

UNHCR Observations on the Proposal for amendments to the Danish Alien Act (Introduction of the possibility to transfer asylum-seekers for adjudication of asylum claims and accommodation in third countries)

[Forslag til Lov om ændring af udlændingeloven (Indførelse af mulighed for overførsel af asylansøgere til asylsagsbehandling og indkvartering i tredjelande)]

I. Introduction

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation for the Nordic and Baltic Countries (“RNB”) appreciates the invitation by the Government of Denmark to provide observations on the “Proposal for law on changes to the Aliens Act (Introduction of the possibility to transfer asylum-seekers for adjudication of asylum claims and accommodation in third countries)” (*Forslag til Lov om ændring af udlændingeloven (Indførelse af mulighed for overførsel af asylansøgere til asylsagsbehandling og indkvartering i tredjelande)* - hereafter the “Proposal”.¹
2. UNHCR has a direct interest in law proposals related to asylum, as the agency entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.² Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,³ whereas the 1951 Convention relating to the Status of Refugees⁴ and its 1967 Protocol (hereafter collectively referred to as “1951 Convention”) oblige State Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union (“EU”) law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the EU. The UN General Assembly has also entrusted UNHCR with a global mandate to provide protection to stateless persons world-wide and for preventing and reducing statelessness.⁵

¹ Full Proposal (in Danish) <https://prodstoragehoeringspo.blob.core.windows.net/df355289-a0f2-4f89-ab20-c7880b25be6d/Lovforslag,%20ROHA.pdf>.

² UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V) <https://www.refworld.org/docid/3ae6b3628.html> (“the Statute”).

³ Ibid, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s supervisory responsibility, October 2002 <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189 <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

⁵ UN General Assembly Resolution A/RES/50/152, 9 February 1996 <http://www.unhcr.org/refworld/docid/3b00f31d24.html>, reiterated in subsequent resolutions, including A/RES/61/137 of 25 January 2007 <http://www.unhcr.org/refworld/docid/45fa902d2.html>, A/RES/62/124 of 24 January 2008 <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and A/RES/63/148 of 27 January 2009 <http://www.unhcr.org/refworld/docid/4989619e2.html>.

3. UNHCR's observations are structured as follows: Section II sets out observations on the scope of the Proposal, Section III sets out general observations on the externalization of international protection, Section IV sets out specific observations on the Proposal and Section V sets out brief conclusions.

II. Observations on the Scope of the Proposal

4. The Proposal seeks to create a legal basis for the transfer of asylum-seekers to third countries for asylum processing and accommodation.⁶ Transfers will take place to third countries for "asylum processing under an agreement or an arrangement for this purpose that Denmark has concluded with one or several countries".⁷ Denmark will not afford protection to applicants who are transferred, including in case the asylum-seeker is recognized as being in need of international protection through a process conducted in the third country. Protection should instead be provided by the third country, which will also be responsible for the return of rejected asylum-seekers following a negative decision as outcome of the process in the third country.⁸
5. In UNHCR's view, the Proposal does not sufficiently detail and elaborate on the proposed arrangements to enable an informed assessment on the compliance with Denmark's international obligations under the 1951 Convention and other international and regional human rights instruments and EU law. It is doubtful whether a full end-to-end process with all requirements spelled out would be in line with international obligations, including when implemented in practice.
6. UNHCR is concerned that the Proposal does not address, or leaves subject to further regulation, relevant details on how the proposed model would be implemented in practice, including: 1) how the prospective arrangements with third countries are going to guarantee that Denmark, as well as the third countries, will adhere to obligations under international law, in practice; 2) what adequate reception conditions, asylum procedures, legal status, rights and services and durable solutions will be accessible in the third country; 3) what categories of asylum-seekers will be exempted from transfer; 4) how the transfers will be, concretely and in practice, sequenced with the procedure under the Dublin system and 5) what effective remedies will be available for individuals affected by transfer in case they need to challenge conduct by Danish authorities prior to, during or after transfer, as well as conduct by the authorities in the third country. In UNHCR's view, such fundamental aspects cannot be left to be regulated in agreements, which may not be subject to parliamentary review.
7. For reasons set out below (in Sections III and IV), UNHCR, as the organization with the global mandate for the international protection of refugees, strongly urges Denmark to refrain from establishing laws and practices that would minimize and shift its asylum and protection obligations to third countries. Such measures are contrary to the foundational principles and spirit of the international and European system for the protection of refugees. UNHCR considers that the Proposal, when implemented in practice, could lead

⁶ The Proposal refers to aliens claiming to fall under Article 7 of the Danish Aliens Act. UNHCR understands this to include any asylum-seeker or refugee, irrespective of whether they would be considered as Convention refugees or other beneficiary of international protection.

