

Protection Policy Paper

Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing

This paper outlines UNHCR’s views on extraterritorial processing of claims for international protection made by persons who are intercepted at sea. It provides an overview of the applicable standards under international human rights and refugee law as well as key policy parameters relating to four models for extraterritorial processing, from the perspective of UNHCR.

TABLE OF CONTENTS

A)	Introduction.....	1
B)	Legal Standards.....	3
I.	Respect for the sovereignty of the host State.....	3
II.	Existence of State jurisdiction	3
III.	Protection against <i>refoulement</i>	4
IV.	Scope and purpose of extraterritorial ‘processing’	5
V.	Reception arrangements.....	7
VI.	Providing outcomes for all intercepted persons.....	9
VII.	Transfer of State responsibility	10
C)	Models of extraterritorial processing: policy considerations.....	10
I.	‘Third State’ processing.....	11
II.	‘Out of country’ processing	12
III.	Regional processing	14
IV.	Processing onboard maritime vessels	15
D)	Role of UNHCR.....	16
E)	Conclusion	16

A) INTRODUCTION

1. Governments in some regions have adopted, or are considering, measures to process certain claims for international protection outside of their territory.¹ This is particularly the case following maritime interception operations,² where asylum-seekers and migrants are prevented from reaching their destination while

¹ For practical reasons, such mechanisms will be referred to in this paper as ‘extraterritorial’ processing arrangements. As is outlined below, Part B, Section IV the term ‘processing’ may include a range of different types of procedures, including profiling or pre-screening, as well as full asylum procedures.

² There is no internationally accepted definition of interception, and its meaning is largely informed by State practice. A working definition is provided in Executive Committee Conclusion No. 97 (LIV) (2003) on Protection Safeguards in Interception Measures, available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010).

on the high seas or in the territorial waters of a third State. In this context, some States view extraterritorial processing arrangements as a tool for entry management, as they seek to control access to their territory or jurisdiction.

2. UNHCR's position is that claims for international protection made by intercepted persons are in principle to be processed in **procedures within the territory of the intercepting State**. This will usually be the most practical means to provide access to reception facilities and to fair and efficient asylum procedures - core components of any protection-sensitive entry system - and to ensure protection of the rights of the individual.
3. However, under certain circumstances, the processing of international protection claims outside the intercepting State could be an alternative to standard 'in-country' procedures. Notably, this could be the case when extraterritorial processing is used as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space. The suggestions made in this paper are accordingly intended to support efforts by States to address complex mixed movement situations in solidarity with other affected States and to implement their obligations under international refugee and human rights law in good faith.
4. If extraterritorial processing is part of a comprehensive or cooperative strategy to address mixed movements, the location of reception and processing arrangements is only one relevant element. With its *10-Point Plan on Refugee Protection and Mixed Migration*, ('10-Point Plan'), UNHCR has developed a tool that provides suggestions across a number of areas, including data collection, protection-sensitive entry systems, reception arrangements, profiling and pre-screening arrangements, and differentiated processes and procedures.³ This paper should be read in conjunction with the 10-Point Plan, and related strategies for comprehensive State cooperation in this field.
5. While the focus of this paper is on extraterritorial processing arrangements in the context of maritime interception operations, most of its recommendations could also apply to arrangements that may be established following rescue at sea operations carried out by a State on the high seas or in the territorial waters of a third State. It is beyond the scope of this paper to analyse the differences between these two types of intervention. Interception and rescue at sea operations are not equivalent and raise different policy questions, international law issues and responses.
6. Some of the considerations outlined in this paper may also apply to interception carried out by intercepting State authorities on the territory of a third State (e.g. through outposted immigration officers) or in 'international' or 'transit' areas in the intercepting State's own territory (e.g. at airports).

³ See: UNHCR, *Refugee Protection and Mixed Migration: a 10-Point Plan of Action*, www.unhcr.org/protect/PROTECTION/4742a30b4.pdf (accessed 20 September 2010).

B) LEGAL STANDARDS

7. Extraterritorial processing and reception arrangements are subject to applicable international legal standards, notably under international refugee and human rights law. These are summarized below. Additional standards may apply under regional human rights and refugee law or national law.

I. Respect for the sovereignty of the host State

8. Formal authorization in accordance with international law by the State on whose territory the processing takes place (the ‘host State’⁴) ensures that there is no violation of the host State’s sovereignty. It also provides an opportunity to clarify the responsibilities of each State and the procedures to be followed.⁵

II. Existence of State jurisdiction

9. The existence of jurisdiction triggers State responsibilities under international human rights and refugee law.⁶ It is generally recognized that a State has jurisdiction, and consequently is bound by international human rights and refugee law, if it has **effective de jure and/or de facto control over a territory or over persons**.⁷ The existence of jurisdiction under international law does not depend on a State’s subjective acknowledgment that it has jurisdiction. Jurisdiction is established as a matter of fact, based on the objective circumstances of the case.⁸
10. This means that State ‘A’ may have jurisdiction over – and responsibilities under international law towards – people who are on the territory of State ‘B’ if State A nonetheless has de facto control over those people or the area where they are located (e.g. where State A runs reception arrangements or asylum procedures on

⁴ The term ‘host State’ refers to a State on whose territory intercepted persons are located, without necessarily implying that this State has assumed responsibility for processing protection claims made by such persons.

