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

Annex to UNHCR Note on the "Externalization" of International Protection:

Policies and practices related to the externalization of international protection

1. This annex to UNHCR's note on the "externalization" of international protection (the 'Note') examines various policies and practices which effectively serve to "externalize" international protection obligations. It explains that measures designed, or effectively serving, to avoid responsibility or to shift, rather than share, burdens are contrary to the 1951 Convention relating to the Status of Refugees ('1951 Refugee Convention') and widely-accepted principles of international cooperation and solidarity. It further explains that such externalization measures are distinct from policies and practices adopted in accordance with international law, aimed at sharing international protection responsibilities in the spirit of international cooperation and solidarity.

2. The international refugee protection system depends on international cooperation and responsibility sharing among States. Cooperative arrangements need to be undertaken in accordance with international refugee and human rights law standards and in the spirit of international cooperation and solidarity. Measures preventing asylum-seekers from entering safe territory and claiming international protection or transferring asylum-seekers and refugees to other countries without sufficient safeguards, can amount to externalization of international protection as outlined in the Note.

Externalization of international protection: unlawful practices

3. Externalization of international protection may include unilateral or cooperative measures to intercept or prevent arrivals of asylum-seekers and processing of asylum claims in or by a third State, without adequate safeguards and resulting in a shift of international protection burdens onto other States.

4. Three categories of practices will, in many cases, constitute externalization because of their specific design and/or implementation, i.e. extraterritorial processing in a third country or other locations, unilateral measures to intercept or prevent arrivals which preclude access to asylum and cooperative measures to intercept or prevent arrivals.

Extraterritorial processing in a third country or other locations

5. States have attempted to 'externalize' international protection by outsourcing elements of asylum processes, such as screening and admissibility, or the entire process, to a third State, either under the laws of the 'externalizing' State, or under those of the third State. It may also involve refugee status determination whereby the applicants await the outcome in a third State.

6. Extraterritorial processing is **unlawful** where it represents an attempt to **avoid jurisdiction or international responsibilities**, or to shift burdens, for example by no longer processing any asylum application on the State's territory; if compliance with international and national **standards** cannot be guaranteed; if durable **solutions** are not available for refugees, as well as other outcomes consistent with human rights for those without international protection needs; or if it has a negative impact on the quality of protection provided by the territorial State.

7. Extraterritorial processing may also occur outside the territory of a State, for example, **aboard a ship in international waters**. UNHCR considers that processing on board maritime vessels is generally

not appropriate, unless reception arrangements and eligibility screening processes in line with international standards can be guaranteed.[1]

8. States may also seek to avoid their legal responsibilities by receiving asylum-seekers and processing their claims in special zones within their territory. Processing or reception within such **transit or 'international' zones** at airports or border areas, or other areas within a State's territory, including offshore islands, that are declared for domestic purposes to have some special 'extraterritorial' or 'excised' status, will not constitute externalization when such processing and reception is subject to the same standards and safeguards as elsewhere on a State's territory.

9. UNHCR guidance on standards relevant to third-country extraterritorial processing is set out in the 2019 Onward Movement guidance, 2019 International Protection in Transit Areas or International Zones at Airports, 2018 Safe Third Country considerations, 2017 General legal considerations: search-and-rescue operations involving refugees and migrants at sea, and 2013 UNHCR Transfer note. See also the 2010 UNHCR Interceptions note, under 'Out-of-country processing' and 'processing onboard maritime vessels', at paras 44-49 and 56ff.

10. In addition to the overarching principles expressed above in the Note, UNHCR has adopted the following positions with regard to the use of extraterritorial processing:

- States cannot avoid their obligations under international refugee and human rights law by employing extraterritorial processing modalities. Both the State to which an asylum claim has been made, or that otherwise exercised effective control over the asylum-seeker, and the State on whose territory the determination takes place retain joint responsibility for **processing and reception,** and speedy and appropriate **outcomes**, consistently with their international obligations.
- The same **procedural guarantees and reception standards** that apply to territorial national asylum procedures also apply extraterritorially, including the requirement to conduct a fair and efficient asylum procedure, the prohibitions on arbitrary detention and protracted encampment and unlawful restrictions to the right to freedom of movement of asylum-seekers.
- In agreeing on an extraterritorial processing arrangement, the States concerned should **clarify in advance** which among them have practical responsibility for reception, processing and solutions.

11. Extraterritorial processing by one State on the territory of another that is not related directly to an asylum claim, such as resettlement processing, visa applications, or applications for a form of protected entry or humanitarian admission do not constitute externalization of international protection. These are processes which do not replace access to asylum within the territory of the State in which an asylum claim is made.

[1] UNHCR, G*eneral legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017, www.refworld.org/docid/5a2e9efd4.html, para 7.

