

Convention Plus
Issues paper
submitted by UNHCR
on
Addressing irregular secondary movements of refugees
and asylum-seekers

1. Introduction

1. On 16 December 2003, within the framework of the Convention Plus initiative, Switzerland, South Africa and UNHCR convened an Open Meeting of States and interested parties on the irregular secondary movements of refugees and asylum-seekers. Among other conclusions, this Open Meeting endorsed the proposal to constitute a Core Group of States and interested parties ‘to inform and monitor work on caseload-specific surveys and to pursue multilateral understandings’ on this issue¹. The short discussion paper annexed to the informal record of the Open Meeting stressed the significance of addressing the problem of irregular secondary movements, within the Convention Plus process, through more equitable burden and responsibility sharing between developing countries hosting large numbers of refugees and developed countries².

2. Among the reasons for addressing irregular secondary movements within the context of Convention Plus is the fact that irregular movements pose problems for States, as well as to refugees. Some States have expressed concerns about asylum-seekers who cross several international borders, either without seeking protection or without awaiting the outcome of their asylum request. The main concern of these States is that some onward movements take place without the necessary valid travel documents or without authorisation, and, that these movements, therefore, undermine the right of States to control who can enter and remain in their territory. Onward movements of refugees and asylum-seekers, on the other hand, are often motivated by protection needs. A lack of regular avenues to find protection puts these refugees and asylum-seekers at a double risk: the uncertainty to find and to be granted protection

¹ FORUM/CG/SM/01.

² See also Ministerial Declaration (HCR/MMSP/2001/09, 16 January 2002), OP, Para. 12: “Commit ourselves to providing, within the framework of solidarity and burden sharing, better refugee protection through comprehensive strategies (...) in order to build capacity, in particular in developing countries and countries in transition, especially those which are hosting large-scale influxes or protracted refugee situations, and to strengthen response mechanisms, as to ensure that refugees have access to safer and better conditions of stay and timely solutions to their problems”.

elsewhere; and leaving them with no other means in this attempt than to resort to irregular means, with all the harmful consequences that this may have for them.

3. Conclusion 58 (XL) of the Executive Committee of UNHCR's Programme³ introduces the issue of irregular secondary movement in the following way:

“The phenomenon of refugees, whether they have formally been identified as such or not (asylum-seekers), who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere, is a matter of growing concern. This concern results from the destabilizing effect which irregular movements of this kind have on a structured international effort to provide appropriate solutions for refugees. Such irregular movements involve entry into the territory of another country, without the prior consent of the national authorities or without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation.”

4. For the purpose of the deliberations in the Core Group, the excerpt above can be understood to refer to a refugee or asylum-seeker moving from a country in which he/she has sought protection to another country [i.e., a secondary movement] without the authorisation of that latter State and/or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation [i.e., an irregular movement].

5. The purpose of the present paper is to raise key issues for discussion within the Core Group. To this end, this issues paper will:

- consider the guidance received from the Executive Committee of the High Commissioner's Programme, as well as the Agenda for Protection⁴, which together form the basis of work in the Core Group;
- identify, through an analysis of causes, potential responses to address them;
- recall general principles governing the responsibilities of States and UNHCR; and
- suggest a number of areas in which, as well as possible mechanisms through which, international co-operation could be enhanced to address irregular secondary movements.

2. Sources of guidance and starting premises

6. The international community has long recognised the problems associated with irregular secondary movements of refugees and asylum-seekers, and has identified a number of steps needed to resolve or mitigate them. ExCom and the Global Consultations on International Protection⁵, resulting in the Agenda for Protection⁶, have provided valuable guidance, upon which Convention Plus intends to build.

³ Concerning the problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, Para (a).

⁴ Agenda for Protection, Goal 2, and in particular objectives 2, 3, 4 and 7.

