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**ONWARD MOVEMENT OF ASYLUM-SEEKERS AND REFUGEES:**  
**Discussion paper prepared for the Expert Roundtable on Onward Movement**  
*Graduate Institute of International and Development Studies*  
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*This paper has been prepared for the purposes of discussion and exchange at the Expert Roundtable on onward movement of asylum-seekers and refugees on 1-2 October 2015. It does not represent the official position of UNHCR or the United Nations unless indicated.*

**A. Context and problem to be addressed**

1. While most asylum-seekers and refugees flee to countries which are relatively close to their countries of origin, a proportion also move onward to other States further afield. In some cases, this includes movement from or through countries where they had or could have sought a form of international protection to other countries where they may request protection. Much of this movement takes place between countries in regions of origin, and only a relatively minor proportion to other regions.<sup>1</sup> Refugees and asylum-seekers who move onwards in this way frequently do so as part of wider migratory movements, in which people in need of international protection travel by similar means and routes as people moving for other reasons, often in an irregular manner.<sup>2</sup>
2. While States generally can and do respond to the arrival of limited numbers of asylum-seekers and refugees through established processes, the arrival and presence of significant additional numbers of people seeking protection can exert pressure on host countries, including their reception capacities, national asylum processes, economies and security. Multiple asylum claims lodged in different countries can lead to inefficiencies, administrative duplication, delays and additional costs. They may be perceived as a form of misuse of the asylum system, and consequently may strain political and public support for refugee protection. States are also seriously concerned about the growth of smuggling and trafficking in human beings, crimes

<sup>1</sup> UNHCR emphasises that the majority of refugees are hosted in the developing world, being 86% of the global total in 2014: *Global trends 2014*, <http://unhcr.org/556725e69.html>. UNHCR has also highlighted that most refugees remain in their regions of origin, indicating in 2011 that ‘available statistical evidence demonstrates that most refugees having fled to neighbouring countries, remain in the same region. The major refugee-generating regions hosted on average between 75% and 93% of refugees from within the same region. UNHCR estimates that some 1.8 million refugees (17% of the total of 10.4 million) live outside their region of origin’: *UNHCR Statistical Yearbook 2011*, <http://www.unhcr.org/516282cf5.html>, 24. See also *UNHCR statistical Yearbook 2010*, <http://www.unhcr.org/4ef9cc9c9.html>, 24; *Global Trends 2010*, <http://www.unhcr.org/4dfa11499.pdf>, 11.

<sup>2</sup> The Executive Committee has defined irregular movement in this context as ‘entry into the territory of another country, without the prior consent of the national authorities or without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation.’ See Executive Conclusion No. 58(XL) (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*, para (a).

which violate the rights and place the lives of asylum-seekers, refugees and migrants at risk, and pose a major challenge for law enforcement at national and international level. The fact that increasing numbers of people fleeing persecution and serious harm feel compelled to undertake dangerous journeys, often using the services of criminal smugglers, highlights the desperation of many who seek protection and solutions in countries where these are available. Some States have chosen to respond to increased irregular movement, including by asylum-seekers and refugees who have moved onward, by reinforcing border controls, building walls and erecting other barriers to entry for people without lawful permission. It is manifestly apparent, however, these approaches have not served effectively to prevent such movement, highlighting the need for other strategies and responses.

3. For asylum-seekers and refugees themselves, onward movement by irregular means can increase their exposure to the risks of violence, exploitation and other violations of their rights. It can also create the risk that they are left in limbo or 'orbit', without a secure legal status or in a country which is ready to accept responsibility for determining their asylum claims and for providing them with protection where they are entitled to it.
4. Responding effectively to the phenomenon of onward movement requires recognition of the wider factors at play, including the fact that asylum-seekers and refugees frequently move onward for justifiable reasons. These may include, in particular, limits on availability and standards of protection, such as restricted access to humanitarian assistance or other means of survival; family separation; obstacles to the means of securing documentation; and a lack of comprehensive solutions. People seeking protection may also face barriers to access to legal and administrative processes, including asylum procedures, where these are in place; as well as procedures in some countries which may not meet relevant standards of fairness and quality, thus creating a risk of exposure to *refoulement*. In some cases, the risk of undertaking further, irregular travel may be seen by asylum-seeker to be less than the risk of remaining in a previous State, given the absence or limited scope of protection there. Other incentives for onward movement may include the desire to join extended family and communities; lack of access to regular migration channels, and a desire to find opportunities for a better future.
5. Onward movement raises important questions regarding where responsibility lies among States for assessing an asylum-seeker's claim to international protection. International law contains important principles which are relevant to the issue, establishing obligations on the part of all concerned States which may be based on the presence of asylum-seekers in their territory, or control or jurisdiction over them at different points along their journeys. International or regional cooperation arrangements aimed at responding to onward movements of refugees and asylum-seekers<sup>3</sup> may provide the basis for more consistent, coherent approaches that can aim to ensure access to protection in a responsible State for people who require it. Asylum claim processing arrangements and adjudication processes need to provide safeguards for people seeking protection who may have moved onwards, while at the same time enabling States to deal efficiently with those who may be able to secure access to protection in another State. Return and readmission arrangements between States need to ensure respect for rights and basic standards of treatment, including in particular the right to family unity. In practical terms there may, however, be limits on a current State's ability to return a refugee or an asylum-seeker to a previous State in many cases. These different issues require coordination and cooperation between States, and with

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<sup>3</sup> UNHCR in recent years has advocated proposed the development of international arrangements for dealing with onward movement as a specific phenomenon or as part of broader comprehensive regional approaches to address mixed migratory movement: see UN High Commissioner for Refugees (UNHCR), *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, January 2007, Rev.1, and successor documents; UN High Commissioner for Refugees (UNHCR), *UNHCR's Special Mediterranean Initiative: Plan for an enhanced operational response, June – December 2015*, 12 June 2015, available at: <http://www.refworld.org/docid/559f85f74.html>.

UNHCR,<sup>4</sup> to avoid the negative consequences of unilateral action, and in order to ensure that people in need of protection can receive it in practice.

6. More broadly, international cooperation is also crucial to tackling the question of what can be done to address the causes of onward movement by asylum-seekers and refugees. Where people are compelled to move onward because of a lack of protection, the means of survival or solutions, international efforts can and must seek to address those gaps more effectively. While it may not be possible to mitigate these causes altogether, given complex displacement and migratory pressures, there are ways in which the phenomenon can be more effectively managed, including where States are able to work cooperatively and in a spirit of solidarity and fair sharing of responsibility and burdens for refugee protection. Effective and consistent protection-sensitive responses to asylum-seekers and refugees who move onward, accompanied by wider ongoing efforts to develop and maintain the capacity of all States to identify and protect refugees, should contribute to reducing some of the most compelling causes of onward movements.<sup>5</sup>

## **B. Purpose and scope**

7. This discussion paper aims to inform a UNHCR Expert Roundtable and the subsequent development of guidance on this subject. The proposed guidance will address primarily government policy-makers and administrative bodies, but also legal practitioners and decision-makers, to assist them in responding to people seeking protection who have, or could have, sought protection in another State. It will seek to help authorities to ensure that national asylum systems are better equipped to manage claims from such people; to reduce the risks related to onward movement for people in need of protection; and to encourage States to work together in a spirit of solidarity to ensure a more equitable allocation of burdens and responsibilities for international protection.
8. The note sets out the international legal obligations and other guiding principles relevant to onward movement of asylum-seekers and refugees, including States' and individuals' legal rights and obligations. It also articulates UNHCR's views on appropriate and effective responses to such movements, as well as the compatibility with relevant legal obligations and principles of specific measures and practices applied by some States.
9. It addresses all States which receive and host asylum-seekers and refugees, whether they are Contracting States Parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol<sup>6</sup> (hereinafter 1951 Convention) and/or regional refugee law instruments,<sup>7</sup> or non-parties. While some of the obligations to which this note refers apply specifically to States Parties to the 1951 Convention, there are others that are relevant to non-parties, based on other refugee and human rights instruments, customary international law and general international legal principles.
10. The note covers asylum-seekers requesting international protection in a current State who have, or could have, sought protection in a previous State.<sup>8</sup> It also addresses refugees who have been recognised by national authorities or under UNHCR's mandate, as well as people who have been

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<sup>4</sup> This has long been acknowledged at international level: see para (c), EXCOM No. 58(XL) (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*.

<sup>5</sup> See section D below on international solidarity and cooperation.

<sup>6</sup> 1951 Convention relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954; and UN General Assembly, Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (hereafter '1951 Convention').

<sup>7</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1001 UNTS 45, entry into force 20 June 1974 (hereafter 'OAU Convention'); Organization of American States, Cartagena Declaration on Refugees (adopted 22 November 1984) (hereafter 'Cartagena Declaration').

<sup>8</sup> For the purposes of this document, 'current State' refers to the State in which an asylum-seeker or refugee is physically present and/or where she or he has most recently applied for international protection. 'Previous State' refers to one or more States through which she or he may have travelled before reaching the current State.

granted a complementary form of protection,<sup>9</sup> and who move onward and seek protection in another State.

11. Given the term has no international legal definition, this document adopts a broad and factual description of the phenomenon of onward movement in order to address the full range of State mechanisms that have been developed to address it. The description of onward movement is not intended to be prescriptive, or to define a class of asylum-seekers or refugees that may be the subject of restrictive, deterrent or punitive measures. The term ‘onward’ movement is preferred over ‘secondary’ movement, in part to reflect the fact that such movements may be driven by different factors,<sup>10</sup> and often involve tertiary or multiple stages.<sup>11</sup> This discussion paper accordingly seeks to utilise simple and practical working terminology.

### C. International legal framework

12. States are bound to respect their international legal obligations in good faith, by ensuring that national laws and policies are consistent with international law and that asylum-seekers and refugees are treated in a manner consistent with international law. Relevant international legal obligations are derived, inter alia, from the 1951 Convention and its 1967 Protocol and other relevant international and regional refugee law instruments, as applicable. Other obligations are contained in international and regional human rights treaties,<sup>12</sup> which apply in principle to all people under the jurisdiction of the States which are party to them, irrespective of their asylum or immigration status.<sup>13</sup>
13. Protection against *refoulement* is a cornerstone of international refugee and human rights law.<sup>14</sup> The *non-refoulement* principle prohibits the removal, in any manner whatsoever, of a person to a territory where she or he could face persecution or be at risk of torture or other cruel, inhuman or degrading treatment or punishment,<sup>15</sup> as well as other serious human rights violations. It is widely

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<sup>9</sup> See Executive Committee, Conclusion No. 103 (LVI) (2005) *on the Provision of International Protection Including Through Complementary Forms of Protection*, 7 October 2005, available at: <http://www.refworld.org/docid/43576e292.html>

<sup>10</sup> A distinction is sometimes made between ‘primary’ movement from initial places of safety, and ‘secondary’ movement from such a place to another for the purpose of claiming asylum. However, it is widely acknowledged that the reasons for such movements are complex, and that the latter cannot in all cases be seen as ‘voluntary and motivated by economic or quality of life concerns’ rather than concerns related to protection or safety. See Zimmerman, S. ‘Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge’, 22(1) *IJRL* (2009), 74-96, 75.

<sup>11</sup> In many discussions, the two terms are frequently used interchangeably and imprecisely. Differing views on the definition of onward movements have at times complicated further discussion and hindered progress in addressing the phenomenon itself: see, for example: UN High Commissioner for Refugees, *Convention Plus Core Group on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers: Joint Statement by the Co-Chairs*, 8 November 2005, FORUM/2005/7, available at: <http://www.refworld.org/docid/46b6ee6a2.html>.

<sup>12</sup> OAU Convention; Cartagena Declaration; 1984 *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, entered into force 26 June 1987 (hereafter ‘CAT’), 1996 *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, entered into force 23 March 1976 (hereafter ‘ICCPR’), UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, (hereafter ‘ICESCR’), Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS (hereafter ‘ECTHR’), of African Unity (OAU), *African Charter on Human and Peoples’ Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (hereafter ‘African Charter’).

