighten the standards, and the presence of an agreement should not weaken them. Ultimately, the question addressed in this paper is what those safeguards are.

*The next three premises bear special emphasis:*

10. Ultimately, the permissibility of returning an asylum seeker to a third country rests on whether that third country will *now* provide effective protection – not on whether it did so in the past, and not on whether it would have done so if requested. Certainly past events can be highly probative evidence of whether effective protection will now be provided, but they are not conclusive. For one thing, country conditions change. For another, when a refugee enjoys some measure of protection in one country but nonetheless travels irregularly to another country only to be denied protection there, it is not unusual for the first country of asylum to refuse readmission. Whether such refusals are right or wrong, the point here is that they occur.

11. In the specific context of the return of asylum seekers to third countries, *effective protection is effective protection*. Whatever core elements one believes international law requires before an asylum seeker may be returned to a third country, there is no apparent reason that those prerequisites should vary depending on whether the third country is labelled a “first country of asylum” or merely a “safe third country.” To be sure, some requirements – for example, that of a sufficiently meaningful prior connection with the third country – will often be more easily satisfied in the first country of asylum context. But that observation tells us nothing about the validity of the requirement itself. If one accepts premise number 10 – that the ultimate question is whether the third country will *now* provide effective protection – then it seems clearer still that the distinction between first

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<sup>204</sup> See 1951 Convention, preamble, clause 4.

<sup>205</sup> UNHCR Ex. Com. Conc. 85 (1998), para. (d); UNHCR Ex. Com. Conc. 22 (1981), section IV; UNHCR Ex. Com. Note on Internat'l Protection, 13 Sept. 2001, 20 Refugee Survey Quarterly No. 4 at 71; UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 28; Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, at 16.

<sup>206</sup> E.g., OAU Convention, art. 2.4; UN Declaration on Territorial Asylum, 1967, art. 2.2.

<sup>207</sup> See generally UNHCR Copenhagen Paper on Burden-Sharing, 15-16 June 1998, at 6; UNHCR Ex. Com. Chairman's Summary of International Solidarity, 12 Oct. 1998, 17 Refugee Survey Quarterly No. 4 at 38.

countries of asylum and mere “safe third countries” should not affect the level of protection on which the international community should now insist.<sup>208</sup>

In the light of the vigorous discussion that this premise attracted in its initial form, clarification and further elaboration are necessary. I do not suggest that the distinction between first countries of asylum and mere safe third countries has no legal consequences at all; indeed, as the discussion below illustrates, first countries of asylum often have obligations that mere safe third countries do not have. Rather, the claim here is more modest -- that the distinction between these two kinds of third countries does not affect the criteria for determining when it is legally permissible to return asylum seekers without deciding the substance of their claims.

One reviewer of this paper argued that article 1.E of the 1951 Convention refutes this claim. This article renders the Convention inapplicable whenever the country in which the person “has taken residence” accords him or her the same rights and obligations as its own nationals. Admittedly, there is no analogous provision for safe third countries. But this provision is far narrower than a “first country of asylum” exclusion. It does not purport to disqualify a person from refugee status whenever the person has already received asylum from a third country. By its terms, it would apply only in the rare (possibly nonexistent) case where the third country grants not only protection, but also all the other rights that its own nationals possess.

Two other reviewers invoked article 12.4 of the ICCPR. This provision reads: “No one shall be arbitrarily deprived of the right to enter his own country.” One might well argue that “own country” encompasses not only one’s country of nationality, but also one’s first country of asylum. That first country of asylum, the argument would then run, thus has a legal obligation to readmit the person. No comparable obligation attaches to mere safe third countries. Thus the return of asylum seekers to first countries of asylum should not be guided by the same set of rules as the return of asylum seekers to mere safe third countries.

But there are problems with that argument. First, two fact situations must be distinguished. If a person *wants* to be readmitted to the first country of asylum, and that country arbitrarily refuses, then arguably that country is in breach of article 12.4. In the present context, however, the problem is the opposite one. The person *does not want* to be readmitted to the first country of asylum; indeed he or she wants to avoid return. The person has applied for asylum in the ultimate destination country and wants to remain there rather than be returned to the first country of asylum. Under those circumstances, to speak of the asylum seeker’s

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<sup>208</sup> The issue of effective protection can arise not only with respect to the return of asylum seekers to third countries, but more generally to any treatment of refugees and asylum seekers. What level of protection, for example, must the country of origin provide before a person can be repatriated involuntarily? When may a grant of refugee status be terminated? What does it take to make an internal flight alternative acceptable? When may a country send a refugee to another permanent resettlement country pursuant to a responsibility-sharing agreement? What protection must the country in which the asylum application is lodged itself provide if it allows the person to remain? In each of these settings the ultimate question is what sorts of conditions must exist before the minimum demands of international protection can be considered met. Which of these contexts lend themselves to a uniform understanding of “effective protection” is beyond the scope of this paper. The more limited supposition made here is that, within the narrower context of establishing criteria for the return of asylum seekers to third countries, the essential elements of effective protection do not vary as between first countries of asylum and mere “safe third countries.”



“right” to be readmitted to the first country of asylum is irrelevant. To put the point slightly differently, surely the obligation that the first country of asylum owes under article 12.4 is an obligation that it owes to the individual, not to another state.

Second, even if article 12.4 were read otherwise, any obligation that the first country of asylum owes to the destination country would not erase the obligations that the destination country owes to the asylum seeker. Thus, the destination country has no right to return the person against his or her will if the first country of asylum will not provide what international law regards as the minimum elements of effective protection. In such a case, the real issues would be what effective protection requires and whether those requirements will be satisfied – precisely the same inquiries that are made when the third country is a mere safe third country rather than a first country of asylum.

Aside from specific articles in the 1951 Convention or in other human rights conventions, bilateral or multilateral readmission or other agreements might obligate third countries to accept the return of asylum seekers. In some cases, those obligations admittedly might be broader when the third country has previously granted asylum than when it has not. Again, however, in each of the cases, the resulting obligations are those that the third country owes to the destination country. They do not supplant the obligations that the destination country owes to the asylum seeker.

To sum up: There might well be situations in which first countries of asylum – and not mere safe third countries – have accepted obligations to readmit former asylees. Even then, however, international law prohibits the destination country from returning an asylum seeker to a third country if the third country will not provide certain basic guarantees collectively described here as effective protection. And that is true whether or not the third country once granted protection in the past.

Still skeptical? If so, I would respectfully pose the following challenge: If you believe that the requirements for the return of asylum seekers to first countries of asylum differ from the requirements for the return of asylum seekers to mere safe third countries, then, as you proceed through section III, try to identify any specific requirements that you believe international law imposes in one context but not the other. In considering this challenge, keep in mind that one requirement for the return of an asylum seeker to either category of third country is that the third country consent to readmit the person -- with or without a preexisting agreement that obligates it to do so.

12. UNHCR has repeatedly stressed that the 1951 Convention prohibits not only direct refoulement to the country of origin, but also indirect, or “chain,” refoulement to third countries that in turn will refoule to the country of origin.<sup>209</sup> The European Commission, the Council of Europe, and the U.K. House of Lords have all endorsed that proposition.<sup>210</sup>

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<sup>209</sup> E.g., UNHCR Position on Readmission Agreements, 1994, para. 3; UNHCR Note on Treatment at Port of Entry, 1991, para. 3.

<sup>210</sup> European Commission Amended Proposal on Asylum Procedures, 18 June 2002, Annex I, para. I.A.1 (observes Refugee Convention); Council of Europe Guidelines on Safe Third Country, 1997, para. 1 (b,c); *R. v. Sec. of State for the Home Dept, ex parte Adan and Aitseguer* [2001] 2 W.L.R. 143, 152-53, citing *Bugdaycay v. Sec. of State for the Home Dept.* [1987] A.C. 514, 532 (H.L.); see also Amnesty International Comments on EC Proposal Determining Responsible State for Deciding Asylum Applications, 2002, section 3.

Similarly, in *Soering v. United Kingdom*,<sup>211</sup> the European Court of Human Rights held that article 3 of the European Convention, which prohibits torture or other “inhuman or degrading treatment or punishment,” bars states parties from sending people to countries that will subject them to such treatment – even if the receiving countries are not themselves parties to the European Convention. In *T.I. v. United Kingdom*,<sup>212</sup> the same Court applied this principle specifically to the question of whether to permit the return of an asylum seeker from the United Kingdom to Germany under the Dublin Convention; return was permitted only upon the Court’s finding that there was no “real risk” of Germany chain refouling the person to conditions of torture or inhuman or degrading treatment or punishment. The ICCPR, in article 7, prohibits torture and “cruel, inhuman, or degrading treatment or punishment;” the UN Human Rights Committee similarly has read that language to bar states parties from exposing individuals to those dangers “upon return to another country by way of their extradition, expulsion or refoulement.”<sup>213</sup> The Convention Against Torture expressly prohibits the refoulement of a person “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>214</sup> The UN General Assembly has taken an analogous position on forcible return to a country “where there are substantial grounds for believing that [the person] may become a victim of extra-legal, arbitrary or summary execution” or “would be in danger of enforced disappearance.”<sup>215</sup>

It is submitted here that these and similar authorities, together with the ILC Articles on State Responsibility discussed below, add up to a principle of more general applicability: No state may knowingly assist another state to do what international law would forbid the first state from doing on its own.<sup>216</sup> Otherwise, the first state would be an accomplice to the misdeed committed by the second state. In this paper, that proposition will be called the “complicity principle.” As applied here, it means that no country may return a refugee or asylum seeker

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<sup>211</sup> [1989] ECHR 14038/88, (1989) 11 EHRR 439; accord, Council of Europe Guidelines on Safe Third Country, 1997, para. 11.

<sup>212</sup> Decision as to the Admissibility of Application No. 43844/98 (Euro. Ct. of Human Rights, 2000).

<sup>213</sup> General Comment No. 20, para. 9 (reproduced in Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, Annex 1, at 20).

<sup>214</sup> Convention against Torture, art. 3.1.

<sup>215</sup> UNGA Res. 44/162 & 47/133 (reproduced in Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, Annex 1, at 21).

<sup>216</sup> Admittedly, there is language in *Soering* that could be read as limiting the extrapolation of its holding. The court said that article 1 of the European Convention, which obligates the states parties to secure the Convention rights to “everyone within their jurisdiction,” cannot be read “as justifying a general principle that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.” [1989] ECHR 14038/88, (1989) 11 EHRR 439, para. 86. This dictum, especially if considered in combination with the Court’s later reference to the fundamental and nonderogable nature of article 3 (the prohibition on torture and inhuman or degrading treatment or punishment), might suggest that the Court was willing to interpret only article 3 – not the entire package of Convention rights – as embodying what I have called the complicity principle. But other parts of the Court’s opinion, see, e.g., para. 86, equally suggest that this cautionary dictum reflected merely the special obligations imposed by extradition treaties, not the special status of article 3. Whatever conflict there might have been between U.K. obligations under the extradition treaty and U.K. obligations under the European Convention, no such conflict arises in the present context. It is not as if some competing source of international law obligates the destination country to return the asylum seeker to the third country; the question, rather, is whether it is permitted to do so.

to a third country knowing that the third country will do *anything* to that person that the sending country would not have been permitted to do itself – regardless whether the third country is a party to the 1951 Convention or to any other human rights conventions.

There are special reasons to apply the complicity principle to the 1951 Convention. Article 31 of the Vienna Convention requires that a treaty be interpreted in accordance with the “ordinary meaning” of its terms “in their context and in the light of its object and purpose.” In the case of the 1951 Convention, both the problem that the Convention addresses -- the forced movement of refugees across international frontiers – and the prescribed solution – an international framework that constrains the forced returns of refugees – inherently require the highest levels of international cooperation. To use the terminology of the Vienna Convention, this “object and purpose” of the 1951 Convention would be thwarted if destination countries, while prohibited from violating the Convention provisions directly, were permitted to assist such violations by returning refugees to other countries knowing the latter would commit the prohibited acts.<sup>217</sup>

The International Law Commission’s Articles on State Responsibility,<sup>218</sup> the product of a monumental 40-year effort, now bear the official imprimatur of the United Nations General Assembly.<sup>219</sup> These Articles lend both further support to this thesis and guidance to its meaning, though as to the latter the Articles send a mixed message. Article 16, the provision most relevant here,<sup>220</sup> reads:

- A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
- (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and
  - (b) the act would be internationally wrongful if committed by that State [meaning the assisting state].

If a state delivers a refugee to another state that in turn violates his or her rights under international law, and the first state does so “with knowledge of the circumstances of the internationally wrongful act,” then the assumption here is that the first state thereby “aids or assists” in the commission of that wrongful act. The delivery of the refugee into the hands of the second state has obviously facilitated the latter state’s violation of international law.

The hard question, however, is how best to interpret the phrase “knowledge of the circumstances of that internationally wrongful act.” First, does “knowledge” require only an *awareness* that the assisted state will use the aid to commit an internationally wrongful act, or does it also require that the assisting state have the *purpose* of facilitating the violation? Second, if “knowledge” truly means only “knowledge” and not “purpose,” what degree of certainty does the assisting state need to have before it can be said to “know” that the assisted state will use the aid to commit the violation? Both issues are critical in refugee

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<sup>217</sup> I credit Volker Türk for this thought.

<sup>218</sup> ILC Articles on State Responsibility, 2001, reproduced in Crawford, 2002; see also ASIL Symposium, 2002.

<sup>219</sup> UNGA Res. 56/83, para. 3 (12 Dec. 2001) (“commending” the Articles “to the attention of Governments”).

<sup>220</sup> See also articles 17 (directing and controlling another state’s internationally wrongful act) and 18 (coercing another state’s internationally wrongful act).

law. Unfortunately the ILC has sent conflicting signals on the first issue and no signals at all on the second.

As to the first issue, suppose, as frequently happens, a destination country wishes to return an asylum seeker to a third country, but the third country is one that systematically violates a particular obligation under the 1951 Convention or another relevant human rights convention. Ordinarily the destination country has no affirmative *desire* or *purpose* to facilitate the third country's violation, yet the destination country might well be *willing* to return the person even though it knows that the third country will commit the violation. Under those circumstances, will the destination country be in violation too, assuming it has undertaken the same relevant legal obligations?

It seems difficult to read a purpose requirement into the text of article 16. The text refers only to "knowledge" of the circumstances. The problem lies in the Official Commentary to the Articles. In at least three different places – comments 1, 3, and 5 to article 16 – the Commentary interprets article 16 as requiring that the aid be given "with a view toward facilitating" the internationally wrongful act. In two other places – comments 5 and 9 – it is suggested that the aid must be "intended to facilitate" the violation. Interestingly, however, the text of article 16 reflects a change from the articles that the ILC had provisionally adopted in 1996. The previous version would have required that the aid be "rendered for the commission" of the other state's internationally wrongful act.<sup>221</sup> The quoted language was replaced by the seemingly lesser requirement that the assisting state act "with knowledge of the circumstances." The change suggests a deliberate decision to replace a purpose requirement with a knowledge requirement.

If in the end the text simply cannot be reconciled with the commentary, then one must assume that the text controls. A saving interpretation of the Commentary, however, might be possible. The phrase in the text "knowledge of the circumstances" might be construed as comprising two elements -- knowledge that the assisted state will commit an internationally wrongful act and knowledge that the contemplated assistance will facilitate that act. The references in the commentary to the assisting state having to give the aid "with a view toward facilitating" the violation might be meant merely to capture that second component of "knowledge." A "view toward facilitating" would thus mean something akin to the assisting state having "foreseen" that its aid would facilitate the violation. Admittedly, the statements in the commentary requiring that the assisting state "intended" to facilitate the violation are harder to explain away. Even those statements, however, might be using the word "intended" in the broad sense in which Anglo-American criminal law and tort law use that term – i.e., one "intends" a consequence if one either consciously desires its occurrence or "knows" that the consequence is practically certain to result from the actor's conduct.<sup>222</sup> Under those interpretations, the commentary is consistent with the text and requires only *knowledge* of an internationally wrongful act and the assisting state's role in facilitating it, not a *conscious desire* to facilitate the violation.

Even on that reasonable assumption, there remains the crucial question of what "knowledge" means. In particular, what degree of certainty does knowledge entail? Does it require, for example, only that the future violation by the third country be reasonably

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<sup>221</sup> See article 27 of the Provisional Articles (1996), reproduced in Crawford, 2002, at 354.

<sup>222</sup> See, e.g., Lafave, 2000, section 3.5(a); cf. ALI, Restatement II of Torts, section 8A (actor either "desires" consequence or "believes" consequence is "substantially certain" to result).

foreseeable by the destination country? That there be “substantial grounds for believing that [the person] would be in danger” of the particular violation?<sup>223</sup> That the destination country be aware of the possibility that the third country will violate the rights of the returned person? That the destination country be aware of a “significant” probability of a violation? A “high” probability? A probability of more than 50%? “Substantial grounds” for believing there is a “real risk” that the third country will violate the person’s rights, to use the terminology from *Soering*?<sup>224</sup> A “deep conviction” (“intime conviction” in French law)?<sup>225</sup> A practical certainty?

