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

Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries

Introduction

1. This paper aims to summarise UNHCR's position, reflecting international law and practice, on access to protection and rights in the context of transfer to 'first countries of asylum' and 'safe third countries'. It examines in particular the relevance of a connection between the refugee and the third country in the application of such concepts and the issue of access to and level of protection that needs to be guaranteed by the third country. The evolution of UNHCR's position and the documents in which it has been expressed are set out in the references.

2. In line with general state practice and international law, ensuring refugee protection and access to human rights for individual refugees is the responsibility of the state where the refugees are, or which otherwise has jurisdiction over them. This reflects the primary responsibility for protection of the state in which a person arrives and seeks international protection. At the same time, refugees do not have an unfettered right to choose their 'asylum country'.¹ Their intentions, however, ought to be taken into account.² Refugees may be returned or transferred to a state where they had found, could have found or, pursuant to a formal agreement, can find international protection. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not prohibit such return or transfer. According to relevant conclusions of UNHCR's Executive Committee, where refugees and asylum-seekers move in an irregular manner from a country where they have already found protection, they may be returned to that country.³ Furthermore, according to relevant conclusions of UNHCR's Executive Committee, where it appears that a person, before requesting asylum, already has a connection or close links with another state, s/he may if it appears fair and reasonable be called upon first to request asylum from that state.⁴

General considerations on applying the first country of asylum and safe third country concepts

3. The 'first country of asylum' concept is generally applied in cases where a person has already, in a previous state, found international protection that continues to be accessible and effective for the individual concerned. Application of the concept requires an individual assessment of whether the refugee will be readmitted to the 'first country of asylum', granted lawful stay⁵ there, and be accorded standards of treatment commensurate with the 1951 Convention and its 1967 Protocol and international human rights standards, including – but not limited to – protection from *refoulement*.⁶

¹ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(i), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 11, <http://www.refworld.org/docid/3fe9981e4.html>.

² *Ibid.* EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iii).

³ EXCOM Conclusion No. 58 (XL) 1989, para. (f).

⁴ EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iv).

⁵ 'Lawful stay' means a permitted, regularized stay of some duration integral to the refugees' enjoyment of rights and necessary if a state is to implement its obligations under the 1951 Convention, see UNHCR, *"Lawfully Staying" - A Note on Interpretation*, 3 May 1988, paras. 11, 21 and 23, <http://www.refworld.org/docid/42ad93304.html>.

⁶ EXCOM Conclusion No. 58 (XL) 1989, para. (f) and EXCOM Conclusion No. 85 (XLIX) 1998, para. (aa). UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 15, <http://www.refworld.org/docid/3fe9981e4.html>. UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 10 and 11, <http://www.refworld.org/docid/3b36f2fca.html>. UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban*

4. The 'safe third country concept' has been applied in cases where a person could have or can find protection in a third state either in relation to a specific individual case or pursuant to a formal bi- or multilateral agreement between states on the transfer of asylum-seekers.⁷ Prior to transfer, it is important, keeping with relevant international law standards, individually to assess whether the third state will:

- (re)admit the person,
- grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs,
- permit the person to remain while a determination is made, and
- accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including – but not limited to – protection from *refoulement*.⁸
- Where she or he is determined to be a refugee, s/he should be recognized as such and be granted lawful stay.⁹

5. In some circumstances, transfers or relocation of refugees or asylum-seekers under a bilateral or multilateral arrangement has been carried out in the absence of an individual assessment. This would require both the existence and availability of certain objective standards of protection in the third state, as well as firm undertakings by that country that those returned will have access to protection, assistance and solutions in line with the guarantees set out above in paragraph 4. Pre-transfer individual assessments, however, are nonetheless necessary for vulnerable groups, including unaccompanied and separated children, with the best interests of the child being given primary consideration.¹⁰

Connection with the third country

6. According to relevant conclusions of UNHCR's Executive Committee, regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another state, s/he may if it appears fair and reasonable be called upon first to request asylum from

Areas, September 2009, paras. 153 and 154, <http://www.refworld.org/docid/4ab8e7f72.html>. UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(vi), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, <http://www.refworld.org/docid/3ae6b3268.html>.

⁷ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 2, <http://www.refworld.org/docid/51af82794.html>.