⁵ Note that an intercepting State may have responsibility for intercepted persons, even if claims for international protection are processed on the territory of another State (see Part B, Section II below).

⁶ See e.g.: Art. 2 of the 1996 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 23 March 1976 [‘ICCPR’] (obliging States to apply the rights in the ICCPR to ‘all individuals within its territory and subject to its jurisdiction’); Art. 2, The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *entered into force* 26 June 1987 [‘CAT’] (obliging State parties to prevent acts of torture to persons ‘in any territory under its jurisdiction’). The concept of ‘State jurisdiction’ refers to a State’s capacity to exercise particular substantive aspects of its sovereignty, especially its rights (or claims), liberties and powers: Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), 106f.

⁷ See e.g.: *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Gen. List No. 131, 9 July 1994; *Case Concerning Armed Activities in the Territory of the Congo (DRC v. Uganda)* (2005) ICJ Gen. List No. 166, 19 December 2005; Human Rights Committee General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*: 25/05/2004, CCPR/C/21/Rev.1/Add.13. Further references may be found in 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, Part II (B), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search> (accessed 12 November 2009) [‘UNHCR Advisory Opinion’].

⁸ This follows from the establishment of jurisdiction based on effective control, whether in law or in fact: See references cited above n [7].

the territory of State B).⁹ It may also mean that a State has jurisdiction under international law due to its de facto control over people located on part of its own territory that has been defined as ‘extraterritorial’ for migration or other purposes under national law.¹⁰ Further, it may mean that a State has jurisdiction over people under its de facto control who are located on the high seas.

11. Depending on the interception operation and processing arrangements, there may be some ambiguity about which State has jurisdiction over intercepted persons. Jurisdiction can be shared by several States (e.g. intercepting State, host State, State undertaking processing or some combination). Clarifying in advance which States have accepted practical responsibility for reception, processing and solutions for intercepted persons will avoid any impression that the objective of a State in taking part in an extraterritorial processing arrangement is to minimize its responsibility under international law or to shift burdens onto other States.

III. Protection against *refoulement*

12. Protection against *refoulement* is a cornerstone of international human rights and refugee law. In addition to being enshrined in Article 33 of the 1951 Convention¹¹ and various human rights treaties, in UNHCR’s view the prohibition of *refoulement* is a rule of customary international law.¹² The prohibition on *refoulement* is applicable also when a State has de jure or de facto jurisdiction extraterritorially.¹³
13. Consistent with the principle of *non-refoulement*, a principal goal of all processing arrangements, extraterritorial or otherwise, is to ensure that no person is returned directly or indirectly to territories where they face a threat of persecution,¹⁴ a real risk of torture,¹⁵ arbitrary deprivation of the right to life¹⁶ or irreparable harm.¹⁷

⁹ Note that in certain circumstances, outlined in Part B, Section VII and Part C, Section I below, an intercepting State may transfer responsibility for intercepted persons to a third State in accordance with international law.

¹⁰ Some governments have argued that an intercepting State may not have jurisdiction under international law over persons located on parts of its territory that have been excised under domestic law (e.g. declared ‘international’ or ‘transit’ areas in airports, ports and border areas, or other parts of State territory including remote territories or islands), on high seas, or on the territory of a third State that is under the control of the intercepting State (e.g. because the intercepting State is responsible for a military base or reception centre). Such arguments are inconsistent with the notion of jurisdiction under international law. Domestic law is not determinative of the existence of jurisdiction as a matter of fact under international law: The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* 27 January 1980, Article 27 (providing that a State may not invoke the provisions of its internal law as a justification for its failure to perform a treaty); see also Article 3 of ILC, Draft Articles on the Responsibility of States for International Wrongful Acts with Commentaries (2001).

¹¹ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137 *entered into force* 22 April 1954 [‘1951 Convention’] and its 1967 Protocol Relating to the Status of Refugee, 606 U.N.T.S. 267, *entered into force* 4 October 1967 [‘1967 Protocol’]. The temporal and geographical limitations of the 1951 Convention contained in Article 1 B have been removed for the vast majority of State Parties through the 1967 Protocol.

¹² UNHCR Advisory Opinion, above n [7].

¹³ UNHCR Advisory Opinion, above n [7]; see also Part B, Section II above.

