

## Guidance on responding to irregular onward movement of refugees and asylum-seekers<sup>1</sup>

### A. Introduction

1. The onward movement of refugees and asylum-seekers, notably in an irregular<sup>2</sup> manner, creates significant challenges for States and for the international protection system as a whole. ‘Onward movement’ refers to movement by refugees and asylum-seekers from one country where they enjoyed international protection, or could have sought and received such international protection, to another where they may request it.<sup>3</sup> Where asylum-seekers lodge multiple claims in different States, move onwards after claiming asylum or receiving protection, or refrain from seeking international protection in a State where they had an opportunity to do so, it results in inefficiencies, administrative duplication, delays and significant costs, as well as additional demands on reception capacities and asylum systems in different countries.<sup>4</sup>
2. Onward movement in such circumstances is frequently seen as a form of misuse of the asylum system, which may consequently strain political and public support for refugee protection. Where it results in or increases the concentration of refugees or asylum-seekers in a limited number of States, onward movement may impact negatively upon the international protection space in those countries. States, UNHCR and the international community more broadly are also seriously and legitimately concerned about the growth of smuggling and trafficking in human beings, the perpetrators of which frequently exploit the vulnerability of others in facilitating and profiting from onward movement. These crimes pose a major challenge for law enforcement at national and international levels.
3. There are moreover significant potential negative consequences of onward movement for refugees and asylum-seekers, particularly where it occurs in an irregular manner. These include

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<sup>1</sup> While the term ‘secondary movement’ is also used to refer to this phenomenon in some contexts, ‘onward movement’ is used in this document to reflect the fact that such movements may be driven by numerous different factors, and often involve tertiary or multiple stages. Neither term is defined in international law, and this document accordingly adopts a broad and factual approach and seeks to use simple and practical terminology.

<sup>2</sup> The Executive Committee of the High Commissioner’s Programme (ExCom) refers to irregular movements which involve ‘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’: 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*, available at: <http://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html>, para (a).

<sup>3</sup> This note discusses approaches to addressing the situation of refugees and others granted international protection, including subsidiary and complementary forms of protection, who move on and seek protection in another State; as well as asylum-seekers requesting international protection in a current State who have, or could have, sought protection in a previous State. Regarding the scope of persons seeking or in need of international protection, see UNHCR, *Persons in need of international protection*, June 2017, available at: <http://www.refworld.org/docid/596787734.html>. For the purposes of this guidance, the term ‘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.

<sup>4</sup> See also ExCom Conclusion No. 58(XL)1989, para (a).

exposure to the risk of violence, exploitation and other violations of their rights, which can affect women, children and people with specific needs in particular. It may also expose refugees and asylum-seekers to the risk of prolonged detention, or being left in limbo or 'orbit', without due process or a secure legal status, or being stranded in a country which is not ready or able to determine or respond to their international protection needs.

4. In some cases, refugees and asylum-seekers move onward in order to seek international protection which is not in fact available in the place to which they have initially fled; or to access the means of survival, through humanitarian assistance or otherwise; to join family members from whom they are separated, or to secure durable solutions.<sup>5</sup> In some cases, they may move onward with the aim of benefitting from economic opportunities or standards of treatment that are, or are perceived to be, higher.<sup>6</sup>
5. International refugee law does not confer upon refugees the right to choose their country of asylum. It also does not authorize their irregular movement between successive countries solely in order to benefit from more favourable conditions. Refugees and asylum-seekers have duties and obligations to respect national laws and measures to maintain public order,<sup>7</sup> including obligations to cooperate with the asylum process, which may include presenting themselves to authorities and submitting asylum claims promptly, or complying with conditions to regularize their stay.
6. The right of refugees and asylum-seekers to enter the territory of States derives from the international legal regime for the protection of refugees, where they do not otherwise have lawful permission to do so. It is thus legitimate for States to require compliance with national laws and processes governing the identification and recognition of refugees. Moreover, States may lawfully take measures against individuals who enter or stay in their territory in an irregular manner, including in some circumstances against refugees and asylum-seekers, subject to legal safeguards.<sup>8</sup>
7. At the same time, there is a need for all States to fully implement their international protection obligations. These include providing access to fair and efficient asylum systems and treatment which reflect international refugee and human rights law standards. Fair and efficient asylum systems and standards of treatment provide powerful incentives for refugees and asylum-seekers to remain in the State where they have sought protection.
8. Onward movement raises important questions concerning responsibility among States for assessing an individual's asylum claim, recognizing her or his need for international protection and for providing it where required. The Preamble to the 1951 Convention acknowledges that the challenges associated with refugee protection can only be addressed through international cooperation and solidarity,<sup>9</sup> given their international scope and nature, and the disproportionate

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<sup>5</sup> See ExCom Conclusion No. 58(XL)1989, para (b).

<sup>6</sup> See UNHCR, *The 10-Point Plan in Action, 2016 Update*, December 2016, available at:

<http://www.refworld.org/docid/584185534.html>, Chapter 8: Addressing Onward Movements section 8.1, 'Assessing the scope and root causes of onward movements'.

<sup>7</sup> 1951 Convention relating to the Status of Refugees (189 United Nations Treaty Series 137, entered into force 22 April 1954; hereafter '1951 Convention'), Article 2.

<sup>8</sup> This is, however, subject to exemptions from penalization which apply under Article 31 of the 1951 Convention. See section E below.

<sup>9</sup> 1951 Convention, Preamble, para 4. The English text of paragraph 4 refers to 'international cooperation', while the French refers to '*solidarité internationale*.' This principle is also reflected in Article II.(4) of the Organisation of African Unity (OAU) *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45, available at: <http://www.refworld.org/docid/3ae6b36018.html>. Article II.(4) provides that 'Where a Member

impact such challenges may have on some States.<sup>10</sup> This includes cross-border onward movement by asylum-seekers and refugees, which by definition implicates several countries. Strategies and approaches are needed which can mitigate and address the negative effects of onward movement, including strained resources, tensions among States, and risks and insecurity for individuals.

