Background paper No. 2

The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees

The scope of the challenge

Countries in Central, Eastern and South-eastern Europe are increasingly becoming points of both destination and transit for substantial movements of persons in search of protection and/or better economic opportunities. The origin of these flows is an indicator that many persons thus transiting these regions may have genuine claims to international protection, however they do not present their claims for any number of reasons, including: the existence of family or community links with previously settled refugees or migrants in Western Europe; lack of knowledge about the laws and procedures of the transit countries; and, last but not least, decisions made on their behalf by the smugglers into whose hands they have entrusted their destiny for lack of other viable options.

States in Western Europe tend to regard such arrivals through their periphery, including those involving asylum-seekers, as irregular movements that need to be curbed, or at least controlled. The "safe third country" notion, which was introduced in the law and practice of most Western European States in the past decade or so, has provided a rather powerful mechanism to send asylum seekers back to countries in which they have spent time - in some cases, a very short time - on their way to Western Europe.

It is debatable, however, to what extent this practice has achieved the objective inherent in its design - namely, to instil a measure of order in the movements of asylum seekers through the European continent, while also ensuring that each asylum seeker is protected against refoulement and can exercise his/her right to seek and enjoy asylum. This doubt arises from the following observations:

(1) it is hard to predict where the chain of return through application of the "safe third country" notion can possibly stop. Not surprisingly, States in Central, Eastern and South-eastern Europe have adopted the notion in their own legislation and practice, thus making the chain ever longer and protection guarantees for the asylum seekers ever weaker;

(2) only a fraction of those asylum seekers that are returned from Western Europe actually apply for asylum in "safe third countries" in Central, Eastern or South-eastern Europe. It is probable - though statistics on this point are, by necessity, lacking - that many of those thus returned make further attempts at crossing the border westwards, but do not present themselves to the authorities when they succeed. This situation risks creating a "hidden" population of asylum seekers, falling outside both the migration control and the protection mechanisms that States have painstakingly developed.

UNHCR has also noted, with concern, considerable confusion in the "transposition" of the "safe third country" notion into the legislation of some States in Central, Eastern and South-eastern Europe. It is the case that, for example, in some countries the existence of a "safe third country" is sufficient ground to deny an asylum claim as abusive or manifestly unfounded. This constitutes a grave confusion between two fundamentally distinct aspects of the asylum procedure, namely: a decision on admissibility of the claim, which is made on purely formal grounds; and a decision on the substance of the claim, i.e., on the well-founded character of the fear of persecution or other harm invoked by the claimant. To collapse these two steps is tantamount to denying the asylum seeker the opportunity, to which he/she is entitled, to present the grounds on which he/she seeks protection as a refugee.

The international legal framework

For refugees to be able to benefit from the standards of treatment provided for by the 1951 Convention, or by other relevant international instruments, it is essential that they have physical access to the territory of the State where they are seeking admission as refugees, followed by access to a procedure in which the validity of their claims can be assessed. Thus, the United Nations General Assembly and UNHCR's Executive Committee have consistently affirmed that the duty of non-refoulement encompasses the obligation not to reject asylum seekers at frontiers and that all asylum

seekers must be granted access to fair and effective procedures for determining their protection needs.

The principle of *non-refoulement*, as set out in Article 33 of the 1951 Convention, applies to all persons coming within the refugee definition of Article 1 of the Convention. Respect for the principle of non-refoulement therefore requires that asylum seekers (persons who claim to be refugees pursuant to the definition of Article 1 of the 1951 Convention) be protected against return "in any manner whatsoever" to a place where their life or freedom would be threatened until their status as refugees has been finally determined. Recognition of refugee status under international law is essentially declaratory in nature -- formal recognition of a person's refugee status does not make the person a refugee but only declares him or her to be one. The duty to observe the principle of *non-refoulement* therefore arises as soon as the individual concerned fulfils the criteria set out in Article 1 of the 1951 Convention, and this would necessarily occur prior to the time at which the person's refugee status is formally determined.