⁷ Proposal, pp. 6, 33-35. Proposed paragraph 29 of the Danish Aliens Act.

⁸ Proposal, p. 5.

to asylum-seekers being transferred to countries where access to international protection is not guaranteed, or where they risk facing serious harm.

8. If States were to consider cooperative arrangements of this type, these should be undertaken with the aim of strengthening, rather than limiting, access to protection for those in need of it. Such arrangements would aim at enhancing the sharing, rather than shifting, of responsibilities. They would need to be undertaken in full partnership between all States concerned, with respect for sovereignty and ensuring that protection is enhanced, rather than placed under additional strain. Such arrangements must not, however, as they in practice often do, shift, minimize or avoid responsibilities.

III. General observations on the externalization of international protection

International solidarity and sharing of responsibilities

9. Denmark was among the core group of States that drafted the 1951 Convention and among the first to ratify the 1951 Convention. At the time, Denmark and other States recognized the need for international cooperation and that “the grant of asylum may place unduly heavy burdens on certain countries ...”.⁹ What was true in 1951 is even more true in the present times – the international system for protection of refugees depends on strong international cooperation.
10. In response to the magnitude and scope of global displacement, UN Member States, including Denmark, came together and adopted the New York Declaration for Refugees and Migrants in September 2016, which reaffirmed States’ commitment to fulfil a shared responsibility to address large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner, through international cooperation, recognizing varying capacities and levels of resources to respond to these movements.¹⁰ The focus on strengthened burden and responsibility-sharing in the context of forced displacement is also at the center of the Global Compact on Refugees, affirmed in December 2018.¹¹
11. With nearly 80 million forcibly displaced people in the world, States need to act, within and beyond their borders, to share responsibility and to refrain from measures that risk undermining the international protection system. Developing regions are hosting 85 per cent of the world’s refugees, with the least developed countries providing asylum for one-third of the global total. Only a very small fraction of the displaced population may eventually move to Europe.¹² In light of these global perspectives and the current historically low number of asylum-seekers in Denmark,¹³ UNHCR finds the Government’s vision of ‘zero asylum-seekers’ in the country inconsistent with global solidarity and responsibility sharing.¹⁴

⁹ 1951 Convention, Preamble para. 4.

¹⁰ See further at <https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html>.

¹¹ Global Compact on Refugees Digital Platform <https://globalcompactrefugees.org>.

¹² UNHCR, Global Trends, Forced Displacement in 2019, <https://www.unhcr.org/globaltrends2019/>; UNHCR, Mid-Year Trends 2020, <https://www.unhcr.org/statistics/unhcrstats/5fc504d44/mid-year-trends-2020.html>. See also, UNHCR recommendations to Denmark on strengthening refugee protection in Denmark, Europe and globally, January 2021, <https://www.unhcr.org/neu/wp-content/uploads/sites/15/2021/01/UNHCR-Recommendations-to-Denmark-on-strengthening-refugee-protection-in-Denmark-Europe-and-globally-January-2021.pdf>.

¹³ According to official figures, 1547 asylum applications were made in Denmark in 2020, see further <https://nyidanmark.dk/da/Tal-og-statistik/Seneste-tal-p%C3%A5-udl%C3%A6ndingeomr%C3%A5det>.

¹⁴ See, for instance, <https://politiken.dk/indland/art8071739/Målet-er-nul-asylansøgere>.