One possible approach to this problem might draw on the literature that considers how best to determine the proper standard of proof for finding facts in courts of law. The standard of proof issues tend to arise more often in common law systems than in civil law systems.<sup>226</sup> Justice Harlan of the United States Supreme Court once observed that the selection of a particular standard of proof – balance of probabilities, proof beyond a reasonable doubt, etc. – influences the relative distribution of the opposing types of errors that can occur. The higher the standard of proof, the higher becomes the probability of an error in favor of the defendant, but the lower becomes the probability of an error in favor of the plaintiff or prosecution. That being the case, he said, a rational way to select the appropriate standard of proof for any category of case would be to ask how harmful an error in either direction would be. In a criminal case, where the legal system makes the judgment that an erroneous conviction is worse than an erroneous acquittal, for example, the standard of proof is set high.<sup>227</sup>

One could approach the present problem in a similar way. How much harm occurs when a destination country believes that a third country will violate the individual’s internationally protected rights and consequently declines to return, and it turns out that the belief of the destination country was wrong? Conversely, how much harm occurs when a destination country believes that a third country will *not* violate the individual’s rights and consequently returns him or her, and it turns out that the belief was wrong and the rights were violated upon the person’s return? The answer to both questions depends, *inter alia*, on the particular right in question. If the right in question is freedom from torture, for example, the cost of an incorrect return is obviously of the highest order. If the right in question is less significant, then so is the harm that results from an erroneous return.

Using that analysis, one might prescribe a variable standard of proof. The more important the particular right, the more confident the destination country should have to be before it is permitted to effect a return. If the right is unusually important, then perhaps any reasonable basis for fearing that the third country will violate the right should be regarded as

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<sup>223</sup> That is the test used in article 3 of the Convention against Torture.

<sup>224</sup> [1989] ECHR 14038/88, (1989) 11 EHRR 439, para. 91; *T.I. v. United Kingdom*, Decision as to the Admissibility of Application No. 43844/98 (Euro. Ct. of Human Rights, 2000).

<sup>225</sup> Gorlick, 2002, at 4 (observing that this standard of proof is sometimes used to determine whether applicant qualifies as refugee).

<sup>226</sup> *Ibid.*

<sup>227</sup> Analogous reasoning is familiar in the law of negligence. To measure the reasonableness of an actor’s conduct, a court generally balances the social utility of the conduct against the probability and the gravity of the harm that it might cause. For a given level of social utility, therefore, the more serious the potential harm, the lower the acceptable probability of its occurrence. See especially the famous opinion of Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

“knowledge” for purposes of the destination country’s responsibilities. One way to concretize this approach would be to classify all the applicable rights into two or more discrete groupings, with a fixed standard for each grouping. Another option would be to construct a continuum, in which the destination country is expected simply to weigh both the likelihood and the gravity of any foreseeable violations by the third country.

The “variable degree of certainty” approach has some decided advantages. There is, first, the compelling logic of Justice Harlan – the more serious the potential harm, the less chance of its occurrence one should tolerate.

Second, this approach would temper extreme applications of the complicity principle. To many observers, an unadorned version of the complicity principle will have logical appeal but pragmatic limitations. As will be seen in section III, the spectrum of refugee rights under the 1951 Convention and other human rights agreements is vast. Some of those rights, all will agree, are fundamental. Others are more minor. One might balk at an international norm that prohibits return to a third country solely because that country will violate a minor right.

Yet the inherent logic of the complicity principle suggests precisely that. When international law prohibits the destination country from violating right X directly, the violation is not excused simply because right X is relatively minor. It is still a violation. Why, then, should the destination country be permitted to bring about the same consequence indirectly by knowingly enlisting another state to violate right X?

The “variable degree of certainty” approach is a way to unite principle with pragmatism. The destination country will still be barred from knowingly assisting the third country to violate international law, but the level of knowledge required will vary inversely with the seriousness of the potential harm. If, for example, the human right at stake is fundamental, the rule might be that return must be withheld when there are “substantial grounds for believing [the person] would be in danger” of being denied the particular right, to borrow the language of article 3 of the Convention Against Torture. In contrast, if the particular right is far less critical, return might be prohibited only when the third country’s violation is a practical certainty. Again, the varying degrees of required certainty could be a series of discrete standards, or they could form a continuum.

Admittedly this approach has one large disadvantage, at least in the short term. There are not yet any clear principles of international law for selecting the specific standards of proof that would govern all of the specific rights. Until such standards evolve, the decisions by destination countries whether to return asylum seekers to third countries in which violations of international law are foreseeable would be indeterminate, unpredictable, and, therefore, subject to manipulation – especially under a continuum model. Moreover, one might object, the very process of selecting the standards of proof for the various rights will leave too much power in the hands of unelected judges and other refugee adjudicators. They will be tempted to apply their own personal values in deciding which 1951 Convention rights and other human rights are the most important and which standards of proof are optimal. In such a sea of discretion, the argument might run, the results will be unpredictable, justice will be unequal, and the policymakers will not be democratically accountable.

These difficulties must be acknowledged. It will not be easy to develop hard law to define the relevant standards of proof with optimal precision. And, it is true, those who develop the standards will be exercising a broad power.

But those objections must be placed in perspective. First, judges and others who adjudicate refugee claims already have to devise standards of proof with precious little hard law to guide them. They have had to decide what standard governs the meaning of “well-founded fear” for purposes of the refugee definition and applications for asylum. They have had to decide what standard of proof is implicit in the phrase “life would be threatened,” essential to nonrefoulement claims under article 33 of the 1951 Convention. As others have shown, the world’s courts generally have employed a variety of formulations.<sup>228</sup> And in the United States, the Supreme Court has adopted a more demanding standard of proof for nonrefoulement than for asylum.<sup>229</sup>

Second, in garden variety negligence cases, unelected judges (and, in the United States, juries) routinely apply the analytical equivalent of the continuum version of the approach proposed here. To ascertain whether an actor’s conduct was unreasonable, the finder of fact necessarily weighs both the probability and the severity of the possible harm. The law endorses their doing so because there is no clearly preferable way to assess the *expected* harm in the range of fact situations that no human being has the prescience to anticipate.

Third, until the standards are pronounced definitively by national legislatures or governments, or by international agreements, there are practical means by which judges and other refugee adjudicators can proceed. Most likely they will identify a few specific rights, arising out of the 1951 Convention or other human rights agreements, of so clearly fundamental a nature that an especially protective standard of proof is at least *largely* noncontroversial. Nonrefoulement under article 33 of the 1951 Convention and under article 3 of the Convention Against Torture are such examples. Except in the United States, return to countries in which the relevant persecution or torture will take place is generally prohibited when the fear of persecution is “reasonable” or there are “substantial grounds for believing there is a danger” of torture. In contrast, adjudicators will most likely prescribe a higher degree of required certainty (perhaps “practical certainty”) before prohibiting return to a country in which relatively minor rights might be violated.

Finally, there is no obvious alternative that would fulfill the spirit of the 1951 Convention and other relevant human rights conventions and at the same time avoid the same objections that might be lodged to the approach proposed here. At this late date it is impossible to interpret international law as imposing no constraints at all on states that knowingly send refugees to third countries that will violate their human rights. The authorities cited earlier in this discussion are too well established. That leaves only two possibilities: Either all of the rights enumerated in the 1951 Convention and the various human rights conventions are protected against indirect violation, or someone must decide which ones are so protected and which ones are not. No convincing principle for drawing the latter line is apparent, and even if it were, someone would have to exercise a broad discretion that would generate the same objections as the variable degree of certainty approach recommended here. Under the

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<sup>228</sup> See generally Gorlick, 2002.

<sup>229</sup> Compare *INS v. Stevic*, 467 U.S. 407 (1984) (adopting a “more likely than not” test for nonrefoulement) with *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (interpreting the “well-founded fear” test required for asylum as less demanding than “more likely than not”).

complicity principle, all rights are protected against both direct and indirect knowing violations, but since the range of protected rights is so vast, the application of the complicity principle to particular rights does not follow a “one size fits all” model. Both the probability and the seriousness of the violation are appropriately considered.

Based on the ILC Articles of State Responsibility and the other international law sources discussed in this subsection, then, this paper will apply the complicity principle to the return of asylum seekers to third countries. Thus, it is assumed that return is prohibited when the destination country has “knowledge” that the third country will violate rights that the destination country is itself obligated to respect. It will also be assumed, consistently with the text of the ILC Articles, that “knowledge” does not require a conscious desire to facilitate the violation. Finally, in applying the complicity principle, it will be assumed that the degree of certainty with which the destination country must know of the third country’s prospective violation will vary inversely with the importance of the particular right. Beyond that, this paper will not attempt to identify the particular degrees of certainty that rise to the level of “knowledge” for each of the various rights in question. I leave those standards to future development.

### **SECTION III**

#### **RETURNING ASYLUM SEEKERS TO THIRD COUNTRIES: THE SPECIFIC CRITERIA**

The question now boils down to this: Under precisely what conditions may a country refuse to decide the substance of an asylum claim that is filed in its territory and, instead, return the applicant to a third country? In addressing that question, this paper is not writing on a blank slate. Over the years, UNHCR has taken positions on various aspects of this issue. Some of the UNHCR positions were clearly written with first countries of asylum in mind, some with safe third countries in mind, and some with both. The compilations have varied somewhat with respect to which safeguards are included, which ones are emphasized, their precise wording, and the degree of detail provided. The elements most frequently stressed are the consent of the third country to readmit the person, protection against persecution and chain refoulement, respect for fundamental human rights, and the assurance of a fair refugee status determination. There has not yet been a consistent, comprehensive set of elements that define effective protection or the requirements for return.

The most important UNHCR Executive Committee Conclusions on this subject are Conclusions 15 and 58, issued in 1979 and 1989, respectively. Ex. Com. Conclusion 15 (formulated long before the Dublin Convention) was concerned with assuring that every asylum seeker have some clearly identifiable country responsible for deciding his or her claim. It advocated common and clearly ascertainable criteria that “take into account the duration and nature of any sojourn of the asylum seeker in other countries” and, “as far as possible” the asylum seeker’s preference concerning country of application.<sup>230</sup> It cautioned against refusing asylum solely because “it could be sought from another State” but acknowledged that a person could be called upon to apply first in another state if he or she “already has a connection or close links” with that state and referral to that state is “fair and reasonable.”<sup>231</sup> One other provision urged “favorable consideration” of a claim that the

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<sup>230</sup> UNHCR Ex. Com. Conc. 15 (1979), paras. h, i.

<sup>231</sup> *Ibid.* para. h(iv).



applicant had “compelling” reasons for leaving his or her first country of asylum because of “fear of persecution or because his physical safety or freedom are endangered.”<sup>232</sup>

Ex. Com. Conclusion 58 focused more specifically on first countries of asylum. It emphasized the dangers of irregular secondary movements, urged support and care for refugees in their countries of temporary asylum, and encouraged promotion of durable solutions.<sup>233</sup> At the same time, it acknowledged that some irregular secondary movement will inevitably occur. In such cases, UNHCR said, returns to the third country are permissible if the applicants are “protected there against refoulement” and “are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them.”<sup>234</sup> The Conclusion also advocated “favorable consideration” in the “exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered” in the third country.<sup>235</sup>

In recent years, additional UNHCR statements have offered somewhat greater specificity in the requirements for returns to first countries of asylum or safe third countries, though again with varying emphases, varying language, and often fairly general prescriptions. Thus, an important UNHCR position paper issued in 1996 identified several “factors” for determining whether an asylum applicant may be returned to a third country.<sup>236</sup> These included the third country’s ratification of, and compliance with “the international refugee instruments” (especially nonrefoulement) and “international and regional human rights instruments,” as well as the third country’s willingness to “accept returned asylum seekers and refugees,” provide a fair asylum determination with suspensive effect, “and provide effective and adequate protection.”<sup>237</sup> The statement later insisted on “the explicit or implicit consent” of the third country to accept the particular individual and provide a fair asylum procedure.<sup>238</sup> It also called upon western European destination countries to “take into account” the facilities for both reception and integration in the third countries of central and eastern Europe and give “due regard” to a comparison of the applicant’s links to the destination country and the third country.<sup>239</sup>

Other UNHCR statements on this subject furnish additional guidance.<sup>240</sup> They will be considered below in connection with some of the specific proposed criteria for return.

One other preliminary comment: This paper does not assume the adoption of any new conventions. The legal analyses are meant to flow from obligations created by existing international agreements. Admittedly, however, while some of the demands that international law places on countries contemplating the return of asylum seekers to third

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<sup>232</sup> Ibid. para. k.

<sup>233</sup> UNHCR Ex. Com. Conc. 58 (1989), paras. a,d.

<sup>234</sup> Ibid. para. f.

<sup>235</sup> Ibid. para. g.

<sup>236</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid. at 3.

<sup>239</sup> Ibid. at 3-4.

<sup>240</sup> E.g., UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, at 3-4; UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001; UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001; UNHCR Global Consultations, 31 May 2001, at 3-5; UNHCR Europe Bureau Overview, Oct. 2000.

countries are clear cut, other such demands are hazier. Many of the issues discussed here have not yet been definitively resolved. Thus, although no new conventions are assumed, many of the analyses require interpretations of indeterminate language in existing agreements. In offering possible interpretations, I have generally relied on the text, evidence of the drafters' objectives, analogies to human rights law, UNHCR pronouncements, and other aids to interpretation.

The elasticity of the language in many of the relevant conventions also means that UNHCR has substantial latitude in deciding how rigorous a set of criteria it should promote. The exercise of that latitude will necessarily reflect a combination of legal and pragmatic judgments. On the one hand, if the effective protection principle is to be taken seriously, then meaningful, concrete criteria for the return of asylum seekers to third countries are vital. Moreover, UNHCR's international protection responsibilities entail, at a minimum, promoting compliance with the demands of international refugee law. On the other hand, too stringent a definition of effective protection might be unrealistic for the typically less developed first countries of asylum. Similarly, stringent prerequisites for return make it more costly for destination countries to apply those prerequisites faithfully.

To accommodate these competing concerns, this paper recommends two sets of criteria for the return of asylum seekers to third countries. One set is the bare minimum required by international law -- a statement of principles from which UNHCR and the rest of the international community should not recede. The other set might be labeled aspirations, or high ideals, or simply "best practice." These are practices that UNHCR should formally embrace, should officially encourage all countries to adopt, and should seek specific commitments to honor whenever the realities of international negotiation permit. But there is no claim that these practices are required by international law.<sup>241</sup>

The first three subsections consider possible criteria -- both minimum threshold requirements and best practice principles -- for the return of asylum seekers to third countries. Subsection A assumes that effective protection is a prerequisite to return and seeks to identify the possible safeguards that the concept of effective protection comprises. Subsection B examines whether, in addition to requiring effective protection, the return criteria should require any type of connection or link between the applicant and the third country. Subsection C discusses the procedures used by the *destination country* to determine whether the criteria for return are met. Subsection D then distills, from the first three subsections, a list of required conditions for the return of asylum seekers to third countries and a broader list of best practice criteria.

## **A. The Elements of Effective Protection**

As explained above, the operating assumption here is that no asylum seeker should be returned to a third country, without a substantive determination of his or her asylum claim, unless the individual will receive effective protection in that third country. But what, exactly, does effective protection mean? Here are some *possible* ingredients:

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<sup>241</sup> An analogy would be the rules that govern the professional responsibilities of lawyers in some states (at one time, all states) of the United States. The American Bar Association's Model Code of Professional Responsibility distinguishes "disciplinary rules" from "ethical considerations." The former describe minimum requirements that lawyers must follow; noncompliance triggers sanctions. The latter describe the high ideals to which lawyers are encouraged to aspire, but which there is no sanction for failing to attain.

### *1. Advance consent to readmit and to provide a fair refugee status determination*

As a condition for the return of an asylum seeker to a third country, UNHCR has consistently required the third country's advance consent to (a) readmit the person; and (b) provide a fair refugee status determination (or effective protection without such a determination).<sup>242</sup> The reasons are clear. Without advance assurance that the third country will in fact readmit the person and provide a fair refugee status determination, there are the twin risks of orbit (if the person is returned to the destination country) or chain refoulement to the country of origin. In addition, obtaining proper consent is integral to the spirit of international collaboration on which a successful refugee regime ultimately rests.<sup>243</sup> Apart from these commonly stated rationales, consent serves a more obvious function: Consent to readmit is the key to all the other elements of effective protection. Even a country that accords model protections to those refugees whom it readmits is of no use to a person whom it refuses to readmit.

For all these reasons, UNHCR is on record as generally preferring readmission agreements (provided they make adequate provision for asylum seekers -- a large issue, as section I of this paper illustrates) over unilateral returns outside the framework of an agreement, and also favoring agreements to allocate responsibility for deciding asylum claims.<sup>244</sup> These sorts of agreements can be useful devices for avoiding disputes as to which country will physically admit the person into its territory and determine his or her refugee status. Along the same lines, UNHCR has expressed its willingness to help countries negotiate such agreements and, in the absence of an agreement, help secure consent in individual cases.<sup>245</sup>

The major issue seems to be whether consent must be explicit. A well drafted readmission agreement or agreement to allocate responsibility for deciding asylum claims will contain provisions that settle the obligations of the signatory states with reasonable certainty. Even still, these provisions offer consent only in broad, general terms; their application to individual cases can be uncertain. Under such circumstances, the willingness of a state party to readmit an individual asylum seeker is at most implicit. Is that enough? In addition, in cases that are *not* governed by any general agreement, does return require the third country's express consent to readmit this specific individual and determine his or her refugee claim, or will implied consent suffice?