It follows from the above that direct removal of a refugee or an asylum seeker to a country where he or she fears persecution is not the only form of *refoulement*. States are responsible for the application of this principle so as to do everything in their power to avoid asylum seekers being returned to their countries without an exhaustive examination of their claims. Indirect removal of a refugee from one county to a third country which subsequently will send the refugee onward to the place of feared persecution constitutes *refoulement*, for which both countries would bear joint responsibility. Therefore, a reliable assessment as to the risk of "chain *refoulement*" must be undertaken in each individual case, prior to removal to a third country considered to be safe.
Underlying the notion of "safe third country" is agreement on the allocation of responsibility among States for receiving and examining an asylum request. The preamble to the 1951 Convention expressly acknowledges that refugee protection is the collective responsibility of the international community: "the grant of asylum may place unduly heavy burdens on countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation."

The Executive Committee of UNHCR has adopted two Conclusions touching on the question of apportioning responsibilities for examining an asylum claim: Conclusion No.15 (XXX) on "*Refugees Without an Asylum Country*," and Conclusion No. 58 (XL) on "*The Problem of Refugees and Asylum-seekers who Move in an Irregular Manner from a Country in which they had Already Found Protection.*" The Committee of Ministers of the Council of Europe has also adopted "*Guidelines on the Application of the Safe Third Country Concept*" in Recommendation No.R (97) 22. In the context of the European Union, the Ministers responsible for immigration of the Member States adopted a Resolution on "*a Harmonized Approach to Questions concerning Host Third Countries*" on 30 November and 1 December 1992. This Resolution is part of the so-called "*EU acquis on asylum*" which candidate States to the Union are required to adopt. It should, however, be superseded in the near future by a binding European Community Directive on minimum standards in asylum procedures.

Distinguishing "safe third country" from "first country of asylum"

The two Conclusions of the UNHCR Executive Committee referred to above set out a clear distinction between these two notions. A "first country of asylum" is a country where a person has already been granted some legal status allowing him/her to remain in the territory either as an asylum seeker or as a refugee, with all the guarantees which international standards attach to such status. A country where the person could have found protection is not a first country of asylum in this sense.

Access to a substantive procedure can legitimately be denied to a person who has already found protection in a first country of asylum provided that such protection continues to be available. When it comes to the issue of return to a "safe third country" of an asylum-seeker whose claim has yet to be determined, UNHCR Executive Committee Conclusions No. 15 (XXX) and No. 85 (XLIX) have laid down the following basic rules:

(i) the circumstance that the asylum-seeker has been in a third State where he could have sought asylum does not, in and by itself, provide sufficient grounds for the State in whose jurisdiction the claim has been submitted to refuse considering his/her asylum request in substance and return him/her instead to the third country;

(ii) the transfer from one State to another of the responsibility for considering an asylum request may only be justified in cases where the applicant has meaningful links or connections (e.g. family or cultural ties, or legal residence) with that other State; and

(iii) when effecting such a transfer there must be, in each individual case, sufficient guarantees that the person will:

- be readmitted to that country;
- enjoy effective protection against refoulement;
- have the possibility to seek and enjoy asylum; and
- be treated in accordance with accepted international standards.

UNHCR has often pointed out that the question of whether a particular third country is "safe" for the purpose of returning an asylum seeker is not a generic question, which can be answered for any asylum seeker in any circumstances. This is why UNHCR insists that the analysis of whether the asylum seeker can be sent to a third country for determination of his/her claim must be done on an individualised basis, and has advised against the use of "safe third country lists".

The requirement that the third country should consent, on a case-by-case basis, to the return or transfer of the asylum seeker is inherent in the overall protection objective of ensuring that one State will assume responsibility for assessing the claim to international protection of every asylum seeker. This responsibility cannot be presumed; it must therefore be the subject of mutual agreement between the States concerned. It needs to be pointed out in this connection that one of the shortcomings of the 1992 EU Resolution mentioned above is that its listed criteria for establishing whether a country can be regarded as a "host third country" make no reference either to the consent of the third country to re-admit the asylum seeker, or to the existence of links between the asylum seeker and either country.

Concluding observations

Unilateral actions by States to return asylum seekers to countries through which they have passed, without the latter's agreement, carries the risk of refoulement or placing the refugee into an endless "orbit" between States. It is also contrary to the spirit of mutual commitment that must prevail in mechanisms of responsibility-sharing and international solidarity. Since the objective of the "safe third country" notion is the appropriate allocation of responsibility for receiving and considering asylum claims, it may be preferable to put in place multilateral arrangements with agreed criteria for apportioning such responsibility fairly and evenly.

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