



Lisbon Expert Roundtable
9 and 10 December 2002

*organised by the United Nations High Commissioner for Refugees
and the Migration Policy Institute
hosted by the Luso-American Foundation for Development*

Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers

1. The December 2002 Lisbon expert roundtable reviewed the concept of “effective protection” in the context of secondary movements of asylum-seekers and refugees. The question of what constitutes effective protection in a third country usually arises in the implementation of what is commonly referred to as the concept of first country of asylum, “safety elsewhere” or the “safe” third country concept. The discussion was based on a background paper by Prof. Dr Stephen Legomsky, Washington University in St. Louis, United States, entitled “Returning Asylum-Seekers to Third Countries: The Requirements of Effective Protection”. Participants included 30 experts from 18 countries, drawn from governments, NGOs, academia, the judiciary and the legal profession.

2. The roundtable is in direct follow-up of the “Agenda for Protection” (A/AC.96/965/Add.1 of 26 June 2002), which defines as one of its six goals “protecting refugees within broader migration movements”. One of the activities foreseen to work towards this goal is: “Bearing in mind ExCom Conclusion No. 58 (XL) of 1989 on the *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in which They had already Found Protection*, UNHCR, in co-operation with relevant partners, to analyse the reasons for such movements, and propose strategies to address them in specific situations, predicated on a more precisely articulated understanding of what constitutes effective protection in countries of first asylum, and taking into account international solidarity and burden-sharing.”

3. The objective of this roundtable was to identify the principles, grounded in law, around which policy parameters could be built to address issues concerning the secondary movement of asylum-seekers and refugees and which would have a practical value for decision- and policy-makers. The principles should be practical and holistic, that is, they should take account of physical, material and legal safety considerations.

4. The following Summary Conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

Overall context

5. The rationale behind examining “effective protection” in the context of the return of asylum-seekers and refugees to third countries is fourfold:

- to enhance international co-operation to share the burdens and responsibilities of admitting and hosting refugees;
- to strengthen protection capacities in host countries;
- to foster international solidarity and support for generating solutions;
- to address issues related to “irregular movement”, including people smuggling, people trafficking, multiple applications and “orbit” cases.

6. The causes of secondary movements are manifold and include lack of durable solutions; limited capacity to host refugees and provide effective protection for protracted periods of time; as well as lack of access to legal migration opportunities. It was recommended that such causes required further careful study in relation to specific situations to provide a clearer understanding on which to build comprehensive strategies to reduce such movements.

7. Return to a third country of asylum is only one element in an interrelated comprehensive framework, aimed at reducing (the need for) secondary movement. Other elements of such an integrated framework were identified as including: addressing root causes of forced displacement; strengthening protection capacities in host countries; enabling access to durable solutions, including local integration and enhanced resettlement; concluding responsibility-sharing agreements; opening up more channels for regular entry in the context of resettlement, labour migration and, importantly, family reunification; as well as criminal law enforcement measures.

8. Operationalising international solidarity and international co-operation to share the burdens and responsibilities of hosting refugees is crucial to effecting the return of asylum-seekers and refugees to third countries under certain circumstances. Hosting large numbers of refugees is a major contribution by developing countries, which should be properly recognised when considering the removal of persons who could have sought protection there.

Framework considerations

9. While the 1951 Convention relating to the Status of Refugees and its 1967 Protocol constitute the core framework, other sources of rights and obligations in international law may be relevant for informing the appreciation of whether or not it is permissible to return an asylum-seeker or refugee to a third country. It is important not to exclude any source of law (treaty obligations, customary international obligations, interpretative guidance such as Executive Committee Conclusions) and to appreciate the specific circumstances of a case. An assessment of effective protection requires an individualised case-by-case examination.

10. From the point of view of identifying the elements of effective protection in the context of return to third countries, the distinction between the so-called “safe” third country and the country of first asylum concepts is not relevant.¹ The distinction is, however, relevant when it comes to an appreciation of the links between an asylum-seeker or refugee and the destination country, in which the person is now applying for asylum, or the third country, as well as for procedural issues in destination countries. In addition, readmission obligations are clearer in respect of countries that have already provided effective protection to an individual.

11. There is no obligation under international law for a person to seek international protection at the first effective opportunity. On the other hand, asylum-seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account.²

12. States could craft bi- or multilateral arrangements, consistent with international refugee and human rights law standards, according to which asylum-seekers would be encouraged and enabled to seek international protection at the first available opportunity. This could be done by agreeing to mechanisms and criteria to allocate responsibilities for the determination of asylum applications and the provision of effective protection. Such arrangements should take account of meaningful links, such as family connections and other close ties, between an asylum-seeker and a particular country. They should also include procedural safeguards, including for example, a notification to the receiving country that an asylum application has not been examined on its

¹ See, UNHCR, “Asylum Processes (Fair and Efficient Asylum Procedures)”, EC/GC/01/12, 31 May 2001, paragraphs 10–18.

² Executive Committee Conclusion No. 15 (XXX) 1979, Refugees without an Asylum Country, paragraph (h) (iii).

merits. The effectiveness of such arrangements needs careful assessment and regular review both in terms of their operational efficiency and their resource implications.

13. Besides considerations of burden-sharing with countries hosting large numbers of refugees, several participants questioned the appropriateness, from a protection perspective, of returns outside the context of countries with equivalent asylum systems. In this regard, the wide disparity and poor levels of protection in many countries were noted.

14. Family and other links between a person seeking asylum and the destination country or the third State are important and should be given weight. The protection of the family as the natural and fundamental group unit of society is a widely recognised principle of human rights.

Critical factors for the appreciation of "effective protection" in the context of return to third States

15. The following elements, while not exhaustive, are critical factors for the appreciation of "effective protection" in the context of return to third countries:

- a) The person has no well-founded fear of persecution in the third State on any of the 1951 Convention grounds.
- b) There will be respect for fundamental human rights in the third State in accordance with applicable international standards, including but not limited to the following:
 - ◆ there is no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the third State;
 - ◆ there is no real risk to the life of the person in the third State;
 - ◆ there is no real risk that the person would be deprived of his or her liberty in the third State without due process.
- c) There is no real risk that the person would be sent by the third State to another State in which he or she would not receive effective protection or would be at risk of being sent from there on to any other State where such protection would not be available.
- d) While respecting data protection principles during the notification process, the third State has explicitly agreed to readmit the person as an asylum-seeker or, as the case may be, a refugee.
- e) While accession to international refugee instruments and basic human rights instruments is a critical indicator, the actual practice of States and their compliance with these instruments is key to the assessment of the effectiveness of protection. Where the return of an asylum-seeker to a third State is involved, accession to and compliance with the 1951 Convention and/or 1967 Protocol are essential, unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.
- f) The third State grants the person access to fair and efficient procedures for the determination of refugee status, which includes – as the basis of recognition of refugee status – grounds that would be recognised in the destination country. In cases, however, where the third State provides *prima facie* recognition of refugee status, the examination must establish that the person can avail him- or herself of such recognition and the ensuing protection.
- g) The person has access to means of subsistence sufficient to maintain an adequate standard of living. Following recognition as a refugee, steps are undertaken by the third State to

enable the progressive achievement of self-reliance, pending the realisation of durable solutions.

- h) The third State takes account of any special vulnerabilities of the person concerned and maintains the privacy interests of the person and his or her family.
- i) If the person is recognised as a refugee, effective protection will remain available until a durable solution can be found.

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