12. Access to asylum needs to be provided by all States as a core international obligation and an important demonstration of international solidarity and responsibility-sharing. In light of the high displacement figures globally, there is exigency for States to work together through regional and global responses to address the important challenges posed by forced displacement in a predictable and equitable manner. Unilateral, national steps that do not share but shift responsibilities to countries and regions already hosting the vast majority of forcibly displaced people runs counter to international cooperation and solidarity. In Europe specifically, the Pact on Migration and Asylum as proposed by the European Commission in September 2020 provides a real opportunity for EU Member States to work together and to seize the opportunity provided by the proposed Pact to strengthen collective approaches to addressing forced displacement challenges in line with the 1951 Convention.¹⁵
13. UNHCR is concerned that the proposed Danish system may lead to an erosion of the international protection system – which has withstood the test of time for the past 70 years and for which there is a collective responsibility to safeguard, especially among all signatories of the 1951 Convention. If other States would consider introducing similar approaches as is now proposed by Denmark, asylum and protection would become increasingly unavailable and refugees would end up in limbo situations. Furthermore, should States neighbouring refugees’ countries of origin that currently host the largest numbers of refugees stop assuming their current generous share of the global responsibility for refugee protection, the system that is essential to protect millions of women, men and children refugees may collapse. This would inevitably result in increased unregulated and uncontrolled movements of people in search of protection, including towards Europe.

“Externalization” of asylum obligations

14. Over recent years, some States have adopted practices that might be consistent with the letter of the 1951 Convention, but that are inconsistent with the intention and spirit of the Convention. States have engaged in practices that directly or indirectly prevent asylum-seekers and refugees from reaching a particular country or region, and from being able to claim or enjoy protection there. For example, some States have attempted to shift their responsibilities to ‘transit countries’ through bilateral agreements for the involuntary transfer of asylum-seekers to a third State, the use of so-called ‘safe havens’ or ‘transit processing centres’, or ‘offshore’ asylum processing. Such measures typically involve shifting responsibility for identifying or meeting international protection needs to another State or leaving such needs unmet. Such State practices can be described as ‘externalization’ of international protection responsibilities.
15. UNHCR considers that the Danish proposal to transfer asylum-seekers to third countries for processing asylum applications and accommodation is an example of such externalization practices.¹⁶ UNHCR does not support externalization, as such practices, that shift burdens, avoid responsibility, and frustrate access to international protection, are

¹⁵ EC, Migration and Asylum Package: New Pact on Migration and Asylum, 23 September 2020 https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en.

¹⁶ International agreements and other instruments as well as ExCom conclusions and UNHCR guidance provide overarching principles relevant to considering the validity of “externalisation” practices.

inconsistent with global solidarity and responsibility sharing, regularly undermines the rights of asylum-seekers and refugees and thus violate international obligations of States.

16. As UNHCR has seen in several contexts, externalization often results in the forced transfer of people to other countries with inadequate protection safeguards and resources. Externalization can lead to indefinite ‘ware-housing’ of asylum-seekers in isolated places where they are ‘out of sight and out of mind’, exposing them to danger and chain refoulement.¹⁷ Externalization may also de-humanize asylum-seekers and label people in need of international protection as unwanted.

Legal obligation to ensure international protection in good faith

17. As reflected in international law and reiterated in a number of UNHCR positions, the primary responsibility for identifying and assessing international protection needs, ensuring appropriate reception conditions and procedural standards during status determination, and providing international protection, rests with the State in which an asylum-seeker arrives and seeks that protection (or, where relevant, the State whose jurisdiction that person engages).¹⁸ States have a duty to make independent inquiries as to the need for international protection of persons seeking asylum,¹⁹ a duty recognized by a wide range of national and regional courts,²⁰ and provide asylum-seekers access to fair and efficient asylum procedures.²¹ The foundations of international refugee law, such as the principle of non-refoulement, the right to seek asylum, a fair and efficient asylum procedure for the assessment of asylum claims, access to rights and services and durable solutions are non-negotiable.

¹⁷ Statement by Ms. Gillian Triggs, Assistant High Commissioner for Protection, to the 71th session of the Executive Committee of the High Commissioner’s Programme, 7 October 2020, <https://www.unhcr.org/admin/dipstatements/5f7e26744/statement-ms-gillian-triggs-assistant-high-commissioner-protection-71th.html>.