Unilateral measures to intercept or prevent arrivals which preclude access to asylum

12. Unilateral measures by States preventing asylum-seekers from reaching or entering their territory and seeking asylum by intercepting them on land, near borders or at sea, including the high seas constitute 'externalization'. Such measures include pushbacks at borders or maritime interceptions and return to third countries, including where fuel, supplies or repairs are provided to allow onward or return travel and/or where disembarkation is refused.

13. Unilateral measures to intercept or prevent arrivals is unlawful where it represents an attempt to avoid jurisdiction or international responsibilities, or to shift burdens, for example by metering or 'caps' on admissions, externalized waiting periods, or extraterritorial pre-screening (e.g. where asylum-seekers prohibited from applying in the territory, but are instead required to apply at embassies abroad). These may be unilateral or with the cooperation of a 'host' State (see also the following section). Such measures in practice involve shifting responsibility for reception arrangements and protection, pending access to territory or assessment of a claim. Measures which pose physical or procedural obstacles to access territory or procedures deny effective access to asylum. Where they serve as a pretext for summary rejection of asylum-seekers at the border, all of these measures may breach the prohibition on collective expulsion, the principle of non-refoulement and the right to seek and enjoy asylum.

14. Relevant UNHCR guidance is set out in the 10-Point Plan in Action and the 2019 Onward movement guidance, the 2010 Interception note, the 2017 Legal considerations on search and rescue, UNHCR's 2011 third party intervention in the Hirsi Jamaa case before the ECtHR (and various subsequent interventions relating to access to territory). ExCom set out its views on interception measures in Conclusion 97 of 2003. Various UNHCR guidance on non-refoulement is relevant including the Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. See the UNHCR Protection Manual at sections B.13.2 (non-refoulement) and C.2 (access to territory and procedures).

15. In addition to the overarching principles expressed above in the Note, UNHCR has adopted the following positions on unilateral measures to intercept or prevent arrivals:

- States are entitled to manage their borders and entry to their territories if measures are consistent with refugee and human rights law. Border management should not prevent access to international protection for those who need it.
- The summary return or denial of admission by a State, without consideration of individual circumstances and an effective opportunity to raise international protection needs, is inconsistent with the State's obligations under international law.
- Unilateral measures which result in shifting burdens or leave asylum-seekers in a situation of 'orbit', without a country of asylum willing to accept them, are damaging to the international protection system and to commitments under the Global Compact on Refugees to international cooperation and solidarity.
- States are not permitted to deny asylum-seekers access to territory or to asylum procedures on the basis of an arbitrarily fixed numerical limit. Purporting to do so will result in discrimination, be at variance with the right to seek and enjoy asylum and creates a risk of refoulement.

16. There are other measures taken by States to limit arrivals which, by virtue of their general application, among other things, are more likely to fall within the scope of lawfully permissible measures by States to manage entry to their territory. This includes carrier sanctions, pre-clearance measures, visa requirements (including some which may prove onerous for people who are nationals of refugee-producing countries), and the use of surveillance and barrier technology. Even if these measures may in some cases have the effect of preventing an asylum-seeker from travelling or entering the country which has taken the measures, absent evidence these measures are discriminatory, at variance with the right to seek and enjoy asylum or lead to refoulement, it may be difficult to demonstrate that their application contravenes international refugee or human rights law.

Cooperative measures to intercept or prevent arrivals

17. States may prevent asylum-seekers from reaching their territory or region through cooperative measures that may lead to the transfer of asylum-seekers to third countries. This may include bilateral cooperative migration controls or outposted migration officers, joint or proxy interception or surveillance arrangements; other bilateral or multilateral migration control agreements (formal or informal); and funding, training, or capacity development for migration control. Such cooperation may be for legitimate purposes, such as increasing search-and-rescue capacity or law enforcement measures against trafficking in persons and migrant smuggling. However, when designed or implemented without adequate safeguards, or to avoid or shift international protection responsibilities, such cooperative measures may constitute externalization.

18. UNHCR's advocacy for refugee protection in migration and mixed movements, including protection-sensitive entry management, is set out in UNHCR's Refugee protection and mixed movements: The 10-Point Plan in Action (2016 update) (10-Point Plan). UNHCR guidance and positions on cooperative measures to intercept or prevent arrivals can be found in the 2019 Submission in the case of S.S. and Others v. Italy (Appl. No. 21660/18) before the European Court of Human Rights, the 2017 Legal considerations on search and rescue, the 2010 Interception note and various guidance documents and court interventions relating to non-refoulement and access to territory. ExCom set out its views on interception in Conclusion 97 of 2003. See the UNHCR Protection Manual at sections B.13.2 (non-refoulement) and C.2 (access to territory and procedures).