9. The centrality of international cooperation to the effective functioning of the refugee protection regime was reaffirmed in the New York Declaration for Refugees and Migrants, adopted by the General Assembly in September 2016.<sup>11</sup> Efforts to address onward movements thus take place in a context where it has been recognized that there is a need for more equitable and predictable burden and responsibility sharing overall,<sup>12</sup> particularly with countries hosting large numbers of refugees, including in view of the fact that some 84 per cent of the world's refugees are hosted in low- or middle-income countries.<sup>13</sup> At the same time, the New York Declaration observes that the ability of refugees to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to, and enjoyment of, international protection elsewhere.<sup>14</sup> The Global Compact on Refugees<sup>15</sup> emphasises the central importance of international solidarity and cooperation and aims to provide a basis for more equitable and predictable burden—and responsibility—sharing,<sup>16</sup> notably to support States most directly affected by large refugee movements.
10. This guidance aims to assist States in responding to the significant challenges posed by onward movement of refugees and asylum-seekers, in a manner consistent with international law and good practice.<sup>17</sup> It describes international legal provisions and guiding principles relevant to onward movement. Building on existing guidance from international instruments, conclusions of the Executive Committee of the High Commissioner's Programme (ExCom) and from UNHCR, as well as State practice and leading jurisprudence, it provides recommendations around approaches to determining which State shall take responsibility for considering a claim and providing international protection to individual refugees, and the applicable standards to be met. It highlights the importance of addressing the causes of onward movement, including through enhanced cooperation and responsibility-sharing among States to ensure access to international protection. It proposes arrangements between States, strategies and processing options which

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State finds difficulty in continuing to grant asylum to refugees (by reason of huge numbers already received), such Member State may appeal directly to other Member States and through the necessary regional body, and such other Member States shall in the spirit of solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum'. See also Article 80, European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>.

<sup>10</sup> It is also recalled that the large majority of the world's refugees are hosted in countries in developing regions, which in many cases are in their regions of origin.: UNHCR, *Global Trends: Forced Displacement in 2017*, June 2018, available at: <http://www.unhcr.org/search?comid=56b079c44&&cid=49aea93aba&tags=globaltrends>, p 15.

<sup>11</sup> UN General Assembly, *New York Declaration for refugees and migrants*, 19 September 2016, UN Doc. No. A/RES/71/1 (hereafter 'New York Declaration'), para 68.

<sup>12</sup> New York Declaration, para 68; Annex 1, para 1.

<sup>13</sup> UNHCR statistics indicate that as of the end of 2018, approximately 84 per cent of the world's refugees were granted international protection in countries in developing regions, as defined by the UN Statistics Division classification: UNHCR, *Global Trends: Forced Displacement in 2018*, 19 June 2019, available at: <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>, p 18. This is consistent with

similar proportions recorded every year for more than a decade.

<sup>14</sup> New York Declaration, para 70.

<sup>15</sup> UN doc. A/73/12(Part II).

<sup>16</sup> *Ibid*, paras 15-16.

<sup>17</sup> Some of the obligations referenced herein apply specifically to States Parties to the 1951 Convention, while others are relevant more broadly to non-parties, based on other refugee and human rights instruments, customary international law and general international legal principles.

aim to help authorities ensure that national asylum or refugee status determination systems are better equipped to manage claims from refugees and asylum-seekers who move onward after claiming asylum or receiving international protection, or refraining from seeking such protection in a State where they had a reasonable opportunity to do so.

## B. International legal principles related to onward movement

11. States have a sovereign right to manage and control their borders, and to define the rights of individuals to enter and stay. This prerogative is subject to international legal obligations, which States are required to respect in good faith by ensuring that national legislation, policies and practices are consistent with international law.<sup>18</sup> International legal obligations relevant for the treatment of refugees and asylum-seekers are derived from the 1951 Convention and its 1967 Protocol and other relevant international refugee and human rights law instruments.<sup>19</sup> The fact that a refugee or an asylum-seeker has moved onward does not affect his or her right to treatment in conformity with international human rights law, or his or her potential need for international protection and associated rights under international refugee and human rights law. This includes, but is not limited to, protection from *refoulement*,<sup>20</sup> and from penalization for irregular entry or stay under Article 31 of the 1951 Convention.<sup>21</sup>
12. International law establishes obligations on the part of concerned States based on the presence of refugees in their territory, or within their jurisdiction. Treatment in accordance with international human rights standards includes adequate reception arrangements which address basic and specific needs<sup>22</sup> while status is being determined. International refugee law requires

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<sup>18</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 26.

<sup>19</sup> OAU Convention; *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, (hereafter 'Cartagena Declaration'), available at: <http://www.refworld.org/docid/3ae6b36ec.html> ; 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>20</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.) Under international human rights law, it also applies to all people at risk of return to the risk of serious human rights violations, by direct or indirect means. This also includes the right to protection against return to face threats to life, liberty and security of the person, enshrined among other instruments in the OAU Convention, Article I(2). The principle of *non-refoulement* to torture, inhuman or degrading treatment or punishment is absolute in character: see *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, <http://www.unhcr.org/refworld/docid/4f4507942.html>. The prohibition on *refoulement* under international refugee law applies not only to persons formally recognized as refugees, but also to asylum-seekers pending a final determination of their status. The *non-refoulement* principle also applies to people intercepted or rescued at sea: see Conclusion of Executive Committee No. 97(LIV)(2003) on *Protection Safeguards in Interception Measures*, available at: <http://www.refworld.org/docid/3f93b2894.html>.

<sup>21</sup> For analysis of the application of Article 31, see Section E below. See also UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention (Geneva Expert Roundtable, 8-9 November 2001)*, (hereafter 'UNHCR, Summary Conclusions: Article 31') June 2003, <http://www.refworld.org/docid/470a33b20.html>, para 10(c).

<sup>22</sup> See UNHCR, *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.

applicable legal and procedural safeguards in the asylum procedure and the extension of international protection to those recognised as refugees.

13. At the same time, asylum-seekers and refugees have duties and obligations towards States in which they find themselves, including to respect national laws and regulations, including measures to maintain public order.<sup>23</sup> They are also obliged to cooperate with reasonable identification and processing requirements and procedural steps.<sup>24</sup>
14. While international law establishes the right to *'seek and enjoy asylum'*,<sup>25</sup> the 1951 Convention and other international legal instruments do not confer a right upon refugees to decide in which State they will receive international protection. There is no obligation under international law for a person to seek international protection at the first effective opportunity, but 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.<sup>26</sup> ExCom has however expressed the view that their intentions *'should as far as possible be taken into account'*.<sup>27</sup> ExCom Conclusions furthermore encourage States to adopt common criteria for identifying the State which will examine the asylum claim of an individual, in a manner which should aim to *'avoid possible disagreement between States as to which of them should be responsible for examining an asylum request and should take into account the duration and nature of any sojourn of the asylum-seeker in other countries'*.<sup>28</sup> ExCom notes that *'[r]egard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State'*. Where, however, it appears that a person, before requesting asylum, already has *'a connection or close links with another State'*, ExCom indicates that she or he *'may if it appears fair and reasonable be called upon first to request asylum from that State'*.<sup>29</sup>
15. In UNHCR's view, this requires an assessment, firstly, of where international protection is available in practice. This assessment in addition needs to consider in which State, as expressed by ExCom, it is *'fair and reasonable'* for an asylum-seeker to seek protection. The requirement for *'reasonableness'* should be interpreted with reference to *'connection[s] or close link[s]'* between the asylum-seeker and the concerned States, which includes *'the duration and nature'* of any previous stay; as well as family ties, including to people in relationships of dependence with the individual; compelling humanitarian consideration (for example, a requirement for medical treatment that is only available in one State); linguistic or cultural links or existing residence rights. *'Fairness'* can be understood by reference to non-discrimination between categories of asylum-seekers, as well as to the need to ensure that any allocation of responsibility or transfer of refugees or asylum-seekers would not result in a disproportionate strain on the State which might otherwise be called upon to assume responsibility.