¹⁸ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), <https://www.refworld.org/docid/3ae6b3712c.html>; UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013 www.refworld.org/docid/51af82794.html (“UNHCR Transfer note”); UNHCR, Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or “International” Zones at Airports, 17 January 2019, www.refworld.org/docid/5c4730a44.html, (“UNHCR Transit Areas Considerations”), para. 3. UNHCR, Note on Diplomatic Assurances and International Refugee Protection, August 2006, www.refworld.org/docid/44dc81164.html, para. 38.

¹⁹ 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 <http://www.refworld.org/docid/510a74ce2.html>.

²⁰ M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011 <https://www.refworld.org/cases,ECHR,4d39bc7f2.html>; UNHCR intervention before the European Court of Human Rights in the case of M.S.S. v. Belgium and Greece, June 2010 <https://www.refworld.org/docid/4c19e7512.html>; Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012 <https://www.refworld.org/cases,ECHR,4f4507942.html>; UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy, 22 June 2011, Application no. 27765/09 <https://www.refworld.org/docid/4e0356d42.html>.

²¹ UNHCR, ExCom Conclusion No. 82 (XLVIII) 1997, para. (d) (iii); Conclusion No. 81 (XLVIII) 1997, para. (h) (A/AC.96/895, para. 18); Conclusion No. 82 (XLVIII) 1997 para.(d)(iii) (A/AC.96/895, para.19); Conclusion No. 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3). See also, Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), [2004] UKHL 55, [2005] 2 AC 1 at para. 26.

18. UNHCR recognizes that States may make arrangements with each other to ensure international protection, so long as these arrangements are consistent with the “widest possible exercise of fundamental rights and freedoms” of refugees - as set out in the 1951 Convention.²² As per established international treaty law, States must fulfil their obligations under international refugee and human rights law in good faith.²³ They should make every effort to ensure that any measures taken to manage displacement, migration or mixed movements, whether unilaterally or in cooperation with other States, are rights-based and protection sensitive, in a way that reflects international standards and obligations towards people arriving at their borders and in their territory, both in law and practice.
19. If States were to consider cooperative arrangements of this type, these should be undertaken with the aim of strengthening, rather than limiting, access to protection for those in need of it. Such arrangements would aim at enhancing the sharing, rather than shifting, of responsibilities. They would need to be undertaken in full partnership between all States concerned, with respect for sovereignty and ensuring that protection is enhanced, rather than placed under additional strain. Such arrangements must not, however, as they in practice often do, shift, minimize or avoid responsibilities. Although the transfer of asylum-seekers to third countries may be lawful where the requisite standards and procedural and substantive safeguards are fully guaranteed, the challenges will lie in the implementation of the proposed system.

Third country arrangements and standards

20. Where States conclude transfer agreements, the transferring State bears responsibility for ensuring that these protection obligations are clearly assumed by the receiving State in law and met in practice, for all asylum-seekers and refugees without any discrimination, prior to entering into sharing arrangements and effecting any transfer. If this cannot be guaranteed, the transferring State may bear responsibility under international law for any violations of the rights of individuals in the State to which a transfer has taken place. An inter-State transfer of asylum-seekers is best governed by a formal, legally binding and public agreement which sets out the responsibilities of each State involved, along with the rights and duties of the asylum-seekers affected.
21. Regular monitoring of conditions in the receiving State is necessary to continuously meet the obligations of the transferring State. These obligations are not likely to be met where transfers are to remote places where the legal or administrative regimes or conditions make monitoring or access difficult in practice.
22. In all cases involving the transfer of an asylum-seeker to a third country, certain stringent standards must, as a precondition, be guaranteed in law and met in practice. These include: admission to the receiving State; appropriate reception arrangements and protection against threats to physical safety or freedom; protection against refoulement; access to fair and efficient asylum procedures, or to a previously afforded protective status; legal right to remain during the asylum procedure, and an appropriate legal status if found to be in

²² 1951 Convention, Preambular para. 2.

