



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports

Introduction

1. UNHCR is aware of instances of persons seeking international protection not being able to make asylum claims upon their arrival at airports. They are stopped in the transit area or “international” zone before being removed and returned to territories where their lives or freedom are threatened, irrespective of whether they have had the opportunity to express a fear of returning to face a risk of persecution or other forms of serious harm to immigration or other officials at the airport. They have been unable to apply for asylum and access relevant procedures to determine their international protection needs. Further, they have had no or limited access to information, assistance, legal counselling or UNHCR.

2. In this context, the paper sets out key legal considerations, based on international refugee and human rights law on the right to seek and enjoy asylum, the principle of *non-refoulement*, and the issues of non-penalization for irregular entry. The paper does not address requirements and modalities for the processing of asylum applications, including through procedures at an airport, once persons seeking international protection have been able to make an asylum claim.¹ However, it provides specific legal guidance for states in the practical context of arrivals by air, to assist them in responding to people who request asylum upon landing, prior to passing through immigration clearance.

The right to asylum and principle of *non-refoulement*

3. Under international law, states have the sovereign power to regulate the entry of foreigners. However, international law also provides that measures to this effect may not prevent foreigners from seeking and enjoying asylum from persecution.² The right to seek and enjoy asylum is affirmed in various regional legal instruments³ and is implemented in part by states’ obligations to provide

¹ UNHCR, *Submission by UNHCR in the case of Khasan Mohamad YASIEEN v. Russia (Application no. 3028/16) before the European Court of Human Rights*, 1 June 2016, Application no. 3028/16, <http://www.refworld.org/docid/574fe5714.html>.

² Article 14 of the *Universal Declaration of Human Rights* provides that ‘[e]veryone has the right to seek and to enjoy in other countries asylum from persecution’.

³ Organization of American States, *American Declaration on the Rights and Duties of Man*, 2 May 1948, Article XXVII, <http://www.unhcr.org/refworld/docid/3ae6b3710.html>, referring to the right to seek and receive asylum. Organization of American States, *American Convention on Human Rights*, “Pact of San Jose”, Costa Rica, 22 November 1969, Article 22(7), <http://www.unhcr.org/refworld/docid/3ae6b36510.html>, referring to the right to seek and be granted asylum. *African Charter on Human and Peoples’ Rights* (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 12(3), <http://www.refworld.org/docid/3ae6b3630.html> referring to the right to seek and obtain asylum. European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 18, <http://www.refworld.org/docid/3ae6b3b70.html> (EU Charter of Fundamental Rights), referring to the right to asylum to be guaranteed with due respect to the 1951 Convention and EU law.

international protection to refugees in accordance with the 1951 Convention relating to the Status of Refugees (1951 Convention)⁴ and its 1967 Protocol,⁵ as well as regional refugee law instruments.⁶

4. Central to the right to seek and enjoy asylum is the principle of *non-refoulement*, which prohibits, without discrimination,⁷ any state conduct leading to the 'return in any manner whatsoever' to an unsafe foreign territory, including rejection at the frontier or non-admission to the territory.⁸ The principle of *non-refoulement* is most prominently expressed in Article 33 of the 1951 Convention, having been recognized as a norm of customary international law.⁹ The principle of *non-refoulement* prohibits states from expelling or returning a refugee in any manner whatsoever to a territory where she or he would be at risk of threats to life or freedom. *Non-refoulement* obligations are also codified in regional refugee law instruments¹⁰ and enshrined in international and regional human rights law instruments.¹¹

5. States are responsible for ensuring protection from *refoulement* to all persons who are within its jurisdiction, including when on the state's territory.¹² The term 'territory' includes a state's land

⁴ *Convention Relating to the Status of Refugees* (28 July 1951) 189 UNTS 137 (1951 Convention), <http://www.refworld.org/docid/3be01b964.html>.