¹⁴ Art. 33, 1951 Convention.

¹⁵ Art. 3, CAT. See also: Art. 7, ICCPR.

¹⁶ Art. 6, ICCPR.

The principle of *non-refoulement* applies not only to those formally recognized as refugees or beneficiaries of complementary forms of protection, but also to asylum-seekers pending a final determination of their claim.¹⁸

IV. Scope and purpose of extraterritorial ‘processing’

14. The scope and purpose of ‘processing’ in extraterritorial arrangements may vary. ‘Processing’ may be limited to a **profiling or pre-screening** exercise with built-in protection safeguards. ‘Processing’ could alternatively consist of **refugee status determination** (‘RSD’) and/or other relevant substantive procedures for persons with specific needs such as children or victims of trafficking.¹⁹ Finally, in appropriate circumstances, ‘processing’ could involve grants of **temporary forms of protection** to particular groups instead of full RSD procedures.

a) *Profiling or pre-screening*

15. Where extraterritorial processing is limited to initial profiling or pre-screening, this is understood to mean a process that precedes formal RSD and aims to identify and differentiate between categories of arrivals (e.g. persons who are seeking international protection, victims of trafficking, unaccompanied children, irregular economic migrants). Its core elements include: providing information to new arrivals; gathering information about new arrivals through questionnaires and informal interviews; establishing a preliminary profile for each person; and counselling. Where extraterritorial processing is limited to profiling and pre-screening, it could also be used as a basis to refer people to authorities or procedures located inside the intercepting State’s territory that can best meet their needs and manage their cases (including, for asylum-seekers, RSD procedures).

16. Profiling is effective if officials responsible for conducting profiling, whether border guards, coastguards or others, are trained to recognize potential international protection needs or other special needs; and have clear instructions and procedures to follow in this event (including referral to specialized and competent authorities). Profiling does not replace RSD, nor is profiling a de facto RSD procedure without or with limited procedural guarantees. If a person expresses in any manner a need for international protection, or there is any doubt whether an individual may be in need of international protection, referral to RSD is the required response.

17. Profiling and pre-screening arrangements require monitoring to ensure that they are conducted transparently and do indeed identify those who are seeking international protection.

¹⁷ Human Rights Committee General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*: 25/05/2004, CCPR/C/21/Rev.1/Add.13.

¹⁸ UNHCR Advisory Opinion, paragraph 6, above n [7].

¹⁹ Such substantive procedures could be conducted after an initial profiling or pre-screening exercise, where practical.

b) *Refugee Status Determination*

18. Providing asylum-seekers with effective access to a fair and efficient asylum procedure where their international protection needs can be properly assessed ensures that the *non-refoulement* principle is respected.
19. A fair RSD procedure, wherever undertaken, requires submission of international protection claims to a specialized and professional first instance body, and an individual interview in the early stages of the procedure. Recognized international standards further include providing a reasoned decision in writing to all applicants, and ensuring that they have the opportunity to seek an independent review of any negative decision, with any appeal in principle having a suspensive effect. It is important that information received from applicants is treated confidentially.²⁰
20. Measures to ensure that access to asylum procedures is effective (namely, that applicants have legal and physical access to asylum procedures and the necessary facilities for submitting applications) include availability of legal advice and interpretation, and adequate time for the preparation of claims. It is also important that asylum applications are registered rapidly and dealt with in a reasonable timeframe. For unaccompanied and separated children an adapted ‘child-friendly’ RSD procedure is advisable.²¹
21. Refugee status may also be determined on a group basis. This is appropriate if most of those arriving in the group can be deemed to be refugees on the basis of objective information related to the circumstances in the country of origin leading to their forced displacement.

c) *Temporary forms of protection*

22. Extraterritorial processes leading to the grant of temporary forms of protection may be appropriate in cases involving groups that are assessed generally as being in need of international protection, but where there is an expectation that their protection needs are only of short duration. Instead of conducting individual RSD,

²⁰ Guidance on RSD has been provided by the UNHCR Executive Committee (‘ExCom’). See e.g.: ExCom Conclusion No. 8 (XXVIII) (1977) and ExCom Conclusion No. 30 (XXXIV) (1983), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010); see also: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva, Jan. 1992; various UNHCR *Guidelines on International Protection*, <http://www.unhcr.org/refworld/rsd.html> (accessed 29 October 2009); UNHCR, *Global Consultations on International Protection: Third Track/Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001 (EC/GC/01/12), <http://www.unhcr.org/refworld/docid/3b36f2fca.html> (accessed 14 November 2009) [‘Fair and Efficient Asylum Procedures’]. For the treatment of asylum-seekers in situations of large scale influx see ExCom Conclusion No. 22 (XXXII), especially Part II(B), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010).