²³ UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 <https://www.refworld.org/docid/3ae6b3a10.html>, Preamble, Articles 26, 31, 46, 69.

need of international protection; and standards of treatment commensurate with the 1951 Convention and international human rights law.²⁴

23. In this regard, UNHCR would also like to recall that the 1951 Convention, in addition to criteria for determining who is a refugee and the principle of non-refoulement, enshrines a number of other important rights to be afforded to asylum-seekers and refugees including but not limited to, access to courts, public relief (health care), employment, education, social security and freedom of movement. Furthermore, Article 34 of the 1951 Convention calls on States to facilitate the integration of refugees.²⁵
24. In UNHCR's view, whether standards of treatment commensurate with the 1951 Convention and international human rights law are available in the receiving State cannot be answered without looking at the full range of the third country's international legal obligations, its domestic laws and the actual implementation in practice of these laws. To ensure access to protection is effective and enduring, being a State party to the 1951 Convention and basic human rights instruments without any limitations is a critical indicator.²⁶ Access to human rights standards and standards of treatment commensurate with the 1951 Convention and human rights law 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.²⁷

IV. Specific Observations

25. Further to the above general observations, the following sets out UNHCR's main areas of concern with regard to specific aspects of the Danish proposal seen from the perspective of the international, European and domestic dimension. As noted above, the Proposal lacks sufficient information, detail and elaboration on several important aspects, notably on the standards of reception, protection and durable solutions that refugees will enjoy. This does not allow for a conclusion on whether the Proposal is compliant with international refugee and human rights law.
26. *International dimension: Undefined third country arrangements create risks of violations of international law*
- UNHCR considers insufficient the assertion that transfers will only take place if in accordance with Denmark's international obligations. Although the transfer of asylum-seekers to third countries may be lawful where the requisite standards and procedural and substantive safeguards are fully guaranteed as elaborated in above general observations, the challenges will lie in the implementation of the proposed system. In UNHCR's experience, proposals such as the Danish example, in practice, tend to result in violations

²⁴ UNHCR, 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, April 2018 <https://www.refworld.org/docid/5acb33ad4.html> ("UNHCR Safe Third Country Considerations").

²⁵ UNHCR's Executive Committee has developed numerous conclusions on the status and rights of asylum-seekers and refugees, see further, UNHCR, A Thematic Compilation of Executive Committee Conclusions (7th Edition), June 2014 <https://www.refworld.org/docid/5698c1224.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 <https://www.refworld.org/docid/3fe9981e4.html>, para. 15(e).

²⁷ UNHCR, Safe Third Country Considerations, para. 10.

of refugee and human rights law, including two core principles, the right to seek and enjoy asylum and the absolute prohibition on refoulement.

- UNHCR is concerned, in further contrast to principles of solidarity, that the Proposal lacks information about a back-stop provision or mechanism that would deal with situations of pressure or overburdening of the third State. It is unclear what would happen if the third State suddenly no longer can provide effective protection and Denmark's obligation in that case to "take back" those transferred, suspend future transfers and accept the responsibility to process the applications in the normal procedure on the merits in Denmark.
- UNHCR recalls that such flawed arrangements could lead to litigation before national, regional and international bodies, which can present significant reputational risk for Denmark. Such litigation processes have the potential to be lengthy, costly and damaging for a country's reputation, exposing weaknesses in the transfer arrangement and process where this fails to ensure all requisite safeguards are in place and implemented in practice, noting the concerns about access to effective remedy flagged in paragraph 6 above.

27. European dimension: The alignment with the Dublin Regulation is unclear

- UNHCR considers that the Proposal does not clarify whether asylum-seekers who arrive in Denmark via another State applying the Dublin Regulation²⁸ will be processed according to the Dublin rules, or directly transferred to a third country under the Proposal. UNHCR is concerned that the sequence of procedures and the applicable safeguards at all steps are not set out. For example, it is not clear whether an applicant with a family member in another Dublin State will be transferred to that country or a third state with which Denmark has concluded an agreement.²⁹
- UNHCR further notes with concern the difference in character between the proposed Danish system and the Dublin system. While the latter is based on principles of responsibility sharing and solidarity among participating States, the Danish proposal is a stand-alone unilateral initiative that is inconsistent with global solidarity and responsibility sharing.