19. In addition to the overarching principles noted above in the Note, UNHCR has the following responses to cooperative measures for interception or prevention of arrivals:

- Sovereign nations have a right and responsibility to manage entry into their territories. They may also cooperate with other States to address irregular migration.
- International cooperation is welcome to save lives on land or at sea, to develop protection capacity in host countries, or to deter trafficking and smuggling. They must nevertheless be carried out in a manner that is consistent with refugee and human rights law and not result in avoiding or shifting responsibilities for asylum-seekers. International cooperation must not frustrate access to international protection; prevent escape from situations of insecurity or persecution; or otherwise place people at increased risk of human rights violations. Nor should cooperative initiatives be undertaken in a way that weakens systems to protect asylum-seekers, refugees and people who are stateless.

Lawful transfer arrangements: Inter-State transfer or safe-third-country arrangements

20. Externalization of international protection is distinct from lawful practices involving a transfer of international protection responsibilities to a third State, taken in accordance with international standards and supporting international cooperation. Lawful transfer practices are those which guarantee asylum-seekers and refugees' respect for rights as well as alleviating the burden on developing States, hosting 85% of the world's refugees.

21. Lawful transfer arrangements may include safe third country arrangements and regional disembarkation mechanisms that ensure adequate safeguards and are implemented to share responsibilities. Additionally, as mentioned in the Note, protection and solutions for refugees may be provided through other lawful arrangements including resettlement, humanitarian admissions and other complementary and regular pathways or protected entry or embassy procedures, which involve transferring international protection responsibilities.

22. States may agree to bilateral or multilateral arrangements for the inter-State transfer of asylum-seekers or refugees, or transfer or return them to a 'safe third country' or 'first country of asylum' on an ad hoc basis. Transfers or returns of asylum-seekers may also occur under readmission agreements.

23. Subject to relevant safeguards, States may also agree on multilateral arrangements to facilitate responsibility-sharing and, in particular, to allocate responsibility for determining an asylum claim and providing international protection. Indeed, such arrangements may be desirable, particularly as part of a **comprehensive and collaborative regional approach** to international protection.

24. UNHCR guidance on the use of transfer, safe third country, first country of asylum, or similar arrangements is set out in specific 'country of asylum' papers and comments to readmission agreements as well as a number of general documents.[2]

25. In addition to the overarching principles noted in the Note, UNHCR has underlined the following relevant principles and requirements which should attend inter-State transfer or safe third country arrangements:

- The international protection claims of asylum-seekers **should ordinarily be processed by and on the territory of** the State in which, or under whose jurisdiction, they sought protection and refugees should be receiving international protection in that country.
- A third **State may assume asylum responsibility** under an inter-State transfer arrangement through readmission to a 'safe third country' or 'first country of asylum'.

[2] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers* , September 2019, www.refworld.org/docid/5d8a255d4.html ('Onward Movement guidance'). 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, www.refworld.org/docid/5acb33ad4.html ('Safe Third Country Considerations'). UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, www.refworld.org/docid/51af82794.html (UNHCR 'Transfer note'). *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, www.refworld.org/docid/4cd12d3a2.html (UNHCR Interception note).

- The inter-State transfer of asylum-seekers and refugees 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 or refugees affected.

- In all cases involving the transfer of an asylum-seeker to a 'safe third country' or a refugee to a 'first country of asylum', certain **standards** must, as a precondition, be guaranteed 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** and **standards of treatment** commensurate with the 1951 Refugee Convention and international human rights law; and for asylum-seekers, access in practice to **fair and efficient asylum procedures**, a legal **right to remain** during the procedure, and an appropriate legal status if found to be in need of international protection; and for refugees, access to a previously afforded protective status. Being a State party to the 1951 Refugee Convention and/or its 1967 Protocol and basic human rights instruments without any limitations is a critical indicator, although an assessment of the State's domestic laws and the actual practice of implementation remain essential.

- Regarding standards of treatment commensurate with the 1951 Refugee Convention and international human rights law, in addition to criteria for determining who is a refugee and the principle of non-refoulement, this includes a number of other important rights to be afforded to asylum-seekers and refugees including but not limited to, access to courts, public relief (including 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.

- A State transferring asylum-seekers or refugees to another State bears **responsibility for ensuring that these protection obligations are** met in practice, prior to entering into sharing arrangements. Regular **monitoring** of conditions in the receiving State is necessary to meet the continuing 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 difficult in practice.

- Generally, an **individual assessment** of the lawfulness and appropriateness of any transfer must be undertaken before transfer occurs. There needs to be an opportunity for an individual to raise objections to any general presumption of 'safety' and/or access to international protection.

- States should consider the individual situation and wishes of an individual before their transfer. Particular consideration should be given to whether they have **close links** through family, community or residence, with a receiving or sending country. Consistently with refugee law and human rights, UNHCR has advocated for such close links to be taken into account when transferring responsibility for determining asylum claims and providing protection.

- Finally, with regard to children, their best interests must be a primary consideration.

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