²¹ UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, www.unhcr.org/refworld/docid/4b2f4f6d2.html (accessed 20 August 2010). See also UNHCR, *Guidelines on determining the best interest of the child*, May 2008, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=48480c342&page=search> (accessed 20 August 2010); UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, <http://www.unhcr.org/refworld/docid/3ae6b3470.html> (accessed 20 August 2010).

States may grant a protected status to the relevant group of persons on a temporary basis. Temporary forms of protection are not a substitute for 1951 Convention status. They build on its framework and do not exclude conferral of refugee status, should protection be required for a longer period of time.²²

V. Reception arrangements

23. Reception arrangements must address the basic needs of new arrivals and provide for a stay consistent with the right to an adequate standard of living.²³ On arrival, persons with acute medical needs are to be treated and a basic medical check up given to others. Information explaining available procedures and the practicalities of reception arrangements can be given in writing or verbally, in languages understood by new arrivals (e.g. using videos or trained interpreters).
24. If new arrivals are housed in reception centres, standard services will include regular, culturally appropriate meals, provision of basic non-food items, and access to communication devices (telephone, mail or email services). When designing reception centres, measures are needed to prevent overcrowding and ensure basic space and privacy for residents (including minimal facilities for religious/cultural practices and daily outdoor activity). Other factors include provision of adequate security, a confidential, accessible complaints procedure, as well as regular cleaning and maintenance of the centres.²⁴ These considerations are not exhaustive.
25. Open reception centres are the preferred way of housing arrivals. Depending on the specific situation, smaller group homes, community placements or private accommodation may be more appropriate than large reception centres. The use of semi-open reception centres with measures to ensure ongoing presence in the centre, such as daily reporting requirements and leave-with-permission, will in many cases be sufficient to minimize absconding.²⁵
26. Where reception centres are closed, this qualifies as ‘detention’ under international human rights law.²⁶ International human rights law provides that no

²² See, e.g.: ExCom Conclusion No. 15 (XXX) (1979), ExCom Conclusion No. 19 (XXXI) (1980), ExCom Conclusion No. 68 (XLIII) (1992), ExCom Conclusion No. 74 (XLV) (1994), ExCom Conclusion No. 103 (LVI) (2005), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010).

²³ Art. 25, Universal Declaration of Human Rights, General Assembly Resolution 217A (III), U.N. Doc. A/810 (1948); Art. 11, International Covenant on Economic Social and Cultural Rights, 003 U.N.T.S. 3, *entered into force* 3 January 1976.

²⁴ For select UNHCR policy on reception conditions for asylum-seekers see e.g.: ExCom Conclusion No. 93 (LIII) (2002); UNHCR, *Reception of Asylum-seekers, Including Standards of Treatment, in the Context of Individual Asylum Claims*, Global Consultations on International Protection (3rd Meeting), 4 September 2001, EC/GC/01/17.

²⁵ See: UNHCR, *Alternatives to Detention of Asylum-seekers and Refugees* (2006), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search> (accessed 14 December 2009).

²⁶ See especially: Art. 9, ICCPR; Human Rights Committee General Comment No. 8, *Right to Liberty and Security of Persons*, 30/06/82. For guidance on detention of asylum-seekers see e.g.: UNHCR’s Guidelines on Applicable Criteria and Standards for Detention (February 1999), <http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf> (accessed 29 October 2009); ExCom Conclusion No. 44 (XXXVII) (1986).

person shall be subject to arbitrary detention²⁷ or be deprived of his or her liberty except on such grounds and in accordance with such procedures as established by law.²⁸ The concept of ‘arbitrariness’ is interpreted broadly to include ‘elements of inappropriateness, injustice and lack of predictability’.²⁹ Any period of detention is required to be necessary and reasonable in all the circumstances, proportionate and non-discriminatory.³⁰ Effective, independent and periodic review of detention by a court empowered to order release is also critical in ensuring compliance with international human rights standards.³¹

27. Prolonged stays in closed reception facilities are not appropriate. This is especially the case for persons who have been determined to be refugees or otherwise in need of international protection and for those who have specific needs (see Part B, Section VI below on the need for rapid outcomes for all persons).
28. Further, people with specific needs may require special considerations in terms of reception and processing arrangements, e.g.:
- **Children**, particularly unaccompanied and separated children: appointment of guardians, systematic ‘best interest’ determinations, assistance with access to asylum procedures and preparation of their claim, and alternative accommodation arrangements. Detention of children is permitted only as a measure of last resort, for the shortest possible period of time and in appropriate conditions;³²
 - **Women**: identification of ‘women-at-risk’ through pre-screening, separate sleeping and washing arrangements in reception centres, presence of appropriate female staff, including to conduct interviews;³³
 - **Trafficked persons**: special procedures to identify potential victims, separate them from traffickers, and to prevent traffickers and smugglers from accessing reception centres; assistance in preparing asylum claims; special short or longer term visas or migration options may be considered (e.g. in exchange for testimony against traffickers);³⁴

²⁷ Art. 9(1), ICCPR; Art. 9, UDHR.