⁵ Global Consultations: Refugee Protection and Migration Control: Perspectives from UNHCR and IOM, 31 May 2001, EC/GC/01/11; Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12; Strengthening Protection Capacities in Host Countries, 4 September 2001,

7. According to ExCom Conclusion 58 (XL), the phenomenon of irregular secondary movements ‘*can only be effectively met through concerted action by governments, in consultation with UNHCR*’, in a number of complementary areas. Firstly, international action is required, aimed at **identifying the causes and scope** of irregular movements in any given refugee situation. Bearing in mind this Conclusion, the Agenda for Protection calls upon ‘UNHCR, in cooperation with relevant partners, to analyze the reasons for such movements’.

8. It is important for States to agree on causes, for which a more systematic diagnosis and analysis may be required. ExCom Conclusion 15 (XXX)⁷ and 58 (XL) provide a good starting point, as they list a number of reasons for these movements, which in their generality seem to be uncontested. Other documents, including the Lisbon Conclusions, have elaborated on these reasons. Nevertheless, further analysis of the causes of irregular secondary movements of refugees and asylum-seekers is necessary to attain a better understanding thereof, and it is for this reason that the Convention Plus process also involves caseload-specific surveys.

9. ExCom Conclusion 58 (XL) also encourages the establishment of appropriate **arrangements for the identification** – i.e., registration and documentation - of refugees in the countries concerned. This call goes to the difficulty of establishing with any certainty the itineraries of refugees and asylum-seekers. In keeping with ExCom Conclusion No. 91(LII)⁸, the Agenda for Protection lists a number of objectives and activities in the field of refugee registration and documentation⁹.

10. This aspect is all the more important since States have limited reliable data about the number or itinerary of asylum-seekers that have moved in an irregular secondary manner prior to entering their territories. Although irregular secondary movements are often perceived as a problem, States have taken few if any steps within their own administrations to obtain a better understanding of this issue.

11. ExCom Conclusion 58 (XL) also emphasizes that international co-operation measures, aimed at reducing irregular secondary movements, must always ensure **humane treatment** for those refugees and asylum-seekers who, ‘*because of the uncertain situation in which they find themselves, feel impelled to move from one country to another in an irregular manner*’. Where those refugees and asylum-seekers resort to **smuggling**, and without prejudice to States’ duty to prosecute the smugglers,

EC/GC/01/19, Para. 12; Ministerial Declaration, 16 January 2002, HCR/MMSP/2001/09, Preamble Para. 4 and OP Para. 2; Lisbon Expert Round Table, 9/10 December 2002 on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers. Conclusions of this roundtable are referred to as ‘Lisbon Conclusions’ hereinafter.

⁶ See footnote 3, above. In particular: objectives 3 and 4 under Goal 2: Protecting Refugees Within Broader Migration Movements; and footnote 11 under objective 3 of the Agenda for Protection, which lists a number of international fora and regional organizations, within which the issue of irregular secondary movements of asylum-seekers and refugees has also been discussed. In addition to those, the process of the Regional Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali II) is one within which UNHCR has had opportunity to present many of the issues and ideas outlined in the present issues paper.

⁷ On Refugees without an Asylum Country, 1979.

⁸ On Registration of Refugees and Asylum-Seekers, 2001.

⁹ Goal 1, Objective 11.

they are covered by the human rights protections contained in Article 16 of the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air¹⁰.

12. The Agenda for Protection calls for strategies to be developed to address the problem of irregular secondary movements, “predicated on a more precisely articulated understanding of what constitutes effective protection in countries of first asylum, and taking into account international and burden-sharing”¹¹. Among other elements, the Lisbon Conclusions¹² list strengthening protection capacities and enabling access to durable solutions, in line with ExCom Conclusion 58(XL), para.(d), as well as:

- opening up more channels for regular entry in the context of resettlement, labour migration and, importantly, family reunification; and
- concluding responsibility-sharing agreements.

13. The need to conclude **responsibility-sharing agreements** has long been recognised, including within the context of transnational movements of refugees and asylum-seekers. ExCom Conclusions 15 (XXX) and 71 (XLIV)¹³ contain language to the effect that:

- an effort should be made to resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria which should be elaborated in keeping with a number of basic principles;¹⁴
- such common criteria and related arrangements should be adopted by those States directly concerned, in consultation with UNHCR¹⁵; and
- such procedures, measures and agreements must include safeguards adequate to ensure in practice that persons in need of international protection are identified and that refugees are not subject to *refoulement*¹⁶.

