

Guidance Note on safeguards against unlawful or irregular removal of refugees and asylum-seekers

I. Introduction

1. The United Nations High Commissioner for Refugees (UNHCR) is concerned at a recent increase, especially in Europe, Central Asia, and parts of Africa, of incidents involving the unlawful or irregular removal of refugees or asylum-seekers¹ from their host States, particularly in the context of mutual assistance in criminal matters or cooperation on security issues. This may result in the forcible return of refugees or asylum-seekers to the country of origin or another country in a manner that is inconsistent with international law.
2. This Note sets out the principal obligations of States under international law to ensure the protection of refugees or asylum-seekers, as well as a number of measures which, in UNHCR's experience, are generally available to States seeking to ensure that refugees and asylum-seekers are protected against unlawful or irregular removal from their territory.

II. States have primary responsibility to ensure protection

3. UNHCR recalls that it remains the responsibility of a State to adhere to its obligations under international refugee and human rights law vis-à-vis refugees and asylum-seekers within the State's jurisdiction.²
4. This includes the obligation to ensure full respect for the principle of *non-refoulement* under international refugee law, which prohibits the expulsion or return in any manner whatsoever of a refugee or of an asylum-seeker to a country where they may be at risk of persecution,³ as well as *non-refoulement* obligations under international human rights law which preclude removal to a risk of torture and other serious human rights violations.⁴

¹ The term "refugees" in this Note refers to persons who meet the eligibility criteria under the refugee definition set out in the 1951 Convention and 1967 Protocol relating to the Status of Refugees or any regional instrument. The term "asylum-seekers" refers to persons who have applied for refugee status pursuant to the definition in the aforementioned instruments as well as other persons seeking complementary, subsidiary or temporary forms of protection, and whose claim has not yet been decided in the final instance or a person who is in an asylum-seeking situation but who has not had an opportunity to lodge his/her application for asylum/refugee status. This may include people who do not receive information required to enable them to access the asylum procedure, or people who are unable to gain access to the procedure due to practical or other barriers.

² See, e.g., Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004). See, further, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras. 25 to 43, available at: <http://www.refworld.org/docid/45f17a1a4.html>.

³ The principle of *non-refoulement* is often referred to as the cornerstone of the international refugee protection regime. It is enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees as well as customary international law, and applies to refugees as well as asylum-seekers.

⁴ See, for example, Article 3 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 7 of the 1966 International Covenant on Civil and Political Rights;

5. The prohibition of *refoulement* applies to all forms of forcible removal, including in the context of extradition,⁵ and in situations where the host State cooperates with agents of another State acting on its territory or permits them to take the person concerned into their custody.

III. Measures by the host State to prevent unlawful or irregular removal

6. In UNHCR's experience, States have adopted a variety of measures which have proven effective in preventing unlawful or irregular removal of refugees and asylum-seekers. These include the following:
 - (i) Identifying refugees and asylum-seekers who may be at risk of unlawful or irregular removal. Depending on the context, those concerned may be persons who are the subject of an extradition request (whether or not they find themselves in extradition detention) and/or persons at risk of unlawful or irregular removal due to their profile.
 - (ii) Providing refugees and asylum-seekers who are held in detention with a view to their possible extradition or other forms of lawful removal, with the opportunity to contact UNHCR as well as appropriate governmental and non-governmental entities, including legal representatives.
 - (iii) Granting UNHCR access to detained refugees and asylum-seekers in order to enable the Office to carry out its protection functions in an effective manner.
 - (iv) Ensuring that refugees and asylum-seekers who are released from detention are immediately referred to the relevant State authorities responsible for their physical protection or any (legal) representative.
 - (v) Establishing secure accommodation options ("safe houses") for refugees and asylum-seekers identified to be at risk of unlawful or irregular removal which provide appropriate and necessary arrangements in response to the risk. In UNHCR's experience, such safe houses are most effective if security is provided by the appropriate agencies of the host State.
 - (vi) Establishing a monitoring and reporting mechanism, and conducting regular checks (provided this does not place the individual at additional risk) to monitor the safety and well-being of the individuals concerned, and responding to any threats identified.