²⁸ Art. 9(1), ICCPR.

²⁹ Human Rights Committee, *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990).

³⁰ *Van Alphen v. The Netherlands*, above n [29]

³¹ *Van Alphen v. The Netherlands*, above n [29]; Art. 9, ICCPR.

³² See: The Convention on the Rights of the Child, 1577 U.N.T.S. 3 entered into force 2 September 1990; General Comment No. 6 (2005) *Treatment of Unaccompanied and Separated Children outside their Country of Origin*, CRC/GC/2005/6.

³³ See e.g.: UNHCR, *The Handbook for the Protection of Women and Girls* (2008), <http://www.unhcr.org/protect/PROTECTION/47cfae612.html> (accessed 29 October 2009); UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response* (2003) <http://www.unhcr.org/3f696bcc4.html> (accessed 29 October 2009); Executive Committee Conclusions No’s. 39 (XXXVI) (1985), 54 (XXXIX) (1988), 60 (XL) (1989), 64 (XLI) (1990) and 73 (XLIV) (1993).

³⁴ See e.g.: OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, <http://www.ohchr.org/Documents/Press/OHCHR%20Recommended%20Guidelines.pdf> (accessed 29 October 2009); UNHCR’s Guidelines on International Protection No. 7, *The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, HCR/GIP/06/07, 7 April 2006; Guidelines on International Protection No. 2, ‘Membership of a Particular Social Group’ Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of

- **Victims of torture or trauma:** availability of basic medical facilities and psychological support, specific assistance with asylum applications or other procedures.

29. All of the above groups of persons may be in need of international protection. In addition to any special measures or procedures, they should have access to RSD procedures and assistance as appropriate in preparing their asylum claim.

VI. Providing outcomes for all intercepted persons

30. States with jurisdiction over extraterritorial reception and processing arrangements are also responsible for ensuring that timely outcomes are provided for all intercepted persons, whether they are found to be in need of international protection or not.³⁵ How cases are resolved will differ depending on the person's legal status. Effective outcomes will also balance State concerns, such as the need to stem future irregular movements and avoid the creation of pull factors, with international human rights and protection standards.

31. For **refugees or other people in need of international protection**, durable solutions will generally be geared towards resettlement and, depending on the arrangement and the particular circumstances in the country, some form of local solution. For these people, with clear entitlements under international refugee law, it is necessary for access to such solutions be guaranteed and available within a reasonable time. For those granted temporary forms of protection pursuant to extraterritorial processing arrangements based on an expectation that their protection needs will be only of short duration (see above, Part B, Section IV), it is appropriate for some form of local solution to be provided, including, e.g., freedom of movement and opportunities for self-reliance, pending the viability of return to their country of origin.

32. For **persons found not to be in need of international protection**, resolution of their situation will generally consist of return to the country of origin.

33. Additional consideration is necessary for the identification of appropriate outcomes for persons with **specific needs** (see above, Part B, Section V).

Refugees, HCR/GIP/02/02, 7 May 2002; Guidelines on International Protection No. 1, *Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002; The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, General Assembly Resolution 55/25, *entered into force* 25 December 2003.

³⁵ As outlined above (Part B, Section II), this could include the intercepting State, as well as any other State that is or becomes involved in extraterritorial processing arrangements (including the host State). See also: ExCom Conclusion No. 62 (XLI) (1990) and ExCom Conclusion No. 85 (XLIX) (1998), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010). As discussed above, Part B, Section IV, extraterritorial processing may in itself consist of finding and allocating responsibility for providing durable solutions in the context of regional processing arrangements.

VII. Transfer of State responsibility

34. Any transfer of responsibility for processing asylum claims made by intercepted persons from an intercepting State to another country is subject to appropriate protection safeguards.³⁶ Notably, transfer of responsibility may be possible:

- Where an asylum-seeker has valid links with the proposed country of transfer (such as close family, educational/language and similar links, previous issuance of an entry visa, or previous residence on the territory – although this would not normally mean mere transit); and/or
- Based on an agreement between the States concerned that guarantees the standards of treatment and procedural and substantive rights listed in Part B (e.g. the US-Canada ‘Safe Third Country Agreement’³⁷).

35. In both cases, formal assurances by the accepting country to respect essential protection standards are necessary. Such assurances generally provide that asylum-seekers i) will be admitted to that country; ii) will enjoy protection against *refoulement* there; iii) will have the possibility to seek and enjoy asylum; and iv) will be treated in accordance with accepted international standards. It is also necessary for the intercepting State to ensure that the accepting country does in practice meet essential protection standards.