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See also UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in Action*, February 2011, <http://www.refworld.org/docid/4d9430ea2.html>, Chapter 4. See also New York Declaration, Annex 1, para 5.

<sup>23</sup> Article 2, 1951 Convention.

<sup>24</sup> Where an asylum applicant fails to comply with such requirements, however, States remain bound by the principle of *non-refoulement*. See also section C on processing options.

<sup>25</sup> UDHR Art 14. The right to asylum is also elaborated in regional law, including Article 12(3) of the African Charter on Human and Peoples' Rights, Article XXVII of the 1948 American Declaration on the Rights and Duties of Man; Article 22 para 7 of the American Convention on Human Rights; Article 23 of the Arab Charter on Human Rights, para. 16 of the ASEAN Human Rights Declaration; and Article 19 of the Charter of Fundamental rights of the European Union.

<sup>26</sup> See 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, (hereafter 'Lisbon Conclusions'), <http://www.refworld.org/docid/3fe9981e4.html>.

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

<sup>28</sup> ExCom Conclusion No. 15(XXX) (1979) on *Refugees without an asylum country*, para. (h)(ii).

<sup>29</sup> ExCom Conclusion No. 15(XXX) (1979) on *Refugees without an asylum country*, para. (h)(iv).

### C. Processing options

16. The primary responsibility for providing international protection which rests with the State in which an asylum-seeker arrives and seeks that protection. Claims for international protection from asylum-seekers should ordinarily be processed in the State in which they are present, or which otherwise has jurisdiction over them,<sup>30</sup> in line with general State practice and international law.
17. In some cases, however, another State may assume responsibility for determining the need for or providing international protection. Such responsibility may be based on:
  - a. A bilateral or multilateral arrangement for the transfer of asylum-seekers and the allocation of responsibility for determining their asylum claims and providing international protection, or for relocation of recognized refugees;<sup>31</sup>
  - b. A prior grant of refugee or other international protection status to that person by that State and an undertaking to continue to protect him or her in practice (based on application of the 'first country of asylum' concept);<sup>32</sup> or
  - c. The availability of access to a fair and efficient asylum procedure to determine the individual's international protection needs, and grant international protection if needed (based on the 'safe third country' concept).<sup>33</sup>
18. As a precondition for transfer of a refugee or asylum-seeker to another State in the cases described above, a number of standards need to be met in practice. These include:
  - a. The State must agree to admit the person;
  - b. Protection from persecution and threats to physical safety and freedom in that State;
  - c. The opportunity to re-avail him or herself of protection previously enjoyed in that State.
  - d. If not previously recognized as in need of international protection, access to a fair and efficient asylum procedure is needed;
  - e. A right to remain lawfully in the territory for the duration of the asylum procedure, as well as a right lawfully to stay if found to be in need of international protection; and

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<sup>30</sup> See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para 1, <http://www.refworld.org/docid/51af82794.html>. This also applies to States which exercise jurisdiction outside their territory, including in the context of operations at sea, noting that in the case of search-and-rescue operations, the applicable rules of international maritime law and exigencies of maritime safety will also guide disembarkation arrangements (see however paras 16ff *infra*). International protection claims should ordinarily be processed on land in the territory of the State in which those concerned have arrived, or whose protection responsibilities have otherwise been engaged; substantive assessment of international protection claims ought not take place at sea, unless international standards for reception and eligibility assessment can be guaranteed. See UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017, available at: <http://www.refworld.org/docid/5a2e9efd4.html>, including at para 7.

<sup>31</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (2013), <http://www.refworld.org/docid/51af82794.html>. See also University of Michigan Law School, *The Michigan Guidelines on Protection Elsewhere*, 3 January 2007: <http://www.refworld.org/docid/4ae9acd0d.html>.

<sup>32</sup> For further guidance on the application of this concept, see UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, available at: <http://www.refworld.org/docid/5acb33ad4.html>

<sup>33</sup> *Ibid.*

- f. Standards of treatment commensurate with the 1951 Convention and international human rights standards including, but not limited to, protection from *refoulement*.<sup>34</sup>

19. A **fair and efficient asylum procedure** requires, among other things, access in practice to the means to submit a claim for international protection and relevant supporting evidence; to an objective and timely determination, and an appeal or review in case of a negative decision. It also requires that international protection is available for all refugees who require it, based on widely-accepted international standards. Refugee status determination is the responsibility of States Parties to the 1951 Convention. Where UNHCR carries out status determination under its mandate, this cannot be considered equivalent to an asylum procedure conducted by a State, which would provide the guarantees necessary as preconditions for the transfer of an asylum-seeker or person in need of international protection. In fact, UNHCR often carries out status determination under its mandate exactly in circumstances where the country concerned does not have the capacity to so engage, whether in terms of legal procedures or extending legal rights commensurate with the 1951 Convention.
20. Refugees and asylum-seekers also need access to means of subsistence sufficient to maintain an adequate standard of living<sup>35</sup> and to undertake steps to enable the progressive achievement of self-reliance.<sup>36</sup> Standards of treatment commensurate with international human rights principles include notably those applicable to people with specific needs. They also require access for refugees to solutions.
21. A critical indicator of the availability of **international protection** is whether a State is party to the 1951 Convention and/or its 1967 Protocol and/or other relevant international refugee law instruments, as well as other human rights instruments.<sup>37</sup> Standards of treatment commensurate with widely-ratified human rights instruments and with the 1951 Convention and its 1967 Protocol are most effectively and durably guaranteed when the State has accepted the obligation to respect those standards under international treaty law, has adopted national laws to implement the relevant treaties and has a record of actual practice by the State indicating consistent compliance with its international legal obligations.

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<sup>34</sup> UNHCR, Lisbon Conclusions, para. 15, <http://www.refworld.org/docid/3fe9981e4.html>. See also UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 14 and 15, <http://www.refworld.org/docid/3b36f2fca.html>; UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, paras. 153 and 154, <http://www.refworld.org/docid/4ab8e7f72.html>. UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(vi), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, <http://www.refworld.org/docid/3ae6b3268.html>. See also UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017, available at: <http://www.refworld.org/docid/5a2e9efd4.html>, para 6.