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<sup>242</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 31(iii); UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 15(b); UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 2-3; UNHCR Global Consultations, 31 May 2001, para. 50(b); UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c (UNHCR Position); UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2-3; UNHCR Note on Treatment at Port of Entry, 1991, para. 3.1.

<sup>243</sup> See, e.g., UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 38; UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 3; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, sections A.1.a, A.1.c (UNHCR Position); UNHCR Position on Readmission Agreements, 1994, para. 5.

<sup>244</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c (UNHCR Position); UNHCR Position on Readmission Agreements, 1994, paras. 1,4; UNHCR Ex. Com. Conc. 15 (1979), para. h; see also the sources cited in the discussion of readmission agreements and agreements to allocate responsibility for deciding asylum claims, in section I of this paper.

<sup>245</sup> UNHCR Position on Readmission Agreements, 1994, para. 6.

UNHCR's statements on this issue have not been consistent. At times UNHCR appears to have advocated a requirement that the third country "expressly" agree to receive back, and determine the refugee claim of, a third party national, or that a state must first seek and obtain "explicit and specific guarantees" of nonrefoulement.<sup>246</sup> In one instrument UNHCR refers to "the State's *express* consent" to decide the refugee claim but says only that such express consent "must be a *key factor* in any decision on admissibility" (emphasis added). The implication is that express consent is one important consideration, to be weighed and balanced against others, but that it is not a prerequisite. Other UNHCR statements take the view that, even without a preexisting general agreement, implicit consent can suffice.<sup>247</sup> Still other UNHCR statements require consent but decline to specify whether the consent must be explicit.<sup>248</sup>

The European Commission's original proposal for a Council directive on asylum procedure, addressing the issue of when the safe third country constraint could be invoked, required "*grounds for considering* that this particular applicant will be readmitted" (emphasis added).<sup>249</sup> Although UNHCR criticized this wording as too lax,<sup>250</sup> the European's Commission's amended version retained the original language in all relevant respects.<sup>251</sup> Other commentators, in contrast, have favored a requirement of explicit consent in the individual case.<sup>252</sup>

This paper takes the view that, before returning an asylum seeker to a third country, the destination country should be required to obtain the third country's explicit confirmation that it will admit the specific individual and will accord him or her a fair refugee status determination (or effective protection without such a determination) – whether or not the two countries are parties to a readmission agreement or to an agreement for allocating the responsibility for determining asylum applications. Further, for reasons discussed below, this criterion for return should be on the list of formal legal requirements, not merely the list of best practices. A travel document that reasonably appears genuine and authorizes the individual's readmission to the third country should satisfy the requirement of explicit consent to readmit, provided the destination country has no reason to think the document

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<sup>246</sup> UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 15(b); UNHCR Note on Treatment at Port of Entry, 1991, para. 3.1. See also UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 3 ("consent, on a case-by-case basis"). Perhaps the reference to "case-by-case" assumes explicit agreement to admit the particular individual. Probably the clearest statement to this effect appears in UNHCR Observations on UK Asylum Bill, Nov. 1992, quoted in Dunstan, Amnesty International, 1995, at 613 (requiring a "case-by-case" approach that "will require that the authorities of the removing country seek and obtain appropriate assurances from the authorities of the third country in question before the removal can take place").

<sup>247</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c (UNHCR Position); UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 3.

<sup>248</sup> E.g., UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, paras. 31(iii) ("third country agrees to admit . . ."), 38 ("third country having consented to admit . . ."); UNHCR Global Consultations, 31 May 2001, para. 50(b) ("has first been ascertained that the person will be accepted . . ."); UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 3 ("third country agrees to admit . . ."); UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2 ("State's willingness and practice" to accept individuals returned to them).

<sup>249</sup> European Commission Original Proposal on Asylum Procedures, 20 Sept. 2000, art. 22(b).

<sup>250</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 38.

<sup>251</sup> European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 28(1)(b).

<sup>252</sup> Abell, 1999, at 66, citing inter alia ECRE, 1995, at 10-12; accord, Dunstan, Amnesty International, 1995, at 612-13, 650.

will not be honored. But a travel document would not normally indicate the third country's consent to provide a refugee status determination (or effective protection without a refugee status determination).

A preexisting general agreement between the two countries, while helpful, is an inadequate guarantee of readmission. The reason is that such an agreement is precisely that – general. Even if the general criteria have been agreed, the application of those criteria to the evidence submitted in individual cases is often less than obvious. The evidence might be ambiguous or conflicting with respect to the applicant's nationality, or travel route, or family ties, or any other criteria that the general agreement incorporates. Consequently, the two countries might differ as to which one is responsible. If the destination country is mistaken in its assumption that the third country will accept responsibility for this applicant, the result of that mistake – as UNHCR has consistently pointed out – might be orbit or, worse, chain refoulement to the country of origin. It is the latter possibility that especially counsels in favor of holding explicit, individualized consent to be a legal prerequisite to return, not just a good idea. Moreover, even when it is clear that the third country will readmit the person under the terms of a preexisting readmission agreement, the agreement might not provide for a refugee status determination.

In this electronic age, the logistics of consent are easy. An e-mail would be free, instantaneous, and, once the system is up and running, routine. Presumably, the destination country also benefits from advance confirmation of the third country's consent, which avoids both the expense and the delay associated with orbit, as well as the additional friction in its foreign relations. Under these circumstances, there is ample reason to play it safe and no convincing reason not to.

With respect to the requirement of the third country's advance explicit consent to provide a fair refugee status determination (or effective protection without such a determination), two last observations are necessary. First, this requirement differs from the related requirement, in criterion 5 below, of assurance that the third country *will actually* provide such a determination (or, again, effective protection without a determination). Without advance explicit consent, it becomes too easy for busy immigration or refugee officials in the destination country to assume that the third country will provide a fair refugee status determination when it might well be that the third country has no actual intention of doing so.

Second, a qualification is necessary to protect the applicant's legitimate privacy interests. There are two distinct privacy concerns. The applicant might fear political reprisals from the government of *the third country* or might fear that the third country will either consciously or inadvertently relay the information to the country of origin. For that reason, the applicant might decide not to request refugee status in the third country even after readmission. In addition, because electronic transmissions are not always secure, the applicant might worry that an e-mail message could inadvertently wind up in a government office in the country of origin. Before requesting the third country's consent to provide a refugee status determination, therefore, the destination country should obtain the applicant's approval. If the applicant withholds approval, then only consent to readmit should be required.

## *2. No refoulement to persecution in the third country*

The most obvious element of effective protection is freedom from being persecuted in the third country. Article 33 of the 1951 Convention prohibits the destination country from returning refugees to any territories – including those of third countries – where life or freedom would be threatened on any of the Convention grounds. This interpretation of article 33 has not been seriously contested, and UNHCR has specifically embraced it.<sup>253</sup>

## *3. Assurance that the third country will respect 1951 Convention rights*

Under the complicity principle developed in section II.B.12 of this paper, no country may knowingly return a refugee or asylum seeker to a country that will do anything that the sending country is prohibited from doing itself. In particular, therefore, if the country in which the asylum application is lodged (described here as the destination country) is a party to the 1951 Convention, it may not knowingly send the person to a third country that will deprive the person of any rights guaranteed by the Convention. To deliver the person into the hands of the third country under those circumstances would assist that third country to violate the Convention and thus would make the destination country an accomplice. The destination country would be just as culpable as if it had violated the Convention directly.

The most familiar application of what I have termed the “complicity” principle is the oft-repeated – and clearly correct – statement that the destination country may not send the asylum seeker to a third country if the third country in turn will violate article 33 of the Convention by refouling the person to territory where his or her life will be threatened on Convention grounds. The same principle holds when the third country, rather than refouling the person directly to the place of persecution, will refoule him or her to still other intermediaries that in turn will refoule to the place of persecution. This point is considered in more detail below.

But article 33, which prohibits refoulement, is merely one of many rights that the Convention confers on refugees. As also discussed below, other Convention rights relate to such subjects as nondiscrimination, free movement, legal status and documentation, family life, subsistence, education, health care, and employment. The same complicity principle that prohibits destination countries from sending asylum seekers to third countries that will violate their nonrefoulement rights under article 33 should, with equal logic, prohibit destination countries from sending asylum seekers to third countries that will violate any of these other Convention rights. And by the same reasoning, destination countries should not be permitted to send asylum seekers to third countries that in turn will send them to still other countries in which any of their Convention rights will be violated. These results do not flow from article 33, which, after all, says nothing about refouling refugees to places where they will be deprived of adequate education or employment opportunities or health care. Rather, these results flow from the application of the complicity principle to the Convention provisions that specifically recognize various refugee rights. As discussed below, however, there is some question as to how literal one should be in applying this reasoning.

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<sup>253</sup> UNHCR Ex. Com. Conc. 58 (1989), para. g; UNHCR Ex. Com. Subcom. On International Protection, Background Note on the Safe Country Concept, 1991, para. 13.

This subsection, then, will consider the major refugee rights that emanate from the Convention and the extent to which they shape the rules for returning asylum seekers to third countries. For this purpose, all references to the Convention are meant to include also the 1967 Protocol, which eliminated the geographic and temporal limitations on the Convention's refugee definition.<sup>254</sup> Recall too that not all refugees have all the rights discussed in the Convention; some rights do indeed belong to all refugees physically present in the territory of a signatory state, but others are specifically reserved for those refugees who are lawfully present, or for those with lawful "stays," or for those who have some still more durable legal status.<sup>255</sup>

#### a. Non-refoulement

Among the bundle of refugee rights recognized by the 1951 Convention, the right of non-refoulement in article 33 stands out as the centerpiece. As UNHCR has frequently stated, article 33 prohibits not only direct refoulement to the country of persecution, but also indirect chain refoulement.<sup>256</sup> UNHCR has consistently applied that principle specifically to the return of asylum seekers to third countries. In such cases, UNHCR has always said, the third country must not be one that will refoule the person to a place where life or freedom would be threatened on any of the Convention grounds.<sup>257</sup> The European Commission, the Council of Europe, and the U.K. House of Lords all agree.<sup>258</sup>

While these general principles are for the most part uncontested, significant problems have arisen when the destination country and the third country interpret or apply the Convention differently. Suppose the third country's interpretation would lead to the applicant's refoulement to his or her country of origin, but the destination country's interpretation would not. Does international law prohibit the destination country from sending the applicant to the third country, knowing that the latter in turn will send him or her to the country of origin? Or does international law allow the destination country to defer to the third country's interpretation of the Convention, assuming the third country is in all other respects the appropriate country to determine the applicant's claim and has accepted responsibility for doing so?

The problem has surfaced in many different contexts. The two countries might interpret the substantive definition of "refugee" differently; for example, the destination country might

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<sup>254</sup> As of 1 January, 2002, there were 138 parties to the 1951 Convention. Of those states, 134 were also parties to the 1967 Protocol. The only four states parties to the Convention that were not also parties to the Protocol were Madagascar, Monaco, Namibia, and St. Vincent & the Grenadines. 20 Refugee Survey Quarterly No. 4 at 218-21 (2001).

<sup>255</sup> See the fuller discussion in sections II.B.4 and III.A.3.b of this paper.

<sup>256</sup> E.g., UNHCR Position on Readmission Agreements, 1994, para. 3; UNHCR Note on Treatment at Port of Entry, 1991, para. 3; accord, Hyndman, 1994, at 251-52.

<sup>257</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 31(i); UNHCR Global Consultations, 31 May 2001, para. 50(c); UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 2-3, 4; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c, UNHCR Position; UNHCR Background Information on Bulgaria, 1999, at 7; UNHCR Background Information on Romania, 1999, para. 25; UNHCR Background Information on Poland, 1999, at 3; UNHCR Ex. Com. Conc. 85 (1998), para. aa; UNHCR Position on Readmission Agreements, 1994, para. 3; UNHCR Note on Treatment at Port of Entry, 1991, para. 2.2.1; UNHCR Ex. Com. Conc. 58 (1989), para. f(i); accord, Hyndman, 1994, at 251-52.

<sup>258</sup> See the authorities cited in section II.B.12 above.

recognize claims based on persecution by non-state actors while the third country does not.<sup>259</sup> The third country might take a broader view of the various exclusion clauses or give wider scope to the internal flight alternative.<sup>260</sup> The third country might invoke the safe third country constraint less discriminately,<sup>261</sup> or might detain broader categories of asylum seekers pending their claims, or might impose more severe filing deadlines. Or the two countries might simply differ in their factual assessments of country conditions or their appraisals of other relevant circumstances.<sup>262</sup> In cases where these differences might affect the ultimate outcome or otherwise disadvantage the applicant in ways that the destination country believes would violate the Convention, is return to the third country prohibited?

At first glance the answer might seem easy. When the destination country's more favorable interpretation is one that international law requires, and the third country's less favorable interpretation therefore falls short of international standards, return to the third country should be prohibited. The eventual result of return to the third country under those circumstances would be refoulement in violation of article 33. In contrast, when the refugee standards of the destination country exceed the requirements of international law, and the standards of the third country, while lower, nonetheless meet international standards, then the destination country should be permitted to return the applicant to the third country even though doing so will ultimately lead to that person's transfer to the country of origin. In that latter case, the destination country's decision whether to return the applicant to the third country should be solely a matter of its own domestic choice of law principles and any relevant agreements it has with the third country.

If all countries agreed as to what international law requires, and the only differentials resulted from countries consciously according greater generosity than required, the above analysis would solve the problem. The disposition of each case would simply be a matter of consulting international law. The difficulty is that, in the usual case, the conflict arises not because the destination country has consciously accorded treatment more generous than required, but rather because the two countries disagree over the very question of what international law requires. In such cases the real issue is which country's law should prevail.

It would be possible to follow what Gregor Noll has called the "formal approach," which would permit return as long as the third country is a party to the 1951 Convention and thus is formally bound to respect its dictates. The alternative, which he calls the "empirical" approach, entails inquiry into the actual practices of the third country, a time-consuming enterprise that would take place during the admissibility phase of the asylum process.<sup>263</sup> Labor aside, withholding return to the third country might strain the two countries' relations and might also magnify the incentive for irregular secondary movements and "forum-shopping." Yet the formal approach, as Noll points out, is even more problematic. It would reduce refugee protection by substituting restrictive policies for the more generous policies

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<sup>259</sup> See the discussion of the T.I. case in section II.A above (harmonization); Noll, 2001.

<sup>260</sup> See the discussion of the Minority Bosnians Case (Swedish Alien Appeals Board, 1998; Swedish government, 2000), in Noll, 2001, at 3-10.

<sup>261</sup> European Commission Staff Working Paper on Dublin Convention, 21 March 2000, paras. 20, 51.

<sup>262</sup> The Minority Bosnians Case, note 260 above, is additionally an example of this differential.

<sup>263</sup> Noll, 2001. Noll makes the further point that this entire problem illustrates both the importance of harmonisation and the dangers of allowing the return of asylum seekers to third countries before fuller harmonisation has been achieved.



that the destination country in this scenario has willingly adopted. One might add that, as discussed earlier, the destination country – being the country in which the application was filed – bears primary responsibility. Thus, there is reason for its interpretation to prevail over that of the third country when the two interpretations conflict. Finally, the ultimate outcome of the asylum determination should not be made to vary depending on the applicant’s travel route – precisely the anomaly that would occur if the applicant’s case had to be turned over to the third country for decision.

The mere fact that two countries hold different views about what international law requires seems an inadequate basis for concluding that international law requires one of those countries to follow its own interpretation when that interpretation is the more generous of the two. The country’s own domestic law, and in particular its own choice of law principles, might compel it to follow its own interpretation. But no rule of *international law* commands it to do so. One could argue, however, that the issue discussed here does not involve two identically situated countries with equal and parallel responsibilities. Having received an asylum application, the destination country bears primary responsibility for its disposition. Yet that rationale is less than satisfying. The destination country’s primary responsibility for the asylum claim obligates it to follow international law and, arguably, to refrain from knowingly delivering the person to another country that will violate international law. But that conclusion tells us nothing about which interpretation of international law must be followed.

One possible middle ground would link the legal obligations of the destination country to the pronouncements of the relevant international bodies. Under that approach, if UNHCR or any other relevant official international entity has issued a definitive interpretation on an issue of international refugee law, and if the third country is likely to take action that fails to comply with that interpretation, then return to the third country should be prohibited. This approach has the advantage of resting on the interpretation of international law by lawfully established official international authorities rather than by any one country.

But that approach would create problems of its own. No official international body has both the power to render definitive interpretations of the Convention and ample occasion to do so. The Convention expressly recognizes the responsibility of UNHCR for “supervising the application of the provisions of this Convention,”<sup>264</sup> and in practice UNHCR has offered its own interpretations in a range of thoughtful position papers and in the UNHCR Handbook. Those interpretations, although useful guidance, are not binding. The Conclusions issued by the Executive Committee of UNHCR probably command the most weight, but of necessity those Conclusions are the products of policy and diplomacy, not neutral and impartial adjudication. When the states parties to the Convention disagree over the interpretation or application of the Convention, any of those parties may refer the dispute to the International Court of Justice.<sup>265</sup> No such request, however, has ever been made.<sup>266</sup> Other international bodies also have occasional opportunity to interpret the Convention, but again those occasions are too intermittent to supply concrete guidance.

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<sup>264</sup> 1951 Convention, art. 35(1).

<sup>265</sup> *Ibid.* art. 38.

<sup>266</sup> *R. v. Sec. of State for the Home Dept., ex parte Adan and Aitseguer* [2001] 2 WLR 143, 154 (H.L.).