<sup>13</sup> UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders: Conference room paper*, 23 July 2014, A/69/CRP. 1, available at: <http://www.refworld.org/docid/54b8f58b4.html>, Part III, A, C.

<sup>14</sup> Article 33, 1951 Convention; Executive Committee Conclusion No. 6(XXVIII) (1977); see also

UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html>.

<sup>15</sup> The principle prohibits States from returning any person in any manner to territories where they would face a threat to life or freedom on 1951 Convention grounds (Art. 33, 1951 Convention); a real risk of torture or inhuman or degrading treatment or punishment (Art. 3, CAT); Art. 7, ICCPR; arbitrary deprivation of the right to life (Art. 6, ICCPR); or irreparable harm (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.). It applies not only to persons formally recognized as

accepted that non-refoulement is a customary international norm, and EXCOM has expressed the view that *non-refoulement* is progressively acquiring the character of a peremptory rule of international law.<sup>16</sup> *Non-refoulement* includes the direct, as well as indirect (via third or other countries) removal of people to face such risks, and also precludes rejection at the frontier or the non-admittance to the territory of a person, where this would lead to *refoulement*.<sup>17</sup> To ensure the principle is respected, people claiming to have a well-founded fear of persecution or being subject to torture or other cruel, inhuman or degrading treatment or punishment require access to fair and effective procedures within the territory in which their claims for international protection can be assessed,<sup>18</sup> as well as authorisation to remain lawfully in the country pending determination of their claim.

14. It is widely recognised that a State has jurisdiction, and is consequently bound by relevant international and regional refugee and human rights law obligations, including *non-refoulement*, if it has *de jure* or effective *de facto* control over a territory or over persons, including where it acts outside its territory.<sup>19</sup>
15. All people have the right to seek and to enjoy in other countries asylum from persecution.<sup>20</sup> A person is a refugee within the meaning of the 1951 Convention,<sup>21</sup> or other applicable regional instruments,<sup>22</sup> as soon as she or he fulfils the criteria in the definition. This necessarily occurs

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refugees, but also to asylum-seekers pending a final determination of their status. The principle of *non-refoulement* is applicable to direct as well as indirect returns (to a country of origin via other countries). In addition to being enshrined in Article 33 of the 1951 Convention and various human rights treaties, UNHCR is of the view that the prohibition of *refoulement* is a principle of customary international law. See: UN High Commissioner for Refugees, *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.refworld.org/docid/45f17a1a4.html>.

<sup>16</sup> Executive Committee Conclusion No. 25(XXXIII) (1982) *General Conclusion on International Protection*, para (b).

Leading scholars have also argued that the prohibition on removal to torture is a norm of customary international law: see Lauterpacht, E. and Bethlehem, D. 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Feller, E., Türk, V. and Nicholson, F. (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003, Cambridge University Press, Cambridge), page 115, para 67. See also Goodwin-Gill, G. and McAdam, J. *The Refugee in International Law* (3<sup>rd</sup> edition), (2007, Oxford University Press, Oxford), pp. 348, 216-7.

<sup>17</sup> Lauterpacht, E. and Bethlehem, D. 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Feller, E., Türk, V. and Nicholson, F. (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003, Cambridge University Press, Cambridge), page 115, para 67. See also Goodwin-Gill, G. and McAdam, J. *The Refugee in International Law* (3<sup>rd</sup> edition), (2007, Oxford University Press, Oxford), pp. 277, 244.

<sup>18</sup> This includes individualized procedures, as well as procedures for granting status on a *prima facie* basis. See UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at:

<http://www.refworld.org/docid/3b36f2fca.html>. See also UN High Commissioner for Refugees, *Expert Witness Testimony before the Inter-American Court of Human Rights, Hearing in the case of Pacheco Tineo v Bolivia*, Case 12.474 (March 2013).

<sup>19</sup> See, for example, *Lopez Burgos v Uruguay*, Comm. No. R 12/52, UN doc. A/36/40; *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at:

<http://www.unhcr.org/refworld/docid/4f4507942.html>. See also UN High Commissioner for Refugees, *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>, paras. 9-10; UN High Commissioner for Refugees, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <http://www.refworld.org/docid/51af82794.html>.

<sup>20</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 14(1); UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), Article 1; Organisation of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, *Costa Rica*, 22 November 1969, Article 22(7); African Charter, Article 12(3); Council of Europe, Committee of Ministers, *Declaration on Territorial Asylum* (18 November 1977), Article 1.

<sup>21</sup> 1951 Convention, Article 1A.

<sup>22</sup> OAU Convention, Articles 1(1) and 1(2); Cartagena Declaration, Article III(3).

prior to the time at which his or her refugee status is formally determined. Recognition of refugee status does not therefore make a person a refugee, but declares him or her to be one.<sup>23</sup>

16. Refugees are entitled to the benefit of the provisions of the 1951 Convention without discrimination as to race, religion or country of origin.<sup>24</sup> This provision, which applies to refugees prior to recognition of their status, also protects asylum-seekers from discrimination on such grounds. International and regional human rights instruments and norms also emphasise the principle of non-discrimination,<sup>25</sup> along with other standards of treatment for all people within a State's territory or jurisdiction.
17. There is no obligation under international law for a person to seek international protection at the first effective opportunity. The intentions of an asylum-seeker as regards the country that will determine her or his asylum claim and provide protection ought to be taken into account to the extent possible, although there is no unfettered right for a person to choose that country.<sup>26</sup>
18. The fact that an asylum-seeker or refugee may have moved on from a previous State does not mean that his or her claim for international protection is unfounded. An application for asylum may not be rejected on its merits solely on the ground that protection could be sought from another State.<sup>27</sup>
19. Departure from a previous State is not an unlawful act. Under international human rights law, everyone has the right to leave any country, including his or her own, and to return to his or her country.<sup>28</sup> The departure of a refugee from a country which has granted refugee status to him or her does not in itself affect the refugee status of that person. The only grounds for loss of refugee status once formally acquired are cancellation, revocation or cessation.<sup>29</sup> States are not permitted to cancel, revoke or apply cessation to a recognised refugee solely on the grounds that she or he has departed from their territory.<sup>30</sup>
20. In seeking asylum, asylum-seekers and refugees shall not be subject to penalties (in particular fines or imprisonment) on account of illegal entry or illegal presence provided they have come

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<sup>23</sup> UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV.3 (UNHCR Handbook), available at: <http://www.refworld.org/docid/4f33c8d92.html>.

<sup>24</sup> 1951 Convention, Article 3.

<sup>25</sup> See, for example, ICCPR, Art 2; European Convention on Human Rights, Art 14.

<sup>26</sup> UN High Commissioner for Refugees, *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, available at: <http://www.refworld.org/docid/3fe9981e4.html>. Executive Committee Conclusion No. 15, para. (h)(iii). See also UN High Commissioner for Refugees, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <http://www.refworld.org/docid/51af82794.html>

<sup>27</sup> Executive Committee Conclusion No. 15(XXX)(1979) on *Refugees without an asylum country*, para (h)(iv).

<sup>28</sup> E.g., Article 13 of the Universal Declaration of Human Rights; ICCPR, Article 12(1) ('Everyone shall be free to leave any country, including his own'); International Convention on the Elimination of All Forms of Racial Discrimination Article 5; General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live; Human Rights Committee, General Comment No. 27, Freedom of Movement (Article 12) (1999), available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>29</sup> Cancellation refers to termination of protected status which has not been properly conferred (because the asylum-seeker did not meet the inclusion criteria or fall within the application of the exclusion clauses). Revocation refers to a withdrawal of status that was properly conferred when, subsequent to recognition, the refugee engaged in conduct that would bring him/her within the exclusion clauses of Art. 1F(a) or (c) of the 1951 Convention. Cessation of refugee status may occur under Article 1C of the Convention where a refugee has voluntarily re-availed him or herself of the protection of his or her country of origin, has re-acquired or acquired a new nationality, has re-established him or herself in an asylum country or can no longer refuse to avail him or herself of the protection of his or her country of nationality because the circumstances in connection with which s/he has been recognised have ceased to exist. See Articles 1C and 1F of the 1951 Convention; UNHCR Handbook, Chapters III and IV. UN High Commissioner for Refugees, *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: <http://www.refworld.org/docid/41a5dfd94.html>.

<sup>30</sup> Articles 1C and 1F of the 1951 Convention; UNHCR Handbook, Chapters III, IV. UN High Commissioner for Refugees, *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: <http://www.refworld.org/docid/41a5dfd94.html>.

directly and present themselves without delay to the authorities and show good cause for their irregular entry or presence.<sup>31</sup> Article 31(1) recognises the realities of refugee flight,<sup>32</sup> such that asylum-seekers and refugees are often compelled to arrive at, or enter, a territory without the requisite documentation or prior authorisation to enter.

21. While Article 31 implicitly permits the imposition of penalties for irregular entry if its requirements are not fulfilled, it does not authorise States to impose penalties upon asylum-seekers or refugees solely on the grounds that they have moved onwards from a previous State. For the purposes of assessing whether penalties for irregular entry may be applied, it must be determined whether a person who has moved onwards from a previous State satisfies the requirement under Article 31(1) of ‘coming directly’. UNHCR considers that the term ‘directly’ should be understood not only in its literal (temporal or geographical) sense, as refugees are not required to have travelled without pause or transit and without crossing other countries from their country of origin.<sup>33</sup> No strict time limit for the passage through or stop in another country can be applied to the concept of ‘coming directly’.<sup>34</sup> Article 31(1) applies to persons who have briefly transited other countries or who are unable to find protection in the country or countries to which they flee.<sup>35</sup> The term ‘coming directly’ does not however cover situations where a refugee has found asylum or where there may have had a reasonable opportunity to seek and enjoy protection in a previous country *en route*, or if he or she had settled in another country.<sup>36</sup> Where penalties may be applied, they should not involve the criminalisation of irregular entry by asylum-seekers and refugees.<sup>37</sup>
22. Consistent with international refugee and human rights law and standards, detention of asylum-seekers should be avoided, and should be considered only where alternatives which are less

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<sup>31</sup> UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention (Geneva Expert Roundtable, 8-9 November 2001)*, June 2003, available at: <http://www.refworld.org/docid/470a33b20.html>, para 10(a).

<sup>32</sup> According to Article 31(1) of the 1951 Convention provides that “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” See Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex (1950), p. 46, referenced by Noll, G, ‘Article 31,’ in Zimmerman, A. (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary* (Oxford University Press, Oxford, 2011) p. 1249.

<sup>33</sup> UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention (Geneva Expert Roundtable, 8-9 November 2001)*, June 2003, available at: <http://www.refworld.org/docid/470a33b20.html>, para 10(b), “Refugees are not required to have come directly from territories where their life or freedom was threatened”; and UNHCR Executive Committee Conclusion No. 15 (XXX) on *Refugees without an Asylum Country* (1979), para. (h)(iii), “The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account”. See also, 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, available at:

<http://www.refworld.org/docid/3fe9981e4.html>, para. 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.” See also Newman J in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, para. 69, “The Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum. Apart from the current necessity to use false documents another current reality and advance, occurring since 1951, is the development of a really accessible and worldwide network of air travel. As a result there is a choice of refuge beyond the first safe territory by land or sea”. See also G. S. Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection’, in *Refugee Protection in International Law* (2003), pp. 217–218.

<sup>34</sup> UNHCR takes the view that transit of less than three months in another country would still be considered to fulfil the requirements of having come directly.

<sup>35</sup> *Summary Conclusions: Article 31*; Grahl-Madsen, A, *The Status of Refugees in International Law* (1966); Noll, G. in Zimmerman (ed).

<sup>36</sup> See *Summary Conclusions: Article 31*, para. 10(c). See also section I regarding elements which should be considered in assessing whether protection is available in a previous State.