Article 22(8) of the 1969 American Convention on Human Rights; Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵ The host State's *non-refoulement* obligations and other bars to the return of the individual concerned to their country of origin under international refugee and human rights law prevail over any duty to surrender an individual or agreement to their seizure by agents of another country under bilateral or multilateral treaties governing extradition or cooperation in matters related to security. The absence of grounds to refuse extradition based on a risk of persecution or serious human rights violations upon return in applicable extradition instruments or mutual cooperation treaties is irrelevant in this regard. See, further, UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008, paras. 20 to 23, available at: <http://www.refworld.org/docid/481ec7d92.html>.

- (vii) Ensuring that information and personal data about refugees and asylum-seekers at risk is treated in line with the international principles and standards of data protection. Given the potential protection risks for the individuals concerned as well as family members and other associates, safeguarding confidentiality is particularly important vis-à-vis the authorities of the country of origin.
 - (viii) Establishing, and providing access for all asylum-seekers, to fair and efficient procedures for the determination of refugee status and/or other forms of international protection.
7. More generally, UNHCR considers that risks of unlawful or irregular removal of refugees and asylum-seekers can be mitigated through the strengthening of national asylum systems and in particular, by developing procedural safeguards, ensuring respect for confidentiality and data protection in asylum procedures, promoting the rule of law, including access to legal representation, to an effective remedy, and to a strengthened and independent judiciary, engaging with national lawyers and/or legal organizations, undertaking training and capacity-building of national authorities, and fostering respect for the institution of asylum.

IV. Measures by the host State to respond to unlawful or irregular removal

8. In cases where there are indications that the unlawful or irregular removal of a refugee or asylum-seeker has or may have occurred, UNHCR considers the host State to retain its responsibility to adhere to its obligations under international refugee and human rights law, and should take immediate steps to locate the individual concerned. The following measures can immediately be taken:
- (i) Informing all relevant agencies of the host State, especially agencies responsible for controlling the departure points at international borders and airports, and providing them with the necessary personal identifiers of the individual concerned, to enable them to monitor passenger manifests and seek to prevent the departure of the individual concerned.
 - (ii) Initiating investigations into any suspected unlawful or irregular removal of the individual concerned from the host State.
 - (iii) Informing the individual's (legal) representative and UNHCR.
 - (iv) Alerting the authorities of transit countries, where applicable, to prevent the onward transfer of the individual concerned to a country where their life or physical integrity would be at risk.
9. In UNHCR's experience, it is particularly important that these immediate steps are followed by efforts to clarify the circumstances in which the individual was removed. In some cases, the individual concerned may benefit from such measures even after his or her unlawful or irregular removal. More generally, ensuring accountability for violations of the principle of *non-refoulement* contributes to the prevention of further instances of such removal. Specific measures to be taken by the host State in this regard would include the following:

- (i) Making representations with the authorities of the destination country, seeking information about the person's whereabouts and his/her situation, calling on the authorities to ensure his/her treatment in a manner consistent with human rights.
- (ii) Considering individual measures to put an end to the violation and to make all feasible reparation for its consequences in such a way as to restore, as far as possible, the situation existing before the breach, including by allowing the refugee or asylum-seeker to return to the country if he/she is able and wishes to do so.
- (iii) Preventing impunity for the breach of human rights, including violations of the principle of *non-refoulement*, by identifying and punishing those responsible.
- (iv) Analysing the findings of the investigations and developing additional measures to prevent any further unlawful or irregular removal of refugees and asylum-seekers from the host State.

V. UNHCR's mandate responsibilities

- 10. In line with its international protection mandate, UNHCR stands ready to work with States and provide support to efforts aimed at putting in place effective measures to prevent and respond to the risk of violations of the principle of *non-refoulement* through the unlawful or irregular removal of refugees and asylum-seekers.
- 11. In certain cases of individuals for whom physical protection in the host State cannot be ensured, UNHCR may seek to find a solution through resettlement to a third country. It should be noted, however, that resettlement under the auspices of UNHCR is only available to persons who have been recognized as refugees by UNHCR under its mandate and – crucially – in respect of whom a third country, which also considers the person to be in need of international protection, is willing to resettle and provide for legal stay in its territory, in accordance with its laws and regulations.⁶
- 12. Where resettlement is available and has been determined to be the most appropriate solution for a refugee, it is also essential that the host State facilitate, and ensure the expeditious completion of, departure formalities, including in relation to exit visas and procedures.

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⁶ UNHCR, *Resettlement Handbook (country chapters last updated 2013)*, July 2011, pages 75 and 361, available at: <http://www.unhcr.org/46f7c0ee2.html>.