While no ideal solution is self-evident, perhaps the optimal solution is the one adopted in 2001 by the U.K. House of Lords. In *R. v. Sec. of State for the Home Dept., ex parte Adan and Aitseguer*,<sup>267</sup> their Lordships held that the “refugee” definition laid out in the 1951 Convention has only one “true international meaning” rather than “a range of interpretations”<sup>268</sup> and that the duty of the government is to ascertain what that interpretation is. Once the government does so, their Lordships held, it must abide by that interpretation rather than return the asylum seeker to a third country that interprets the refugee definition more narrowly. Although their Lordships focused specifically on one article of one treaty (the “refugee” definition in article 1A.2 of the 1951 Convention), the language of Lord Slynn’s judgment was more sweeping: “In principle therefore there can be only one true interpretation of a treaty.”<sup>269</sup> For that principle, he relied primarily on U.K. statutory law. As further support, however, he invoked the analogous philosophy of the European Court of Human Rights.<sup>270</sup>

This paper suggests a qualified version of *Adan and Aitseguer*. Rather than assume, as Lord Slynn does, that every provision of every treaty has a uniquely correct meaning, this paper will assume that some provisions lend themselves to a single international meaning while others have multiple permissible meanings. Under that assumption, when faced with the dilemma discussed here, a destination country should apply its own more favorable interpretation whenever it regards the particular provision as susceptible to only one true international meaning. Further, that conclusion should itself be regarded as required by international law – more specifically, the very treaty provision being interpreted. In contrast, if the destination country views both its own interpretation and that of the third country as permissible, then its decision which one to follow should be governed by the destination country’s own choice of law rules and any applicable agreements with the third country. Even then, to avoid complicity in what *its own law* views as a violation of international standards, the *best practice* would be to refrain from return, provided the destination country’s choice of law rules and international agreements allow it that degree of flexibility.

#### b. Other Convention rights

As noted earlier, the Convention recognizes numerous other refugee rights. They run the gamut from the fundamental right of nonrefoulement to the lesser known right of administrative assistance from the host government.<sup>271</sup>

Different subgroups of refugees enjoy different sets of rights.<sup>272</sup> Some rights are expressly extended either to all refugees or to those who are physically within the territory of a state party. Among these are freedom from discrimination based on race, religion, or nationality; freedom of religion; certain property rights; access to court; education; the issuance of identification papers; immunity from penalties for illegal entry; and of course nonrefoulement.<sup>273</sup> A second group of rights is reserved for those refugees whose presence in the country’s territory is “lawful.” These include the right to be self-employed, freedom

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<sup>267</sup> Ibid.

<sup>268</sup> Ibid. at 153.

<sup>269</sup> Ibid. at 154.

<sup>270</sup> Ibid. at 153.

<sup>271</sup> 1951 Convention, arts. 33 and 25, respectively.

<sup>272</sup> See section II.B.4 above.

<sup>273</sup> 1951 Convention, arts. 3, 4, 13, 16.1, 22, 27, 31, and 33, respectively.

of movement, and the right not to be expelled other than on national security grounds.<sup>274</sup> A third group of rights is for a still smaller subgroup – those refugees whose “stays” in the country are lawful. For this purpose, a “stay” is assumed to require something more substantial than mere physical presence.<sup>275</sup> This group of rights includes a limited freedom of association, wage-earning employment, eligibility for certain professions, housing, eligibility for public relief, labor law protection and social security, and the issuance of travel documents.<sup>276</sup> A possible fourth tier of rights is enjoyed only by those refugees whose stays rise to the level of “habitual residence;” these rights include legal assistance and the protection of the intellectual property laws.<sup>277</sup>

Convention rights can also be classified in another way. Many amount only to the right to be treated at least as favorably as aliens generally or, alternatively, a right to “the most favourable treatment accorded to nationals of a foreign country.” Examples include certain property rights, non-political association, wage-earning employment, self-employment, eligibility for certain professions, housing, and public non-elementary education.<sup>278</sup> Several other provisions grant a right to whatever treatment the state accords its own nationals. These provisions include freedom of religion, the protection of the intellectual property regime, legal assistance, public elementary education, public relief, and labor law protections, including social security.<sup>279</sup> Only a few provisions delineate specific rights in nonrelative terms. The main examples are nondiscrimination (on grounds of race, religion, or nationality), access to court, and nonrefoulement.<sup>280</sup>

Does international law bar the return of an asylum seeker to a third country that will violate one or more of these Convention rights? On the one hand, there appears to be no clear statement by an official international authority that would make a third country’s compliance with this entire package of Convention rights a necessary condition for the return of asylum seekers to that country. On the other hand, there are numerous statements disapproving the return of asylum seekers to countries that will violate certain specific Convention rights. Return to third countries that will violate the right of nonrefoulement is the most obvious example and has already been discussed. In addition, UNHCR and others have suggested that asylum seekers should not be returned to third countries that will breach the Convention norms on detention (an aspect of freedom of movement),<sup>281</sup> or on family

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<sup>274</sup> Ibid. arts. 18, 26, and 32, respectively.

<sup>275</sup> See Hathaway, 2002, at 9-11; Grahl-Madsen, 1966, at 353-54.

<sup>276</sup> 1951 Convention, arts. 15, 17, 19, 21, 23, 24, and 28, respectively.

<sup>277</sup> Ibid. art. 14.

<sup>278</sup> Ibid. arts. 13, 15, 17, 18, 19, 21, and 22.2, respectively.

<sup>279</sup> Ibid. arts. 4, 14, 16.2, 22.1, 23, and 24, respectively.

<sup>280</sup> Ibid. arts. 3, 16.1, and 33.

<sup>281</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c, UNHCR Position. On the detention of asylum seekers generally, see UNHCR Reception Standards, July 2000, at 9-11; UNHCR Revised Detention Guidelines, 1999; UNHCR Ex. Com. Conc. 85 (1998), paras. cc-ee; UNHCR Ex. Com. Conc. 44 (1986).

unity,<sup>282</sup> or on the basic necessities of life (often included within the general rubric of treatment according to basic “human” standards).<sup>283</sup>

How the various Convention rights should affect the formulation of criteria for the return of asylum seekers to third countries is probably the single most difficult issue addressed in this paper. Just as a state party may not directly violate any person’s Convention rights, the complicity principle described earlier<sup>284</sup> suggests that a state party may not evade that constraint by knowingly delivering the person to another country that will violate any of those same rights.

At first glance, the application of the complicity principle to the Refugee Convention seems manageable. Since the present scenario concerns only asylum seekers, and not persons who have already been granted lawful stays or durable residence in their host countries, the rights in question are not the more ambitious ones such as wage-earning employment. As the catalog provided above indicates, however, even the rights that are not confined to refugees in lawful stays can be substantial. Thus, a literal application of the complicity principle to the Refugee Convention admittedly could create some serious practical concerns. First, with respect, it would disqualify huge numbers of third countries – perhaps literally all of them. What country can genuinely claim 100% compliance with all the provisions of the 1951 Convention, from nonrefoulement all the way down to administrative assistance? As seen in section I, many of the developing countries of first asylum have been unable to meet some of the more important Convention requirements concerning education, employment, and free movement. Even some of the most prominent of the permanent resettlement countries have been called to task for detention policies and interdiction policies that appear to contravene Convention standards. And in Europe, safe third country admissibility criteria and readmission agreements have similarly raised at least doubts about full fidelity to the Convention.

Second, this approach would generate some difficult procedural and administrative issues. In every case in which return is contemplated, the destination country in theory would have to investigate the record of the third country with respect to every one of the rights guaranteed by the Convention. Presumably, that investigation would require not only consultation of the third country’s laws, but also enquiry into its actual practices and conditions. All this would occur at the admissibility stage, before the substance of the asylum claim is even addressed. The administrative demands are potentially staggering.

The administrative problem can be mitigated, however, by shifting to the applicant the burdens of identifying the particular violation by the third country and producing some evidence of it. (If this is done, an exception for nonrefoulement is recommended. Nonrefoulement is fundamental enough that the destination country – which as noted earlier

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<sup>282</sup> This has been a major topic of discussion with respect to returns under the Dublin Convention. See UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 7; European Commission Proposal on Determining Responsible State for Deciding Asylum Application, 26 July 2001, commentary para. 3.1 at 5-6 and articles 6-8, 15. On the general right of refugees to family life, see UNHCR Ex. Com. Conc. 85 (1998), paras. u-x; UNHCR Ex. Com. Conc. 22 (1981).

<sup>283</sup> E.g., UNHCR Background Information on Bulgaria, 1999, at 7; UNHCR Background Information on Romania, 1999, para. 25; UNHCR Background Information on Poland, 1999, at 3; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c, UNHCR Position.

<sup>284</sup> See section II.B.12 above.

bears primary responsibility for the application – should be expected to initiate the enquiry on its own.) Under this proposal, once the applicant identified the violation and offered some evidence of it, the destination country would retain the ultimate burden of proving that the particular right would be respected.

Even a shift in the burden of producing evidence, however, would leave the destination country with complex proof problems, at a time when destination countries have been instituting accelerated procedures and other programmes to make the asylum process faster, cheaper, and less inviting – not slower, more costly, and more enticing. At any rate, a shift in the burden of producing evidence would not solve the first problem. A standard that even the destination countries themselves rarely attain would invite irrelevance.

The main argument for the complicity principle is that the premise on which it rests is unassailable. It follows unavoidably from cases like *Soering* and *T.I.* and from other sources of international law; it also finds support in the International Law Commission's Articles on State Responsibility.<sup>285</sup> Just as no one denies that one violates the Convention by knowingly sending someone to a third country that in turn will violate the person's right to nonrefoulement, so too there is no evident basis to dispute that one violates the Convention by knowingly sending someone to a third country that in turn will violate other Convention rights. Specific authority aside, the complicity principle reflects a deeply intuitive notion: If you are prohibited from doing something, you cannot normally avoid responsibility by knowingly enlisting someone else to do it.

Further, the practical consequences of applying the complicity principle to the Refugee Convention might be less overwhelming than first appears. It is true that most first countries of asylum are developing countries that struggle to meet the needs of their own nationals. It is also true that the Convention grants a wide variety of rights. As discussed earlier, however, the vast majority of those rights are expressed in relative terms. Most of the rights provisions require only that the country treat the refugee no less favorably than it treats other aliens. Admittedly, several other provisions either speak in nonrelative terms or require treatment on a par with that accorded the country's own nationals. Most of the latter, however, apply only to those refugees who have been granted lawful stay. Without trivializing the burdens of full compliance, one might find the practical difficulties at least manageable.

Moreover, the approach recommended here should not be dismissed solely because it presents enforcement challenges. Any number of position papers issued by UNHCR and other international agencies can meet resistance. Actual implementation of rigorous interpretations would require the usual judgment and sensitivity to institutional priorities and to the realities of international negotiation.

At any rate, two practical constraints on the implementation of the complicity principle should confine the actual results within reasonable bounds. First, as discussed earlier,<sup>286</sup> the standards applied to the destination country's requisite "knowledge" of the third country's prospective violation of the Convention would vary inversely with the importance of the particular right. The less important the right, the more certain the destination country would have to be of the third country's prospective violation before return is precluded. As

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<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

previous discussion indicated, the specific standards of proof that would govern each of the specific violations do not yet exist in international law. If the general principle suggested in this paper were otherwise acceptable, those standards would need to develop through the usual domestic and international legal processes.

A second constraint, suggested by Professor Hathaway in correspondence with the author, is specific to the 1951 Convention. As noted earlier, different subcategories of refugees possess different sets of Convention rights. Certain rights extend to all refugees physically within the country's territory, others extend only to those "lawfully" present, still others are limited to those refugees who are "lawfully *staying*" in the country, and a few rights are confined to refugees with even more durable residence. A country should not be prohibited from returning a refugee to a third country solely because that third country would deny rights that attach, for example, to lawful "stays." Those rights will not be relevant unless the third country ultimately grants a lawful stay; that, in turn, is not an event on which the destination country should be required to speculate. This qualification is compatible with the complicity principle, since, even under a fairly broad understanding of the word "knowing," the destination country would not be returning the refugee "knowing" that the third country will violate his or her Convention rights. The possible violation would be too speculative. Further, one can assume that those particular Convention rights which extend to all refugees tend generally to be the ones that the states parties regarded as the most fundamental; otherwise, they would have been reserved for selected subcategories of refugees. Consequently, one side benefit of this qualification is that the most important rights are the ones most likely to be protected from violation by third countries.

Alternatives to a strict application of the complicity principle are certainly possible. One could try to classify the Convention rights according to whether they are important enough to bar the destination country from returning asylum seekers to third countries. Unless the same criterion as above (classifying the Convention rights according to which categories of refugees enjoy them) were used, however, a principled dividing line would be hard to locate. Under any formulation, nonrefoulement, presumably, would be sacrosanct. No third country that will refole the applicant in violation of article 33 would be regarded as providing effective protection, and therefore no destination country would be permitted knowingly to initiate chain refoulement. But how would one decide which of the other violations are important enough to bar return and which are not? One might build a test on vague terms like "fundamental" rights, or "basic" rights, but such a formulation would raise more questions than it answers and would give almost unlimited discretion to the officials who decide individual cases.

Still, a stratified approach is possible. One could, for example, focus on article 42.1 of the Convention. It reads: "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 [definition of refugee], 3 [nondiscrimination], 4 [freedom of religion], 16(1) [access to courts], 33 [nonrefoulement], 36 to 46 inclusive [miscellaneous provisions not relevant here]." Article 42.1 thus left states free to enter reservations to most of the Convention's rights provisions, including such significant rights as property ownership, freedom of association, self-employment, wage-earning employment, membership in the professions, housing, education, public relief, labor law protection, and social security. Quite a number of reservations have in fact been entered. The most popular reservations have concerned

wage-earning employment, education, labor and social security legislation, and freedom of movement.<sup>287</sup>

Thus, one option might entail classifying the Convention rights according to whether they are reservable or non-reservable. Destination countries would be barred from returning asylum seekers to third countries that will violate the applicant's rights under any of the non-reservable provisions of the Convention. The return of asylum seekers to third countries that will violate the applicant's rights under the reservable provisions of the Convention would be discouraged under the "best practice" heading, but it would not be legally prohibited as long as all the other elements of effective protection are satisfied. Importantly, one of those other elements, discussed below (criterion 6), is the third country's conformity to certain international human and human rights standards. As will be seen, these standards potentially guarantee the basic necessities of life. They thus provide a safety net that would limit the dangers of this "reservable rights" approach. The adequacy of that safety net would depend on which human rights it is defined to protect.

Some substantial arguments for that option could be marshalled:

First, compromise is the most viable alternative. A purist standard that almost no country satisfies will be ineffectual. A more easily enforced middle ground will accomplish more.

Second, article 42 was added for a reason. The fact that the drafters consciously distinguished those rights that states could decline to protect from those rights that states were required to protect is compelling evidence that the drafters regarded some Convention rights as more fundamental than others. Thus, if lines need to be drawn based on degree of importance – and again that is a big "if" – the text of article 42 arguably furnishes a principled basis for doing so.

Third, it might seem anomalous to prohibit return to a third country solely because that third country does not protect a particular Convention right, when the very terms of the Convention gave both that country and the destination country the option not to protect that right in the first place. (One counterargument is that, whether or not the country in question had a choice originally, it has now made that choice. Having done so, it should be held to its freely accepted obligations.)

Fourth, as emphasized above, one of the other proposed elements of effective protection is the third country's compliance with certain international human and human rights standards beyond the 1951 Convention. Since some of the most important of the reservable 1951 Convention rights implicate crucial human rights norms, insisting on compliance with these other human rights norms will provide a safety net that limits the dangers of this "reservable rights" approach.

And fifth, that approach is conducive to certainty and predictability. Questions of fact, including predictions of the conduct of third countries, will be present under almost any formulation, but the "reservable rights" approach at least makes clear which rights provisions count and which ones don't.

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<sup>287</sup> Hathaway, 2000, at 117 & n.63.

But the basic problem would remain. A “reservable rights” approach offends the complicity principle. A destination country may not escape its treaty obligations by knowingly assisting another state to violate them. Moreover, as article 42 reveals, even some of the reservable rights are keenly important. Finally, one might object that this approach misconstrues the historical objective of article 42, which was to enable states to become parties to the Convention immediately, rather than have to wait until they had amended any of their laws that conflicted with the Convention. Indeed, with the passage of time, UNHCR has encouraged states parties to withdraw their reservations.

For all these reasons, this paper concludes that international law requires the application of the complicity principle to the 1951 Convention. Destination countries may not knowingly return asylum seekers to third countries that will violate rights recognized in the Convention. For purposes of that rule, the degree of certainty required by the word “knowingly” should vary inversely with the importance of the individual right. Under any standard of proof, however, the destination country is not required to speculate that the third country will ultimately grant the person the right of lawful stay. Therefore, the possibility that the third country will violate any of the Convention rights that are contingent on lawful stay does not bar return.

#### *4. Respect for international and regional human rights standards*

It is clear that the 1951 Convention is no longer the only significant international source of refugees’ rights. Additional rights flow from an array of universal and regional human rights instruments. To what extent do these sources shape the specific criteria for the return of asylum seekers to third countries?