<sup>37</sup> See UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders*, 23 July 2014, A/69/CRP. 1, available at: <http://www.refworld.org/docid/54b8f58b4.html>, principle 2. See also Council of Europe: Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, February 2010, available at: <http://www.refworld.org/docid/4b6a9fef2.html>.

invasive and coercive have been considered to be ineffective in the individual case. Where asylum-seekers are detained, on an exceptional basis as a measure of last resort, detention must be necessary, reasonable in the circumstances and justified for a legitimate purpose, as defined in law. Detention must be for a limited period of time, and decisions to detain or extend subject to procedural safeguards, and in conditions which are humane, dignified and adapted to address specific circumstances and needs of individual asylum-seekers.<sup>38</sup> Where detention is used as a penalty under Article 31(1), it can only be justified if it satisfies the aforementioned human rights safeguards.<sup>39</sup>

23. States are required to afford reception arrangements to asylum-seekers awaiting a determination of their claims which address their basic and any specific needs.<sup>40</sup> At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum-seekers in so far as they relate to humane treatment and respect for basic rights.<sup>41</sup> International human rights law instruments also define basic standards of treatment which apply to all people in the territory of a State party, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, which recognise the right of all people to an adequate standard of living.<sup>42</sup>
24. States parties to the 1951 Convention<sup>43</sup> and other relevant instruments<sup>44</sup> are obliged to issue a Convention Travel Document to refugees to whom they have granted protection who are staying lawfully in their territory, which should be respected by other States parties.<sup>45</sup> States of asylum are required to readmit and to provide protection under international, national and regional law to refugees whom they have recognised.<sup>46</sup> The fact that a refugee may have departed and sought protection in another State does not alone provide grounds to decline to admit him or her to the territory or an asylum procedure, to revoke, cancel or consider refugee status to have ceased, nor to reduce levels of protection or other entitlements on return.
25. Measures aimed at preventing loss of life at sea and at or near borders and along transit routes are required in many circumstances pursuant to States' obligations under the international law of the sea and human rights principles. Such measures need to be designed and implemented in a

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<sup>38</sup> UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>. See also section F, paras 38-42 below.

<sup>39</sup> See UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, available at: <http://www.refworld.org/docid/553e0f984.html>, para 18, n 45.

<sup>40</sup> UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 4. There are also specific binding regional norms defining minimum standards for conditions for asylum-seekers, including the EU Reception Conditions Directive (Directive 2013/EU/32).

<sup>41</sup> See 1951 Convention, Articles 3 (non-discrimination), 4 (religion), 5 (rights granted apart from this Convention), 7 (exemption from reciprocity), 8 (exemption from exceptional measures), 12 (personal status), 16 (access to courts), 20 (rationing), 22 (public education); 31 (non-penalisation of refugees unlawfully in the country), and 33 (*non-refoulement*).

<sup>42</sup> Under the ICESCR, these include the provision of food, clothing and accommodation, which would apply to asylum-seekers otherwise unable to obtain them. It is noted that rights under the ICESCR are to be achieved progressively, taking into account available resources.

<sup>43</sup> 1951 Convention, Article 28 and Schedule. States may nonetheless require a visa or otherwise regulate the entry of a holder of a Convention Travel Document: Schedule, para 14.

<sup>44</sup> See, for example, the OAU Convention, Article 6.

<sup>45</sup> This is particularly evident if the refugee had established habitual residence in the State which granted protection, or is holding a valid Convention Travel Document (Schedule to the 1951 Convention, para 6). The Executive Committee has underlined that Convention Travel Documents should have a wide validity and should contain a return clause: Executive Committee Conclusion No. 13(XXIX) (1978) *Travel documents for Refugees*, para c. See also Executive Committee Conclusion No. 12(XXIX) (1978) on *Extraterritorial Effect of the Determination of Refugee Status*, para (c), referring to the 'desirability for maintenance and continuity of refugee status'; para (d), noting that refugees maintain their status unless they fall under a cessation or exclusion clause.

<sup>46</sup> See Executive Committee Conclusion No. 12(XXIX) (1978) *Extraterritorial effect of the determination of refugee status*, para (b) on maintenance and continuity of refugee status; No. 15 (XXX) (1979) on *Refugees without an Asylum Country*.



manner consistent with international and regional human rights and refugee law. Efforts by States to address transnational crime, including smuggling and trafficking in persons, must also be carried out in conformity with relevant human rights and refugee protection obligations.<sup>47</sup> International law requires respect for the human rights of victims of these crimes, including individuals who may be compelled to cooperate with traffickers or smugglers. People who have been the object of smuggling are not liable to criminal prosecution for smuggling offences,<sup>48</sup> including asylum-seekers who use the services of smugglers to facilitate their journey to a country where they seek asylum.

26. Once an asylum-seeker who has moved onwards from a previous State is admitted to the territory and an asylum procedure, she or he is entitled to be treated in accordance with the rights applicable to all asylum-seekers, including to humane treatment and applicable legal and procedural safeguards.
27. Asylum-seekers and refugees have duties and obligations towards States in which they have requested or received protection, including to respect national laws and measures to maintain public order.<sup>49</sup> They are also obliged to cooperate with asylum and other legal procedures.<sup>50</sup>

#### **D. International solidarity and cooperation to share responsibilities**

28. International cooperation remains a core principle of the international refugee protection system, as well as of international law more broadly.<sup>51</sup> The Preamble to the 1951 Convention acknowledges that refugee movements and associated protection challenges are inherently transnational and cannot be addressed by any one State alone.<sup>52</sup> This includes onward movement of asylum-seekers and refugees across borders, which by definition implicate different States. All countries bear obligations toward refugees and need to play their part; no State can or should be called upon to respond alone, especially in situations of large-scale movement. When global or regional systems are unbalanced and dysfunctional, pressure and impact are felt not only by directly concerned States, but by others in their regions and beyond.
29. States and UNHCR have sought for a number of years to develop modalities and frameworks for responding collectively to the issue.<sup>53</sup> These discussions have acknowledged that there are often

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<sup>47</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/4720706c0.html>. Article 14 of the Protocol (the 'saving clause' provides that '(1) Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein').

<sup>48</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, Article 5, available at <http://www.refworld.org/docid/479dee062.html>.

<sup>49</sup> Article 2, 1951 Convention.

<sup>50</sup> UN High Commissioner for Refugees (UNHCR), *Rights and Duties: Relevant to Asylum-seekers*, 30 September 2011, available at: <http://swigea56.hcrnet.ch/refworld/docid/4e92c7052.html>

<sup>51</sup> See Charter of the United Nations, Articles 1, 13, 55 and 56, <http://www.un.org/en/documents/charter/index.shtml> (hereafter 'UN Charter'); Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, 4<sup>th</sup> Principle, <http://www.unhcr.org/refworld/docid/3dda1f104.html>

<sup>52</sup> 1951 Convention, Preamble, para 4.

<sup>53</sup> See, for example, discussions on a proposed common framework of international cooperation to share burdens and responsibilities: UN High Commissioner for Refugees, *Summary Conclusions: Expert Meeting on International Cooperation to Share Burdens and Responsibilities*, 28 June 2011, available at: <http://www.refworld.org/docid/4e9fed232.html>. See also Executive Committee Conclusion No. 58(XL) 1989, which concluded that irregular onward movement 'can only be effectively met through concerted action by governments in consultation with UNHCR, aimed among other things at removing or mitigating the causes of such irregular movement through the granting and maintenance of asylum and the provision of necessary durable solutions..' (para e(ii)). See also Executive Committee Conclusion No. 15 (XXX) (1979) on

justifiable reasons why refugees or asylum-seekers feel impelled to move onward.<sup>54</sup> While there remains no agreed overarching multilateral framework, neither at the international nor in many regional contexts, on how to respond comprehensively to onward movements, some arrangements exist at bilateral or regional level which aim to clarify which State is responsible to determine the claim of asylum-seekers and afford protection to refugees who require it. There are also examples of burden- and responsibility-sharing initiatives to support front-line States through relocation arrangements. Such arrangements, where they provide for the allocation of responsibility for determining international protection claims made by persons who have moved onward, based on defined, rational criteria and explicit commitments to accept and fulfil protection responsibilities in line with basic safeguards and standards, may be beneficial both for States and for asylum-seekers. They could help ensure that people in need of protection will be assured of access to a fair examination of their protection claims; while reducing the lack of clarity among States regarding where responsibility for determining claims and affording protection should lie. However, experience of such arrangements has underlined the vital importance of safeguards and judicial oversight to ensure their implementation respects fundamental rights and protection responsibilities.<sup>55</sup> To maximise their effectiveness and sustainability, such arrangements need to provide for asylum-seekers' rights as well as their reasonable and well-informed intentions to be taken into account regarding the State which shall be responsible to determine his or her claim and provide protection.<sup>56</sup>

30. At the same time, cooperative arrangements which simply provide for allocation of responsibility will not of themselves serve to obviate the need or compulsion for onward movement.<sup>57</sup> For this purpose, international cooperation should also seek to address the causes of onward movement, including by assisting States to provide protection and solutions more effectively. Cooperation among States to address onward movement should be undertaken in good faith and constitute genuine efforts to share burdens and responsibilities, and not 'burden-shifting' or other attempts to avoid responsibilities under international law.<sup>58</sup>
31. Examples of international or regional cooperation which can provide a basis for addressing the need for and responding to onward movements may include:

*Strengthening protection capacity*

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*Refugees without an Asylum Country*; No. 85(XLIX) (1998) on *International Protection*, among others; efforts undertaken in the context of Convention Plus, summarised in UN High Commissioner for Refugees, *Convention Plus Core Group on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers: Joint Statement by the Co-Chairs*, 8 November 2005, FORUM/2005/7, available at: <http://www.refworld.org/docid/46b6ee6a2.html>;

<sup>54</sup> Executive Committee No. 58(XL) (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*, paras (g), (b), (c)(v).

<sup>55</sup> On the EU's Dublin Regulation, see European Court of Human Rights, *M.S.S. v Belgium and Greece*, Application 30696/09, 21 January 2011; Court of Justice of the European Union, *N.S. v Secretary of State for the Home Department and M.E. and others v Refugee Applications Commissioner and others*, Joined cases C-411/10 and C-439/10, 21 December 2011. For a critique of the Dublin system in Europe, including European Council of Refugees and Exiles, ECRE, *Dublin II Regulation: Lives on Hold* (Brussels, 2013), available at: <http://ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html>; Jesuit Refugee Service (2013) *Protection Interrupted: The Dublin Regulation's Impact on Asylum Seekers' Protection* (Brussels, 2013). Available from [www.jrs.net/assets/publications/file/protection-interrupted\\_jrs-europe.pdf](http://www.jrs.net/assets/publications/file/protection-interrupted_jrs-europe.pdf).

<sup>56</sup> See discussion of possible arrangements for allocation of responsibility which are non-coercive and take asylum-seekers' intentions into account, in E. Guild, C. Costello, M. Garlick, and V. Moreno-Lax, *Enhancing the Common European Asylum System and alternatives to Dublin: Study for the European Parliament's Committee on Civil Liberties, Justice & Home Affairs* (PE 519.234), July 2015, ch 3; [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU\(2015\)519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf).

<sup>57</sup> 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>, paras 23-25, underlining the importance of situating such arrangements within a broader framework that seeks to respond to the causes of onward movement.

<sup>58</sup> 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>.