⁵ *Protocol Relating to the Status of Refugees* (31 January 1967) 606 UNTS 267 (1967 Protocol), <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁶ *OUA Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45, Article II, (1969 OAU Convention) <http://www.refworld.org/docid/3ae6b36018.html>. *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, Conclusion III(4), (1984 Cartagena Declaration) <http://www.refworld.org/docid/3ae6b36ec.html>.

⁷ According to the 1951 Convention relating to the Status of Refugees, note 3 above, Article 3, '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.

⁸ ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 22 (XXXII), 1981, para. II.A.2; ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q).

⁹ *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para.4, <http://www.unhcr.org/refworld/docid/3d60f5557.html>. UNHCR, *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, providing a comprehensive reasoning and listing a range of sources at paras. 28-71, <http://www.refworld.org/docid/510a74ce2.html>.

¹⁰ See: Organization of American States, *American Convention on Human Rights*, note 2 above, Article 22(8) and 1984 Cartagena Declaration, note 5 above, Conclusion III.5, reiterating the importance of the principle of *non-refoulement* and the need for acknowledging and observing it as a rule of *jus cogens*.

¹¹ See for an overview: 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 B, <http://www.refworld.org/docid/45f17a1a4.html>, in which reference is made to various human rights law instruments, including the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Articles 6 and 7; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Article 3; 1969 American Convention on Human Rights, note 2 above, Article 22(8); Banjul Charter, note 2 above, Article 5; *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Articles 2 and 3. See also: EU Charter of Fundamental Rights, note 2 above, Article 19(2).

¹² 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. 9 and 20, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>. The principle of *non-refoulement* also applies extraterritorially, i.e. wherever the state in question is acting outside its territory and has effective control over the person, see: UNHCR, *UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy*, 22 June 2011, Application No. 27765/09, <http://www.refworld.org/docid/4e0356d42.html>. 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. 24, 26, 32-43, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy*, March 2010, paras. 4.1.1-4.2.3, <http://www.unhcr.org/refworld/docid/4b97778d2.html>. UNHCR, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, 17 February 2012, para. 2(4), <http://www.refworld.org/docid/4f4c959f2.html>. UN Human Rights

territory and territorial waters as well as its *de jure* border entry points, including transit areas or “international” zones at airports.¹³ A state’s responsibility to protect persons from *refoulement* is regardless of whether the person has entered the country in a legal sense and has passed immigration control, was authorized to enter, or is located in the transit areas or “international” zone of an airport.¹⁴ It is not possible for states to divest themselves of their *non-refoulement* obligations through the provisions of their domestic (immigration or border control) laws and excising parts of their territory for asylum-related purposes.¹⁵ By virtue of Article 27 of the 1969 Vienna Convention on the Law of Treaties,¹⁶ it is an established principle of international law that a state may not invoke its legislation as a basis or justification for failure to perform its international legal obligations.¹⁷

6. In order to give effect to their international legal obligations, including the right to seek and enjoy asylum and the principle of *non-refoulement*, states have a duty vis-à-vis persons who have arrived on their territory and are stopped in the transit area or “international” zone of an airport, to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of *refoulement*.¹⁸ This is the case particularly when states know, or could reasonably be

Committee General Comment No. 31, Nature of the General Legal Obligations imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10, <http://www.refworld.org/docid/478b26ae2.html>. See also: *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, paras. 109 to 113, <http://www.refworld.org/cases,ICJ,414ad9a719.html>, considering that states are bound to fulfil their international human rights obligations wherever they exercise jurisdiction. *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACrTHR), 19 August 2014, para. 61, <http://www.refworld.org/cases,IACRTHR,54129c854.html>.

¹³ I Brownlie, *Principles of Public International Law* (OUP 1998), 105 and 116-118.

¹⁴ *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, <http://www.refworld.org/cases,ECHR,3ae6b76710.html>, at para. 52 the Court notes that ‘even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law’ and considered further that [d]espite its name, the international zone does not have extraterritorial status’. See also, *D. v. United Kingdom*, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997, para. 48 in conjunction with para. 25, <http://www.refworld.org/docid/46deb3452.html>.