<sup>35</sup> Article 11, ICESR.

<sup>36</sup> UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 283, <http://www.refworld.org/docid/4c63e52d2.html>.

<sup>37</sup> UNHCR, Lisbon Conclusions, para 15(e); UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 14, <http://www.refworld.org/docid/3b36f2fca.html>; UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(iii) and 3(viii), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, <http://www.refworld.org/docid/3ae6b3268.html>; UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, available at: <http://www.refworld.org/docid/5acb33ad4.html>, para 9. It should be noted that the conclusion considers accession to and compliance with the 1951 Convention and/or its 1967 Protocol to be essential, unless the destination country can demonstrate it has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.

22. Prior to any transfer, an individual assessment of its lawfulness and appropriateness, subject to relevant procedural safeguards, should be undertaken. It is important for individuals to have an opportunity in the course of that assessment to **rebut the presumption** that they will be protected in the State to which transfer is proposed, based on their particular circumstances.<sup>38</sup> In some circumstances, transfers or relocation of refugees or asylum-seekers under a formal bilateral or multilateral arrangement may be carried out in the absence of an individual assessment. This would require both the existence of certain objective standards of protection in the receiving country, as well as firm undertakings by that country that those returned will have access to protection, assistance and solutions.<sup>39</sup> Pre-transfer individual assessments are nonetheless necessary in all cases for vulnerable groups and/or people with specific needs, including unaccompanied and separated children, with the best interests of the child being given primary consideration.<sup>40</sup>
23. In considering State responsibility for determining an asylum claim and providing international protection, ExCom has highlighted the importance of taking account of **connections or close links** between refugees or asylum seekers and States. These include consideration of the duration and nature of any previous stay;<sup>41</sup> family ties, including to extended family and others in relationships of dependence with the individual; linguistic or cultural links; existing residence rights; as well as other compelling humanitarian considerations (for example, a requirement for medical treatment that is only available in one State). Taking account of such connections or close links increases the viability and sustainability of the transfer from the viewpoint both of the individual and the State, and may reduce incentives for onward movement. While a connection between the individual and the State is important, it is however not a requirement under international law, and could be omitted in case of inter-State responsibility-sharing arrangements, provided that relevant safeguards are present.
24. Based on the principles of **international cooperation** and **burden—and responsibility—sharing**, as well as fairness and **efficient asylum claim management**, it may be appropriate for a State to accept responsibility to determine claims, rather than returning them to another State. This may be particularly the case where the other State is hosting large numbers of refugees or other people in need of international protection in relative or absolute terms, including in mass influx or protracted situations, in circumstances which place strains on its capacity to receive or protect them.
25. The terms of **bilateral or multilateral arrangements among States** to relocate refugees and asylum-seekers and/or to allocate responsibility for determining asylum claims and providing international protection,<sup>42</sup> should be in the public domain. Such arrangements need to be implemented in good faith with the objective of effectively sharing burdens and responsibilities

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<sup>38</sup> See UK Supreme Court, *R (on the application of EM (Eritrea)) (appellant) v Secretary of State for the Home Department (respondent)* [2014] UKSC 12, per Kerr LJ for the majority, para 41.

<sup>39</sup> Such an arrangement would also need to respect the prohibition of collective expulsion under international law. This means that individual must have an opportunity to put forward arguments against expulsion in his or her specific case.

<sup>40</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (2013), available at: <http://www.refworld.org/docid/51af82794.html>.

<sup>41</sup> Conclusion of the Executive Committee No. 15 (XXX)(1979), para (h)(iv).

<sup>42</sup> UNHCR has 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 UNHCR, *Refugee Protection and Mixed Movements: A 10-Point Plan of Action*, 2017; UNHCR, *UNHCR's Special Mediterranean Initiative: Plan for an enhanced operational response, June – December 2015*, 12 June 2015, : <http://www.refworld.org/docid/559f85f74.html>. See also See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (2013): <http://www.refworld.org/docid/51af82794.html>.

among States. There should be no ‘burden-shifting’ in the sense of seeking to avoid responsibility and/or disproportionately increasing strains on the capacity of another State nor any attempt to avoid or minimize responsibilities under international law.<sup>43</sup> Their application needs to ensure that refugees and asylum-seekers are not summarily denied entry or pushed back at borders.

26. For people **previously recognized as refugees** or otherwise accorded international protection, to whom the ‘first country of asylum’ concept may be applied, it is necessary to assess the standards of treatment accorded to them in practice in that location, to determine whether they are commensurate with the standards of the 1951 Convention and international human rights law, including, but not limited to, *non-refoulement*. It is important to recall that where a person has been recognized as a refugee by UNHCR under its mandate, the mere fact of UNHCR’s recognition cannot be considered as equivalent to or a guarantee of State protection and adequate standards of treatment.<sup>44</sup>
27. In addition, where a person recognised in one State subsequently claims asylum in another State, the latter may, in preference to applying the ‘first country of asylum’ concept, elect to determine the claim on its merits; or recognize the status granted in the previous State.<sup>45</sup> In case the person has previously been recognized by UNHCR following an individual assessment, the State should give the recognition considerable weight.<sup>46</sup>
28. In case an asylum-seeker had sought international protection in a previous State, and received a **negative final decision**, including on appeal, the current State may proceed to a fresh assessment of the claim on the merits. This will be particularly important if new elements or grounds exist which could warrant the grant of international protection. A current State may not dismiss a claim based on a prior rejection in another State alone, unless there is evidence that a final decision was

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<sup>43</sup> See UNHCR, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities*, 28 June 2011, <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. Other examples of burden- and responsibility-sharing initiatives to ensure access to protection and support States receiving significant numbers of refugee arrivals include resettlement, relocation and other forms of admission.

<sup>44</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/cases,ECHR,45cb3dfd2.html>.

<sup>45</sup> It is important to recall that refugee status continues until it ceases in accordance with one of the cessation clauses under the 1951 Convention: see para 112, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (reissued 2019), <https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>. See also the Advisory Opinion 25/18 of the Interamerican Court of Human Rights of 30 May 2018 (released July 2018) where at para 123 it was affirmed that: *[...]the Court has stated [in the case of Pacheco Tineo vs Bolivia (2013)] that once refugee status has been determined for the applicant, this will be maintained except in the case where cessation clauses will apply. Under this understanding, it is necessary to consider State obligations to maintain and give continuity to refugee status determination, which acquire extraterritorial validity, unless cessation clauses may incur, as already expressed*” : Corte Interamericana de Derechos Humanos (Corte IDH), Opinión Consultiva OC-25/18 de 30 de mayo de 2018 solicitada por la República del Ecuador. La institución del asilo y su reconocimiento como derecho humano en el Sistema Interamericano de Protección. (Interpretación y alcance de los artículos 5, 22.7 y 22.8, en relación con el artículo 1.1 de la Convención Americana sobre Derechos Humanos), 30 Mayo 2018: <http://www.refworld.org/es/docid/5b48db9a4.html> para 123, p41-42 (unofficial translation; emphasis added).