- a. **Strengthening and harmonizing protection frameworks and capacity in countries and regions of origin and transit:** States hosting refugees in countries and regions of origin and transit, with the support of UNHCR and other partners, need to seek and use opportunities to strengthen their ability to provide protection in line with their obligations and operate asylum systems which reflect international standards and good practice. Experience shows that developing and strengthening the rule of law, as well as legislation and institutions to uphold it, can contribute to ensuring greater security and respect for fundamental rights in host countries, including those of asylum-seekers and refugees, alongside their host communities; and increasing the prospects of security and stability of stay.<sup>59</sup> Adopting legislation and procedures on refugee protection, asylum and related matters, and ensuring their effective application, as well as establishing institutions and services for asylum-seekers and refugees can contribute to the reduction of incentives for individuals to move onward in search of protection, security and solutions.<sup>60</sup>
- b. **Initiatives for people with specific needs,** including children and other groups which may be at risk, which can help identify and address those needs through monitoring, guardianship, measures to ensure safety, medical treatment and other forms of support where required, may also help to ensure these groups have viable alternatives to onward movement and thus reduce their exposure to the further risks such movement may entail.<sup>61</sup>
- c. **Including refugees in wider development strategies:** International donors, including States in the industrialised world, are also urged to work with host States in these regions to support them in strengthening refugee protection, as well as cooperating with them to address wider development needs. It is widely recognised that development policies and support should take into account refugee and migratory movements, in acknowledgement of the fact that such assistance can support host communities respond to the challenges related to such movements, but also to harness the potential of refugees and asylum-seekers to contribute to favourable economic and other conditions in their host countries and communities.<sup>62</sup>

*Multilateral and/or bilateral arrangements allocating responsibility for asylum claims*

- d. **Cooperative approaches to the handling of asylum claims by people who have moved onward:** Region-specific arrangements can contribute to the expedient and fair processing of asylum applications in all relevant States, and be a first step towards establishing more uniform and consistent asylum procedures across countries, including

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<sup>59</sup> For examples of activities aimed at addressing needs to improve conditions and protection in the key areas of child protection, education and prevention and responses to sexual and gender-based violence, see UN High Commissioner for Refugees, *Note on International Protection*, A/AC.96/1134, 9 July 2014.

<sup>60</sup> See, for example, efforts undertaken to support development of South Africa's refugee protection system, including capacity for refugee status determination, as well as provision of protection more broadly: UNHCR, *State of the World's Refugees: In Search of Solidarity* (Oxford University Press, Oxford, 2012) Chapter 2, 52-53.

<sup>61</sup> Specific strategies to address the risk of dangerous onward movement of children, including through trafficking and smuggling, have included UNHCR's *Child Protection Regional Initiative - Live, Learn & Play Safe 2014-2016*, 2014, available at: <http://www.refworld.org/docid/53bbc6314.html>. Initial impact assessments have concluded that measures to identify unaccompanied separated children, strengthen child protection systems, enhancing alternative care arrangements, family reunification and education and livelihood opportunities have reduced onward movement from camps in participating countries, increased participation in education, addressed problems with alternative care and contributed to other positive developments: UNHCR, *Child Protection Impact Assessment – Khartoum, Sudan: Live, Learn and Play Safe*, March 2015.

<sup>62</sup> For a discussion of some of the opportunities and challenges around linking development and refugee assistance strategies and programmes, see T. Alexander Aleinikoff, *From Dependence to Self-Reliance: Changing the Paradigm in Protracted Refugee Situations*, Migration Policy Institute, May 2015, <http://www.migrationpolicy.org/research/dependence-self-reliance-changing-paradigm-protracted-refugee-situations>.

as regards their application to people who have moved onward.<sup>63</sup> The strengthening of asylum procedures can be complemented by the establishment of differentiated processes and procedures for persons who are not seeking international protection but who may have other humanitarian needs,<sup>64</sup> as well as dignified, sustainable and timely return of persons without international protection needs, and who are not otherwise entitled to stay, to their countries of origin.<sup>65</sup>

*Solutions and alternative opportunities for lawful stay or migration*

- e. **International cooperation in support of solutions:** Building on their existing engagement and contributions, States need to redouble collective efforts to ensure that the traditional solutions for refugees – resettlement, voluntary return and local integration – are available in practice to enable people not only to live in safety, but to restart their lives. Unless there is access to solutions which can enable refugees and their families to do so in a timely way, many will feel compelled to move onward. International cooperation thus needs to focus on developing new approaches, and initiatives aimed at identifying solutions which put refugee rights, dignity and self-reliance at the forefront of humanitarian action, and aim to assist refugees to achieve self-reliance and participate in economic activity, could provide important new opportunities in this area.<sup>66</sup> Solutions-oriented approaches that can be applied from the outset of displacement crises are also being developed, and warrant wider international support and participation.<sup>67</sup> Comprehensive approaches to achieving solutions for refugees in protracted situations also remain essential. The need has been acknowledged for a shift away from long-term care and maintenance towards self-reliance and solutions-oriented planning, undertaken in partnership between concerned governments, displaced persons, host communities, development actors and others.<sup>68</sup> Work undertaken in the context of the Solutions Alliance, which aims to promote and enable the transition for displaced persons away from dependency towards increased resilience, self-reliance and development, could contribute to this, given sufficient investment and participation.<sup>69</sup>
- f. **Provision of alternative rights to stay:** in some cases, it may be possible for refugees or asylum-seekers to seek another legal right to stay in a current State which may offer them

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<sup>63</sup> Joint or regional reception arrangements or processing may also be envisaged (see e.g., UN High Commissioner for Refugees, *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.refworld.org/docid/4cd12d3a2.html>).

<sup>64</sup> See section H below. In addition, specific measure and approaches might be required to address the needs of children, elderly persons, those with medical needs, victims of trafficking and women at risk: UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 6.

<sup>65</sup> See section J below. See also UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 9.

<sup>66</sup> See UN High Commissioner for Refugees, *Solution Strategies*, 63rd meeting of the Standing Committee, EC.66/SC/CRP.15 <http://www.unhcr.org/5596446f9.pdf>

<sup>67</sup> See ongoing work on a multi-annual *Protection and Solutions Strategy* to be released in 2016: UN High Commissioner for Refugees, *Solution Strategies*, 63rd meeting of the Standing Committee, EC.66/SC/CRP.15 <http://www.unhcr.org/5596446f9.pdf>, Section III, para 9.

<sup>68</sup> UN High Commissioner for Refugees (UNHCR), *Update on solutions*, 6 June 2014, EC/65/SC/CRP.15, available at: <http://www.refworld.org/docid/542cfe634.html>

<sup>69</sup> The Solutions Alliance was launched at the Copenhagen Roundtable held on April 2-3, 2014. The Roundtable brought together an inclusive range of humanitarian actors, development organisations, affected states, donor nations, academics, the private sector, civil society and other actors. Its subsidiary objectives include supporting innovative solutions and concrete operations in selected displacement situations; helping shape the global policy agenda, including the post-2015 development agenda and the New Deal process, to recognise displacement as a development challenge as well as a humanitarian and protection issue; and ensure that a diverse and growing group of partners form a vibrant network and maximise the impact of their individual efforts based on the Alliance's principles and objectives as specified in the Mission Statement. See <http://www.solutionsalliance.org>

swifter access to protection on a temporary or longer-term basis, and potentially greater legal security or other rights than their existing status. This could be used as part of national or regional strategies.

- g. **Making available economic and other opportunities** in countries of asylum an important component of national asylum systems. For example, the ability to engage in decent work – whether through the labour market or self-employment - is a fundamental human right, integral to human dignity and self-respect. For refugees and asylum-seekers in particular, it can be crucial to their survival and self-sufficiency and reduce reasons for onward movements. It contributes to stabilise populations. Lack of access to education is another often-cited reason why families move onward. Investing in refugee education contributes to increasing protection space and the scope for durable solutions.<sup>70</sup>
- h. **Access to and availability of safe alternative migration channels:** the creation of safe and legal alternative options to move for refugees and asylum-seekers to move onwards, including for the purpose of joining family members (including extended family), in order to work, to study and for humanitarian reasons are important steps towards reducing impulsion to undertake onward journeys which may be irregular, hazardous and employ criminal smuggling networks. Such alternative routes include the establishment or increased use of resettlement and other forms of humanitarian admission, using existing legal channels, such as family reunification, labour and study visa schemes; and other forms of regular entry.

*Information, data collection and analysis*

- i. **Information and communication strategies:** Information strategies, counselling services, helplines, electronic media and other means of communication and information-sharing can be used more effectively to inform asylum-seekers and refugees contemplating onward movement about the options open to them and realistic prospects in current or other States. Accurate information may help to ensure fully informed choices about their next steps, to manage expectations about life in other States, warn of the dangers of irregular travel, smuggling and trafficking and provide information on available channels for legal migration,<sup>71</sup> as well as explaining the potential consequences of failing to engage in the asylum procedure or other formal processes, or cooperating with authorities.
- j. **Data collection and analysis:** Better research and data collection, sharing and analysis between States on onward movements may help States identify the causes of onward movement, and take measures to address these. This can include gathering statistical data on asylum-seekers and refugees, as well as people with specific needs within these groups, in disaggregated form; aligning statistical recording methods between agencies and states to ensure greater comparability, and others.<sup>72</sup>

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<sup>70</sup> See UN High Commissioner for Refugees (UNHCR), *UNHCR Education Strategy, 2012-2016*, 28 February 2012, available at: <http://www.refworld.org/docid/4f4cd9812.html>

<sup>71</sup> UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 10. See also acknowledgement of the importance of such information strategies as acknowledged in discussions among States in regional fora, for example, the Rabat Process (Euro-African Dialogue on Migration and Development), Thematic Meeting on Asylum and International Protection, Co-chairs' Conclusions, para 13, [http://processusderabat.net/web/uploads/Rabat2015/EN/EN\\_summary-of-debates-and-conclusions\\_Rabat-2015\\_final.pdf](http://processusderabat.net/web/uploads/Rabat2015/EN/EN_summary-of-debates-and-conclusions_Rabat-2015_final.pdf)

<sup>72</sup> For a range of statistical and data tools and sharing arrangements undertaken at regional level in different parts of the world, see UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 2, Chapter 8.

## *Combatting trafficking and smuggling*

- k. Measures to combat smuggling and trafficking:** trafficking and smuggling of people are international crimes that require international cooperation among states to tackle them effectively. Processes have been launched in different regions worldwide to strengthen and coordinate efforts to combat these phenomena, including law and order measures and through reinforced efforts to identify, prosecute and penalise the perpetrators.<sup>73</sup> Trafficking and smuggling can have devastating effects on individuals, including asylum-seekers and refugees who resort to the services of smugglers in the absence of accessible safe and legal routes to protection, as well as those who fall victim to traffickers during their journeys. International efforts to develop and implement responses to trafficking and smuggling need to ensure that safeguards are included in preventive measures and strategies, to ensure that people in need of protection can secure access to asylum procedures where needed, and will not be punished because they have been subject of trafficking or smuggling activity.<sup>74</sup>

### *Protection at sea and disembarkation*

- l. Rescue at sea and disembarkation:** In many parts of the world, asylum-seekers and migrants travel by sea in life-threatening circumstances, along dangerous maritime routes and typically in unseaworthy vessels. States carry vital responsibilities under international maritime law for search-and-rescue services and coordination in their Search and Rescue zones. Additionally, shipmasters who encounter people or vessels in distress at sea, or who are called upon to participate in rescue operations, have obligations to assist, regardless of the nationality, status or the circumstances in which those in distress are found.<sup>75</sup> Regional cooperation plays an important role in ensuring that there is preparedness and capacity to undertake search and rescue when required.<sup>76</sup> Wherever asylum-seekers are rescued at sea, or intercepted in the course of maritime border control operations, disembarkation should take place promptly in a place where they can have access to asylum procedures, non-detention responses and to dignified treatment pending outcomes of their cases.<sup>77</sup>

## **OPTIONS FOR GOVERNMENTS IN RESPONDING TO ONWARD MOVEMENT**

### **E. Protection-sensitive entry systems**

33. States have the sovereign right to control their borders, within the limits of international law. Protection-sensitive entry systems aim to take into account the protection needs of individuals seeking access to State territory, and the duty of States to respect their obligations under international human rights and refugee law. Such systems should ensure that legitimate measures

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<sup>73</sup> See, for example, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational crime (<http://www.baliprocess.net>); Declaration of Intent and Plan of Action adopted at the African Union, *Ministerial Conference on Human Trafficking and Smuggling in the East and Horn of Africa* in Khartoum in October 2014. (<http://italia2014.eu/media/3785/declaration-of-the-ministerial-conference-of-the-khartoum-process.pdf>) and activities undertaken under the auspices of the Khartoum Process.

<sup>74</sup> See para 25 above.