3. Causes and potential responses

14. As mentioned in the previous Section, a number of causes of irregular secondary

¹⁰ Supplementing the United Nations Convention against Transnational Organized Crime, A/RES/55/25. Of particular relevance in this context is Art. 16 (1): “ In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures (...) to preserve and protect the rights of persons (...), in particular the right to life and the right not be subjected to torture or other cruel, inhuman or degrading treatment or punishment,. Art. 16 (3) states that “ States shall afford appropriate assistance to migrants whose lives or safety are endangered; and (4) accords that States shall take into account the special needs of women and children.

The Palermo Protocols on smuggling and trafficking provide that each State party shall adopt such legislation and other measures as may be necessary to establish these acts as criminal offences, Article 6 of Annex III and article 5 of Annex II.

¹¹ Goal 2, Objective 2.

¹² See footnote 5 above.

¹³ Conclusions on International Protection of Refugees adopted by the Executive Committee, 1993

¹⁴ For a listing of applicable principles, see ExCom-Conclusion 15(XXX), Para.(h)

¹⁵ ExCom-Conclusion 15(XXX), Para.(h), (v).

¹⁶ ExCom Conclusion 71 (XLIV), (g), (i), (k) and (l).

movements of refugees and asylum-seekers have been recognized by ExCom and other international fora. This Section will mention those reasons most frequently cited and provide suggestions for appropriate ways to address them.

15. From the perspective of the refugee or asylum-seeker, an irregular secondary movement may be prompted by:

- compelling reasons for leaving his/her country of previous stay due to fear of persecution or because his/her physical safety or freedom is endangered;
- the desire to re-unite with separated members of his/her family;
- lack of a secure legal status;
- the absence of educational and employment possibilities, dependency on aid and/or a low level of self-reliance in a first country of asylum;
- the non-availability of long-term durable solutions by way of voluntary repatriation, local integration and/or resettlement;
- compounding any or all of the above, lack of access to legal opportunities to migrate.

16. To adequately address these causes, potential responses of States and other stakeholders should, at a minimum, acknowledge the compelling nature of circumstances under which refugees move onward for reasons of safety. States further afield should feel encouraged to try and reach out to those individuals at risk through the provision of emergency resettlement and other ‘protected entry’ procedures¹⁷. In addition to the obvious protection benefit they offer, such procedures can bring an element of order and predictability into the secondary movements of refugees, and mitigate the need to resort to unlawful means of travel, including smuggling and trafficking.

17. Furthermore, family links between a person seeking asylum and his/her intended country of destination are important and should be given due weight in State responses. The protection of the family as the natural and fundamental group unit of society is a widely recognized principle of human rights.

18. This complex set of causes can only be addressed by States acting in concert, and in consultation with UNHCR, to ensure continuing access to, and a better quality of, international protection and the provision of durable solutions.

19. From the perspective of the first country of asylum, secondary movements may appear as the unintended consequence of its limited capacity to host refugees and provide effective protection for protracted periods of time. There is little doubt that the passing of time, without an improvement in the quality of protection and/or without prospects for durable solutions, is a factor in the increase of irregular secondary movements.

¹⁷ Protected entry procedures are understood as various channels to access protection through a (preliminary) processing of claims for asylum beyond national borders in order to ensure an orderly and managed arrival of persons in need of international protection. See also the Communication of the European Commission “Towards more accessible, equitable and managed asylum systems”, COM (2003) 315, p. 13.

20. UNHCR's Framework for Durable Solutions¹⁸ provides guidance for possible ways to address these causes. It proposes a methodology that should facilitate the introduction of measures, aiming at promoting the self-reliance of refugees in countries of asylum, pending durable solutions, while also benefiting host communities. The strategic use of development assistance to achieve sound levels of refugee self-reliance should be an integral part of any capacity-building plans targeting countries of asylum in the developing world.

21. More in general, in tackling the causes of irregular secondary movements, States are expected to relate those causes to their individual, as well as collective, responsibilities.