C) MODELS OF EXTRATERRITORIAL PROCESSING: POLICY CONSIDERATIONS

36. This Part C outlines UNHCR’s views on four different models of extraterritorial reception and processing that have been considered or applied by intercepting States.

- I. ‘Third state’ processing
- II. ‘Out of country’ processing
- III. Regional processing
- IV. Processing onboard maritime vessels

37. These models include arrangements where responsibility for processing is transferred from the intercepting State to another State, as well as where the intercepting State retains responsibility for undertaking processing itself, but conducts this outside of its territory. All extraterritorial arrangements are subject to the legal standards set out in Part B.

³⁶ See: ExCom Conclusions No. 15 (XXX) (1979) and ExCom Conclusion No. 58 (XL) (1989), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010); UNHCR, Fair and Efficient Asylum Procedures, above n [20].

³⁷ *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, 5 December 2002, <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> (accessed 15 July 2010).

I. 'Third State' processing

38. In certain circumstances, claims for international protection may be processed **in and by** a State other than the State that has carried out an interception operation (a 'third State'³⁸), if the third State is a party to the 1951 Convention and has a fair and effective asylum system in place.
39. This may be particularly appropriate where **the third State also has concurrent jurisdiction** over the intercepted persons, in addition to the intercepting State: for example, because the interception has been carried out by the intercepting State in the territorial waters of the third State.³⁹ This is consistent with UNHCR Executive Committee Conclusion No. 97 (LIV) (2003) which provides that 'the State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons'.⁴⁰ Third State processing may also be appropriate during **rescue at sea operations** taking place in the search-and-rescue area of the third State, where, in addition to being a party to the 1951 Convention and having a fair and effective asylum system in place, the third State has been identified as the most suitable place for disembarkation or where maritime safety has required this.⁴¹
40. In a second category of cases, it may be acceptable for intercepting States to refer asylum-seekers for processing **in and by third States that do not otherwise have immediate jurisdiction** over those persons in the circumstances and under the conditions outlined in Part B, Section VII above: notably, where an asylum-seeker has valid links with that third country; and/or based on an agreement for transfer of responsibility between the States concerned.
41. In the interests of burden sharing and international cooperation, the preferred option where responsibility for processing is transferred to a third State is for the intercepting State to assist, e.g. by determining certain asylum claims and/or providing durable solutions to some refugees, including resettlement. It is useful if burden-sharing agreements between intercepting States and third States clearly delineate the protection responsibilities of each State in this regard. In the absence of a standing arrangement, ad hoc agreements on the roles and responsibilities of each State for protection-related issues can be concluded for particular interception operations or intercepted groups.

³⁸ The term 'third State' refers to the fact that this country is neither the country of origin of the asylum-seeker, nor the State that carried out the interception operation.

³⁹ See definition of 'jurisdiction' above, Part B, Section II. An intercepting State (State A) and a third State (State B) may also have concurrent jurisdiction where interception has been carried out by State A on the territory of State B. This may be the case, for example, where State A has outposted immigration officials at airports in State B who prevent persons without appropriate travel documentation from travelling to State A.

⁴⁰ ExCom Conclusion No. 97 (LIV) (2003) on Protection Safeguards in Interception Measures, available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010).

⁴¹ See: United Nations General Assembly, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees*, A/AC.259/17, 11 April 2008.

42. In all cases, the intercepting State maintains responsibilities for intercepted persons under international law as long as they are within its jurisdiction.⁴² Accordingly, it is for the intercepting State to ensure that the (proposed) third State is willing and able to provide access to fair and efficient asylum procedures and protection before responsibility is transferred (see Part B, Section VII). If formal assurances are not forthcoming, or if the third State does not in fact process claims properly, then it is not appropriate for the intercepting State to transfer claimants to this third State.
43. As stated above, transfer of responsibility for processing to a third State is acceptable only if that State is a party to the 1951 Convention and has an asylum system in place that meets international standards. It is also not acceptable for a person's asylum claim to be transferred to a third State if the person is a national of that country or if there are other reasons why access to protection in that State would not be possible in his or her individual case.

II. 'Out of country' processing

44. 'Out of country' processing involves processing **by an intercepting State on the territory of another State** or on **part of the intercepting State's own territory** that has been delineated as 'extraterritorial' for migration or other purposes under national law.⁴³ Unlike 'third State' processing, discussed in Part C, Section I above, 'out of country' processing does not involve the transfer of responsibility for processing to another State. Rather, responsibility under international law is retained by the intercepting State itself.⁴⁴
45. In specific circumstances, 'out of country' processing may increase protection options. This may be the case where:
- A group has been intercepted in the territorial waters of a State that does not have an adequate asylum procedure in place or is not a party to the 1951 Convention, and relocation of persons to intercepting State territory is not possible (e.g. due to the number of claims);⁴⁵
 - It can facilitate disembarkation of people rescued at sea on the high seas by commercial vessels;⁴⁶

⁴² For the scope of jurisdiction under international law, see Part B, Section II. For the transfer of responsibility to a third State in accordance with international law, see Part B, Section VII.