<sup>75</sup> See UN High Commissioner for Refugees (UNHCR), International Maritime Organisation (IMO) and International Chamber of Shipping, *Rescue at Sea. A Guide to Principles and Practice as Applied to Refugees and Migrants*, January 2015, available at: <http://www.refworld.org/docid/54b36554.html>

<sup>76</sup> For example, in the European Union, joint border patrol operations conducted by Member State vessels under coordination of the EU's border agency Frontex were strengthened in 2015, to increase their capacity to undertake search and rescue efforts. See also discussions at regional level, for example, in the context of the Bali Process, *Regional Roundtable on Irregular Migration by Sea in the Asia-Pacific Region*, March 2013. See also UN High Commissioner for Refugees, *Refugees and Asylum-Seekers in Distress at Sea - how best to respond?*, 5 December 2011, available at: <http://www.refworld.org/docid/4ede0d392.html>.

<sup>77</sup> See UN High Commissioner for Refugees (UNHCR), *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>

to control entry are not applied arbitrarily and that they allow asylum-seekers to be identified and granted access to a territory where their protection needs can be assessed.<sup>78</sup>

34. Asylum-seekers and refugees may not be rejected arbitrarily at frontiers, and must be admitted to the territory, where denial of entry could lead to *refoulement*.<sup>79</sup> States are also bound by the principle of *non-refoulement* wherever they exercise control or jurisdiction over refugees, including where they act outside their territory.<sup>80</sup> Summary denial of access to registration or to asylum procedures by persons seeking protection should not occur. This includes those who are believed to have moved on from a previous State where they had or could have sought protection, whether on the basis of the concerned person's presumed nationality, profile, or of unverified assumptions about his or her travel routes or status.
35. Protection-sensitive entry systems need to ensure that entry officials, including border official, law enforcement officers and others who may be the first point of contact between asylum-seekers and State authorities, are aware of basic principles of human rights and refugee law, including the principle of *non-refoulement*, and of national provisions which reflect the State's relevant obligations. Operational guidelines, training and other relevant tools that can clarify standards of treatment that should be applied to asylum-seekers, as well as how to identify and refer them appropriately, are important aspects of good practice in this area.<sup>81</sup> Cooperation with international and non-governmental organisations with knowledge and experience of asylum law and the needs of asylum-seekers and refugees are also potentially useful for States in addressing arrivals, and can bring additional resources and expertise into the process. The establishment of Independent monitoring mechanisms can also ensure that gaps or problems in practice at entry points can be identified or addressed.<sup>82</sup>
36. The establishment of profiling or screening and referral mechanisms, upon or after arrival in the territory, may represent a useful tool for some States in managing the arrival of asylum-seekers in mixed movements, including those who have moved on from other States.<sup>83</sup> Profiling/screening refers in this context to a non-binding process that precedes any formal status determination procedures and aims to differentiate between categories of persons travelling as part of mixed migratory movements, including asylum-seekers.<sup>84</sup> It can enable the identification of specific needs (for example, asylum-seekers or refugees who may require medical or other forms of treatment or assistance, and people with particular vulnerabilities, or those have been trafficked from a previous State and who will require particular attention or support).<sup>85</sup> It also affords an opportunity to provide information to asylum-seekers about their rights and obligations, including

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<sup>78</sup> UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 3.

<sup>79</sup> Executive Committee Conclusion No. 15(XXX)(1979) on *Refugees without an Asylum Country*, para (j). See Lauterpacht, E. and Bethlehem, D. 'The Scope and Content of the Principle of *non-refoulement*: Opinion' in Feller, E., Türk, V. and Nicholson, F. (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003, Cambridge University Press, Cambridge), page 115, para 67. For further discussion of this subject, see Goodwin-Gill, G. and McAdam, J. *The Refugee in International Law* (3<sup>rd</sup> edition), (2007, Oxford University Press, Oxford), pp. 277, 244.

<sup>80</sup> See *Hirsi Jamaa and others v Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>.

<sup>81</sup> UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 3, section 3.1

<sup>82</sup> *Ibid*, sections 3.4, 3.7.

<sup>83</sup> For further details on managing irregular mixed movements, including protection sensitive entry systems, reception arrangements and differentiated processes and procedures, see: UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapters 3–6.

<sup>84</sup> Core elements of 'profiling and referral mechanisms' include: providing information to new arrivals, gathering information through questionnaires and informal interviews, establishing a preliminary profile for each person, and counselling and referring individuals to authorities or procedures that will be best suited to management of their case ("differentiated processes and procedures"). See: UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 5.

<sup>85</sup> See further: UNHCR, *Trafficking in Human Beings*, available at: <http://www.refworld.org/thb.html>.

in the asylum procedure,<sup>86</sup> and counselling for the purpose of referral to relevant procedures, services and support, as required.<sup>87</sup> It can also permit States to gather information from individuals, subject to confidentiality and protection of data, which can assist in improving responses to onward and mixed movements more generally.

37. Profiling/screening processes can also permit States to identify people who have moved onward for the purpose of referring them to specific procedures, where they are in place, for determining these categories of claims.<sup>88</sup> It may however not always be possible at the point of entry to determine whether a person requesting asylum has transited or stayed in, or sought or received asylum in a particular State. In case of doubt, such people should be referred to the regular asylum procedure. Profiling/screening in this context should be seen as a case management tool, and not as a substantive procedure with legally binding outcomes that determine the person's rights or status.

#### **F. Detention and alternatives to detention**

38. States' responses to the management of irregular entry, including that of asylum-seekers and refugees in the context of onward movement, are varied and may include the imposition of detention and/or alternatives to detention. To remain in conformity with international law, alternatives to detention need to be considered prior to a detention decision and detention should only be used as a last resort. The fact that an asylum-seeker has moved onward from another country where he or she had or could have sought protection is not per se a legitimate ground for detention. Legitimate purposes are limited to those of public order, public health or national security.<sup>89</sup>

39. While onward movement presents particular challenges to asylum and migration governance when on a large-scale, State practice increasingly shows that alternatives to detention can meet these concerns while taking account of the asylum-seekers' rights and particular circumstances. In large-scale situations, rarely is State capacity adequate to detain large numbers of persons, requiring the State to consider and implement a range of alternative measures. Further, any deprivation of liberty must be taken on an individual basis under international law, and while minimum periods in detention for the purposes of identity or health checks are acceptable, any extension of that period needs to be properly justified.<sup>90</sup>

40. Considerations such as the escalating costs of immigration detention,<sup>91</sup> the effectiveness of non-detention responses<sup>92</sup> and the well-documented harmful effects of detention on those detained have prompted many governments to review their detention policies and to consider a range of less coercive options appropriate to the individual case. These include such alternatives as:<sup>93</sup>

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<sup>86</sup> UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, section 5.1.1.

<sup>87</sup> UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, section 5.2.1.

<sup>88</sup> See section on processing strategies.

<sup>89</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>.

<sup>90</sup> Ibid.

<sup>91</sup> Alternatives to detention have been shown to be nearly universally more cost-effective than detention: see Executive Committee of the High Commissioner's Programme, Standing Committee, 63<sup>rd</sup> Meeting: *Introduction to CRP.12 on Alternatives to Detention*, June 2015, available at: <http://www.unhcr.org/559643e59.pdf>.

<sup>92</sup> Alternatives to detention have also shown to achieve high – higher than 95% in some cases – compliance rates, see Executive Committee of the High Commissioner's Programme, Standing Committee, 63<sup>rd</sup> Meeting: *Introduction to CRP.12 on Alternatives to Detention*, June 2015, available at: <http://www.unhcr.org/559643e59.pdf>.

<sup>93</sup> For more information on alternatives to detention and their implementation please see, UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, available at: <http://www.refworld.org/docid/5523e8d94.html> and UNHCR, *Options Paper 2: Options for governments on open reception and alternatives to detention*, available at <http://www.refworld.org/docid/5523e9024.html>.



- Deposit or surrender of documentation
- Reporting
- Designated or directed residence
- Alternatives based on bail or bond
- Supervision or case management in the community.

41. Screening is a key component of successful asylum and migration systems and vital to the implementation of alternatives to detention, as it allows for better case by case determination of the possible necessity and proportionality of any decision to detain. Screening involves identity, security and health checks, as well as importantly the detection of specific vulnerabilities.<sup>94</sup> Screening helps minimise reliance on detention, by supporting the early identification of persons with protection needs and, if applicable, their channelling into the most appropriate alternative to detention suited to the individual circumstances and needs.<sup>95</sup>

42. Case management is another feature of successful alternatives to detention. Although case management operates differently in different contexts, it is generally understood to be a strategy for supporting and managing individuals and their asylum/migration claims and other needs, and can be an integral part of the success of alternatives to detention. It helps orient and support individuals to navigate the asylum/migration system, while also responding to their individual needs to allow them to engage fully with those processes. Case management may involve legal representation and, in the case of unaccompanied or separated children, would need to include guardianship arrangements. Alternatives to detention work in practice when they are developed and implemented in a way that is context-specific, taking into account the particularities of each situation/country context. A holistic approach to alternatives to detention is required, in the sense that they should identify and address individual needs in a comprehensive way, exploring all available options to resolve individual cases. Furthermore, successful alternatives will frequently involve joint Government and civil society collaboration and the clear delineation of roles and responsibilities, especially between the support, case management and service provision functions and any compliance or enforcement aspects.<sup>96</sup> Alternatives to detention are also applicable in the returns context and, combined with case management, have been shown to result in solid voluntary return/independent departure rates.<sup>97</sup>

## G. Reception conditions

43. States are required to treat asylum-seekers in accordance with international human rights and refugee law standards.<sup>98</sup> Most asylum-seekers arrive without the means of support in an asylum country, and require assistance in the form of reception conditions which address their basic needs, and which can afford them a dignified standard of living.<sup>99</sup>

<sup>94</sup> Particularly vulnerable groups or individuals include children, torture survivors, asylum-seekers and victims of past persecution, victim of trafficking, physical or mental disabilities, elderly, pregnant or nursing mothers, or parents with a primary caretaker responsibility, as well as persons with serious physical illness, serious mental illness, or differing sexual orientation/gender identity.

<sup>95</sup> For further information on screening see UNHCR, *Second Global Roundtable on Reception and Alternatives to Detention: Summary of Deliberations*, August 2015, available at: <http://www.refworld.org/docid/55e8079f4.html>.

<sup>96</sup> For further information on the success factors in implementing alternatives to detention, see: Executive Committee of the High Commissioner's Programme, Standing Committee, 63<sup>rd</sup> Meeting: *Introduction to CRP.12 on Alternatives to Detention*, June 2015, available at: <http://www.unhcr.org/559643e59.pdf>.

<sup>97</sup> Ibid.

<sup>98</sup> See para 23 above. See also UN High Commissioner for Refugees, *Global Consultations on International Protection: Reception of asylum-seekers, including standards of treatment in the context of individual asylum systems*, 4 September 2001, EC/GC/01/17, para 11. UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>.

<sup>99</sup> UN High Commissioner for Refugees, *Global Consultations on International Protection: Reception of asylum-seekers, including standards of treatment in the context of individual asylum systems*, 4 September 2001, EC/GC/01/17, para 11. In

44. Where they require accommodation, good practice entails the provision of adequate accommodation by the State. UNHCR supports the right of asylum-seekers to freedom of movement and residence, and use of alternatives to camps which can ensure that refugees are protected and assisted effectively and enabled to achieve solutions.<sup>100</sup> Recognising the considerable pressures that large refugee populations may place on resources and services that may strain to meet the needs of local people,<sup>101</sup> States are encouraged to develop legal, policy and administrative frameworks in host countries which provide for the exercise by asylum-seekers of free movement and other rights as members of the communities in which they are living.<sup>102</sup> Allowing asylum-seekers to work can reduce the costs to States of supporting those who do not have other means of subsistence.<sup>103</sup> Where access to employment is restricted or unavailable, financial assistance will also be required, at least at the level of the minimum social welfare support available in the State to cover essential living expenses, such as food and clothing.<sup>104</sup> Health care in principle should be available throughout the asylum procedure,<sup>105</sup> as a minimum involving emergency care, if available, and preferably free of charge. Special measures are needed to ensure family unity such as family-oriented living arrangements.<sup>106</sup> Asylum-seekers should be able to trace family members, with State support, which may be particularly necessary following onward movement from one or more previous States as families may be separated, or may have travelled onward in order to reunite with family members. Asylum-seeking children are entitled under international law to education and other basic rights,<sup>107</sup> and they and other asylum-seekers with specific needs, including victims of trauma, elderly asylum-seekers and others, will often require access to special facilities and support.<sup>108</sup>
45. There is no basis in international or regional human rights law for reducing reception conditions or standards of treatment of asylum-seekers or refugees on grounds that they have moved onward from a previous State. Moreover, reducing standards of reception conditions may make it more difficult for asylum-seekers to pursue their claims effectively and submit all the necessary information and evidence to asylum authorities. It is recognised that States face challenges in meeting the costs associated with reception conditions, as well as the risk of misuse by people who may not require protection, and pressures in situations of large-scale arrivals. However, best

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the EU context, see UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>

<sup>100</sup> See UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Alternatives to Camps*, 22 July 2014, UNHCR/HCP/2014/9, available at: <http://www.refworld.org/docid/5423ded84.html>, 'Objectives', p 6.