4. Towards a better understanding of sharing responsibilities

General considerations regarding the responsibilities of States and of UNHCR

22. The nature and extent of State responsibility for the protection of refugees is determined by reference both to law and practice. Within the international protection regime *non-refoulement* is considered a core principle, "*whose applicability is embedded in customary international law*"¹⁹. Thus, the country in which an asylum application is lodged is and remains ultimately responsible for ensuring respect for the principle of *non-refoulement*, even if that country transfers the person to a third country. The principle of *non-refoulement* precludes the removal of a refugee or asylum-seeker to a third state where there is a risk that s/he might be sent from there to a territory where his/her life or freedom would be threatened (so-called indirect *refoulement*).

23. A transfer of responsibilities between States for the handling of asylum applications is possible provided that certain conditions are met. International co-operative arrangements reliant upon such a transfer must be clear as to the division of responsibilities between the different actors involved and the continuation of such responsibilities until such time as an appropriate durable solution is achieved or, in the case of those found not to be in need of international protection, return to the country of origin takes place.

24. It is equally important to note that an effective and fair system of responsibility-sharing must recognize and address the wide disparity which currently prevails among State capacities to protect refugees, as well as the uneven distribution of the refugee burden among States, both of which have a serious impact on levels of protection world-wide.

25. UNHCR stands ready to play its role, as a multilateral organisation, to facilitate agreements among States that will enhance refugee protection world-wide in conformity with the letter and spirit of international refugee law, and result in more effective and reliable burden-sharing. The responsibility of UNHCR for monitoring

¹⁸ UNHCR Geneva, May 2003.

¹⁹ Ministerial Declaration, Preamble, Para. 4.

the adoption and implementation of inter-State agreements that have an impact on the protection of refugees must be seen as flowing directly from its Statute²⁰.

State responsibilities and international co-operation along the movement routes

26. As refugees and asylum-seekers move irregularly across several international borders, the risk increases that they fall between the cracks of the international refugee protection regime. Such a gap may occur in the relation between a State and an individual, when no State assumes responsibility to provide protection to a refugee, or in the relation among States, when States are not assuming responsibility to share the burden. States located along the irregular movement route should, therefore, make every effort to co-operate in order to minimize, and if possible eliminate, any gaps in the provision of international protection. In particular, agreement should be reached regarding the following areas of State responsibility and/or international co-operation.

To receive and process asylum requests

27. Whether through individual screening, group determination, or a combination of the two, identification and recognition of protection needs is what triggers the international protection regime. It can safely be argued that it is in the interest of States, as well as in the interest of the refugees themselves, that the need for international protection be identified as early as possible in the refugee's movement, i.e., as soon as possible after the refugee has left the country in which persecution or violence is feared.

28. A State presented with an asylum request, at its borders or on its territory, has and retains the immediate refugee protection responsibilities relating to admission, at least on a temporary basis. This responsibility extends to the provision of basic reception conditions and includes access to fair and efficient asylum procedures.

29. In applying these basic principles to situations of irregular secondary movement, the following issues may arise:

- issues of jurisdiction: these are likely to arise, in particular, in the context of interception in international waters or on foreign territory, and in situations of rescue-at-sea²¹;
- the extent of State responsibility to document a need or request for international protection, once identified. Documentation [as an asylum-seeker or, within the context of group recognition *prima facie*, as a refugee] is not only an important guarantee for the person concerned, it is also a service to other States, to whom this information is potentially relevant.

Without proper registration and/or documentation of the fact that an asylum-seeker sought protection, any collective system for apportioning subsequent State responsibilities may be seriously undermined. Mechanisms should be developed to

²⁰ Statute, para. 8 (a) and (b).

²¹ Neither interception nor rescue-at-sea are discussed in any detail in this issues paper.

create incentives for individuals to retain, and for States to provide, documents to which they give importance.

*To assess the merits of the claim*²²

30. Fair and efficient procedures for the determination of refugee status are an essential element in the full and effective application of the 1951 Convention/1967 Protocol, since they enable States to identify those who should benefit from international protection, as well as provide an important guarantee that refugees will not be *refouled* and will receive the treatment due under relevant international law. As a rule, access to procedures means access to a determination of the merits of the claim.