<sup>46</sup> “Having regard, however, to UNHCR’s unique international mandate and authority, and its expertise and experience, the fact that UNHCR has recognised an individual as a refugee is relevant to RSD [refugee status determination] carried out by States. It should be the starting point of any exercise in the determination of whether the individual should be recognised as a refugee by the State. In considering the asylum claim of an applicant who has been recognised as a refugee by UNHCR, the State should give the recognition considerable weight and take it seriously into account”. (UNHCR, *I. A. v. Secretary of State for the Home Department: Case for the Intervener*, 27 October 2013, UKSC2012/0157, available at: <https://www.refworld.org/docid/52a098e34.html>).

made in a fair and efficient asylum procedure and no new circumstances have arisen which could warrant the grant of international protection.

29. In the case of asylum-seekers who have, or could have, sought international protection in another State, to whom a current State is considering applying a '**safe third country**' concept, or in other relevant contexts such as disembarkation following interception or rescue at sea,<sup>47</sup> the requisite standards require that access is available to a fair and efficient asylum procedure in the country which agrees to readmit them.<sup>48</sup> Where these standards are met, and any general presumption of 'safety' and availability of international protection is not rebutted, the current State may elect not to examine the asylum-seeker's claim in substance, and instead request their readmission to the previous State for the purpose of determining their international protection needs.<sup>49</sup>
30. In case access to a fair and efficient asylum procedure is not available in another State,<sup>50</sup> and/or transfer to such a State is not possible, the current State is required to admit the asylum-seeker to its procedure for a substantive examination of the merits of the claim.<sup>51</sup> For asylum-seekers who merely transited through a previous State which does not have an established national asylum system, or where it cannot be demonstrated that international protection will be available to the person, the current State would need to admit the applicant to the asylum procedure and to assess their claims to international protection on the merits.
31. If a person has applied for asylum and has not yet received a decision, but has subsequently left the territory and/or failed to comply with a substantive obligation in the asylum procedure, the authorities of the State in question may deem the claim to be **implicitly withdrawn**. This will usually arise on the basis of reasonable criteria in national law, including failure to appear on several occasions at effectively notified appointments without reasonable explanation. In such cases, the authorities may suspend or close their case files. The ability to re-open files is an important safeguard in the context of application of safe third country concepts.
32. Some refugees or asylum-seekers apply for protection only after they have been arrested and faced with removal for irregular entry or stay. Such people may nevertheless have a need for international protection, precluding summary removal without consideration of the well-foundedness of their claims.<sup>52</sup> While applying for asylum after arrest or pending removal does not of itself justify rejection or lesser scrutiny of a claim, failure to apply earlier without good reason, where there is information regarding the means and a reasonable opportunity to do so may, subject to other available evidence, be considered relevant to the assessment of the credibility of a claim.

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<sup>47</sup> See also UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017, available at: <http://www.refworld.org/docid/5a2e9efd4.html>

<sup>48</sup> See ExCom Conclusion no. 85(XLIX)(1998), available at: <http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-international-protection.html>, para (aa), where ExCom 'Stresses that, as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum'.

<sup>49</sup> 'Safe third country' concepts may be designated by another name or applied without specific categorisation in the law or practice of States. See ExCom Conclusion No. 58 (XL) (1989); as well as the Global Consultations on International Protection, *Asylum Processes (Fair and effective asylum procedures)*, EC/GC/01/12, 31 May 2001, section II.A.

<sup>50</sup> ExCom Conclusion No. 15(XXX) (1979) on *Refugees without an Asylum Country*, para (k).

<sup>51</sup> This is also necessary where the person faces the threat of persecution or dangers to his or her physical safety or freedom: ExCom Conclusion No. 58 (XL) (1989), para (g).

<sup>52</sup> Some States and regions have applied accelerated procedures in such cases, accompanied by relevant safeguards.

#### D. Return and readmission

33. Where a refugee has moved onward from a State which has granted international protection, that State bears ongoing obligations towards the individual, unless his or her status has ceased.<sup>53</sup> International refugee law does not provide a basis for penalties or restrictions upon a refugee's right to leave, although national laws in some countries do limit rights to leave. A State which has previously issued a Convention Travel Document to refugees pursuant to Article 28 of the 1951 Convention is bound to readmit them under para 13 of the Schedule to the 1951 Convention. Consistent with existing practice, States are encouraged to readmit refugees whose international protection needs they have recognized.<sup>54</sup>
34. Refugees and asylum-seekers should be treated in accordance with human rights standards pending their return to a State which has agreed to readmit them. Providing asylum-seekers and refugees with an opportunity to return voluntarily to a previous State corresponds with good practice, which can reduce costs for States and hardship and indignity for individuals. Providing a person with an opportunity, prior to forced removal, to depart within a defined timeframe, on a voluntary basis, and potentially with financial support, is preferable to forced removal.<sup>55</sup> In all circumstances, return and removal should be implemented in a humane manner in full respect for human rights and dignity.<sup>56</sup>
35. In cases where there are reasonable grounds for suspecting a risk of absconding, alternatives to detention should be considered in all cases, prior to resorting to pre-removal detention. UNHCR recognises that protecting public order is a legitimate purpose that may justify the lawfulness of detention,<sup>57</sup> including to prevent absconding or in cases where non-cooperation is likely. Accordingly, where there are strong grounds for believing that a specific asylum-seeker is likely to abscond and detention is necessary and proportionate to manage that risk, detention may be permissible in an individual case.<sup>58</sup> Detention must be subject to regular judicial review to ensure

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<sup>53</sup> The UNHCR Handbook in para 112 affirms the continuity of refugee status, in the absence of circumstances that would lead to the cessation of his or her status: 'once a person's status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses.' See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (reissued 2019), <https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

<sup>54</sup> ExCom has noted that 'UNHCR may be requested to assist in arrangements for the re-admission and reception of the persons concerned': ExCom 58(XL)(1989), para. f(ii). However, in practice, UNHCR's scope and resources to do so may be limited.

<sup>55</sup> For the definition and scope of 'voluntary' in the return context, see further: UNHCR, *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, <http://www.refworld.org/docid/4cea23c62.html> (Annex I: Definitions).