The starting point is the increased recognition that states can violate human rights agreements not only by directly breaching the rights of individuals, but also by sending individuals to other states that will breach those rights. The “complicity” principle, as it has been called in this paper, has been recognized and applied in various contexts by the European Court of Human Rights, the UN Human Rights Committee, the Convention Against Torture, the UN General Assembly, and most recently the ILC Articles on State Responsibility (endorsed by the UN General Assembly).<sup>288</sup>

How literally to apply the complicity principle to the vast network of existing universal and regional human rights agreements is a difficult question. In the specific context of the return of refugees to third countries, UNHCR has employed several different formulations. Thus, UNHCR has said that refugees should not be returned to first countries of asylum unless they will be “treated in accordance with recognized basic human standards.”<sup>289</sup> That phrase should be understood to include basic subsistence needs.<sup>290</sup> Other UNHCR documents have used phrases such as “accepted international standards;”<sup>291</sup> or “recognized

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<sup>288</sup> See section II.B.12 above.

<sup>289</sup> UNHCR Ex. Com. Conc. 85 (1998), para. f(ii); see also UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c, UNHCR Position; UNHCR Background Information on Bulgaria, 1999, at 1 (“basic human standards”); UNHCR Background Information on Romania, 1999 (same); UNHCR Background Information on Poland, 1999 (same); UNHCR Note on Treatment at Port of Entry, 1991, paras. 2.2.1, 2.2.2 (“recognized human standards”).

<sup>290</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c, UNHCR Position.

<sup>291</sup> E.g., UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 31(1); UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 3.



basic human *rights* standards” (emphasis added).<sup>292</sup> Presumably also, as discussed earlier,<sup>293</sup> the application of broad terms like “basic human standards,” “recognized human rights standards,” and “inhuman or degrading treatment” to the facts of individual cases requires consideration of any special traumas the person has already experienced. Treatment that has a merely adverse but not debilitating effect on one person might rise to the level of “inhuman” when inflicted on a torture victim, for example. This factor obviously looms large in the context of refugees.

It is not clear whether these general references to “human” standards and “human rights” standards were meant to convey different meanings. The phrase “human rights” usually conjures up images of rights held against potential wrongdoers, while the phrase “human” standards is usually assumed to convey a wider meaning, encompassing general subsistence, for example. But even the phrase “human rights” can encompass social and economic rights that do not necessarily assume an identifiable wrongdoer;<sup>294</sup> conversely, wrongdoers can be the source of threats to subsistence. For present purposes, the distinction seems irrelevant. It will be assumed that third countries unable or unwilling to meet certain minimum international human *or* human rights standards would not be regarded as providing effective protection.

Again, under a literal application of the complicity principle,<sup>295</sup> no country would be permitted knowingly to return an asylum seeker (or anyone else) to a third country that will violate any human rights that the destination country is obligated to respect. Must that principle be relaxed, on the assumption that the international community simply is not yet ready to embrace it? The issues mirror those presented in the previous discussion of respect for 1951 Convention rights.

If modifications of the basic principle are to be considered, the possibilities are plentiful. All would involve identifying certain rights that form a minimum protection floor. Under a purist version of the complicity principle, one could argue that a state may not return an asylum seeker (or anyone else) to a country that will violate *any* of that person’s human rights that the sending state itself is obligated to protect. Until governments are willing to abide by such a norm, however, it might prove necessary to identify particular human rights that, at the very least, are protected against such indirect violations.

But defining these basic human standards is difficult, as UNHCR has acknowledged.<sup>296</sup> Not surprisingly, therefore, past attempts to locate the appropriate dividing line have taken varied tacks.

A thoughtful paper by Hathaway and Foster considers analogous classification problems in the slightly different context of internal flight alternatives.<sup>297</sup> Under what circumstances,

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<sup>292</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2; see also Council of Europe Guidelines on Safe Third Country, 1997, Guideline 1(a) (“observance . . . of international human rights standards”).

<sup>293</sup> See section II.B.5 above.

<sup>294</sup> See, e.g., ICESCR.

<sup>295</sup> See section II.B.12 above.

<sup>296</sup> UNHCR Ex. Com. Subcom. On International Protection, Background Note on the Safe Country Concept, 1991, para. 15.

<sup>297</sup> Hathaway & Foster, 2001; see also Michigan Guidelines on Internal Protection Alternative, 1999; Kelley, 2002.

they asked, would it violate the 1951 Convention for a country to return a protection seeker to a sub-area of the country of origin? In particular, they wanted to know when the person's exposure to violations of human rights would preclude such a return. One option they identified would be to bar the use of the internal flight alternative when a "fundamental" human right is at risk. They note that the use of "fundamental" as a limitation might be problematic, however, both because the term is vague and because it is not sufficiently linked to the 1951 Convention. For both reasons, they ultimately suggest anchoring the protection requirements for internal flight alternatives in the specific rights conferred by the 1951 Convention itself.<sup>298</sup>

Let us assume that the 1951 Convention was not meant to incorporate other international human rights agreements, existing or future. Under that assumption, it makes sense to conclude that whether *the 1951 Convention* bars return to a portion of the country of origin should rest entirely on the rights provisions laid out in the 1951 Convention itself. And given the specific purpose of the internal flight alternative paper, which was to assess whether return to a portion of the country of origin would violate the 1951 Convention, linking the human rights criterion to the specific rights enumerated in the 1951 Convention makes sense. Even with respect to internal flight alternatives, however, it is submitted that other international law sources – including especially the Convention Against Torture, the European Convention, the OAU Convention, and specialized conventions dealing with women or children, for example – are independent constraints. At any rate, the concern of the present paper is with the limitations that international law generally – not just the 1951 Convention – places on the return of asylum claimants to third countries. Accordingly, there is no need to restrict the present inquiry to the catalog of rights laid out in the 1951 Convention.

Some, including UNHCR, have suggested looking to the International Bill of Rights (the Universal Declaration of Human Rights, the ICCPR, and the ICESCR) as a way to distinguish those rights that are essential to effective protection from those that are not.<sup>299</sup> Others have suggested confining the focus to non-derogable rights.<sup>300</sup>

One possibility is to combine the latter two limitations, thus barring return on human rights grounds only when the third country will violate those provisions of the International Bill of Rights that are non-derogable. The main derogation clause of the ICCPR is article 4. It reads:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.

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<sup>298</sup> Hathaway & Foster, 2001, at 33-34.

<sup>299</sup> UNHCR Ex. Com. Subcom. On International Protection, Background Note on the Safe Country Concept, 1991, para. 15; cf. Hathaway & Foster, 2001, at 34 (in context of internal flight alternative).

<sup>300</sup> European Commission Amended Proposal on Asylum Procedures, 18 June 2002, Annex I, para. I.B; cf. Hathaway 1991 (for purposes of defining "persecution"); Hathaway & Foster, 2001, at 34 (concerning internal flight alternative).

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.

The non-derogable articles refer to the right to life (6), torture and cruel, inhuman, or degrading treatment or punishment (7), slavery and servitude (8), imprisonment for failing to fulfil a contract (11), retroactive criminal punishment (15), recognition as a person before the law (16), and freedom of thought, conscience, and religion (18). Among the rights that *are* derogable are liberty, security, and freedom from arbitrary arrest and detention (9), freedom of movement, including freedom to leave the country (12), certain protections against deportation (13), certain guarantees in criminal trials (14), freedom from arbitrary interference with family or home (17), freedom of expression (19), freedom of assembly and association (21 and 22), certain family protections (23), and equal protection of the law (26).

The derogation clauses in the other two instruments of the International Bill of Rights are wider still. The ICESCR grants only limited rights to begin with. Article 2.1 obligates each state party only “to *take steps . . . to the maximum of its available resources*, with a view to achieving *progressively* the full realization of the rights recognized in the present Covenant . . .” The “rights,” therefore, are more in the nature of aspirations. The derogation clause appears in article 4, which allows states parties to limit those already modest protections as long as the limitations are “compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” This derogation clause, unlike that of the ICCPR, does not require a public emergency and, more important here, contains no enumerated list of exempt provisions. The UDHR has a similarly sweeping derogation clause, article 29(2), which allows limitations for the purpose of respecting the rights of others and for meeting “the just requirements of morality, public order and the general welfare in a democratic society.” Again, no rights are made non-derogable. Thus, the non-derogable provisions of the International Bill of Rights are essentially the non-derogable provisions of only one of its components – the ICCPR.

Linking effective protection to the non-derogable provisions of the ICCPR would have several advantages. First, the ICCPR is a universal instrument that reflects a world consensus. Second, because the ICCPR is a United Nations instrument, a UNHCR requirement would bear the imprimatur of its parent organization. Third, all of the applicable rights are ones that the world community recognizes as having particular importance; otherwise they would be derogable. Fourth, each of these rights is readily ascertainable from the text of the ICCPR and therefore capable of practical application. Certainty, in turn, reduces adjudication time, permits predictability, and enhances the likelihood of equal justice. (Under any formulation there can be complications in either the basic factfinding or the determination of whether given facts constitute a violation, but the proposed formulation at least has the virtue of eliminating argument over whether a particular provision qualifies.) Finally, each of the elements of the proposed criterion finds support in one or more previous pronouncements of at least one international body.

UNHCR and others have also taken the position that, for the protection offered by a third country to be effective, the country must observe asylum-relevant human rights not only in

universal instruments, but also in regional instruments.<sup>301</sup> Although the instruments that express these views do not say, it is assumed they mean to refer only to those regional instruments to which the particular destination country is a party. Otherwise there would be no apparent basis for imposing obligations on the destination country.

One might object that to bar returns to third countries on the sole basis of such a regional agreement would erode the emerging uniform understanding of international refugee law. At a time when harmonization of the asylum laws is rightly touted, there is merit to that concern. The rules for the return of asylum seekers to third countries would vary depending on the regional human rights agreements to which the various destination countries are parties.

But that is as it should be. First, destination countries should, like any other countries, be held to the obligations they freely and willingly assume. The resulting differentials might be lamented, but they are a natural consequence of the universal norm that treaty obligations are binding – however distinctive those obligations might be.<sup>302</sup> Second, even the so-called “universal” agreements are universal only in the senses that not all states parties are situated in the same region and the agreements are usually open for all states to sign. Just as is true of regional agreements, not all the world’s states are parties to any particular universal agreement. Indeed, some “universal” agreements have fewer participants than some regional agreements. Thus, whether an agreement is universal, regional, or, for that matter, bilateral, some states will incur obligations that other states do not have.

Other suggestions have also been offered. Distinctions could be drawn, for example, between civil/political and economic/social/cultural rights.<sup>303</sup> Still another possibility, adopted by UNHCR in the different context of the protection of asylum seekers in situations of mass influx, would require both the enjoyment of “fundamental civil rights internationally recognized, in particular those set out in the [UDHR]” and “the basic necessities of life including food, shelter and basic sanitary and health facilities,” as well as several other specifically enumerated rights such as nondiscrimination, safety, free access to courts, family unity, and registration of births, deaths, and marriages.<sup>304</sup> Along similar lines, the Summary Conclusions of the 2002 Lisbon Roundtable would require “respect for fundamental human rights in the third State in accordance with applicable international standards, including, but not limited to [a real risk of] torture, inhuman or degrading treatment or punishment in the third State; . . . the life of the person . . . [or deprivation of] liberty in the third State without due process.”<sup>305</sup>

Yet another classification approach was suggested by one participant at the Lisbon roundtable. The idea would be to bar return when the third country will violate a right that is found to be fundamental to the particular individual. Thus, a religiously devout refugee could not be returned to a third country that will deny freedom of religion, but a refugee to whom religion is not important might be returned under otherwise identical circumstances.

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<sup>301</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c., UNHCR Position; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2; Council of Europe Guidelines on Safe Third Country, 1997, Guideline I.A.

<sup>302</sup> Vienna Convention, art. 26.

<sup>303</sup> Hathaway, 1991, at 109-12 (for purposes of defining “persecution”); Hathaway & Foster, 2001, at 34 (concerning internal flight alternative).

<sup>304</sup> UNHCR Ex. Com. Conc. 22 (1981), para. II.B.2(b,c,e,f,g,h).

<sup>305</sup> UNHCR Lisbon Roundtable Conclusions, 2002, para. 15(b).

This approach has the unique advantage of tailoring the solution to the needs of the individual refugee, but it too is problematic. Even if one is philosophically comfortable with the notion that a refugee may be deprived of legal rights as long as he or she does not personally regard those particular rights as fundamental, both the elasticity of words like “fundamental” and the need to decide which rights each applicant values the most highly would leave breathtaking room for the vagaries of individual officials – to say nothing of the additional factfinding it would require.

All these possibilities are intriguing, but ultimately they all suffer a common flaw: They simply cannot be squared with the complicity principle. Under each of these formulations, a destination country would still be able knowingly to assist the third country in its violation of the person’s explicit treaty rights. That those rights might or might not be fundamental or non-derogable does not mean they have not been breached. Nor is there any other obvious basis for *selective* protection of *some* internationally recognized human rights against indirect infringement. As with the analogous problem concerning the non-article 33 rights recognized by the 1951 Convention, this paper therefore concludes that international law prohibits a destination country from knowingly returning asylum seekers to a third country that will violate rights guaranteed by universal or regional human rights agreements to which the destination country is a party.

Again, the degree of certainty that the word “knowingly” is assumed to imply should vary inversely with the importance of the right. In that way, the complicity principle is respected but its application to the least important violations is tempered. While the precise standards of proof remain to be developed, it is suggested that certain violations – unlawful execution, torture, and detention without due process come immediately to mind – are so serious that destination countries should refrain from returning refugees to third countries in which there are even “substantial grounds for believing there is a danger” (to paraphrase article 3 of the Torture Convention) of the violation occurring.

Two special problems warrant special mention. One is physical security. As seen in section I of this paper and in a recent UNHCR Note on International Protection,<sup>306</sup> refugees in camps have experienced increased violence at the hands of local authorities, military units, the local population, and fellow refugees. At least two UNHCR Executive Committee Conclusions recommend “favourable consideration” for asylum applicants who request protection on the ground that their “physical safety or freedom are endangered” in a third country.<sup>307</sup>

The other problem relates to basic subsistence. Does the complicity principle prohibit the return of an asylum seeker to a country where that individual’s basic subsistence needs will not be met?

Nothing in the 1951 Convention guarantees refugees the right of subsistence. There are specific rights to wage-earning employment, housing, and public relief, but none of those rights attaches until the refugee has been granted a lawful stay.<sup>308</sup>

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<sup>306</sup> UNHCR Ex. Com. Note on International Protection, 13 Sept. 2001, at 76-78.

<sup>307</sup> UNHCR Ex. Com. Conc. 58 (1989), para. g; UNHCR Ex. Com. Conc. 15 (1979), para. k.

<sup>308</sup> 1951 Convention, arts. 17, 21, and 23.

The ICESCR, in contrast, explicitly recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”<sup>309</sup> But this is a thin reed. Like all the other rights guaranteed by the ICESCR, this one is subject to article 2.1, which binds a state party only to “take steps, . . . , to the maximum of its available resources, with a view to achieving progressively the realization of the rights recognized in the present Covenant . . . .” Even then, developing countries are granted special dispensation to decide to what extent they will apply the Covenant’s economic rights to non-nationals. Since many of the third countries are developing states, these limitations are significant. At any rate, the United States, a major destination country, is not a party to the ICESCR.

For those destination countries that are parties to the African Charter, there are such rights as “existence;” “economic, social and cultural development;” and “a general satisfactory environment favourable to their development,”<sup>310</sup> but those are the rights of “peoples,” distinct from the rights of individuals spelled out in preceding portions of the Charter. Article 5 does confer an individual right “to the respect of the dignity inherent in a human being,” and it goes on to prohibit “all forms of degradation of man, particularly . . . cruel, inhuman or degrading punishment and treatment.”

That last phrase offers the greatest promise, especially since it also appears in several other human rights conventions, both universal and regional.<sup>311</sup> There is great intuitive appeal to the notion that sending a person to a place where he or she will be unable to eke out even a basic subsistence amounts to cruel, inhuman or degrading treatment. The same could be said with respect to physical security. One concern in both cases, however, would be the larger implications. If sending a *refugee* to a *third country* without a means to subsist or to be safe from physical attack is cruel, inhuman or degrading treatment, then why would it not similarly be cruel, inhuman or degrading treatment to send a *non-refugee* (for example, an asylum seeker whose claim has been rejected in substance or a person who has not applied for refugee status at all) back to his or her *country of origin* under similar circumstances? The international community has not yet accepted the latter proposition. It is true that, by virtue of the 1951 Convention, refugees enjoy numerous rights that others do not. As just noted, however, neither the right to subsistence nor the right to physical security is among the special rights that the 1951 Convention confers on refugees.

Still, even aside from the 1951 Convention, one’s refugee status can render a claim of a right to subsistence or a right to physical security legally more compelling. The argument would be as follows: Whether treatment is cruel, inhuman or degrading depends on all the individual circumstances. Treatment that one person might find merely harmful or inconvenient might be far more damaging to a person who has already been traumatized by torture or other persecution. Depending on the precise circumstances, therefore, sending a *refugee* to a country where he or she will lack basic subsistence or physical security might well constitute cruel, inhuman or degrading treatment. One can accept that conclusion – at least in the form of a rule that would require consideration of the facts of the particular case – even if one is otherwise unwilling to reach a similar conclusion with respect to non-refugees.

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<sup>309</sup> ICESCR, art. 11(1).

<sup>310</sup> African Charter, arts. 20, 22, and 24.

