

Position paper

Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees

1. UNHCR acknowledges the challenges and complexities of the movement of people by sea into and through the South-East Asia region, including towards Australia.
2. UNHCR supports the view that constructive efforts need to be taken to reduce the tragic loss of lives at sea.
3. UNHCR encourages States to engage in regional and international cooperation to address international protection challenges, and has advocated for the development of regional cooperative processes,¹ including in the Asia-Pacific.² In this regard, the creation of the Regional Cooperation Framework and the Regional Support Office established under the auspices of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (which is co-chaired by Indonesia and Australia) are significant developments in the region.
4. UNHCR considers that cooperative approaches in the region, which build and complement effective national asylum procedures and promote responsibility sharing, can help asylum-seekers and refugees find viable protection options other than through dangerous and exploitative boat journeys.
5. Any concerted and cooperative action by States to save lives should ensure respect for international law, including international refugee and human rights law, notably the principle of *non-refoulement*, and ensure that appropriate access is provided to fair and efficient asylum procedures for those seeking international protection, and timely durable solutions are in place for those found to be refugees.
6. Any cooperation should be based on responsibility sharing, in order to meet challenges around asylum and migration in effective and sustainable ways³ to enhance the protection space in all concerned States and regions as a whole. It should not result in the shifting of responsibilities or burdens to States less well-equipped to carry them.
7. UNHCR's position on bilateral and multilateral transfer arrangements in relation to *asylum-seekers* for the purposes of asylum processing remains relevant.⁴ Asylum-seekers should ordinarily have their claims processed, and benefit from protection, in the territory of the State from which they claim

¹ See, for example, UN High Commissioner for Refugees (UNHCR), *Regional Cooperative Approach to Address Refugees, Asylum Seekers and Irregular Movement*, November 2011, available at: <http://www.refworld.org/docid/4e92d7c32.html>; See UN High Commissioner for Refugees, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities*, 28 June 2011, available at: <http://www.refworld.org/docid/4e9fed232.html>; UN High Commissioner for Refugees, *Summary Conclusions: Refugees and Asylum-Seekers in Distress at Sea - how best to respond? Expert Meeting in Djibouti, 8 to 10 November 2011*, 5 December 2011, available at: <http://www.refworld.org/docid/4ede0d392.html>.

² See, for example, UNHCR, UNODC, IOM, *Bay of Bengal and Andaman Sea: Proposals for Action*, May 2015: <http://www.unhcr.org/55682d3b6.html>.

³ See 1951 Convention, Preamble, Recital 4; Executive Committee Conclusion No. 52(XXXIX) 1988 on *International Solidarity and Refugee Protection*.

⁴ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* 2013 ('Guidance Note on transfer arrangements'), May 2013, <http://www.refworld.org/docid/51af82794.html>, paras 1 and 3(vi).

protection, or which otherwise has jurisdiction over them.⁵ The primary responsibility for providing protection rests with the State from which asylum is sought.⁶

8. The legality and appropriateness of any bilateral/multilateral transfer arrangement need to be assessed on a case-by-case basis, subject to its particular modalities and legal provisions. However, as UNHCR has stated previously, the assessment of a proposed arrangement should be guided by the following principles:
 - a) Although there is no obligation for asylum-seekers to seek asylum at the first effective opportunity nor is there an unfettered right to choose one's country of asylum. The intentions of an asylum-seeker ought to be taken into account to the extent possible.
 - b) It is generally recognized that a State has jurisdiction, and consequently is bound by relevant international refugee and human rights law obligations if it has *de jure* and/or effective *de facto* control over a territory or over persons. This includes situations where a State exercises jurisdiction outside its territory, including either at sea or on another State's territory.
 - c) In principle, States involved in bilateral or multilateral transfer arrangements should be parties to the *1951 Convention relating to the Status of Refugees* (1951 Refugee Convention) and/or its 1967 Protocol, or otherwise party to relevant refugee and human rights instruments. While being party to such treaties is an important indicator, the actual practice of States and their adherence to treaty obligations and standards must be monitored by other States parties to the arrangement, including those seeking to transfer asylum-seekers for the purpose of undergoing processing.
 - d) Such arrangements should contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole, and enhance responsibility-sharing.
 - e) An arrangement between States for the transfer of asylum-seekers is best governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum-seekers. The arrangement would need to clearly stipulate the rights and obligations of each State and the rights and duties of asylum-seekers and refugees.
9. In terms of the minimum guarantees applicable, any bilateral/multilateral transfer arrangement must ensure that each asylum-seeker is:
 - a) individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Such safeguards include an opportunity to rebut the presumption of safety in the individual's particular circumstances. Pre-transfer assessments are particularly important