<sup>101</sup> See UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, available at: <http://www.refworld.org/docid/4ab8e7f72.html>

<sup>102</sup> See UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Alternatives to Camps*, 22 July 2014, UNHCR/HCP/2014/9, available at: <http://www.refworld.org/docid/5423ded84.html>, p 8, 10.

<sup>103</sup> UN High Commissioner for Refugees, *Global Consultations on International Protection: Reception of asylum-seekers, including standards of treatment in the context of individual asylum systems*, 4 September 2001, EC/GC/01/17, para 13.

<sup>104</sup> ICESCR, Article 11(1).

<sup>105</sup> The right to health is enshrined in UDHR Article 25; ICESCR Article 12(1), and for children, the Convention on the Rights of the Child, Article 24(1). See also ICESCR General Comment No. 14 on the right to the highest attainable standard of health, which specifies that States are under an obligation to respect the right to health by refraining from denying or limiting equal access for asylum-seekers to preventive, curative and palliative health services (HRI/GEN/1/Rev.5, para. 34).

<sup>106</sup> See Article 8 of the ECHR, the UDHR and the CRC, and see also Article 23 of the ICCPR; see also Executive Committee Conclusion No. 22 (XXXII) (1981) on *Protection of asylum-seekers in situations of large scale influx*.

<sup>107</sup> Article 22, 1951 Convention; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>;

Arts 28, 22; Executive Committee Conclusion No. 47 (XXXVIII) (1987) on *Refugee children*; UNHCR Guidelines on Protection and Care of Refugee Children (1994).

<sup>108</sup> UN High Commissioner for Refugees, *Global Consultations on International Protection: Reception of asylum-seekers, including standards of treatment in the context of individual asylum systems*, 4 September 2001, EC/GC/01/17, para 26; UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>.

efforts to provide adequate reception conditions can help ensure that asylum-seekers are in a position to pursue their claim effectively, and enable States to take decisions on their claims accurately and in a reasonable timeframe. Persons who are found not to be in need of international protection, or who are to be transferred to a previous State, are also more likely to engage constructively with the process when they are treated in a dignified and humane way throughout the relevant procedure.

## H. Processing strategies and options

46. Primary responsibility to provide international protection lies with the State in which asylum is sought. UNHCR considers that asylum-seekers and refugees should ordinarily be processed in the territory of the State in which they have arrived, or which otherwise has jurisdiction over them.<sup>109</sup>

### *Large-scale arrivals: prima facie or temporary forms of protection*

47. The recognition of refugee status on a *prima facie* basis is used in many countries in particular to address large-scale arrivals, in cases where individual status determination may be impractical, impossible or unnecessary. It is employed on the basis of readily apparent objective circumstances in a country of origin (or former habitual residence, for stateless persons) which demonstrate a need for refugee protection.<sup>110</sup> Such an approach could be used in appropriate cases for people seeking protection who have moved onward, where the law of the current State provides for *prima facie* recognition, and the facts and evidence warrant its use for the individual or group in question. In such cases, it may relieve the current State of some of the demands of individual status determination of each case on the merits, as status could be granted based on a formal declaration of recognition or an accelerated procedure. It may also serve to ensure a consistent approach between countries to persons fleeing the same country circumstances. Adopting a *prima facie* approach in countries further away from the crisis may, however, encourage and/or promote onward movements to those countries. Consideration of how to balance these consequences, while also taking into account the need for burden-sharing with countries of first asylum, would be needed.<sup>111</sup> A *prima facie* approach may also be used within individual procedures, based on the manifestly founded nature of the claims at hand.<sup>112</sup>
48. Temporary protection<sup>113</sup> has also served as a response to humanitarian crises in different situations in the past, in a manner that is coordinated with and complementary to the 1951 Convention. It is particularly relevant in non-States parties to the 1951 Convention so as to ensure an effective response which can provide a certain level of assistance and protection. At the regional level, arrangements for temporary protection have been seen as a potential means of dealing more effectively with the arrival of significant numbers of asylum-seekers and refugees, which must be predicated on responsibility- and burden-sharing, and is best expressed through situation- or region-specific arrangements. Granted on the basis of categories, groups or scenarios where protection needs are manifest, rather than individual claim assessments, it could assist non-States parties deal with large-scale arrivals, including of people who have moved onwards from previous States. For States parties, temporary protection may serve as an urgent response pending the re-establishment of more predictable and regular responses. While it can be of a limited duration, temporary protection should last as long as protection is needed and should also

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<sup>109</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para 1, available at: <http://www.refworld.org/docid/51af82794.html>.

<sup>110</sup> UN High Commissioner for Refugees, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, CR/GIP/15/11 (2015), available at: <http://www.refworld.org/docid/555c335a4.html>.

<sup>111</sup> *Ibid.* Note however that rejection of a claim is not possible through a *prima facie* process.

<sup>112</sup> *Ibid.*, paras. 40-41.

<sup>113</sup> UN High Commissioner for Refugees, *Summary Conclusions on Temporary Protection* (2012), available at [http://www.unhcr.org.uk/fileadmin/user\\_upload/pdf/Temporary\\_Protection\\_Summary\\_Conclusions\\_final\\_July\\_2012.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/pdf/Temporary_Protection_Summary_Conclusions_final_July_2012.pdf)

envisage a transition to solutions where necessary for people whose protection needs do not cease at the end of the temporary protection period.<sup>114</sup>

*Bilateral or multilateral arrangements regarding transfer of asylum-seekers for the processing of asylum claims and protection*

49. In some cases, a bilateral or multilateral arrangement may exist between a current and previous State for the transfer of asylum-seekers for the purpose of processing their asylum claims. Such an arrangement needs to guarantee that each asylum-seeker will be admitted to the proposed receiving State; will be protected from *refoulement*; will have access to fair and efficient asylum procedures to determine his or her need for international protection and will be treated in accordance with accepted international standards. In order to ensure their effectiveness and sustainability, such arrangements should provide for the reasonable and well-informed intentions of the asylum-seeker to be taken into account regarding the State which shall be responsible to determine his or her claim and provide protection.<sup>115</sup> An individual assessment of the appropriateness of transfer must be undertaken in each case, subject to procedural safeguards, prior to transfer. The asylum-seeker must have an opportunity to challenge the legality of the transfer before a court or tribunal.<sup>116</sup>
50. Similar arrangements may serve as a basis for transfer of an asylum-seeker to a previous State, provided it fulfils the above-mentioned standards and respects the basic principles articulated in relevant UNHCR guidance.<sup>117</sup> If such an arrangement is in place, a current State could exceptionally consider use of admissibility procedures<sup>118</sup> for asylum-seekers who are the responsibility of another State under its terms, incorporating relevant safeguards to permit a person to challenge the presumption that she or he would be able to seek and enjoy protection in that country, where required.

*Accelerated, prioritised or fast-track procedures for asylum-seekers who have moved on from a previous State*

51. Current States may consider specific procedural approaches for asylum-seekers who are believed to have moved onward from a previous State i.e. outside the scope of an arrangement for transfer of asylum-seekers. Accelerated, prioritised or fast-track procedures, which involve adequate procedural safeguards, including a reasonable time for the claim to be submitted and assessed,<sup>119</sup> could enable authorities to deal effectively with claims from people who have moved onward from a previous State. This could include accelerated procedures leading to a positive decision, for example, in case a current State elects to reconfirm the status of a person recognised in a previous State.<sup>120</sup> It could also include accelerated procedures to determine that another State person can seek and enjoy protection in a previous State which is ready to accept responsibility

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<sup>114</sup> See elements of the proposed model framework put forward in a UNHCR-facilitated expert roundtable in 2012 : Ibid.

<sup>115</sup> Executive Committee Conclusion No. 15(XXX) (1979) on *Refugees without an Asylum Country*, para (h)(iii), (iv). UN High Commissioner for Refugees, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (2013) available at <http://www.refworld.org/docid/51af82794.html>.

<sup>116</sup> Ibid, ExCom No. 15(XXX) (1979), para 3(v).

<sup>117</sup> See UN High Commissioner for Refugees, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (2013) available at <http://www.refworld.org/docid/51af82794.html>

<sup>118</sup> See UN High Commissioner for Refugees, *Global Consultations on international Protection, Asylum Processes (Fair and effective asylum procedures)*, EC/GC/01/12, 31 May 2001, section II.A and II.B.

<sup>119</sup> In the EU context, see provisions on accelerated procedures in the EU Asylum Procedures Directive (EU/32/2013) which explicitly require 'reasonable' time limits for accelerated procedures and additional time 'where necessary in order to ensure an adequate and complete examination of the application for international protection': (Article 31(9)).

<sup>120</sup> See also Section I, paras 57-75, on Deciding asylum claims, below.

for him or her, based on an assessment of the availability of protection in that State according to relevant standards, and incorporating adequate procedural safeguards.<sup>121</sup>

52. The fact that an asylum-seeker or refugee has moved onwards does not imply that he or she does not have a well-founded fear of persecution or other need for protection in his or her country of origin. Accordingly, onward movement must not alone constitute grounds to place asylum-seekers into simplified procedures which entail reduced procedural safeguards.<sup>122</sup> If particular procedures are used for assessing the claims of people who are believed to have moved onward, they must be subject to adequate procedural safeguards, including the opportunity to rebut any presumption that the applicant be protected in the previous State; as well as a reasonable timeframe to enable the claim and for relevant evidence to be presented and assessed, and to permit an accurate decision to be made.<sup>123</sup> Reducing the procedural safeguards or restricting or delaying access to different stages in the claim determination procedure for people who have moved onward is unlikely to facilitate claim assessment, but rather may make it more difficult for the applicant to fulfil his or her obligation to cooperate with the procedure.<sup>124</sup>

#### *Seeking information from previous States or UNHCR*

53. If States wish to put queries to the authorities of possible previous States about the previous transit or stay of an asylum-seeker or refugee in that previous State's territory, such inquiries must respect data protection principles. It must be ensured that information about the whereabouts or asylum claim of a person seeking protection does not reach his or her country of origin, due to the potential risk to his or her safety or to that of family members or associates, who may still be in the country of origin or elsewhere.<sup>125</sup> Where it remains unclear whether the person in question has moved onwards, she or he should be admitted to the substantive asylum procedure and his or her claim given a full examination on its merits within a reasonable time. In this connection, the applicant should be given the benefit of the doubt.
54. In certain circumstances, States make inquiries with UNHCR about the possible prior presence or transit of an asylum-seeker or refugee in a country where UNHCR has an operational presence or conducts mandate refugee status determination. However, UNHCR is often not in a position to provide requested information on individual cases for a range of reasons. This is due to strict limits on disclosure regarding asylum applicants,<sup>126</sup> which aim to ensure observance of data protection principles,<sup>127</sup> security of asylum-seekers, refugees and staff, and operational constraints, among others.<sup>128</sup>

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<sup>121</sup> Ibid.

<sup>122</sup> For further guidance on fast-track for manifestly unfounded or clearly abusive claims, see UN High Commissioner for Refugees, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 6, 175ff.