28. Domestic dimension: Asylum-seekers lack access to procedures in Denmark and effective opportunity to rebut the presumption of access to protection

- UNHCR is concerned that the proposed system whereby Denmark will seek to avoid the substantive processing of asylum claims, unless it would be in breach of international obligations, is not in line with the fundamental right to seek and enjoy asylum as enshrined

²⁸ EU: Council of the European Union, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003 <https://www.refworld.org/docid/3e5cf1c24.html>, Article 3(3).

²⁹ UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) - COM (2016) 270, 22 December 2016 <https://www.refworld.org/docid/585cdb094.html>, pp. 13-14.

in Article 14 of the Universal Declaration of Human Rights and as inherent in the proper functioning of the 1951 Convention.³⁰

- UNHCR is also concerned that individuals who apply for asylum in Denmark will not be registered as asylum-seekers and that it is unclear what rights and services they will be entitled to as this is normally associated with their status as registered asylum-seekers. As UNHCR understands, applicants will consequently also be barred from obtaining any kind of residence permit in Denmark, including on humanitarian grounds.³¹
- UNHCR is also concerned that admissibility considerations may take precedence over considerations linked to family reunion and the best interests of children, in particular that unaccompanied or separated children applying for asylum may not be able to have their request for protection considered in Denmark.
- To UNHCR, the lack of any fixed maximum time for detention in the Proposal is of serious concern.³² Indefinite detention for immigration purposes is arbitrary under international refugee and human rights law.³³ To guard against arbitrariness, maximum periods of detention should be set in national legislation.
- UNHCR finds it questionable whether the proposed admissibility-like procedure in Denmark will provide an effective opportunity for an individual to raise objections to any general presumption of “safety” and/or access to international protection and solutions in the third country.³⁴ UNHCR is concerned that there will only be one interview, which will focus on identity and general information about the applicant’s health and family – and not on whether he or she, considering individual profile and circumstances, will be able to receive effective protection in the third State.³⁵
- UNHCR is further concerned that the proposed procedures will not be efficient, as the resources of the Danish asylum authorities will be spent on other procedures than on refugee status determination. In UNHCR’s view, it could lead to significant delays in the identification and granting of refugee protection, as the individuals concerned will have to go through several steps in the processing of their asylum application, including a transfer to a third country, before an assessment on the merits is undertaken.

³⁰ See, UNHCR Transit Areas Considerations, para. 3. UNHCR, Submission in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights, 15 November 2015, para. 3.1.1.

³¹ Proposal, pp. 5, 14, 48.

³² UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 <https://www.refworld.org/docid/503489533b8.html>, p. 26.

³³ For relevant case law, see, A v. Australia, HRC, Comm. No. 560/1993, 3 April 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b71a0.html>, para. 9.2; Mukong v. Cameroon, HRC Comm. No. 458/1991, 21 July 1994, para. 9.8. <http://www.unhcr.org/refworld/docid/4ae9acc1d.html>; European Court of Human Rights, Saadi v. the United Kingdom [GC], no. 13229/03, 29 January 2008, para. 74; Mathloom v. Greece, no 48883/07, 24 April 2012, para. 71. Khudoyorov v. Russia, no. 6847/02, 8 November 2005.

³⁴ UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers, September 2019 <https://www.refworld.org/docid/5d8a255d4.html>.

³⁵ See European Court of Human Rights cases of M.S.S. v. Belgium and Greece [GC], no. 30696/09, 21 January 2011; Ilias and Ahmed v. Hungary [GC], no. 47287/15, 21 November 2019; K.R.S. v. the United Kingdom (dec.), no. 32733/08, 2 December 2008.

V. Conclusions

29. In conclusion, UNHCR strongly urges Denmark to refrain from establishing laws and practices that would externalize its asylum obligations. UNHCR discourages national stand-alone initiatives, such as the present Danish proposal, which is not founded on solidarity and which may undermine the international protection system. Rather than developing initiatives that do not address the problem but just move it elsewhere, UNHCR encourages Denmark to use its strong engagement on global refugee issues as a foundation for working together in solidarity to develop regional and global responses to forced displacement with special focus in Europe and the current discussions on the proposed EU Pact on Migration and Asylum.

UNHCR Representation for the Nordic and Baltic Countries

4 March 2021