31. An asylum-seeker may, however, be refused a determination of the merits of his or her claim in the country where the application has been made,

- i) following a determination that the applicant has already found effective protection in another country (a first country of asylum), or
- ii) if responsibility for assessing the particular asylum application in substance is assumed by a third country, provided there is no risk of persecution in that country, and provided that there are sufficient guarantees in the individual case that the asylum-seeker will be admitted to that country, be protected effectively from *refoulement*, have the possibility to have his/her protection needs fairly assessed through an effective national procedure, and be treated throughout in accordance with accepted international standards.

32. Where a person has lodged an asylum application, and this application has not been dealt with in substance, the question of his/her re-admission by another State (in which, e.g., he/she has previously stayed) becomes in reality a question of re-admission *for the purpose of* considering his/her claim. At issue, in final analysis, is the question of how to allocate responsibility for examining an asylum application in such a way as to ensure that the applicant receives the necessary consideration of protection needs and, if warranted, can enjoy international protection.

33. Allocation of responsibility for determining a claim in substance is clearly an area where discussion and agreement(s) among States are needed, both on criteria and on procedures. **Criteria** will normally include lawful residence, family ties, or other demonstrable connections between the individual asylum-seeker and the country into which re-admission is sought. Pursuant to ExCom Conclusions 15 (XXX) and 71 (XLIV), the criteria should make it possible to identify in a positive manner the country responsible for examining the asylum request on its merits, and they should take into account the duration and nature of any sojourn of the asylum-seeker in other countries. The intentions of the asylum-seeker should as far as possible be taken into account.

²² Where States resort to group determination on a *prima facie* basis, this step is subsumed under the previous one.

34. Alongside clear and workable criteria, sound **procedures** are crucial for the fair, humane and effective operation of inter-State agreements in this area. These procedural arrangements should formalize the consent of all parties concerned, while respecting the rights of the individual and providing the necessary guarantees of fairness.²³

To provide protection pending durable solutions

35. The responsibility to provide access to a substantive refugee status determination procedure would normally entail, in the case of recognition, a responsibility to ensure protection according to international standards, with durable solutions as a realizable possibility.

36. There is a collective duty of the broader community of States, including through UNHCR, to equip States receiving or likely to receive asylum-seekers with the means to live up to international standards in their treatment of refugees, both upon recognition and over time. From the perspective of international burden-sharing, those regions that host the smallest number of refugees relative to their wealth can be expected to assist those with the highest number of refugees in relation to their economies.²⁴

37. This collective commitment to refugee protection according to recognized international standards must translate into concerted efforts, based on partnership among States and with international and non-governmental organisations, to improve the quality and effectiveness of protection available within the countries in regions close to the source of refugee movements. By the same token, assumption of responsibility by countries of first asylum, including a willingness to facilitate return, is crucial to underpin international co-operative efforts.

To provide durable solutions

38. More accessible solutions from first asylum countries are prerequisites if the pressures driving onward movement are to be reduced. These are shared responsibilities in keeping with the principle of international solidarity and burden sharing. Achieving equitable mechanisms through which to realize burden- and

²³ In practice, very few multilateral or bilateral agreements exist that address this issue directly or thoroughly. While an increasing number of bilateral “re-admission agreements” address the situation of third country nationals finding themselves unlawfully on the territory of either party, and while among those third country nationals there may be persons seeking international protection, very few re-admission agreements contain any specific provision regarding the treatment of these asylum-seekers, in spite of their particular needs and corresponding State obligations. As for multilateral instruments delineating, on the basis of agreed criteria, the respective responsibilities of States Parties for examining asylum claims, they are in even shorter supply. UNHCR is aware of only one such instrument in force today, namely the EC Regulation which replaced the 1990 Dublin Convention, binding the Member States of the European Union, as well as Iceland and Norway. It may be worthwhile reviewing the lessons learned from the implementation of this [so far] unique framework.

²⁴ Economic and Social Impact of Massive Refugee Populations on Host Developing Countries, as well as other Countries, EC/54/SC/CRP.5, Standing Committee March 2004. See in this context also Global Consultations: Strengthening Protection Capacities in Host Countries, 4 September 2001, EC/GC/01/19.

responsibility-sharing is a priority challenge to be addressed in any agreement among States faced with irregular secondary movements of refugees and asylum-seekers.