<sup>56</sup> See Executive Committee Conclusion No. 96(LIV) (2003) on *Return of people found not to be in need of international protection*, para (o). ExCom also in that conclusion recalled that the best interests of the child should be a primary consideration in all actions concerning children; and further noted that force, where it should be necessary, should be proportionate and consistent with human rights law. See also Executive Committee Conclusion No. 85(XLIX) (1998), para (bb); Executive Committee Conclusion No. 81(XLVIII) (1997), para. (s); Executive Committee Conclusion No. 79(XLVII) (1996), para. (u). <http://www.refworld.org/docid/4f9d415d2.html>

<sup>57</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, (hereafter 'Detention Guidelines 2012'), available at:

<http://www.refworld.org/docid/503489533b8.html>, Guideline 4.1, para 22. See also ExCom Conclusion No. 44 (1986)

<sup>58</sup> UNHCR, *Detention Guidelines 2012*, Guideline 4.1, para 22. The UN Human Rights Council has also reaffirmed that detention should be used only as a 'last resort.' U.N. Human Rights Council, *Report of the Working Group on Arbitrary Detention*, para. 77, U.N. Doc. A/HRC/13/30 (18 January 2010). Moreover, the UN Human Rights Commission noted that

its ongoing legality; must take place in adequate conditions, and be subject to maximum time limits which are established in law. It is never in the best interests of children to be detained.<sup>59</sup> International standards thus necessitate the use of non-custodial, community-based alternatives to detention for children and families.<sup>60</sup>

36. Readmission agreements which apply to refugees or asylum-seekers who have moved onward may facilitate return in a legal and orderly manner. These need to ensure respect for the standards and safeguards described above in relation to bilateral and multilateral arrangements and use of safe third country and first country of asylum concepts. Applicable safeguards, which need to be stipulated in such agreements and applied effectively in practice, include a guarantee of respect for *non-refoulement*.<sup>61</sup> In order to ensure the legality, appropriateness and sustainability of return, the principle of family unity and the specific needs of individuals need to be respected, and the best interests of the child must be a primary consideration. Where return is proposed to a previous State in which a refugee was recognized, States need to ensure that such agreements provide explicitly for refugees' entitlement to benefit from their previously-recognized status and associated rights. Where the return is foreseen of asylum-seekers who have not had a substantive assessment of their claims in the previous State, readmission agreements need to specify that the current State is to inform the previous State that there has been no substantive assessment of the applicant's claim, and ask the previous State to ensure access to a fair and efficient asylum procedure.

#### E. Penalties

37. Well-functioning, harmonised asylum systems, international protection and treatment which reflects international standards provide powerful incentives for refugees and asylum-seekers to remain in countries in which they have sought or received international protection. Even where such systems and treatment are in place, however, States may wish to adopt measures that discourage irregular onward movement from States where refugees and asylum-seekers enjoyed or could have sought and received international protection.
38. Article 31(1) of the 1951 Convention prohibits the imposition of penalties on refugees who have come directly from territories where their life or freedom is threatened, present themselves without delay to authorities and show good cause for their unauthorized entry or presence.<sup>62</sup> Conversely, refugees who enter or are present without authorization and who have not come

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under the principle of proportionality, any restriction on liberty must be the least intrusive option to achieve the desired result, and any restriction must both serve "permissible purposes" and be necessary to achieve them: U.N. Human Rights Comm., *General Comment No. 27 on Freedom of Movement*, para. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1 November 1999).

<sup>59</sup> See UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, (hereafter 'UNHCR Position Paper 2017'), available at: <http://www.refworld.org/docid/5885c2434.html> See also Committee on the Rights of the Child, General Comment no. 4, 2017 (xx).

<sup>60</sup> See Committee on the Rights of the Child, General Comment no. 4, 2017 (xx).

<sup>61</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, <http://www.refworld.org/docid/3b36f2fca.html>; UNHCR, *Convention Plus: Issues Paper Submitted by UNHCR on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers*, 11 March 2004, FORUM/CG/SM/03, <http://www.refworld.org/docid/471de35b2.html>. On the value of monitoring arrangements to ensure the effective functioning of safeguards and prevent and address protection risks in the context of readmission, see UNHCR, *The Ten Point Plan in Action* (2016), available at: <http://www.refworld.org/10pointplaninaction2016update.html> : section 8.5, 'Supporting and monitoring the readmission of refugees who have moved onward to their country of first asylum'.

<sup>62</sup> The qualifying conditions for non-penalization of "directness", "promptness" and "good cause" are cumulative, see Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, (hereafter 'Costello et al'), available at <http://www.refworld.org/docid/59ad55c24.html>, p. 16.

directly, or have not presented themselves without delay to authorities, or have not shown good cause for their unauthorized entry or presence, are not exempted from the imposition of penalties on account of their unauthorized entry or presence.

39. Refugees who have not ‘come directly’ from their countries of origin may accordingly be liable to penalties. The term ‘directly’ is to be interpreted broadly and not in a literal temporal or geographical sense, meaning that refugees who have crossed through, stopped over or stayed in other countries *en route* may still be exempt from penalties.<sup>63</sup> There is no defined time limit for a delay, stopover or stay, and the reasons for doing so will be relevant to determining whether penalties may be applied.<sup>64</sup> Furthermore, in order to be exempted from penalties under Article 31(1) of the 1951 Convention, refugees need to present themselves to the authorities ‘without delay’. This requirement will usually not be met when refugees make a claim for international protection after being apprehended or detained by the authorities, despite having had an earlier effective opportunity to do so, as this would not, unless there are good reasons for the delay, reflect a genuine attempt by the refugee to regularise his or her situation in a timely manner by presenting themselves to the authorities.<sup>65</sup> Refugees must show good cause or valid reasons for their unauthorized entry or presence, which could include the absence or unavailability in practice of access to fair and efficient asylum procedures or international protection and standards of treatment in line with international standards.
40. Forms of penalty which are used by States in some cases where the prohibition under Article 31(1) does not apply could include, for example, administrative and pecuniary sanctions; limitation of social benefits; or other penalties, including limitations of freedom of movement.<sup>66</sup> Such penalties must however be proportionate, necessary for a legitimate purpose and applied on a case-by-case basis. Where it is proposed to limit access to social assistance or other reception conditions, or to provide assistance in kind rather than with cash for asylum-seekers in irregular situation, UNHCR recalls that such conditions must as a minimum ensure an adequate standard of living and conformity with international human rights. Under no circumstances, however, can a State, by way of a penalty for not coming directly, failing to present themselves without delay to the authorities, or not showing good cause for their irregular entry or presence, prevent asylum-seekers or refugees who have arrived or are present without authorisation from applying for asylum or accessing an asylum procedure, or impose procedural or other requirements or preconditions which would in practice prevent refugees from applying or accessing such a procedure. This would deny them the right to seek asylum, contrary to the purpose of Article 31(1), and the overall object and purpose of the 1951 Convention and its 1967 Protocol.<sup>67</sup>

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<sup>63</sup> UNHCR Summary Conclusions: Art 31, para. 10(b). See also, UNHCR, Lisbon Conclusions, para. 11. See also G S Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, p.189, <http://www.refworld.org/docid/470a33b10.html>, pp. 217–218. See also Newman J in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, available at : [http://www.refworld.org/cases,GBR\\_HC\\_QB,3ae6b6b41c.html](http://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html) (hereafter ‘Adimi’), para 69: ‘Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee.’