<sup>123</sup> Executive Committee Conclusion No. 30 (XXXIV) (1983) on the *Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum* (<http://www.refworld.org/docid/3ae68c6118.html>). See also UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012, available at:

<http://www.refworld.org/docid/4f3281762.html>, section 21, p 26ff; UN High Commissioner for Refugees (UNHCR), *Observations écrites du HCR devant la Cour européenne des droits de l'homme dans l'affaire I. M. c. France, September 2009, Requête no. 9152/09*, available at: <http://www.refworld.org/docid/4abb61992.html>

<sup>124</sup> See UN High Commissioner for Refugees, *Expert Witness Testimony before the Inter-American Court of Human Rights, Hearing in the case of Pacheco Tineo v Bolivia*, Case 12.474 (March 2013).

<sup>125</sup> See UN High Commissioner for Refugees, *Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information*, 31 March 2005, <http://www.refworld.org/docid/42b9190e4.html>;

<sup>126</sup> UN High Commissioner for Refugees, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 20 November 2003, available at: <http://www.refworld.org/docid/42d66dd84.html>

<sup>127</sup> UN High Commissioner for Refugees, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, May 2015, <http://www.refworld.org/docid/55643c1d4.html>.

<sup>128</sup> See UN High Commissioner for Refugees, *I. A. v. Secretary of State for the Home Department: Case for the Intervener*, 27 October 2013, UKSC2012/0157, paras 31-77, <http://www.refworld.org/docid/52a098e34.html>

55. Careful handling of the cases of recognised refugees who are known to have left a State's territory is required. Should they already be recognised as a refugee and travelling on a Convention Travel Document, for example, their files should be unaltered. States have an obligation to readmit refugees to their territory. States may however need to alert various service providers of their departure, such as social services. Upon their return, service provision may be reactivated and appropriate arrangements should be in place to do so. Importantly, though, where a head of household departs, family members and other dependants who have been granted a form of international protection on derivative grounds should not lose this status and associated rights due to the departure of the principal applicant, unless cancellation, revocation or cessation grounds apply.
56. Where it is apparent that asylum-seekers who have not yet received a decision on their claims have left the territory, their case files may be suspended or closed, depending on the situation of the individual. For example, a case file may be suspended or closed where the claim is deemed to be implicitly withdrawn based on reasonable criteria, including failure to appear on several occasions at scheduled and effectively notified appointments without a reasonable explanation. It is advisable that permanent records of all asylum applications received by the State be maintained, including the recording of suspended and/or closed cases. The ability to re-open files is an important safeguard, especially where bilateral and regional arrangements are in place for the return of asylum-seekers from a current State to the previous State.

### **I. Deciding asylum claims**

57. The fact that a refugee or an asylum-seeker has moved onwards from a previous State is not relevant to his or her well-founded fear of persecution in their country of origin or eligibility for international protection.<sup>129</sup> Similarly, onward movement is not relevant to the credibility of the asylum-seeker's statements regarding his or her fear of persecution or serious harm.<sup>130</sup>

#### ***i. Prior recognition by another State***

58. In the situation where a previously recognised refugee applies for asylum in another State party to the 1951 Convention, the starting point is the general principle that refugee status determined by one State party will be recognised also by another State party.<sup>131</sup> Refugee status as determined in a Contracting State to the 1951 Convention may only be called into question by another Contracting State in exceptional circumstances.<sup>132</sup> States retain, however, their sovereign right to

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<sup>129</sup> Executive Committee Conclusion No. 15 (XXX) on *Refugees without an asylum country* (1979)(h)(iv).

<sup>130</sup> In UNHCR's view, the travel route taken by an asylum-seeker is rarely a fact that is material to his or her need for protection. Inconsistency in or incorrect statements about the travel route should not be seen as affecting the credibility of statements about his or her fear of persecution or serious harm. Given the many factors affecting his or her journey, it cannot be presumed that a person would have sought asylum immediately on reaching a first country which she or he comes to if his or her fear of persecution was genuine: see UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, available at: <http://www.refworld.org/pdfid/519b1fb54.pdf>.

<sup>131</sup> Executive Committee Conclusion No. 12(XXIX) on *Extraterritorial Effect of the Determination of Refugee Status* (1978) para (f).

<sup>132</sup> See Executive Committee Conclusion No. 12(XXIX) (1978) on *Extraterritorial Effect of the Determination of Refugee Status*, para (g) '...refugee status as determined in one Contracting State should only be called into question by another Contracting State in exceptional cases when it appears that the person manifestly does not fulfil the requirements of the Convention, e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention'. The need to respect the decisions of other States, and of UNHCR under its mandate, is not inconsistent with the principle that States are responsible for reaching their own determinations of refugee status, but rather contributes to the maintenance of a consistent

determine an applicant's case on its merits.<sup>133</sup> Consideration on the merits may be warranted, for example where there are good reasons to doubt the refugee status owing to a change in circumstances or an erroneous assessment by the previous State.<sup>134</sup>

59. In appropriate cases and/or where mutual recognition is not permitted by national law, States may find manifestly well-founded or accelerated/prioritised procedures for reaching positive decisions to be useful case management approaches for previously recognised cases. Status may also be granted in the current State on a *prima facie* basis if applicable under national law, and if the requirements are fulfilled.<sup>135</sup> If a negative decision on an applicant's asylum claim was reached in the previous State however, this should not be considered as decisive, particularly in view of the possibility of new circumstances or additional risks that the applicant may have faced or face in her or his country of origin or the previous State.
60. In cases where a person has been recognised as a refugee in a previous State, the current State may apply the 'first country of asylum' concept, and carry out an assessment as to whether protection can be enjoyed in that State and to that end, whether the previous State will accept responsibility for the refugee and is prepared to fulfil its protection obligations in practice. This requires an individual assessment of whether the refugee will be (i) readmitted to the first country of asylum and (ii) be accorded standards of treatment commensurate with the 1951 Convention and international human rights standards including importantly protection from *refoulement*.<sup>136</sup> A legal right of stay is also essential.
61. While accession to relevant international and regional instruments may provide an indicator of whether protection and respect for rights is available, the actual practice of States and their consistent compliance with their obligations should be decisive for determining the availability of such protection.
62. An individual refugee must have an opportunity within the procedure to rebut the presumption that she or he will be protected in the previous State (the presumed 'first country of asylum') based on his or her particular circumstances.
63. Even where the above criteria are met, rejection of a claim on the basis that a previous State is a 'first country of asylum' which is responsible for the applicant may not be appropriate in a number of circumstances, including for example where:
  - a. the security, rule of law and human rights situation in the previous State precludes safe and dignified return; or
  - b. links between the refugee and the current State preclude return (such as extended family links, previous residence or long-term visits, cultural ties or others);<sup>137</sup> or

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and effective international protection system: UN High Commissioner for Refugees, *I. A. v. Secretary of State for the Home Department: Case for the Intervener*, 27 October 2013, UKSC2012/0157, <http://www.refworld.org/docid/52a098e34.html>.

<sup>133</sup> Executive Committee Conclusion No. 12(XXIX) (1978) para (h), '...a decision by a Contracting State not to recognize refugee status does not preclude another Contracting State from examining a new request for refugee status made by the person concerned'.

<sup>134</sup> For example, good reasons to believe that recognition may have been erroneously granted as a result of one or more of the following factors: (a) misrepresentation or concealment of relevant facts/evidence with or without fraudulent intent; (b) misconduct, including threats or bribery; (c) error of fact or law in applying inclusion or exclusion criteria; and (d) misconduct or administrative error. See UN High Commissioner for Refugees, *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: <http://www.refworld.org/docid/41a5dfd94.html>.

<sup>135</sup> UN High Commissioner for Refugees, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, CR/GIP/15/11 (2015)

<sup>136</sup> This includes at least protection from torture and other cruel, inhuman or degrading treatment or punishment; risks to his or her life, or to deprivation of liberty without due process: UN High Commissioner for Refugees, *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, available at: <http://www.refworld.org/docid/3fe9981e4.html>.

<sup>137</sup> Executive Committee Conclusion No. 15(XXX) (1979) on *Refugees without an Asylum Country*, para (h)(iv) refers to the relevance of 'a connection or close links' to a particular State to the question of where an asylum-seeker should be called

c. Other compelling humanitarian reasons apply.

64. In addition to the above, principles of international cooperation, solidarity and responsibility-sharing among States may require that a current State recognise and provide protection to refugees moving onward from other States which are under strain, particularly where a previous State is experiencing a large-scale influx challenging its capacity to receive or protect refugees.<sup>138</sup> The intentions of the asylum-seeker regarding the country in which she or he wishes to request and enjoy protection should, as far as possible, be taken into account.<sup>139</sup>

### *ii. Previous recognition and/or protection by UNHCR*

65. In general, where a person has been recognised as a refugee by UNHCR under its mandate in a previous State, but not by State authorities, the fact of UNHCR's recognition cannot be considered as equivalent to State protection for the purposes of returning an asylum-seeker to that location.<sup>140</sup> UNHCR's mandate recognition may not, for example, always be fully respected in States in which it conducts mandate refugee status determination. By contrast, if a previous State is able and willing to ensure full respect for UNHCR's status determination and accord protection in line with the standards articulated above, then there may be legitimate grounds to return that asylum-seeker to the previous State.

66. In terms of the weight to be given to UNHCR's prior recognition of refugee status within national refugee status determination procedures, there are two general approaches taken by States. In some jurisdictions, UNHCR's prior recognition is accepted as the basis for refugee status without further interrogation, while in others, UNHCR's prior recognition is to be accorded considerable weight subject in the absence of cogent reasons to disregard the decision.<sup>141</sup>

### *iii. Options for asylum-seekers who have sought, or could have sought, protection in a previous State*

67. Where a person has moved onward from a previous State in which she or he applied for protection, a current State may elect not to examine the claim in substance, where the previous State may be considered as safe and agrees to readmit the person. This approach is known in some contexts as the 'safe third country' concept.<sup>142</sup> Where States apply such concepts, they should be

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upon to seek asylum. See also discussion of such connections or links at para 62 below. See also UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.refworld.org/docid/3b36f2fca.html>.

<sup>138</sup> UN High Commissioner for Refugees, *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, available at: <http://www.refworld.org/docid/3fe9981e4.html>; 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>.

<sup>139</sup> Executive Committee Conclusion No. 15(XXX) (1979) on *Refugees without an Asylum Country*, para (h)(iii).

<sup>140</sup> See, *Salah Sheekh v. The Netherlands*, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007, available at: <http://www.refworld.org/docid/45cb3dfd2.html>.

<sup>141</sup> See, e.g., *I.A. v The Secretary of State for the Home Department*, [2014] UKSC 6, United Kingdom: Supreme Court, 29 January 2014, available at: <http://www.refworld.org/docid/52e90d974.html> and *I. A. v. Secretary of State for the Home Department: Case for the Intervener*, 27 October 2013, UKSC2012/0157, available at: <http://www.refworld.org/docid/52a098e34.html>.

<sup>142</sup> Such rules may be designated by another name or without specific categorisation in the law or practice of States. For further explanation of the meaning of 'having found protection' see, e.g., UN High Commissioner for Refugees, *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, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>. See also ExCom Conclusion No. 58 (XL) (1989); as well as the



defined in national law, be justiciable and enforceable before national courts, and conform to the standards described below.