¹⁵ UNHCR, *Communication from the European Commission on a Common Policy on Illegal Immigration* (COM(2001) 672 final). UNHCR’s Observations, 1 July 2002, para. 12, <http://www.refworld.org/docid/3d57e5c34.html>. See also: UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders: Conference room paper*, 23 July 2014, A/69/CRP. 1, para. 1, <http://www.refworld.org/docid/54b8f58b4.html>, stating that ‘[i]nternational zones are not zones of exclusion or exception for human rights obligations’.

¹⁶ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 <http://www.refworld.org/docid/3ae6b3a10.html>.

¹⁷ G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (OUP 2007) 253. UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para.12, <http://www.refworld.org/docid/42dd174b4.html>, stating with regard to the Convention on the Rights of the Child that ‘[the] State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State’s territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State’. *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACrTHR), para. 220, 19 August 2014, <http://www.refworld.org/cases,IACRTHR,54129c854.html>, quoting the aforementioned General Comment No. 6 of the UN Committee on the Rights of the Child in the broader context of *non-refoulement* obligations.

¹⁸ UNHCR, *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, paras. 74-75, <http://www.refworld.org/docid/510a74ce2.html>. The “duty of independent inquiry” has been recognized by various courts: *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, paras. 146-148, <http://www.refworld.org/docid/4f4507942.html>; *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras. 286,298,315,321,359, <http://www.refworld.org/docid/4d39bc7f2.html>; *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004, para. 26, <http://www.refworld.org/docid/41c17ebf4.html>; *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56, 64,

expected to know, the risks which arise when persons are returned.¹⁹ There is no single correct formula or phrase for how the desire to seek international protection needs to be conveyed.²⁰ In this regard, states must ensure that all relevant officials, including among others, immigration officers and border officials who may come in contact with persons seeking international protection, 'have clear instructions for dealing with cases which might be within the purview of the relevant international instruments'²¹ and refer them to the relevant asylum authorities.²²

7. At the outset, persons seeking international protection must have access to relevant information in a language they understand and the ability to make a formal asylum claim with the competent authority. Further, persons seeking international protection must be given the opportunity to contact UNHCR. Simultaneously, pursuant to its mandate,²³ UNHCR should be given the possibility to contact and visit such persons, including in transit areas or "international" zones at airports, to assess and supervise their well-being and provide assistance when needed.²⁴ These safeguards are particularly important when persons seeking international protection are in transit areas or "international" zones at airports, because of their particular vulnerability and the risk of denial of access to a fair and efficient asylum procedure. People might reasonably fear summary return and regard transit areas or "international" zones as inappropriate or unfavourable places to express a need for international protection.²⁵

Non-penalization of irregular entry

<http://www.refworld.org/docid/515010a52.html>. European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, <http://www.refworld.org/docid/51d29b224.html>, Article 6(1), 3rd indent: 'Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.'

¹⁹ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para. 157, <http://www.refworld.org/cases,ECHR,4f4507942.html>. *Sharifi et autres c. Italie et Grèce*, Requête no 16643/09, Council of Europe: European Court of Human Rights, 21 October 2014, <http://www.refworld.org/cases,ECHR,544617ad4.html>.

²⁰ There is no single correct formula or phrase for how the desire to seek asylum needs to be conveyed, see: UNHCR, *UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy*, 22 June 2011, Application No. 27765/09, <http://www.refworld.org/docid/4e0356d42.html>. It is recommended that states adopt screening and referral processes at international borders to ensure people who try to enter and are at risk are identified and appropriately referred, see: UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders : Conference room paper*, 23 July 2014, A/69/CRP. 1, Guideline 6, para. 1, <http://www.refworld.org/docid/54b8f58b4.html>.

²¹ ExCom Conclusion No. 8 (XXVIII), 1977, para. (e)(i).