<sup>64</sup> UNHCR Summary Conclusions: Article 31, para. 10(d). EXCOM Conclusion No. 15 (XXX), 1979, para. (h)(iii). See also Adimi, para. 18.

<sup>65</sup> J C Hathaway, *The Rights of Refugees under International Law*, (2005, Cambridge University Press, Cambridge), p. 390, referring to the travaux in footnote 496 and 497. An exception would be circumstances whereby refugees are apprehended or detained before they could reasonably have been expected to present themselves to the authorities: Summary Conclusions. Hathaway *op cit*, p. 391; Adimi 528-529.

<sup>66</sup> Goodwin-Gill, *op cit*, p. 204; G Noll, ‘Article 31 (Refugees Unlawfully in the Country of Refuge)’ in A Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (OUP 2011), p. 1264.

<sup>67</sup> *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, Canada: Supreme Court, 27 November 2015, para. 63, [https://www.refworld.org/cases,CAN\\_SC,56603be94.html](https://www.refworld.org/cases,CAN_SC,56603be94.html).

41. Detention is used by some States as a penalty for unauthorized entry or presence. Article 31(2) of the 1951 Convention protects refugees who are exempted by Article 31(1) from penalties also from restrictions on their freedom of movement, other than those which are necessary, and then only until their status is regularized or they obtain admission into another country. This implies that refugees who do *not* meet the requirements of Article 31(1) (and are thus *not* exempted from penalties) may in some cases be subject to restrictions on movement. Moreover, even for those who are so exempted, non-punitive detention in the context of Article 31(2) of the 1951 Convention, may, after consideration of less restrictive alternatives be permissible, for example when there is a significant risk of absconding, in order to effect admission to another country or regularization of status to avoid onward movement. Detention must also be subject to relevant safeguards in all cases.<sup>68</sup>
42. While international refugee law does not provide a basis for penalizing onward movement as such, it may nevertheless be permissible under the 1951 Convention for States to impose penalties on refugees and asylum-seekers who have entered or remain in the territory without authorisation and who do not satisfy the above-described conditions of entitlement under Article 31, subject to applicable safeguards.

#### F. Addressing the causes of onward movement

43. The Global Compact on Refugees and the New York Declaration of 2016<sup>69</sup> contain objectives to address the underlying causes of onward movement. Specific arrangements aimed at effective burden—and responsibility—sharing, as foreseen in the Global Compact on Refugees, will also enhance conditions for refugees and asylum-seekers, and broaden access to safe, legal pathways to third countries, including through resettlement and complementary mechanisms for admission, as well as supporting other solutions at an early stage, which could address some of the elements which fuel onward movement.
44. **Finding solutions:** The ultimate goal of the international protection regime is to assist States and refugees to find solutions to displacement.<sup>70</sup> This includes supporting the voluntary repatriation of refugees, where conditions are in place; facilitating resettlement and other third country solutions; and supporting self-reliance. Investment in solutions is an important means to address one of the key causes of onward movement.<sup>71</sup> This is a critical priority for all States, given the sobering reality that some 15.9 million refugees (over half of the 2594 million global total) were in protracted situations<sup>72</sup> at the end of 2018.<sup>73</sup> Many host States face extreme and increasing pressures over time, and individuals who see no viable solutions within reach move onward.
45. Ensuring access to solutions in a timely manner can help further incentivize refugees to cooperate with procedural requirements and obligations in national asylum processes. Where it is

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<sup>68</sup> See para 41 above.

<sup>69</sup><http://www.unhcr.org/5b51fd587>. See further: <http://www.unhcr.org/towards-a-global-compact-on-refugees.html>.

<sup>70</sup> ExCom Conclusion No. 56 (XL) (1989) on *Durable Solutions and Refugee Protection*, <http://www.refworld.org/docid/3ae68c428.html>; see also UNHCR, *Update on Solutions*, 6 June 2014, EC/65/SC/CRP.15, <http://www.refworld.org/docid/542cfe634.html>. See also UNHCR, *Towards a Global Compact on Refugees*, concept paper for thematic discussions four and five, <http://www.unhcr.org/5a0019467>.

<sup>71</sup> ExCom Conclusion No. 58 (XL) (1989), paras. (b) and (d)(ii).

<sup>72</sup> UNHCR defines as ‘protracted’ a situation in which 25,000 people or more have been displaced for at least five years.

<sup>73</sup> UNHCR, *Global Trends: Forced Displacement in 2018*, available at: <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>. See also Executive Committee Conclusion No. 58 (XL) (1989), para (c)(ii).

understood that engagement with the authorities, including with border and asylum processes, can result in access to international protection and solutions for those who need them, the perceived need to move onward irregularly in search of an anticipated solution is likely to diminish.

46. **Facilitating regular movement, including family reunification:** reuniting with immediate and extended family members is a key driver of onward movement for many refugees and asylum-seekers. States are strongly encouraged to consider ways to facilitate access to legal means to reunite with family, and remove practical, financial and administrative barriers to doing so.<sup>74</sup> More flexible approaches are needed to the scope of family reunification rules, to ensure that dependents do not continue to resort to dangerous journeys.
47. Arrangements which provide for **regular movement** of recognized refugees can provide important means of access to solutions, and are to be encouraged and facilitated. This includes arrangements between countries on the basis of a **regional or bilateral agreements on free movement**, which may provide explicitly for a right for defined categories of people, which may include refugees, to move between participating countries. Refugees should also be able to benefit from wider mobility and free movement arrangements which may apply to them based on their nationalities, status, economic capacity or labour market needs. Where necessary, transfer of protection arrangements may be needed to ensure safeguards against *refoulement* and other protection risks. These can enable refugees to contribute economically where their skills and potential can be most effectively realised, in a manner which is regulated and potentially beneficial for States.
48. Other **safe routes and complementary pathways** to international protection and solutions for refugees include the establishment or increased use of resettlement and humanitarian admission programmes for refugees and others in need of international protection; greater and simplified use of existing legal channels for regular movement, including labour and study visa programmes;<sup>75</sup> mobility schemes; the grant of visas for the purposes of seeking asylum (discretionary humanitarian or protected entry visas), along with other forms of regular entry. Strict carriers' sanctions and visa requirements are among the factors which can limit or preclude regular movement for refugees. Flexibility in their application to people coming from countries where persecution and conflict are widely-documented, could also help make safe and lawful entry a realistic alternative to irregular movement for people in need of international protection. Such safe routes complement other necessary measures to address **smuggling and trafficking**.
49. **Admission, reception and addressing needs:** Adequate, safe and dignified reception conditions which address the essential needs of new arrivals can help to ensure refugees and asylum-seekers have viable alternatives to onward movement, and thus reduce their exposure to the further risks such movement may entail.<sup>76</sup> Contingency planning, early warning systems and more flexible

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<sup>74</sup> See UNHCR, *Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons In Need Of International Protection*, 4 December 2017, Expert Roundtable, available at: <http://www.refworld.org/docid/5b18f5774.html>. See also UNHCR, *Summary Conclusions: Family Unity*, June 2003, available at: <http://www.refworld.org/docid/470a33bed.html>.