68. In such cases, the current State is required to undertake an assessment on an individual basis of whether there is a previous State which will accept responsibility for the asylum-seeker and is prepared to fulfil its obligations in law and practice towards him or her. This requires an individual assessment of whether the asylum-seeker will be (i) readmitted to the first country of asylum and (ii) be accorded standards of treatment commensurate with the 1951 Convention and international human rights standards including importantly protection from *refoulement*.<sup>143</sup> A legal right of stay is also essential.
69. While accession to relevant international and regional instruments may provide an indicator of whether protection and respect for rights is available, the actual practice of States and their consistent compliance with their obligations should be decisive for determining the availability of such protection.
70. Where there is a connection or close links to the current State,<sup>144</sup> these ought to be taken into account. UNHCR has identified such links as including family relations; previously acquired rights in the current State such as previous residence or long-term visits to the country; and linguistic, cultural or other similar links.. In addition to the existence of such links, UNHCR considers that the safe third country concept should only be applied where it is reasonable for the asylum-seeker to go to the previous State, including with reference to the established link.<sup>145</sup>
71. An asylum-seeker must have an opportunity within the procedure to rebut the presumption of safety and that she or he will be able to access fair and effective asylum procedures or receive protection, if required, based on his or her particular circumstances.<sup>146</sup>
72. Even where the above criteria are met, rejection of a claim on the basis that a previous State is considered a 'safe third country' which is responsible for the applicant may not be appropriate in a number of circumstances, including where:
  - a. The security, rule of law and human rights situation in the previous State precludes safe and dignified return; or
  - b. Other compelling humanitarian reasons apply.
73. In addition to the above, principles of international cooperation, solidarity and responsibility-sharing among States may require that a current State examines the merits of the claims of asylum-seekers who have moved onward from other States which are under strain, particularly those experiencing large-scale influx challenging their capacity to receive and protect asylum-

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Global Consultations on international Protection, *Asylum Processes (Fair and effective asylum procedures)*, EC/GC/01/12, 31 May 2001, section II.A.

<sup>143</sup> This includes at least protection from torture and other cruel, inhuman or degrading treatment or punishment; risks to his or her life, or to deprivation of liberty without due process: UN High Commissioner for Refugees, *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, available at: <http://www.refworld.org/docid/3fe9981e4.html>.

<sup>144</sup> Executive Committee Conclusion No. 15(XXX) (1979) on *Refugees without an Asylum Country*, para (h)(iv) refers to the relevance of 'a connection or close links' to a particular State to the question of where an asylum-seeker should be called upon to seek asylum.

<sup>145</sup> See UNHCR, *UNHCR Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, 9 November 2004)*, February 2005, Comments on Article 27(2)(a), p 37.

<sup>146</sup> UN High Commissioner for Refugees, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, 33, at: <http://www.unhcr.org/refworld/docid/4c63ebd32.html>; UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.refworld.org/docid/3b36f2fca.html>, para 13

seekers and refugees.<sup>147</sup> Current States should consider the reasonable and well-informed intentions of the asylum-seeker regarding the State which shall be responsible to determine his or her claim and provide protection.<sup>148</sup>

74. In case protection in accordance with the above conditions is not available and return to a previous State is not possible, the current State should admit the asylum-seeker to the regular asylum procedure for a substantive examination of his or her claim, and provide protection where required.
75. For asylum-seekers who only transited through a previous State and who never applied for asylum there, the responsibility rests generally with the current State to admit them to the asylum procedure and to assess their claim on the merits.

## **J. Return and readmission to a previous country**

76. States are not permitted to expel a refugee who is lawfully in their territory except based on national security or public order grounds. Once lawfully present, including where she or he has been admitted to the asylum procedure, a refugee or asylum-seeker should not be removed to another State unless national security or public order concerns are established, up to the conclusion of the asylum procedure.<sup>149</sup> However, in accordance with the above guidance, return of a refugee or an asylum-seeker may be permissible to another State which is found to constitute a first country of asylum or a safe third country for that person.<sup>150</sup>
77. In practice, the feasibility of return of refugees who have been granted protection and asylum-seekers who sought, or who could have sought, protection in a previous State will depend often on the readiness of the previous State to readmit, as well as the interest and ability of the current State to effect return in practice. Other potential barriers include lack of diplomatic relations; absence of evidence that the person was in the previous State; resource and administrative capacity limitations on the part of the concerned States, and others. Return in safety and dignity may often be possible, appropriate and efficient only for a limited number of refugees and asylum-seekers who have moved onwards from previous States.
78. In cases where a previous State agrees to accept the return and readmission of an asylum-seeker or refugee, she or he should be treated in accordance with human rights standards pending return. Refugees and asylum-seekers should be given an opportunity to return voluntarily to a previous State. Providing a person with an opportunity to depart within a given timeframe prior to forced removal does not equate to voluntary return. However, this is preferable to forced removal.<sup>151</sup> Return should be undertaken in a humane manner, with respect for human rights and dignity. The

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<sup>147</sup> UN High Commissioner for Refugees, *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, available at: <http://www.refworld.org/docid/3fe9981e4.html>; 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>.

<sup>148</sup> Executive Committee Conclusion No. 15(XXX) (1979) on *Refugees without an Asylum Country*, para (h)(iii).

<sup>149</sup> Art 32(1), 1951 Convention.

<sup>150</sup> See paras 57-75 above.

<sup>151</sup> For the definition and scope of 'voluntary' in the return context, see further: UN High Commissioner for Refugees, *Protection Policy Paper: The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role*, November 2010, available at: <http://www.refworld.org/docid/4cea23c62.html> (Annex I: Definitions).

use of force should be avoided. Where it is necessary, it should be proportional and used in a manner consistent with human rights law.<sup>152</sup>

79. Readmission agreements which contain appropriate protection safeguards can facilitate return to a previous State in a legal and orderly manner.<sup>153</sup> Such agreements should explicitly affirm that their implementation is subject to the respect of principle of *non-refoulement*. They should also provide that every person in respect of whom return is proposed is individually assessed as to the legality and appropriateness of readmission, having regard to the principle of family unity, the specific needs of individuals, and the need to ensure that the best interests of the child is a primary consideration. Where return of a recognised refugee to a previous State is proposed, the agreement should provide that such refugees will be entitled to benefit from their previously-recognised status and associated rights. Where the return is proposed of an asylum-seeker who has not had a substantive assessment of his or her claim in the previous country, the readmission agreement should oblige the current State to inform the previous State that there has been no substantive assessment of the applicant's claim; and require the previous State to provide access to the asylum procedure.
80. If return and readmission of an asylum-seeker or refugee cannot be effected in accordance with the above safeguards due to the absence of protection,<sup>154</sup> or because it is not possible for practical reasons (for example, in the absence of diplomatic relations between the current and previous State, of documentation, or evidence of previous presence), his or her asylum claim would need to be considered on the merits in the current State in the regular asylum procedure within a reasonable time.<sup>155</sup> This should also occur if it is determined that return is possible in principle, but effecting that return proves or is likely to prove unduly lengthy or impossible in practice. In such cases, denial or delay in access to the procedure cannot be imposed upon an asylum-seeker as a penalty on the basis of onward movement alone.
81. Should an applicant in such cases be found not to be eligible for international protection, a current State may consider granting them another form of right to stay, which ensures that they are not left in limbo without an adequate standard of living or lawful means of subsistence, notably where there are compelling humanitarian considerations which apply.

## K. Solutions

82. Assisting States and refugees to find solutions to displacement, fully enabling refugees to live dignified lives and determine their own futures, remains the ultimate goal of the international protection regime.<sup>156</sup> In the context of onward movement, investment in solutions should be seen as an important means to address one of its key causes.<sup>157</sup> With nearly three-quarters of the refugees under UNHCR's care worldwide, and many others hosted by States, living in protracted displacement situations, the need for international cooperation to find more creative and widely-

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<sup>152</sup> Executive Committee Conclusion No. 96(LIV) (2003) on *Return of people found not to be in need of international protection*, para (o); Executive Committee Conclusion No. 85(XLIX) (1998), para (bb); Executive Committee Conclusion No. 81(XLVIII) (1997) Executive Committee Conclusion No. 79(XLVII) (1996), all available at <http://www.refworld.org/docid/4f9d415d2.html>

<sup>153</sup> UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at:

<http://www.refworld.org/docid/3b36f2fca.html>; UN High Commissioner for Refugees, *Convention Plus: Issues Paper Submitted by UNHCR on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers*, 11 March 2004, FORUM/CG/SM/03, available at: <http://www.refworld.org/docid/471de35b2.html>

<sup>154</sup> See paras 57-75 above.

<sup>155</sup> On the requirement to afford timely access to asylum procedures, see Executive Committee Conclusion No. 71(XLIV) (1993), para i.

<sup>156</sup> Executive Committee Conclusion No. 56 (XL) (1989) on *Durable Solutions and Refugee Protection*, available at: <http://www.refworld.org/docid/3ae68c428.html>; see also UN High Commissioner for Refugees (UNHCR), *Update on solutions*, 6 June 2014, EC/65/SC/CRP.15, available at: <http://www.refworld.org/docid/542cfe634.html>

<sup>157</sup> Executive Committee Conclusion No. 58 (XL) (1989), para (c)(ii)

available approaches to solutions for refugees is evident. It is broadly acknowledged that a shift is needed away from long-term care and maintenance, towards self-reliance and solutions-oriented planning involving governments, displaced persons, host communities and others.<sup>158</sup> Aiming at planning for solutions in the early stages of a displacement crisis should also help to avoid the development of protracted situations, with the associated pressures and hardships they create for refugees, host communities and other affected States alike.

83. It is not apparent that restricting or delaying access to solutions for refugees who move onward serves effectively as a deterrent to onward movement. Where people are in need of international protection, limiting access to solutions in a current State will not address that need. It is however likely to create significant hardship for individuals and families for whom voluntary return to their countries of origin is not an option, or it may encourage further onward movement in search of a solution. For this reason, effective cooperation among States to determine responsibility among them for protecting refugees, based on a commitment to sharing burdens and responsibilities more equitably, remains essential. Unilateral deterrence measures by individual States, by contrast, are likely only to exacerbate the problems and pressures in the international protection system as a whole.

## L. Conclusions

84. International mobility is a reality in today's globalised world, on a far larger scale than in the past, including for asylum-seekers and refugees. Movements across borders are frequently a force for good, and people seeking or in need of protection may bring positive contributions to the States which host them, including current and previous States. The phenomenon could however be managed more effectively by States, and greater resources invested in addressing gaps in protection for people who are entitled to it, which could reduce the need for onward movement. More effective responses to onward movement could also improve the efficient use of resources and reinforce public support for the plight of refugees and asylum-seekers. The desperation of people who take irregular sea journeys and move along other dangerous routes across multiple countries in search of refuge highlights the urgency of addressing this phenomenon in a principled and practical way. This requires collaborative and far-sighted approaches that recognise the pressing need to ensure that people in need of protection can find it, and acknowledge the fact that reinforcing borders or limiting access to asylum procedures and protection are not the solution.
85. Increased efforts are particularly needed to address pressures and gaps which cause asylum-seekers or refugees to move onward to other States. Strengthened legal frameworks for protection at national level, as well as effective institutions and practice, along with comprehensive protection strategies, may reduce the need for such movements. Investments in capacity-building and support from other States to enhance protection systems globally can enable refugees to secure protection at an earlier stage, closer to their countries of origin, than is presently the case for millions of people. Appropriate responses to onward movement, and to the protection needs of those who do so move, could increase the effective operation of and support for the international protection system as a whole.
86. Even where significant numbers of asylum-seekers exert pressures on national protection systems and capacity, States are obliged to respect the rights of asylum-seekers and refugees. States are thus urged to invest the resources and political priority that is needed in ensuring conditions, effective processes and safeguards for refugees that can enable them to enjoy protection and their basic rights. It is nevertheless evident that capacities to receive and protect refugees vary in different countries and regions, as do the associated costs. In this context, international

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<sup>158</sup> See UN High Commissioner for Refugees, *Global Strategy for Livelihoods 2014-2018*, available at <http://www.unhcr.org/530f107b6.html>; see otherwise also UN High Commissioner for Refugees (UNHCR), *Update on solutions*, 6 June 2014, EC/65/SC/CRP.15, available at: <http://www.refworld.org/docid/542cfe634.html>

cooperation is essential - identified as a key principle to address the transnational character of refugee movements in the 1951 Convention. The principle requires that States should not focus solely on their national challenges and actual or perceived burdens, and how to relieve these, potentially at the expense of other States and without regard to their wider impact. No one State can address the causes and effects of onward movement, and unilateral responses motivated by a desire to deter people who have moved onward from arriving or receiving protection in line with their rights will simply deflect or exacerbate the problem. States' responses to onward movements must thus be guided by the principles of solidarity and responsibility-sharing, rather than being limited to the minimum measures required by their definitive legal obligations.

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