⁴³ Examples of excision of certain parts of State territory under national law include airports, ports and other border areas through the creation of 'international' or 'transit' zones as well as islands or other remote areas. The European Court of Human Rights has held that, despite its name, the 'international zone' of an airport does not have extraterritorial status: *Amuur v France* 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.

⁴⁴ The existence of State jurisdiction as a matter of fact under international law is outlined in Part B, Section II. The transfer of responsibility to a third State under international law is described in Part B, Section VII.

⁴⁵ Cf. 'third State' processing outlined in Part C, Section I above where the third State is party to the 1951 Convention.

⁴⁶ See generally: United Nations General Assembly, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees*, A/AC.259/17, 11 April 2008, especially paragraphs 32 - 35.

- It is used as an element in a longer term strategy to establish or enhance the protection capacity of the country in which the processing takes place;
 - It facilitates burden and responsibility sharing among destination States with varying capacities in a particular region.
46. The same procedural guarantees and reception standards that apply to regular ‘in-country’ procedures also apply to ‘out of country’ processing arrangements. In particular, measures to safeguard against prolonged stay in reception facilities with no or only limited freedom of movement before or after protection claims have been examined will be critical. This could include admission to the intercepting State’s territory or resettlement in a third country for those persons ultimately recognized as refugees, and return for those found not to be in need of international protection.
47. Responsibility for ‘out of country’ processing and reception arrangements, as well as ensuring the availability of timely and appropriate outcomes, will remain fully with the intercepting State.⁴⁷ Where processing is undertaken on the territory of a third State, that State may also have responsibilities under international law (Part B, Section II). In some cases, States have sought assistance from UNHCR, IOM or another international organization for ‘out of country’ processing or reception.⁴⁸ Full responsibility under international law in such situations remains with the State(s) concerned.
48. ‘Out of country’ processing by an intercepting State is not appropriate in any of the following alternative circumstances:
- Compliance with national and international standards cannot be guaranteed (see Part B);
 - There is no resolution, either for refugees or for those found not in need of international protection, within a reasonable time after protection claims have been determined;
 - It negatively impacts on the availability or development of the asylum system (‘asylum space’) in the country on whose territory the processing takes place;
 - Where people have been intercepted in the territorial waters of the intercepting State, if the ‘out of country’ processing arrangement involves processing by the intercepting State on the territory of another State.
49. Consistent with the understanding in this paper that States implement extraterritorial processing arrangements in good faith, it is also not appropriate to use such mechanisms where:
- It represents an attempt by an intercepting State to divest itself of responsibility and shift that responsibility to another State (or UNHCR or another international organization);

⁴⁷ See: Part B, Section II above.

⁴⁸ The possible scope of UNHCR’s involvement in extraterritorial processing arrangements is discussed in Part D below.

- It is used as an excuse by the intercepting State to deny or limit its jurisdiction and responsibility under international refugee and human rights law.

III. Regional processing

50. 'Regional processing' could involve joint processing carried out by several transit or destination States.⁴⁹ It could be appropriate in the event of large numbers of claims being made in several States but **arising from the same situations or particular migratory routes**. It could also be appropriate where there is a concern about **managing responsibility** for asylum processing and solutions more evenly between, or with more consistency among, destination States in a particular region.
51. It is recommended that such processing be undertaken under the joint responsibility of several States in regional processing centres located inside the territory of one or more of the participating States. Regional processing could be based on comprehensive plans of action to address targeted refugee groups: for example, persons of specific nationalities who are regularly found to need international protection in high numbers in relevant destination States; or persons from countries of origin that present complex claims which would benefit from a pooling of resources among governments in the region.⁵⁰
52. The scope of the 'processing' under a regional processing arrangement could be more or less extensive.⁵¹ For example, it could involve joint reception arrangements, registration and pre-screening of asylum-seekers by cooperating governments, followed by referral of different categories of claims to substantive RSD and other procedures in individual States. This could be supported by the adoption of common asylum procedures by States.⁵²
53. Alternatively, regional processing could involve full RSD procedures in line with the international standards set out in Part B, Section IV above, carried out jointly at the regional level with a consortium of national asylum officers and second instance decision makers. In certain circumstances, which would require further exploration, regional processing could also be undertaken upon the request of a group of States by a supranational, regional or international organization or a multi-agency task force (for the possible role of UNHCR, see below Part D). States could adopt different roles and responsibilities consistent with their capacity (hosting reception centres, offering relocation places for refugees, organising return, providing funds). Additional support, financially and in the form of resettlement places, could be made available by third States outside the region.