<sup>75</sup> Such schemes may be specifically targeted at refugees, and incorporate safeguards or other specific provisions to ensure their ongoing protection and access in practice to such schemes.

<sup>76</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, <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.

reception capacity can help ensure that States are better equipped to receive large number of arrivals, and that onward movement is not exacerbated by inadequate conditions where such arrivals occur. International support may be needed to support the establishment of relevant measures and facilities<sup>77</sup> and to ensure that the presence of refugees does not exert undue pressure on local services, facilities and infrastructure. In addition, measures for people with specific needs, including children, have been demonstrated to be particularly important.<sup>78</sup> Access to jobs and livelihoods are also crucial elements which can increase the ability of refugees and asylum-seekers to contribute to their host communities while strengthening their self-reliance. These measures need to be undertaken in a way which supports host communities, and enables them to benefit from economic opportunities and development initiatives. Information campaigns which provide objective, up-to-date information about the risks of onward movement, as well as potential penalties for irregular entry and stay, may also help counterbalance unrealistic expectations, ignorance of hazards and misinformation from smugglers that may encourage onward movement in some situations.<sup>79</sup>

**50. Strengthening and harmonizing international protection frameworks and capacity:** Refugee-receiving States in all regions may require support to strengthen their ability to operate asylum systems and provide international protection in line with international standards and good practice.<sup>80</sup> Reinforcing the rule of law, as well as facilitating the development of 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. The application of relevant laws, institutions and fair and effective procedures for identification of people in need of international protection, in a timely fashion, are key priorities in this area. Regional strategies and approaches can also ensure greater coordination and cooperation, and reduce scope and incentives for onward movement.<sup>81</sup> Concerted efforts are needed to harmonize uneven standards, practice and resulting rights within and between region in relation to the grant and provision of international protection.

**51. Including refugees in wider development strategies:** International donors are encouraged to work with host States to support them in strengthening refugee protection, as well as cooperating to address wider development needs. It is recognized that development policies and support will have greater impact where they take into account refugee and migratory movements. This acknowledges the fact that such assistance can support host communities in responding to the challenges related to such movements, but also harness more effectively the potential of refugees and asylum-seekers to contribute to favourable economic and other conditions in their host

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<sup>77</sup> New York Declaration, Annex 1, para 5 *et seq.*

<sup>78</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 UNHCR, *Note on International Protection*, A/AC.96/1134, 9 July 2014. For further information on international support being envisaged for reception arrangements as part of the global compact on refugees see: UNHCR, *Towards a Global Compact on Refugees*, concept paper for thematic discussions two and three, <http://www.unhcr.org/59dc8f317>.

<sup>79</sup> UNHCR, *The 10-Point Plan in Action, 2016 Update, Chapter 8: Addressing Onward Movements*, December 2016, available at: <http://www.refworld.org/docid/584185534.html>. See section 8.2, 'Strengthening protection capacities in countries of asylum and providing information about the risks of irregular onward movement'.

<sup>80</sup> UNHCR, *The 10-Point Plan in Action, 2016 Update, Chapter 8: Addressing Onward Movements*, December 2016, available at: <http://www.refworld.org/docid/584185534.html>. See section 8.2, 'Strengthening protection capacities in countries of asylum and providing information about the risks of irregular onward movement'.

<sup>81</sup> See further, for example, the suggestions made in the Asia-Pacific region as part of the regional cooperative approach: UNHCR, *Regional Cooperative Approach to Address Refugees, Asylum Seekers and Irregular Movement*, November 2011, <http://www.refworld.org/docid/4e92d7c32.html>. See also UNHCR, *The 10-Point Plan in Action, 2016 Update, Chapter 8: Addressing Onward Movements*, December 2016, available at: <http://www.refworld.org/docid/584185534.html>, section 8.4, 'Developing regional and bilateral protection strategies.'

countries and communities.<sup>82</sup> To the extent possible, addressing disparities in economic opportunities across and between regions is also highly desirable. States and competent international actors are strongly encouraged to invest in long-term development that can contribute to this goal in different refugee-hosting countries and regions.

## G. Conclusions

52. International mobility, on a scale far larger than in the past, is a reality in today's globalized world. People seeking or in need of international protection may bring positive contributions to the States which host them. There is scope for the phenomenon to be managed more effectively in ways which could reduce some of the need for onward movement. Investments in support for international protection capacity development and in support to States to enhance their protection systems globally, could help enable more refugees and asylum-seekers to secure international protection at an earlier stage, closer to their countries of origin; or to find safe and regular pathways to international protection and solutions than is presently possible for millions of people.
53. Capacities to receive refugees, address their basic needs and provide them with international protection, vary in different countries and regions, as do the costs and resources available. In this context, the essential nature of enhanced international cooperation – as a central precondition to resolving the transnational challenges associated with refugees, as recognized in the 1951 Convention<sup>83</sup> and reiterated by the Global Compact on Refugees<sup>84</sup> – is particularly evident in the context of onward movement. No one State can address the causes and effects of onward movement, and unilateral responses motivated by a desire to deter the arrival of people who have moved onward run the risk of simply deflecting or exacerbating the problem. Ensuring effective responses to onward movements will require collective will to strengthen the international refugee protection system, and to put essential principles of solidarity and responsibility-sharing into practice. This will also demand evidence of a clear commitment to support countries in regions of origin who receive the majority of the world's refugees, as well as to ensuring access to international protection and solutions for those who require them.

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<sup>82</sup> See UNHCR, *Note on international protection*, 8 June 2015, EC/66/SC/CRP.10, <http://www.refworld.org/docid/55c1dacf4.html>. For further 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>. See further: UNHCR, *Towards a Global Compact on Refugees*, concept paper for thematic discussions two and three, <http://www.unhcr.org/59dc8f317>.

<sup>83</sup> 1951 Convention, Preamble, para 4; see also para 8 above.

<sup>84</sup> UN doc. A/73/12 (Part II); see in particular paras 5, 14-16 and section 3.