<sup>311</sup> E.g., ICCPR, art. 7; Convention Against Torture, art. 16; American Convention, art. 5.2; European Convention, art. 3.

## 5. Assurance that the third country will provide a fair refugee status determination

UNHCR has repeatedly insisted that no asylum seeker be returned to a third country, under a safe third country provision or a readmission agreement, unless the third country will provide a fair refugee status determination (or provide effective protection without such a determination).<sup>312</sup> Ensuring that the fair refugee status determination actually occurs requires several safeguards. First, the destination country should advise the applicant where to go to apply for refugee status in the third country.<sup>313</sup> Moreover, to avoid misunderstanding, the destination country should give the applicant a letter stating clearly that the destination country has not determined the person's asylum application in substance.<sup>314</sup> Ideally, the letter should be written in one of the official languages of the third country.<sup>315</sup> Second, subject to the privacy qualification discussed in section III.A.1 above, return should not take place until the third country has explicitly agreed to provide a refugee status determination.

The 1951 Convention nowhere *expressly* requires a fair refugee status determination. It is submitted, however, that the central (albeit not the only) rationale for fair procedure in any context is that an unfair procedure necessarily produces an unjustifiably high risk of violating the individual's substantive rights. Thus, a fair refugee status determination is one essential component of the article 33 prohibition on refoulement. Without a fair determination, the risk is that the person could be erroneously refouled.

An example will illustrate. Suppose a country establishes a refugee status determination procedure. It requires that a written application be filed within 24 hours of arrival, that refugee status be proved beyond a reasonable doubt, and that the adjudicator reach a final decision within 24 hours after the filing. There is no oral hearing or interview, and there is no appeal. Applicants found to be refugees receive permanent resident status; the others are returned immediately to the country of origin. The Convention does not *expressly* prohibit this or any other specific procedure, but because this procedure is so unfair and unreliable, the act of establishing it assures that an unacceptably high number of refugees will be returned erroneously to their persecutors. Thus, it is submitted, the establishment of an unfair refugee status determination procedure is itself a violation of article 33. By

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<sup>312</sup> UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, paras. 15(b,e); UNHCR Global Consultations, 31 May 2001, para. 15; UNHCR Background Information on Bulgaria, 1999, at 1; UNHCR Background Information on Romania, 1999, at 1; UNHCR Background Information on Poland, 1999, at 1; UNHCR Ex. Com. Conc. 85 (1998), para. aa; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2; UNHCR Position on Readmission Agreements, 1994, paras. 4, 5. This view is widely shared. See, e.g., Council of Europe Guidelines on Safe Third Country, 1997, para. 1(c); Abell, 1999, at 66 n.25, citing ECRE, 1995, at 10-12.

<sup>313</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 3.

<sup>314</sup> UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 15(c); UNHCR Global Consultations, 31 May 2001, para. 15; UNHCR Background Information on Bulgaria, 1999, at 7; UNHCR Background Information on Romania, 1999, para. 26; UNHCR Background Information on Poland, 1999, at 6; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 3; UNHCR Position on Readmission Agreements, 1994, paras. 4, 5. Accord, European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 28; cf. Council of Europe Guidelines on Safe Third Country, 1997, section II (suggesting only that destination country inform third country that asylum applications "are generally not examined in substance") (emphasis added).

<sup>315</sup> UNHCR Global Consultations, 31 May 2001, para. 15; accord, European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 28.

analogous reasoning, such a procedure would also violate all of the other substantive Convention provisions that confer rights on refugees.

Perhaps one could argue alternatively that fair procedure has evolved into a “general principle of law” for purposes of becoming a principle of international law. Notions of “due process” and “natural justice” have become familiar features of virtually all domestic legal systems in cases where important individual interests are at stake.

From an effective protection standpoint, it should not matter who provides the refugee status determination as long as all the components of fairness are in place. Thus, a particular third country might delegate the determination to UNHCR.

Strikingly, almost every pronouncement of the need for a fair refugee status determination in the third country has been made in the specific context of either safe third country rules or readmission agreements – not, for example, in discussions of first countries of asylum. Clear statements that the same principle applies in first countries of asylum are rarer, though they do exist.<sup>316</sup> The relative absence of discussion of this requirement in the first country of asylum context probably reflects one of two assumptions.

One assumption might be that a country that provided effective protection in the past remains willing to do so again. As seen in section I, that assumption is not always true.

The other possibility is that a refugee status determination is assumed to be unnecessary because the third country’s prior recognition of refugee status remains intact. That assumption is also flawed. As seen in section I, the use of the first country of asylum mechanism has not been confined to cases in which third countries have made formal prior determinations of refugee status; the first country of “asylum” might in fact have offered only some lesser, *de facto* form of protection.<sup>317</sup> If that same arrangement will resume upon return, the difficult question identified in the previous subsection would arise.

As suggested earlier, it is the actual protection, not the formalities, that should control. If the third country will honor all the elements of effective protection without the formality of a refugee status determination, then the requirements of the present subsection should be deemed satisfied. At any rate, there seems no reason in principle to require a safe third country to provide a formal refugee status determination but not to expect the same from a first country of asylum (unless the latter is willing to renew or continue a previous grant of refugee status without a new determination, in which case the point is moot). Consequently, this paper assumes that the requirement of a fair refugee status determination (or a willingness to provide all the elements of effective protection without such a determination) applies to third countries in both contexts.

Large questions arise, of course, in deciding what it takes to make a refugee status determination fair. That question has been thoroughly debated both within and outside UNHCR and is especially topical in the light of the European Union’s progress on asylum

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<sup>316</sup> See UNHCR Background Information on Bulgaria, 1999, at 1; UNHCR Background Information on Romania, 1999, para. 2; UNHCR Background Information on Poland, 1999, at 1. The first paragraph of each of these three documents explicitly refers to “the return of applicants who have found or could have found protection in another country . . .” (emphasis added).

<sup>317</sup> See, e.g., European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 26.



harmonisation. Rather than reinvent the wheel, this paper simply incorporates UNHCR's existing statements on the elements of fair asylum procedure.<sup>318</sup> In particular, it seems reasonable to insist that the third country be one that permits asylum seekers to have access to UNHCR.<sup>319</sup> In contrast to the general claim that international law requires fair refugee status determinations, it is not claimed here that international law requires the particular set of elements endorsed by UNHCR. The latter are commended nonetheless as best practice criteria.

Two specific elements of fair procedure require special mention. One is privacy. UNHCR has repeatedly emphasized the important privacy interests of anyone who applies for refugee status, as well as the privacy interests of his or her family.<sup>320</sup> Keeping the information confidential does more than protect the refugee from the humiliation that can attend revelations of torture, although that is reason enough. As UNHCR has noted, confidentiality also serves two other practical functions – avoiding the exposure of the applicant and his or her family to the risk of recrimination by the country of origin, and permitting frank testimony essential to the applicant's case.<sup>321</sup>

The latter consideration suggests that a bar on returning asylum seekers to third countries that will fail to protect their privacy can be considered a requirement of international law, not merely a best practice criterion. As this subsection has demonstrated, the 1951 Convention indirectly requires a fair refugee status determination procedure. One element of fair procedure is that the applicant be able to testify freely. And that, in turn, requires a guarantee that his or her asylum application and specific testimony will not be shared with the country of origin. Legal requirements aside, privacy is independently valued as a prerequisite to the dignity and mental well being of the refugee and therefore is highlighted here.

The second point concerns refugees with special vulnerabilities. Special vulnerability is endemic to refugees, but certain subgroups of refugees are known to have additional special protection needs. UNHCR has expressed its concern for these subgroups on numerous occasions.<sup>322</sup> Examples of the specially vulnerable subgroups singled out by UNHCR include torture victims, women,<sup>323</sup> subcategories of women (for example victims of rape or

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<sup>318</sup> UNHCR Global Consultations, 31 May 2001, para. 50; see also UNHCR Observations on EC Proposal on Asylum Procedures, July 2001; European Commission Amended Proposal on Asylum Procedures, 18 June 2002; Legomsky, 2000.

<sup>319</sup> UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 15(g).

<sup>320</sup> See, e.g., UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 25; UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 5.

<sup>321</sup> See, e.g., UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 25; UNHCR Global Consultations in Budapest, Background Paper No. 3, May 2001, at 5. The risk of recrimination is quite real. See, e.g., *Chang v. INS*, 119 F.3d 1055, 1067-68 (3d Cir. 1997); Lawyers Committee for Human Rights, 2002, at 8; Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 *Georgetown Immigration Law Journal* 267, 287-88 (1997).

<sup>322</sup> For statements that enumerate lists of the special groups, see UNHCR Ex. Com. Note on International Protection, 13 Sept. 2001, 20 *Refugee Survey Quarterly* No. 4 at 88-92; UNHCR Global Consultations, 31 May 2001, para. 44; UNHCR Ex. Com. Note on Internat'l Protection, 7 July 2000, at 56-58.

<sup>323</sup> See UNHCR Refugee Women Guidelines; UNHCR Ex. Com. Conc. 64 (1990); UNHCR Ex. Com. Conc. 60 (1989); UNHCR Ex. Com. Conc. 54 (1988); UNHCR Ex. Com. Conc. 39 (1985).

other sexual violence,<sup>324</sup> pregnant women, and women who are single heads of households), children (especially unaccompanied children),<sup>325</sup> the elderly, the physically or mentally disabled, and stateless persons.<sup>326</sup> UNHCR has commended the practice, adopted in some states, of devising specific procedures and guidelines for these groups.<sup>327</sup>

Is the third country's willingness to consider the applicant's special vulnerabilities merely a good idea, or does international law make it a prerequisite to return? To the extent that the particular vulnerability is relevant to the likelihood or severity of persecution, it is submitted that the Refugee Convention requires consideration of that vulnerability. As just suggested, the Convention should be interpreted to require a fair refugee status determination. A procedure cannot be fair if it excludes consideration of evidence relevant to the applicant's claim. Therefore, the Convention requires consideration of whether the applicant's special vulnerabilities will affect the likelihood or severity of persecution or otherwise compromise the fairness of the determination.

Technically, there should still be no need for a specific admonition concerning specially vulnerable groups. The examination of the various criteria for effective protection must always be performed on a case-by-case basis (see section C below), and among the individualized attributes that must be considered are those that make the person specially vulnerable. Explicit reference to this requirement is nonetheless a useful reminder to decisionmakers in destination countries to raise the question in appropriate cases.

#### 6. *Third country is a party to the 1951 Refugee Convention*

It is clear that formal ratification of the 1951 Convention (and the 1967 Protocol) is not *sufficient* to guarantee the effectiveness of the protection offered by a third country.<sup>328</sup> The country's actual practice matters. But should formal ratification be a *necessary* condition?

Official UNHCR documents (noted below) have addressed that issue in the specific context of safe third country rules but not, apparently, in the context of first countries of asylum. As with the other safeguards addressed in this paper, however, there is no apparent reason to require ratification of the Convention in one of those contexts but not the other. A country's willingness to supply effective protection in the past might indeed be probative evidence of what the country will do now, but that evidence is not conclusive. The ultimate question in both contexts should be whether the country will now provide effective protection. If it makes sense to require that safe third countries be parties to the 1951 Convention, then it makes equal sense to hold first countries of asylum to the same standard.

UNHCR clearly regards ratification of the Convention as relevant to the return of an asylum seeker to a third country, but UNHCR does not appear to regard ratification as an absolute prerequisite. A 1996 UNHCR position paper identified a third country's "ratification of and

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<sup>324</sup> UNHCR Ex. Com. Conc. 73 (1993).

<sup>325</sup> UNHCR Ex. Com. Conc. 84 (1997); UNHCR Ex. Com. Conc. 59 (1989); UNHCR Ex. Com. Conc. 47 (1987).

<sup>326</sup> UNHCR Ex. Com. Conc. 78 (1995).

<sup>327</sup> UNHCR Global Consultations, 31 May 2001, para. 44.

<sup>328</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 32; UNHCR Global Consultations, 31 May 2001, paras. 14, 39; UNHCR Note on Treatment at Port of Entry, 1991, para. 3.1.

compliance with the international refugee instruments” as among the “factors for consideration in determining” the permissibility of return to a particular country.<sup>329</sup> The statement stopped short of making ratification a requirement.

In 2000 the European Commission, as part of its proposal for harmonised asylum procedures, took the view that a safe third country need not have ratified the 1951 Convention if it protects refugees in any of several other specified ways. The alternative routes include observing the principles of the OAU Convention or the Cartagena Declaration, or, even when neither of those alternatives has been adopted, “generally [observing the 1951 Convention standards] in practice” and having an adequate procedure in place. Yet another proposed alternative is that the country “complies in any other manner whatsoever with the need for international protection,” either through cooperation with UNHCR or through other means acceptable to UNHCR.<sup>330</sup> In 2001 UNHCR expressed concern over this provision:

. . . UNHCR is bound to raise a strong objection against the designation of a country as a “safe third country,” even with regard to a particular individual, *if that country has not ratified the 1951 Convention* and the applicant whose admissibility is in question is seeking the protection of that Convention. UNHCR is not only bound by the terms of its own Statute to promote accessions to the Convention, but perhaps more importantly, can only effectively fulfil its mandate of supervising the Convention’s application in those States where it has been ratified (emphasis added).<sup>331</sup>

The UNHCR statement nicely encapsulates the two principal arguments in favor of a formal ratification requirement. The UNHCR Statute does indeed obligate it to promote ratifications of international refugee conventions.<sup>332</sup> (The language of the Statute is generic because the 1951 Convention had not yet been adopted.) Further, as the UNHCR statement points out, the Convention recognizes UNHCR’s “duty of supervising the application of the provisions of this Convention.”<sup>333</sup> This duty will be easier to discharge once a country becomes a state party, because states parties must cooperate with UNHCR in the exercise of its supervisory mandate.<sup>334</sup>

Still, it is not clear that either of these UNHCR responsibilities necessitates a firm rule that would bar the returns of asylum seekers to non-party states. While a UNHCR statement that interprets the Convention to require such a condition might have symbolic value, it would be highly unlikely to promote accessions or deter denunciations. After all, the statement would impose constraints on the destination countries, not on the third countries that would be receiving the asylum seekers. Telling a third country that its failure to ratify the 1951 Convention would prevent destination countries from sending their unwanted asylum claimants its way is hardly an incentive for ratification. If anything, it is an incentive not to ratify. I acknowledge, however, the observation of one UNHCR official

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<sup>329</sup> UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2.

<sup>330</sup> European Commission Original Proposal on Asylum Procedures, 20 Sept. 2000, Annex I, para. I.A.2. The amended proposal contains essentially the same language. European Commission Amended Proposal on Asylum Procedures, 18 June 2002, Annex I, para. I.A.2.

<sup>331</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 35.

<sup>332</sup> UNHCR Statute, 1950, art. 8(a).

<sup>333</sup> 1951 Convention, art. 35.1.

<sup>334</sup> Ibid.

that a rule prohibiting the return of asylum seekers to non-party states might provide an incentive for EU and other destination countries to promote third countries' accessions to the Convention.<sup>335</sup>

Even the supervision rationale, while more convincing, does not prove that international law bars returns to nonparty states.<sup>336</sup> The ultimate question is whether the third country will in fact provide effective protection. All else equal, the fact that a country is a party to the Convention gives UNHCR a degree of leverage that it might not otherwise have. It increases the chance that UNHCR will be able to influence that country's policies, that the country will guarantee asylum seekers access to UNHCR, and that the country will otherwise cooperate with UNHCR in its supervisory role. Ratification might also decrease the chance that the country will later abandon responsible refugee policies when the political climate changes. For all these reasons, ratification is clearly an important factor – highly probative evidence – in assessing the likelihood that a country will provide effective protection to a given individual. Consequently, a strong case could be made for placing nonreturn to a nonparty state in the “best practice” category.

But it is not clear that the Convention *prohibits* the return of asylum seekers to a nonparty third country. Article 35 gives UNHCR the duty to supervise application of the Convention and obligates states parties to facilitate that duty. One could argue that a state breaches its obligation to facilitate UNHCR's supervisory duties if the state returns an asylum seeker to a state that UNHCR lacks the authority to supervise. The real question, though, is whether article 35 is an end in itself or merely a means to an end – the end being effective protection for refugees. If all the other elements of effective protection will be assured by the third country, it would seem that the object and purpose of article 35 and the rest of the Convention will be honored. A contrary conclusion would require the assumption that, as a matter of law, the fact that a third country is not a party to the 1951 Convention outweighs all other evidence that it will respect the person's rights. Along the same lines, the UNHCR statement itself says only that UNHCR “is bound to raise a strong objection” when the third country is not a party to the Convention. It stops short of declaring that such a return would be a *per se* violation.

A few other points are worth making. The practical effect of prohibiting return to nonparty states would be to preclude returns to almost all of South Asia and almost all of the Middle East. These regions have absorbed huge, and disproportionate, shares of the world's refugee population for many years. The countries that have hosted the most refugees have been among the world's poorest nations, with compelling needs of their own. While refugee conditions have been far from perfect, the protection that these countries provides helps to meet critical immediate needs. This point cuts both ways. On the one hand, it suggests cutting these countries some slack. On the other hand, a *return* requirement would not prevent these countries from continuing to serve as first countries of asylum if they are willing to do so; it would merely prevent destination countries from returning people there once they have left.

Further, the fact that a country is not a party to the Convention does not mean that UNHCR has no influence over its refugee policies. Pakistan, for example, is a member of the UNHCR Executive Committee and thus a willing participant in numerous Executive

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<sup>335</sup> I thank Jean-François Durieux for that thought.