39. Third-country resettlement deserves a special place in this discussion, not the least because a framework of undertakings on the strategic use of resettlement is emerging from another strand of Convention Plus deliberations. In addition to being an instrument of protection and a durable solution for the refugees concerned, resettlement is also an important mechanism of burden-sharing and an instrument of ‘flow management’ – i.e., a regular and orderly alternative to irregular secondary movements.

5. Towards a special agreement

40. A special agreement to address the irregular secondary movements of refugees and asylum-seekers will call for three complementary types of efforts: 1) to ensure that effective protection is available in countries of asylum where people arrive; 2) to find durable solutions for refugees at an early stage; and 3) to develop strategies to ensure better control of irregular secondary movements in a protection sensitive manner. Multilateral special agreements could be developed on the basis on these three elements, within the Convention Plus process, which sets out shared understandings and commitments to make responsibility sharing and co-operation within the international community more equitable and predictable.

41. Agreements must be based on a shared understanding of the causes and scope of irregular secondary movements in particular situations. Critically, they must encapsulate the commitment of States and other interested parties, not only to reduce the current level of irregular secondary movements, but also to work preventatively to reduce the occurrence of the phenomenon. These commitments must be made in full cognizance of individual State responsibilities, and with the explicit purpose of strengthening international solidarity and burden-sharing.

42. In view of this crucial burden-sharing element, agreements on ways to reduce irregular secondary movements would be best framed within comprehensive durable solutions arrangements, into which the various strands of Convention Plus would converge. It is an ambition of the Convention Plus initiative to facilitate the development of comprehensive plans of action to arrive at durable solutions for targeted refugee groups, particularly those in protracted situations. It must be recognized, however, that such comprehensive plans may not be forthcoming in all refugee situations. Furthermore, co-operative frameworks aimed at addressing situations of irregular secondary movement may, in and by themselves, contribute to creating the conditions for more comprehensive approaches to unfold.

43. Without losing sight of the objective of comprehensive plans of action, therefore, the Core Group could usefully focus its work on a number of areas, in which renewed commitments and a better structured international co-operation would have a direct bearing on the reduction and prevention of the irregular secondary movements of refugees and asylum-seekers. Based on the preliminary analysis provided in this issues paper, areas of possible agreement could include, among others, the following (without any suggested order of priority):

- i. Harmonized approaches to, and support for, comprehensive and systematic registration and documentation of refugees and asylum-seekers including standards on exchange of information and incentives for asylum-seekers and refugees to retain and for States to provide travel and/or identity documents;
- ii. Criteria for the sharing and allocation of responsibilities among States for examining refugee claims on their merits. Such criteria, as well as the corresponding procedures, should address the ways in which responsibilities are assumed, continued and/or transferred;
- iii. Support for capacity-building and sustainable protection systems in those States that find it difficult, on account of their limited resources, to provide protection to refugees and asylum-seekers on their territories;
- iv. Burden-sharing to realise durable solutions for refugees, including:
 - a. sustained support for measures enabling refugees to attain self-reliance on the way to durable solutions, while also meeting the development needs of host communities (DAR);
 - b. resettlement commitments – both for immediate protection purposes and as a burden-sharing mechanism – and /or ‘protected entry’ procedures²⁵;
 - c. sustainable repatriation in post-conflict situations through a 4Rs approach (Repatriation, Reintegration, Rehabilitation and Reconstruction);
 - d. Where feasible, DLI (Development through Local Integration) for residual caseloads.
- v. Where feasible and appropriate, regional approaches for the pooling of national mechanisms for an efficient processing of refugee claims and/or burden-sharing mechanisms to deal with the outcomes of such processing;
- vi. Co-operation in criminal law enforcement against acts of smuggling and trafficking, including the necessary guarantees for persons in need of international protection;
- vii. Mechanisms to monitor the implementation of the agreement, evaluate its impact, and report to stakeholders. UNHCR would normally be given, within such mechanisms, a role consistent with its mandate.

²⁵ See footnote 17.