⁸ EXCOM Conclusion No. 85 (XLIX) 1998, para. (aa). UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 15, <http://www.refworld.org/docid/3fe9981e4.html>. UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 14 and 15, <http://www.refworld.org/docid/3b36f2fca.html>. UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, paras. 153 and 154, <http://www.refworld.org/docid/4ab8e7f72.html>. UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(vi), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, <http://www.refworld.org/docid/3ae6b3268.html>.

⁹ UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 15, <http://www.refworld.org/docid/3fe9981e4.html>. UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, para. 153, <http://www.refworld.org/docid/4ab8e7f72.html>. UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(vi), <http://www.refworld.org/docid/51af82794.html>.

¹⁰ See, e.g. Article 3 of the Convention on the Rights of the Child (2 September 1990) 1577 UNTS 3; UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, <http://www.refworld.org/docid/48480c342.html>; and 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, <http://www.refworld.org/docid/42dd174b4.html>.

that state.¹¹ Requiring a connection between the refugee or asylum-seeker and the third state is not mandatory under international law. The person may well be returned to a country through which s/he may have passed *en route*,¹² or the person may be transferred to a country to which s/he has never been but that has agreed, by way of a formal arrangement, to be responsible.¹³ In follow up to relevant conclusions of UNHCR's Executive Committee, UNHCR though has consistently been advocating for a meaningful link or connection to exist that would make it reasonable and sustainable for a person to seek asylum in another state.¹⁴ Taking into account the duration and nature of any sojourn, and connections based on family or other close ties¹⁵ increases the viability of the return or transfer from the viewpoint of both the individual and the state. As such, it reduces the risk of irregular onward movement, prevents the creation of 'orbit' situations¹⁶ and advances international cooperation and responsibility sharing. In this context, transfers to third countries should be aimed at enhancing burden- and responsibility-sharing and international/regional cooperation, and not be burden shifting. Transfers to third countries need to contribute to the enhancement of the overall protection space in the transferring state, the receiving state and/or the region as a whole.¹⁷

Access to and level of protection in the third country

7. As a precondition to return or transfer of an asylum-seeker or refugee to another country, it is crucial to establish that s/he has access in that country to standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards.¹⁸ While protection from *refoulement* is at the centre of refugee protection principles, the standards of treatment to which refugees and asylum-seekers have a right under the 1951 Convention, its 1967 Protocol and international human rights law go beyond protection from *refoulement*.¹⁹

¹¹ EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iv).

¹² UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 12 and 16, <http://www.refworld.org/docid/3b36f2fca.html>.

¹³ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 2, <http://www.refworld.org/docid/51af82794.html>.

¹⁴ UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, <http://www.refworld.org/docid/3ae6b3268.html>. UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 16 (final sentence), <http://www.refworld.org/docid/3b36f2fca.html>. UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 12, <http://www.refworld.org/docid/3fe9981e4.html>.

¹⁵ UNHCR has identified such ties as including family relations; previously acquired rights in the state such as previous residence or long-term visits, and linguistic, cultural or other similar ties. See, for example: UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, <http://www.refworld.org/docid/3ae6b3268.html>; UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 311, <http://www.refworld.org/docid/4c63e52d2.html>.

¹⁶ EXCOM Conclusion No. 71 (XLIV) 1993, para. (k).

¹⁷ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(iv), <http://www.refworld.org/docid/51af82794.html>.

¹⁸ EXCOM Conclusion No. 87 (L) 1999, para. (l). According to which, asylum-seekers and refugees must be treated in accordance with the highest possible standards of protection.

¹⁹ EXCOM Conclusion No. 85 (XLIX) 1998, para. (aa), stressing that asylum-seekers who are returned to a third country will be treated in accordance with accepted international standards, will be protected from *refoulement*, and will be able to seek and enjoy asylum. UN General Assembly, *Note on International Protection*, 7 July 1999, A/AC.96/914, para. 19, <http://www.refworld.org/docid/3ae68d98b.html>, considering that no asylum-seeker should be returned to a third country for determination of the claim without sufficient guarantees, in each individual case: that the person will be readmitted to that country; will enjoy there effective protection against *refoulement*; will have the possibility to seek and enjoy asylum; and will be treated in accordance with accepted international standards. UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 11, <http://www.refworld.org/docid/3b36f2fca.html>, indicating that securing "effective protection" requires the full and durable enjoyment of rights. UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(vi), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *The Concept of 'Protection Elsewhere'*, 7 IJRL 123 (1995), p. 125, in which UNHCR 'welcomes the fact that the definition of 'safe' now includes not only protection from *refoulement* but also the absence of 'other violations of fundamental human rights', in response to a Note submitted by the government of the United Kingdom to the Inter-Governmental Consultations on 'Sending Asylum Seekers to Safe Third Countries'.