⁵ It is generally recognised 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: 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-in/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search>. See also UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010 ('Protection Policy Paper'), <http://www.refworld.org/docid/4cd12d3a2.html>, part II. See also UNHCR, *UNHCR Submissions in the High Court of Australia in the case of CPCF v Minister for Immigration and Border Protection and the Commonwealth of Australia*, 15 September 2014, NO S169 OF 2014.

⁶ UNHCR, Guidance Note on transfer arrangements, May 2013, <http://www.refworld.org/docid/51af82794.html>, para 4.

for vulnerable people, including unaccompanied and separated children. The best interest of the child must be a primary consideration;

- b) admitted to the proposed receiving State;
- c) protected against *refoulement*;
- d) given access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
- e) treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; use of detention only as a last resort, where legal grounds are shown, and subject to judicial control; use of alternatives to detention wherever possible; and identification and provision of assistance to persons with specific needs); and
- f) if recognized as a refugee, is able to enjoy asylum and timely access to a durable solution that includes the following guarantees:
 - i) the recognized refugee is to be protected from *refoulement*, in any manner whatsoever;⁷ and otherwise enjoy the rights under the 1951 Refugee Convention in full and without discrimination, in law and in practice. In particular, the arrangement would provide for lawful stay,⁸ access to employment and/or self-employment opportunities,⁹ education for children,¹⁰ freedom of movement including the right to choose one's place of residence,¹¹ and the right to travel outside the territory;¹²
 - ii) an adequately resourced integration programme is in place which provides the services and support needed by refugees to adjust to a new society;
 - iii) family reunification is available, and supported;¹³ and
 - iv) the capacity of the receiving State and the commitment of the local community are able to sustain such an arrangement.

10. Where the guarantees referred to in paragraphs 8 and 9 above cannot be met, any bilateral or transfer arrangement would not be appropriate.

11. In terms of State responsibility post-transfer, at a minimum, and regardless of the arrangement, the transferring State remains, *inter alia*, subject to the obligation of *non-refoulement*.¹⁴ The receiving State, in exercising territorial jurisdiction, will be subject to applicable international refugee and human rights law obligations.

12. Further, the transferring State may retain responsibility for other obligations under, and potentially for any violations of, international refugee and human rights law. This may occur, for example, if the

⁷ Article 33 of the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention).

⁸ The spectrum of rights in the 1951 Convention accorded to refugees "lawfully staying" equates to permanent residency.

⁹ Articles 17-19 of the 1951 Refugee Convention.

¹⁰ Article 22 of the 1951 Refugee Convention.

¹¹ Article 26 of the 1951 Refugee Convention.

¹² Article 28; and Article 12, ICCPR.

¹³ Article 12; Final Act of the Conference of Plenipotentiaries.

¹⁴ See generally, 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, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

reception and/or processing of asylum-seekers in the receiving State is effectively under the control or direction of the transferring State.

13. UNHCR's firm view is that any bilateral/multilateral arrangement would not be appropriate where they represent an attempt, in whole or part, by a Contracting State to the 1951 Refugee Convention to divest itself of responsibility; or they are used as an excuse to deny or limit jurisdiction and responsibility under international refugee and human rights law. Any cooperation should be based on responsibility sharing to ensure the global refugee system is not undermined through denial of access by States deny to territory for certain categories of asylum-seekers and refugees.

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