²² *Ibid.* See also, ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii) and (iii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q). See also: UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders: Conference room paper*, 23 July 2014, A/69/CRP. 1, Guideline 7, para. 5, <http://www.refworld.org/docid/54b8f58b4.html>. See also: *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, Inter-American Court of Human Rights (IACrTHR), 25 November 2013, <http://www.refworld.org/cases,IACRTHR,52c53b154.html>

²³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>. UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, <http://www.refworld.org/docid/5268c9474.html>.

²⁴ ExCom Conclusion No. 22 (XXXII), 1981, para. III. EXCOM Conclusion No. 33 (XXXV), 1984, para. (h). EXCOM Conclusion No. 72 (XLIV), 1993, at para (b). EXCOM Conclusion No. 73 (XLIV), 1993, at para. (b) (iii). EXCOM Conclusion No. 79 (XLVII), 1996, at para. (p). See also UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, p. 7, <http://www.refworld.org/docid/5268c9474.html>, setting out UNHCR's mandate.

²⁵ UNHCR, *Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention*, 15 March 2017, Roundtable, para. 17, <http://www.refworld.org/docid/5b18f6740.html>.

8. Persons in need of international protection are often compelled to arrive at, or enter, a country without the requisite documents or prior authorisation to enter. Recognizing the realities of refugee flight,²⁶ the 1951 Convention, under Article 31(1), prohibits the imposition of penalties for illegal entry or presence on refugees who, coming directly from a territory where they fear persecution, enter or are present without authorization, provided they present themselves without delay to the authorities and show good cause for their unauthorized entry or presence. Article 31(1) of the 1951 Convention applies to refugees and asylum-seekers alike. For Article 31(1) to be effective, it must apply to any person who claims to be in need of international protection and until she or he is found not to be so, having been issued a final decision following a fair procedure.²⁷ The word ‘penalties’ has a broad meaning and is not limited to criminal penalties, but includes any administrative sanction or procedural detriment imposed on a person seeking international protection.²⁸ The refusal to allow a person seeking international protection who has entered a country without authorization to apply for asylum or obstructing or delaying access to the asylum procedure and retain that person in the transit area or “international” zone at an airport, may amount to a penalty and be at variance with Article 31(1) of the 1951 Convention.²⁹

Conclusion

9. States’ legal responsibilities under international refugee and human rights law are engaged when persons seeking international protection arrive at airports, including in transit areas or “international” zones. States should not keep such persons in transit areas or “international” zones, but refer such persons to competent asylum authorities and enable them to make an asylum claim and allowing them access to fair and efficient procedures for determining their status and protection needs. A failure to do so would be at variance with the right to seek asylum, the principle of *non-refoulement* as well as the principle of non-penalization of refugees for unauthorized entry and presence.

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²⁶ According to the drafters of the 1951 Convention: ‘[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge’, in: UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, comment paragraph 2 under Article 24, <http://www.refworld.org/docid/3ae68c280.html>. See also, ExCom Conclusion No. 58 (XL), 1989, para. (i), making reference to refugees being compelled to use fraudulent documentation.

²⁷ UNHCR, *Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees - Revised (Geneva Expert Roundtable, 8-9 November 2001) [Global Consultations on International Protection/Second Track]*, 9 November 2001, para. 10(g), <http://www.refworld.org/docid/470a33b20.html> and Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, p. 15, <http://www.refworld.org/docid/59ad55c24.html> (“Costello et al”). Reference can also be made to the declaratory character of refugee status, see UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 28, <http://www.refworld.org/docid/4f33c8d92.html>.

²⁸ Costello et al, note 26 above, p. 33, referencing inter alia *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, Canada: Supreme Court, 27 November 2015, http://www.refworld.org/cases,CAN_SC,56603be94.html.

²⁹ *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, Canada: Supreme Court, 27 November 2015, para. 57, http://www.refworld.org/cases,CAN_SC,56603be94.html.