8. Refugees who have been so recognized and found protection in a third state need to have the opportunity to re-avail themselves of the protection previously afforded to them as refugees. Upon return, they need to be granted lawful stay in the country and as such be entitled to the corresponding rights of the 1951 Convention, i.e. all rights applicable to refugees generally, including protection from *refoulement* and access to the legal right to pursue gainful employment in accordance with Articles 17, 18 and 19 of the 1951 Convention in order to enable the progressive achievement of self-reliance.²⁰

9. When it has not yet been determined by the third state whether the person seeking protection is a refugee or otherwise in need of international protection, upon return or transfer to the third country the person needs to be granted access to a fair and efficient asylum procedure and be authorized to remain in the country, until and unless a final negative determination of the asylum-seeker's claim to refugee protection is rendered. During this time the asylum-seeker is lawfully in the state.²¹ Protective obligations under the 1951 Convention applicable to refugees generally, including protection from *refoulement*, to refugees present in the territory, and, to refugees 'lawfully in' are relevant. This includes the requirement for the third state to provide asylum-seekers access to means of subsistence sufficient to maintain an adequate standard of living²² and to undertake steps to enable the progressive achievement of self-reliance.²³ As such, although the enjoyment of the right to self-employment under Article 18 of the 1951 Convention may be delayed for a limited period of time, it cannot be denied over the long-term because of government delays in the asylum procedures.²⁴ Once it is determined the person is a refugee, s/he should be granted lawful stay and have access to the corresponding rights of the 1951 Convention as mentioned above in paragraph 8.

10. Whether standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards are available cannot be answered without looking at the state's international legal obligations, its domestic laws and the actual practice of implementation.²⁵ To ensure access to protection is effective and enduring, being a state party to the 1951 Convention and/or its 1967 Protocol and basic human rights instruments without any limitations is a critical indicator.²⁶ Access

²⁰ UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 15(g), <http://www.refworld.org/docid/3fe9981e4.html>.

²¹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 13, <http://www.refworld.org/docid/503489533b8.html>. UNHCR, "Lawfully Staying" - A Note on Interpretation, 3 May 1988, <http://www.refworld.org/docid/42ad93304.html>.

²² Article 11, International Covenant on Economic, Social and Cultural Rights.

²³ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 283, <http://www.refworld.org/docid/4c63e52d2.html>.

²⁴ (UNHCR), *Expert opinion of UNHCR on issues of the right to work for refugees and asylum-seekers in the case of [South African Somali Association vs Limpopo Department of Economic Development, Environment and Tourism] in the North Gauteng High Court, Pretoria, South Africa*, 14 March 2013, 12/HCR/RSA/ADM/594, <http://www.refworld.org/docid/5215d0734.html>.

²⁵ UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 14, <http://www.refworld.org/docid/3b36f2fca.html>. UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 283, <http://www.refworld.org/docid/4c63e52d2.html>. UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 15 (e), <http://www.refworld.org/docid/3fe9981e4.html>. UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(iii) and 3(viii), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, <http://www.refworld.org/docid/3ae6b3268.html>.

²⁶ UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 15(e), <http://www.refworld.org/docid/3fe9981e4.html>. It should be noted that the conclusion considers accession to and

to human rights standards and standards of treatment commensurate with the 1951 Convention and its 1967 Protocol may only be effectively and durably guaranteed when the state is obliged to provide such access under international treaty law, has adopted national laws to implement the relevant treaties and can rely on actual practice indicating consistent compliance by the state with its international legal obligations.

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compliance with the 1951 Convention and/or its 1967 Protocol to be essential, unless the destination country can demonstrate it has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.