<sup>336</sup> See generally Türk, 2001 (discussing the precise ambit of UNHCR supervision).

Committee Conclusions on International Protection. Moreover, even countries that are not parties to the 1951 Convention might be parties to other important international human rights instruments.

Finally, again as a practical matter, the countries that are not parties to the 1951 Convention generally also lack domestic refugee legislation and thus tend not to have any formal refugee status determination procedures in place. Because that gap alone would bar returns (see element 6 above), an absolute rule that excludes nonparty states will seldom be necessary.

The conclusion here is that international law does not flatly prohibit the return of refugees to third countries that are not parties to the 1951 Convention. As long as the third country in actual practice observes the Convention and otherwise meets all the requirements of effective protection – including a fair refugee status determination procedure and the specific element of adequate access to UNHCR – then return should not be barred. It is emphasized, however, that that conclusion assumes adoption of the other proposed elements of effective protection. If crucial elements are omitted, then insistence on the third country being a party to the Convention would become essential.

Moreover, given the importance of Convention ratification, however, UNHCR should do two things. First, it should make clear that the third country's failure to ratify the Convention is one highly probative factor in the destination country's assessment of whether the third country will respect the applicant's nonrefoulement and other Convention rights, whether the third country will guarantee access to UNHCR officials, and any other effective protection requirement to which the lack of ratification might be logically relevant in the individual case. Second, UNHCR should include nonreturn of asylum seekers to nonparty states on its list of "best practice" criteria. These actions would honor the core rationale of UNHCR's past statements without the rigidity of a fixed rule.

#### *7. Durable solution in the third country*

In recent times UNHCR has given more prominent emphasis to the durability of protection.<sup>337</sup> How long a commitment must the third country make in order for the protection that it affords to be considered effective? At least four possibilities can be distinguished:

1. For the rest of the person's life.
2. For as long as the person remains a refugee;
3. For as long as the person remains a refugee, unless another country (for example, a fourth country) will admit the person and provide effective protection for the remainder of his or her refugee status (either by itself or by transferring the person to a fifth country that will provide effective protection);

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<sup>337</sup> UNHCR Ex. Com. Standing Com., *New Directions*, 2001, 13 *Internat'l Journal of Refugee Law* at 690-91.

4. For as long as the person remains a refugee, unless another country (for example, a fourth country) will admit the person and provide effective protection that does not necessarily last for the duration of refugee status.

The first possibility should be ruled out. Nothing in the 1951 Convention requires any country to host a person for life solely because the person was once a refugee. To the contrary, article 1.C (the “cessation” clause) lists various specific events that terminate the need for international protection.<sup>338</sup> The fourth possibility should be ruled out for the opposite reason. It would permit the return of an asylum seeker to a third country that in turn might eventually transfer the person to a fourth country in which effective protection is not available. As noted earlier, this sort of chain refoulement would violate article 33.

The choice between the two middle options – the second and the third – is less obvious. Each would guarantee a durable solution – i.e., protection for as long as the person meets the definition of a refugee. The difference is that the second possibility would require that this durable protection be provided by the third country itself, while the third possibility would permit temporary protection in the third country until durable protection emerges somewhere else. The additional step means that the refugee eventually could be subjected to at least one more involuntary movement, which could occur at any time in the future. Moreover, invoking the same rule, that latter country of “durable” protection could then, at any time, transfer the person to still another such country. There appears to be no rule of international law, however, that would prohibit that scenario. Thus, this paper does not propose including the second possibility in the list of minimum core requirements for return to third countries. In contrast, the third possibility belongs in the list of core requirements, because the less stringent alternative – not insisting that the protection provided by either the third country or some subsequent country be durable – can lead to refoulement in the manner described above.

Past UNHCR pronouncements also appear to embrace the third possibility. The clearest statement appears in Ex. Com. Conclusion 58, which permits the return of asylum seekers to first countries of asylum as long as those countries provide protection “until a durable solution is found for them.”<sup>339</sup> This formulation does not require that the first country of asylum provide durable protection; one more transfer – to another country that will provide durable protection – is allowed. A 1991 UNHCR position paper is more vaguely worded, allowing return to a first country of asylum if the person “has access to a durable solution.”<sup>340</sup> Because that position paper cites Ex. Com. Conclusion 58, however, it is assumed that the access to which it refers could include subsequent transfer to one other country that will provide durable protection. A more recent UNHCR statement, also somewhat vague on this point, insisted merely that Dublin-style agreements to allocate responsibility for deciding asylum claims assure “a suitable durable solution.”<sup>341</sup>

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<sup>338</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. III, section B.2.1, UNHCR Position; UNHCR Ex. Com. Conc. 69 (1992) (noting, however, in para. (e), that states should consider hardship before removing a long-term resident); see generally Hathaway, 1997.

<sup>339</sup> UNHCR Ex. Com. Conc. 58 (1989), para. f(ii).

<sup>340</sup> UNHCR Ex. Com. Subcom. On International Protection, Background Note on the Safe Country Concept, 1991, para. 13.

<sup>341</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 7.

Even though international law does not prohibit the extra step contemplated by the third possibility, should the second possibility be officially preferred on policy grounds, and therefore included in the best practice list? For refugees who have already been traumatized once by the events that impelled their original escape, and who crave the stability that would enable them to begin rebuilding their lives, the extra step could be detrimental. In that respect, the second possibility (insisting on durable protection in the third country, without further disruption to the person's life) is advantageous. It also carries a substantial disadvantage, however. A rule that forbids a destination country from returning a person to a third country whenever the latter is unable or unwilling to provide protection for the duration of refugee status would create a strong incentive for irregular secondary movement from the third country to the destination country. People would soon learn that once they reached the territory of the destination country they could not be sent back. Perhaps that would not be such a bad result if the third country were unwilling to protect them in the interim, until some other durable protection could be arranged. But if the third country is willing to protect them until then, the third possibility suffices and there is no need for irregular secondary movement. For that reason, this paper does not propose including the second possibility even on the best practice list.

## **B. The Applicant's Links to the Destination Country and the Third Country**

Let us assume the third country is willing and able to accept the applicant into its territory and provide all the elements of effective protection that section A finds obligatory. Should return be prohibited nonetheless if the links between the applicant and that third country are too weak, either in an absolute sense or in comparison with the applicant's links to the destination country?

The question seldom arises in connection with first countries of asylum, because the previous protection would in most cases satisfy any links requirement that might reasonably be imposed. The question is more likely to surface in discussions of the safe third country concept, readmission agreements, or agreements to allocate responsibility for determining asylum claims. In those latter contexts, the consistent position of UNHCR has been that asylum seekers should not be returned to third countries with which they lack sufficient connection.<sup>342</sup> For this purpose, mere transit or other momentary physical presence in the third country is not a sufficient connection; in contrast, "family connections, cultural ties, knowledge of the language, the possession of a residence permit and the applicant's previous period of residence in the other State would constitute meaningful links."<sup>343</sup> Along similar lines, UNHCR has urged states that receive asylum applications to take the reasonable preferences of the applicant into account when determining whether to transfer

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<sup>342</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 7; UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, paras. 31(ii), 37; UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 18; UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.c, UNHCR Position; UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 4; UNHCR Position on Readmission Agreements, 1994, para. 5; UNHCR Ex. Com. Conc. 15 (1979), para. h(ii, iv).

<sup>343</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 7; see also UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 4; UNHCR Position on Readmission Agreements, 1994, para. 5.

the application to another state.<sup>344</sup> These statements discouraging return in the absence of a meaningful connection between the applicant and the third country rest on sensible and humane policy considerations rooted in international solidarity, burden-sharing, and recognition of refugees' special needs, but with one crucial exception they have not claimed to reflect or express binding principles of international law. The exception relates to family unity and is considered separately below.

Does international law prohibit destination countries from returning asylum seekers to third countries that would provide effective protection but with which the applicants lack meaningful connections? There are two potential kinds of obligations to consider here – those that the destination country owes to the third country and those that the destination country owes to the asylum seeker.

It is difficult to derive a “meaningful links” requirement from any obligations owed by the destination country to the third country, absent a readmission or other agreement that positively imposes such a requirement. On the assumption that the third country has freely and explicitly consented to readmit the particular asylum seeker, there is no evident basis for complaint. Given the laudable objectives of international cooperation and burden-sharing, one might regret that destination countries often utilize their superior bargaining power to extract concessions from less powerful third countries. But no principle of international law prohibits them from doing so.

Thus, if international law imposes any “meaningful links” requirement, it would have to emanate from obligations that the destination country owes to the asylum seeker. As to that possibility, at least two arguments should be considered. One argument is based on article 14.1 of the Universal Declaration of Human Rights, which recognizes a “right to seek and to enjoy in other countries asylum from persecution.” For reasons already discussed,<sup>345</sup> this provision cannot be read as guaranteeing a right to have an asylum application determined in substance *by the country of one's choosing*.

The other argument invokes article 31.1 of the 1951 Convention, which reads in relevant part: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees . . . coming directly from a territory where their life or freedom was threatened . . . , provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” It has been argued that article 31.1 limits the powers of states to divert asylum applications to third states against the reasonable preferences of the applicants, particularly when the applicants lack meaningful connections with those third states. Conversely, the same language (with emphasis on the word “directly”) has been invoked to support the return of asylum seekers to first countries of asylum. These arguments are summarized in section II.B.3 of this paper and set out in more detail by Professor Goodwin-Gill.<sup>346</sup> As he demonstrates, neither the text of article 31 nor the negotiating history of the Convention sheds much light on the application of article 31 to the practice of diverting asylum applications to third countries.

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<sup>344</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, paras. 31(ii); UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 18; UNHCR Ex. Com. Conc. 15 (1979), para. h(iii).

<sup>345</sup> See section II.B.3 above.

<sup>346</sup> Goodwin-Gill, 1996, at 88-91; see also Goodwin-Gill, 2001.



Does article 31 prohibit countries from diverting asylum applications to third countries that are willing and able to provide effective protection but to which the applicants have insufficient links? The answer seems to be no, and for several reasons.

First, it seems difficult to characterize the actions of either the destination country or the third country as “penalties,” for purposes of article 31.1. As Professor Goodwin-Gill and UNHCR have concluded, the word “penalties” should be read to include (but not necessarily to be limited to) “prosecution, fine, and imprisonment.”<sup>347</sup> In the present context, the two countries have simply entered into a cooperative arrangement – either a general agreement or an understanding in the particular case – for determining which of them will take responsibility for deciding the substance of asylum claims. Of course, the fact that a refugee has either insufficient links to the third country or close links to the destination country might well constitute “good cause” to enter the latter state illegally. But that still does not mean that returning the person to the third country for a determination of his or her asylum claim is a “penalty.”

Second, it is even more difficult to describe their actions as penalties for “illegal entry or presence.” It will sometimes be true that the destination country would not have diverted the claim to the third country if, instead of simply failing to prevent the applicant from entering or remaining in the country unlawfully, it had issued a visa to the applicant or admitted him or her into its territory. When the destination country is willing to determine the application in such cases, however, it is only because its positive act of issuing a visa or granting admission creates an obligation, *vis a vis the third country*, to take responsibility for the asylum claim. That assumption of responsibility flows from its own actions and from its agreement with the third country – not from the applicant’s “illegal entry or presence.”

Third, article 31.1 reflects the drafters’ frank recognition that refugees frequently require resort to irregular means to escape persecution. It also reflects recognition that persecution in the country of origin is not the only example of “good cause” for entering the destination country illegally.<sup>348</sup> To punish refugees for doing what they could not avoid would be inappropriate. That rationale has little application to the present issue. Here, it is assumed that a country is willing and able to accept the applicant and provide effective protection, and the only problems relate to links and preferences.

Fourth, while no law requires a refugee to seek the first port in a storm, similarly no law provides that a refugee’s preference to live in a particular country must trump that state’s preference not to receive him or her – at least when, as hypothesized here, another state is willing and able to provide the necessary protection.

Fifth and finally, UNHCR has endorsed the Dublin Convention, albeit with subsequent concerns.<sup>349</sup> Yet, in the absence of family connections to the country of origin, both the Dublin Convention and its successor regulation allocate responsibility to external border states – with no requirement that the applicant have any links to those states.<sup>350</sup> Thus, if article 31 were read as prohibiting return to a country that is willing and able to provide

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<sup>347</sup> Goodwin-Gill, 2001, para. 29; UNHCR Global Consultations, Conclusions on Article 31, para. 10(h).

<sup>348</sup> Goodwin-Gill, 2001, section 2.2.

<sup>349</sup> See generally section I.A.3 above.

<sup>350</sup> See section I.A.3 above.

effective protection but with which the applicant has insufficient links, the very foundation of the Dublin Convention and the new regulation would be invalid. In the vast majority of cases, return to a country with which the applicant lacks meaningful links is precisely what the Dublin Convention prescribes.

For all those reasons, there is no *per se* international legal prohibition on the return of applicants to third countries with which they lack preexisting links – subject, again, to the family unity qualification that will be discussed below. Nonetheless, this paper strongly endorses the longstanding UNHCR position, described above, that it is good practice not to divert asylum applications to third countries without consideration of both the applicant’s reasonable preferences and the applicant’s links to that third country.

Admittedly, consideration of the applicant’s links can be messy. Problems of proof have, in fact, been the main reason that modern readmission agreements – unlike their predecessors – have tended to omit mention of the applicant’s links.<sup>351</sup> But there are powerful reasons to consider such links and preferences nonetheless. The most substantial reason is humanitarian; if the person is later found to be a refugee (and that should be the operative assumption until the claim is determined), the trauma and disruption are among the equities that should militate toward weighing the applicant’s interests heavily. Meaningful links also permit speedier and more successful integration, a crucial benefit for both the applicant and the host society. Importantly, a willingness to consider the relationship between the applicant and each of the two countries additionally fosters international solidarity and equitable responsibility-sharing.

More specifically, the best practice criteria recommended here would synthesize several elements that UNHCR has already embraced with respect to preferences and links: If the applicant’s links to the third country are insufficient, he or she should not be returned, even if that third country is otherwise willing and able to provide effective protection. Examples of specific connections include all those that UNHCR has cited (as discussed above) and any others that would expedite or enhance the prospects of integration. The applicant’s links to the third country should not be evaluated in isolation; rather, the test should be whether the applicant’s links to the destination country are greater than his or her links to the third country.<sup>352</sup> Finally, while not controlling, the applicant’s preference – as distinguished from links -- is a relevant factor that the destination country should take into account before diverting the application to a third country.<sup>353</sup>

Family connections are merely one specific type of relevant link between the applicant and either the destination country or the third country. They require separate treatment, however, because legal systems generally and human rights agreements particularly treat family unification distinctively. As seen earlier, both in Europe and in North America the principal agreements for allocating responsibility for deciding asylum claims make special provision for reuniting families.<sup>354</sup>

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<sup>351</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, para. 4.4.B.

<sup>352</sup> See, e.g., UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 4; UNHCR Position on Readmission Agreements, 1994, para. 5.

<sup>353</sup> See footnote 345 above.

<sup>354</sup> See section I.A.3 above.

A UNHCR roundtable on that subject, part of the recent Global Consultations, produced an instructive set of summary conclusions. The participants found an internationally recognized legal right to family unity, rooted in “the universal recognition of the family as the fundamental group unit of society.” They cited a long list of human rights conventions that explicitly recognize such a right, including the Universal Declaration of Human Rights, the ICCPR, the ICESCR, the Convention on the Rights of the Child, the European Convention, the European Social Charter, the African Charter, and international humanitarian law. The Final Act of the Conference of Plenipotentiaries that adopted the 1951 Convention specifically reaffirmed “the ‘essential right’ of family unity for refugees.” A long list of UNHCR Executive Committee Conclusions adopts the same view. The UNHCR Summary Conclusions add that, because this right emanates from generic human rights conventions, the obligation to respect the right of refugees to family unity extends to all states, even those that are not parties to the 1951 Convention. As the Summary Conclusions also observe, the right to family unity can give rise to positive obligations to reunite families, not merely the duty to refrain from actively separating families. For refugee families, the special importance of reunification is self-evident.<sup>355</sup>

In the present context – the return of asylum seekers to third countries -- the precise parameters of this legal constraint are not clear cut. The applicant might have any number of different family members in the destination country, the third country, or both. Moreover, the applicant might have any number or kind of other, non-family connections to either country. In this paper, therefore, the proposed minimum legal criterion will be unavoidably general. It is asserted merely that return of an asylum seeker to a third country is prohibited, even when the third country will otherwise provide effective protection, if, in the light of the applicant’s comparative family ties to the destination country and the third country, return would violate the person’s internationally recognized right to family unity. That conclusion admittedly is a truism, but it hopefully serves to alert destination countries to their critical family unity obligations. Beyond that, generalization is difficult.

### **C. The Procedure for Deciding Whether to Return an Asylum Seeker**

The two previous subsections propose substantive criteria for determining when destination countries may return asylum seekers to third countries without deciding the claims in substance. In every case in which return is contemplated, someone will have to decide whether those criteria have been met. This subsection explores the procedures by which those return decisions are to be made.