⁴⁹ Note that while regional processing arrangements as described in this Section have been considered by States, they have not yet been implemented in any region.

⁵⁰ See: UNHCR Working Paper: A Revised 'EU prong' Proposal (22 December 2003), available at <http://www.unhcr.org/refworld/docid/400e85b84.html> (accessed 5 July 2010) ['Revised EU Prong Proposal'].

⁵¹ See, also: above Section B, Part IV.

⁵² See: Revised EU Prong Proposal, above n [50].

54. Responsibility for the identification and implementation of solutions for those in need of international protection and resolution for others would remain with all States involved in the regional processing arrangement.

IV. Processing onboard maritime vessels

55. Processing onboard maritime vessels is generally not appropriate. In exceptional circumstances, that would need to be defined further, initial **profiling or pre-screening** onboard the maritime vessel by the intercepting State may be one solution to ensure that persons with international protection needs are identified and protected against *refoulement*. Following profiling, those persons identified as having potential protection needs would need to be disembarked in the territory of the intercepting State to have their international protection claims considered in regular in-country RSD procedures. As stated above (Part B, Section IV), if during profiling a person expresses in any manner a need for international protection, or there is any doubt whether an individual may be in need of international protection, referral to RSD is the required response.

56. In general the carrying out of **full RSD procedures** onboard maritime vessels will not be possible, as there can be no guarantee of reception arrangements and/or asylum procedures in line with international standards.⁵³ In terms of reception arrangements, this would require a vessel of a certain size, with adequate facilities to meet asylum-seekers' basic needs (including for medical treatment, food and fresh water, rest, interpretation, as well as space to conduct individual, confidential interviews). Even on large vessels the limitations on space may increase the risks of overcrowding and spread of contagious illnesses. It may also be more challenging to manage security risks on maritime vessels than in onshore reception centres.

57. Even if these standards could be met, full RSD procedures could only be carried out onboard maritime vessels for claimants whose asylum applications could be decided quickly, i.e. manifestly founded or unfounded cases. If determination of certain claims proved to be more complex during the course of such procedures, individuals would need to be disembarked and referred to regular in-country asylum procedures.

58. At the same time, other procedural requirements - such as access to legal assistance, allowing sufficient time to prepare asylum claims, providing a reasoned decision in writing, and allowing an independent appeal of any negative decision with suspensive effect - remain applicable for on-board RSD. Trained, professional asylum experts would be required on-board, as it is not appropriate for RSD to be carried out by border or coastguard officials. Trained translators or interpreters may also be necessary.

59. It is not appropriate to process the claims of vulnerable people or people with specific needs, including children, on-board maritime vessels other than through initial profiling or pre-screening (Part B, Section IV).

⁵³ See: above, Part B, Sections IV and V.

D) ROLE OF UNHCR

60. UNHCR has a supervisory responsibility under its Statute in conjunction with Article 35 of the 1951 Convention.⁵⁴ In order to exercise this responsibility, UNHCR or its partners need access to extraterritorial reception centres and permission to contact asylum-seekers and refugees. UNHCR may also provide advice to States, for instance on the inclusion of protection responsibilities in interception agreements.
61. In some situations, the Office could agree to become directly involved in extraterritorial reception arrangements or asylum procedures, or to assist with the search for durable solutions for refugees. This could be the case for rescue at sea operations involving the responsibility of several States, where UNHCR's engagement could be crucial for brokering an agreement. It could also form part of a strategy to establish or enhance the capacity of the State on whose territory asylum processing takes place. Finally, direct UNHCR involvement could be considered to assist States in establishing a comprehensive regional cooperation framework.
62. UNHCR's involvement is best undertaken in conjunction with State authorities, other international organizations and civil society.
63. Involvement by UNHCR will not be appropriate where it could call into question UNHCR's impartiality or mandate, or lead to UNHCR being seen as favouring one or the other of the States involved. It is also not appropriate where it may have the effect of devolving State responsibility to provide access to an asylum procedure and search for durable solutions to UNHCR.

E) CONCLUSION

64. In general, processing of intercepted persons will take place inside the territory of the intercepting State. This is consistent with the responsibilities owed by the intercepting State to persons within its de jure or de facto control under international refugee and human rights law. It will also usually be the most practical alternative.
65. However, in certain circumstances, extraterritorial processing may be appropriate as part of burden-sharing arrangements in order to better and more fairly to distribute responsibilities to respond to refugee and mixed movement situations among interested States.
66. This paper has provided general guidance on four models of extraterritorial processing that have been considered by States and the international legal standards that apply to such models. However, the effectiveness of any particular

⁵⁴ See: *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775 (1950).

extraterritorial processing arrangement and its consistency with international refugee and human rights law would depend on the details of each scheme.

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