Much of the literature on this procedural question has been inspired by the common European practice of drafting lists of countries that are thought to be safe in some generic sense. The European Commission, in both the original and the amended versions of its proposal for harmonized asylum procedures, has specifically endorsed the use of such lists for safe third country purposes.<sup>356</sup> UNHCR has advised against the creation of safe third country “lists”<sup>357</sup> but accepts their use as long as the implementation procedures ultimately

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<sup>355</sup> UNHCR Global Consultations, Conclusions on Family Unity, 8-9 Nov. 2001, paras. 1-6; see also Jastram & Newland, 2001.

<sup>356</sup> European Commission Original Proposal on Asylum Procedures, 20 Sept. 2000, art. 21 & Annex I; European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 27 & Annex I.

<sup>357</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 33; UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 3.

allow for individualized inquiry into whether the country is safe for the particular applicant.<sup>358</sup> As a practical matter, this means that the applicant must at least be given an opportunity to rebut the presumption of safety.<sup>359</sup> The European Commission's proposal appears to comply with that requirement. It makes clear that a country can be considered safe "for a particular applicant for asylum" only if, among other things, "there are no grounds for considering that the country is not a safe third country in [the applicant's] particular circumstances."<sup>360</sup>

Questions have arisen concerning the precise ingredients of that individualized determination procedure. In general, the same safeguards that are required for determining the substance of the claim should be required for the determination of whether to divert the asylum application to a third country. The basic decision to be made in the return determination procedure is whether the particular third country will afford the applicant effective protection. If the destination country concludes that effective protection will be provided, and its conclusion proves to be wrong – either because the person in fact will face danger in the third country or because the third country is likely to refoule him or her to the country of origin – the resulting harm is potentially as great as when an asylum claim is erroneously denied in substance and the person is returned directly to the country of origin. In each case the person is being returned, in violation of law, to a country that will not provide effective protection. And since the primary purpose of procedural safeguards is to minimize the risk of error, the need for safeguards is equally great in return determinations and substance determinations. Moreover, the fact questions to be resolved in return determination proceedings can be just as complex as those presented by the substance of the case. In each of those two settings, questions of empirical fact, predictions, characterizations of predicted events, and legal interpretation issues can all arise and can all prove difficult.

One qualification seems necessary. Some European states have been conducting safe third country determinations in accelerated procedures, on the assumption that the possibility of seeking asylum elsewhere makes the claims "manifestly unfounded."<sup>361</sup> Although the language is somewhat unclear, it appears that the amended European Commission proposal on harmonized asylum procedures similarly envisions relegating return decisions to accelerated procedures.<sup>362</sup> Normally, return determinations seem ill suited to accelerated procedures. The staff of the European Commission (in the context of the Dublin

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<sup>358</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 33; UNHCR Global Consultations, 31 May 2001, para. 13; UNHCR Global Consultations in Budapest, Background Paper No. 2, May 2001, at 3. The Council of Europe agrees with UNHCR that all the criteria must be met in each individual case. Council of Europe Guidelines on Safe Third Country, 1997, para. 1.

<sup>359</sup> UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 15(a); UNHCR Considerations on Safe Third Country, 8-11 July 1996, at 2; UNHCR Ex. Com. Subcom. On International Protection, Background Note on the Safe Country Concept, 1991, para. 15.

<sup>360</sup> European Commission Original Proposal on Asylum Procedures, 20 Sept. 2000, art. 22; European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 28.

<sup>361</sup> UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.b.

<sup>362</sup> Article 25 of European Commission Amended Proposal on Asylum Procedures, 18 June 2002, consigns return determinations (for purposes of Dublin decisions, safe third country decisions, and first country of asylum decisions, among others) to the admissibility phase of the asylum proceeding. Though less clear, both articles 23(1)(a) and 40(3)(a) in turn imply that admissibility determinations may be made in accelerated procedures.

Convention)<sup>363</sup> and the Intergovernmental Consultations for Asylum, Refugee and Migration Policies in Europe, North America and Australia (in the context of readmission agreements)<sup>364</sup> have both acknowledged how difficult the problems of proof can be when a person's past travel itinerary is in dispute. Moreover, as noted earlier, the interests at stake can be just as serious in a return determination as they are in determinations of the substance of the claim. Hence, the consequences of error can be just as grave, and the corresponding need for full procedural safeguards just as compelling, as in a substance determination.

That said, in general the term "accelerated procedure" is merely a label. If the acceleration component comprises nothing more than expedition – i.e. arranging for a case to jump the queue and be heard sooner – then fairness and accuracy objections seem misplaced. And even if the procedure is "accelerated" in the usual sense that significant procedural safeguards will be omitted and not just expedited, the permissibility of using that accelerated procedure to decide issues of return to third countries will depend ultimately on precisely what procedural ingredients are retained. They might or might not be adequate to assure a fair and accurate decision. Having found no reason to systematically subject third country return decisions to a higher probability of error than that which is acceptable for substance determinations, this paper will simply incorporate by reference the principles that UNHCR has already thoroughly explored and adopted for the latter.<sup>365</sup>

Two specific issues that have surfaced in the context of return determination procedures, however, require brief mention. One concerns burden of proof. Both the European Commission's original proposal for harmonized asylum procedures and its amended proposal, though again not explicit, can be read to imply that it is up to the applicant to prove that there are grounds for finding the third country unsafe.<sup>366</sup> UNHCR, so interpreting the proposal, objected. Noting that the country in which the asylum application is filed has primary responsibility for considering it, UNHCR rightly concluded that that country has the burden of proving that it would be safe to transfer responsibility to a third country.<sup>367</sup>

All this is not to preclude the use of reasonable presumptions. For example, once the government proves prior effective protection, perhaps the burden should shift to the applicant to produce evidence that changed circumstances now threaten the margin of safety the country was able to offer in the past. As a rebuttable evidentiary presumption, such an approach might well be reasonable and should be open for destination countries to adopt. Even then, however, once the applicant produces evidence of such changed circumstances,

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<sup>363</sup> European Commission Staff Working Paper on Dublin Convention, 21 March 2000, paras. 25, 42.

<sup>364</sup> Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, para. 4.4.B.

<sup>365</sup> These principles appear in UNHCR Global Consultations, 31 May 2001, para. 50; see also UNHCR Observations on EC Proposal on Asylum Procedures, July 2001; European Commission Amended Proposal on Asylum Procedures, 18 June 2002; Legomsky, 2000. See generally the analogous discussion, in section III.A.4 of this paper, on the elements of fair procedure that third countries are expected to use for deciding the substance of the cases that are referred to them.

<sup>366</sup> European Commission Original Proposal on Asylum Procedures, 20 Sept. 2000, art. 22(c); European Commission Amended Proposal on Asylum Procedures, 18 June 2002, art. 28(c).

<sup>367</sup> UNHCR Observations on EC Proposal on Asylum Procedures, July 2001, para. 36.

the ultimate burden of proving that it would now be safe to return the applicant should remain with the government that wishes to transfer him or her there.

One last procedural issue warrants discussion here. The European Commission's proposal for allocating responsibility for deciding asylum claims allows the applicant to appeal a transfer decision to the courts but with no suspensive effect.<sup>368</sup> The accompanying commentary reasons that transfer to another member state "is not likely to cause the person concerned serious loss that is hard to make good," and that therefore suspensive effect is not necessary.<sup>369</sup> Given the generally high level of human rights observance throughout the European Union and the relatively small distance between any two states, it is easy to understand that view. But no country has a perfect record on issues of protection, and an error could be costly and even irreparable – particularly if the third country takes an unduly broad view of which other countries qualify as "safe." Moreover, once the European Union is enlarged, the physical distances between member states will be dramatically greater. For these reasons, this paper concurs in the previously expressed UNHCR position that appeals against decisions to transfer asylum applicants to third countries should have suspensive effect.<sup>370</sup>

Should the proposals contained in this subsection be seen as requirements of international law or merely best practice criteria? For the reasons given, the view here is that international law requires an individualized, case-by-case determination of whether to return the applicant to a third country. Moreover, to meet its obligations under the 1951 Convention, a destination state may not return an asylum seeker to a third country until the entire determination process, including appeal, has been completed. Only then can there be adequate assurance that the person's Convention rights, including the right of nonrefoulement, will be observed.

As a matter of best practice, the same procedural guarantees of fairness and accuracy that UNHCR has previously adopted for the determination of the substance of the claim are generally recommended for the return determination. It is further recommended that states avoid relying on preformulated lists of "safe" countries, even though such lists are not barred when individuals are given the opportunity to rebut the presumption of safety. Similarly, as a best practice matter, the government of the destination country should have the ultimate burden of proof on all issues of effective protection.

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<sup>368</sup> European Commission Proposal on Determining Responsible State for Deciding Asylum Application, 26 July 2001, art. 20.

<sup>369</sup> *Ibid.* at 19.

<sup>370</sup> UNHCR Observations on EC Proposal on Determining Responsible State for Deciding Asylum Application, Feb. 2002, para. 12; UNHCR Global Consultations in Budapest, Conclusions, 6-7 June 2001, para. 15(d) (concerning safe third country determinations); UNHCR Europe Bureau Overview, Oct. 2000, ch. 2, section A.1.b, UNHCR Position.

## **D. The Results: Minimum Legal Requirements and Best Practice Criteria for Returning Asylum Seekers to Third Countries**

The previous three subsections have explored possible minimum legal requirements and best practice criteria for the return of asylum seekers to third countries. Here are lists of each:

### *1. Minimum legal requirements*

Under certain circumstances, a destination country (i.e., a country in which an asylum application has been lodged) may decline to determine the application in substance and instead return the applicant to a third country (i.e. a country other than the destination country or the country of origin). Such returns are permissible, however, only if all of the following conditions, collectively referred to as effective protection, are met:

1. The third country has explicitly agreed (a) to readmit the particular individual; and (b) to accord him or her either a fair refugee status determination or effective protection without such a determination. To protect the applicant's privacy interests, however, the assurance described in part (b) is not required, and should not be requested by the destination country, without the applicant's authorization.
2. The applicant has no well-founded fear of being persecuted, in the third country, on any of the 1951 Convention grounds.
3. The applicant has no well-founded fear of being refouled by the third country, directly or indirectly, to a territory where his or her life or freedom would be threatened on any of the 1951 Refugee Convention grounds. If the destination country has interpreted the 1951 Refugee Convention in a way that would prohibit the applicant's refoulement, but the third country's interpretation would not, and the destination country regards the particular Convention provision as susceptible of only one true international interpretation, then return is prohibited. If the third country is not a party to the 1951 Refugee Convention or the 1967 Refugee Protocol, that fact must be considered in determining whether this and the other minimum legal requirements for return have been met.
4. The destination country may not knowingly return the applicant to a third country that will violate any of the applicant's rights under the 1951 Refugee Convention (apart from nonrefoulement, which is treated separately in criterion 3 above). The degree of certainty required by the word "knowingly" should vary inversely with the importance of the particular right. With respect to those Convention rights that are contingent upon the refugee "lawfully staying" in the third country, the destination country is not required to speculate that lawful stay will be granted. The destination country may shift to the applicant the burden of identifying any particular Convention provisions that he or she believes the third country will violate, as well as the burden of producing some evidence of the prospective violations, but once those burdens are met, the government of the destination country retains the ultimate burden of proving that the third country will not violate those provisions.
5. The destination country will not knowingly return the applicant to a third country that will breach any of the applicant's rights under any human rights agreement to which the destination country is a party. The degree of certainty required by the word "knowingly"

should vary inversely with the importance of the particular right. For purposes of this criterion, these violations encompass both harms that occur in the third country and harms that might result from the third country sending the applicant elsewhere. Depending on the circumstances of the case, knowingly sending the applicant to a third country where he or she will lack either physical security or basic subsistence can be “cruel, inhuman or degrading treatment” for purposes of the various human rights agreements that use that term.

6. The third country will either provide a fair refugee status determination or provide effective protection without such a determination. For this purpose, it is necessary but not sufficient that the destination country (a) direct the applicant to the relevant refugee authorities in the third country; and (b) provide the applicant with an official document that states that the asylum application has not yet been determined in substance. Many first countries of asylum provide no formal refugee status determination but nonetheless provide some form of de facto protection. Such arrangements are not adequate substitutes for refugee status determinations, unless in the particular case the lack of formal status or documentation does not impair the other requirements of effective protection enumerated here. A fair refugee status determination also requires respect for the privacy interests of the applicant and his or her family, as well as consideration of any special vulnerabilities of the applicant. Specially vulnerable groups include, but are not limited to, torture victims, women, subcategories of women (for example victims of rape or other sexual violence, pregnant women, and women who are single heads of households), children (especially unaccompanied children), the elderly, the physically or mentally disabled, and stateless persons.

7. The third country is willing and able to provide effective protection for as long as the person remains a refugee or until another source of durable effective protection can be found.

8. Even when the third country will otherwise provide effective protection, return is prohibited if, in the light of the applicant’s comparative family ties to the destination country and the third country, return would violate the applicant’s internationally recognized right to family unity.

9. The destination country must apply each of the above criteria on an individual, case-by-case basis. The applicant may not be returned involuntarily to the third country until this procedure, including appeal, has been completed.

## 2. *Best practice criteria*

In addition to the above conditions, which constitute the minimum requirements of international law, the following safeguards are recommended as best practice criteria:

1. The applicant should not be returned to a third country with which he or she lacks meaningful links, even if that third country is otherwise willing and able to provide effective protection. Mere transit or other momentary physical presence in the third country should not be deemed sufficient. Examples of meaningful links include family connections, cultural ties, knowledge of the language, the possession of a residence permit, the applicant’s previous period of residence in the other State, and any other connections that would expedite or enhance the prospects of integration. Among the cited examples, family



unity is especially critical and is treated separately in the list of minimum legal requirements. The applicant's links to the third country should not be evaluated in isolation; rather, the test should be whether the applicant's links to the destination country are greater than his or her links to the third country. Finally, while not controlling, the applicant's preference – as distinguished from links – is a relevant factor that the destination country should take into account in deciding whether to divert the application to a third country.

2. With respect to minimum requirement 3 (nonrefoulement), when the destination country's interpretation of the Convention would prohibit refoulement but the interpretation of the third country would not, and the destination country regards both interpretations as permissible, the best practice is to follow its own, more favorable interpretation.

3. With respect to minimum requirement 6 (fair refugee status determination), the specific elements of the third country's refugee status determination procedure should be guided by the recommendations set out in para. 50 of the background document for the Global Consultations on "Asylum Processes (Fair and Efficient Asylum Procedures)," EC/GC/01/12 of 31 May 2001.

4. Also with respect to minimum requirement 6 (fair refugee status determination), the letter explaining that the asylum application has not yet been determined in substance should, ideally, be written in one of the official languages of the third country.

5. Also with respect to minimum requirement 6 (fair refugee status determination), even though de facto protection under certain circumstances can substitute for a fair refugee status determination, the best practice is not to return the applicant at all if no such status determination will take place.

6. Normally, an asylum applicant should not be returned to a third country that is not bound by the 1951 Refugee Convention and the 1967 Refugee Protocol.

7. With respect to minimum requirement 9 (return determination procedures of destination country), the specific elements of the procedure should be guided by the recommendations set out in para. 50 of the background document for the Global Consultations on "Asylum Processes (Fair and Efficient Asylum Procedures)", EC/GC/01/12 of 31 May 2001. The government of the destination country should have the ultimate burden of proof on all issues of effective protection. It is further recommended that states avoid relying on preformulated lists of "safe" countries, even though such lists are not barred when individuals are given the opportunity to rebut the presumption of safety.

## CONCLUSION

Increasingly, refugees follow circuitous paths from their countries of origin to their intended ultimate destinations. These paths frequently take them through one or more "third countries," where they remain for varying lengths of time and under varying circumstances. If they apply for asylum in the destination countries, which country should be expected to determine their claims?

Destination countries today commonly attempt to settle this question through a combination of domestic legislation and international agreements. The measures have taken the form of safe third country provisions, readmission agreements, agreements to allocate responsibility for determining asylum claims, and first country of asylum provisions.

These restrictions, however, have posed problems for both refugees and the affected third countries. Many of the latter are developing countries with limited resources and disproportionately large refugee populations that reflect their geographic proximity to the countries of origin. The problems are described in section I, and they are serious. Strategies for attacking the root causes of both primary and secondary movements are therefore essential. They are summarized in section II.A. But those strategies are not sufficient. Also needed are clear criteria for determining precisely when the return of asylum seekers to third countries is both permitted by international law and compatible with sound and humane practice. Twelve policy premises that inform the selection of those criteria are discussed in section II.B.

One of the major premises, described here as the “complicity principle,” is that no country may send any person to another country, knowing that the latter will violate rights which the sending country is itself obligated to respect. By way of qualification, the degree of certainty encompassed by the word “knowing” should vary inversely with the importance of the right. If a right is fundamental, for example, return perhaps should be barred if the destination country has even “substantial grounds for believing there is a danger” of violation by the third country. If the right is relatively minor, perhaps return ought to be permitted unless the destination country is “practically certain” the right will be violated. The precise standards of proof that should accompany particular rights is left to future development.

Another core premise has been that the meaning of “effective protection” does not vary as between first countries of asylum and mere safe third countries. Accordingly, the proposed requirements for the return of asylum seekers to first countries of asylum and mere safe third countries are the same.

Section III explores precisely what those requirements are. It proposes both minimum core criteria required by international law and best practice criteria. The various criteria consist mainly of the elements that define the concept of “effective protection.” The criteria also include comparison of the applicant’s links to the third country and the destination country, as well as fair and accurate procedures in the destination country for determining whether the other return criteria have been met.

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