Background paper No. 3

Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim

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The scope of the challenge

This background paper examines two closely inter-connected issues. In background paper No. 2 also submitted within the context of the Budapest Regional Conference (6-7 June 2001), UNHCR has emphasised the critical importance of a formal agreement between the sending and receiving States, wherever the application of the "safe third country" notion is envisaged. Formal agreements between States are commonplace with regard to the re-admission of their respective nationals. Increasingly, such re-admission agreements also try to address the situation of third country nationals finding themselves unlawfully on the territory of either party.

Among those third country nationals who are covered by a re-admission agreement, there may be persons seeking international protection. Few bilateral agreements contain any specific provision regarding the treatment of these asylum seekers, in spite of their peculiar needs and corresponding State obligations. As for multilateral instruments delineating, on the basis of agreed criteria, the respective responsibilities of States Parties for examining asylum claims, they are in even shorter supply. UNHCR is aware of only one such instrument in force today, namely the 1990 Dublin Convention, which binds the Member States of the European Union as well as Iceland and Norway.

Re-admission agreements are a basic tool of migration management. They have, over unilateral return measures, the significant advantage of encapsulating the mutual commitments of two or (in some cases) more States. Where third country nationals are concerned, however, and in particular third country nationals seeking asylum, the nature and scope of such commitments need to be spelled out. Re-admission is, in effect, an end in itself when it comes to regulating the movements of nationals of either State Party, but such is not the case where what is at stake is the re-admission of third country nationals. In this case, criteria must be agreed upon, beyond the possession of a particular nationality, on which to base an expectation of re-admission. Such criteria will normally include lawful residence in, or other demonstrable connections with, the country into which re-admission is sought.

Where a person has made an asylum application, and this application has not been dealt with in substance, the question of his/her re-admission by another State (in which, e.g., he/she has previously stayed) becomes in reality a question of re-admission for the purpose of considering his/her claim. At issue, in final analysis, is the question of how to allocate responsibility for examining an asylum application in such a way as to ensure that the applicant receives the necessary consideration of protection needs and, if warranted, can enjoy international protection.

At the time of its adoption, UNHCR welcomed the Dublin Convention because it established a binding mechanism among EU States (all of them party to the 1951 Convention), whereby an asylum claim would be adjudicated, in principle, by one and only one of them. Such a mechanism had the potential to remedy the situation of so-called “orbit cases”, in which no State would consider itself responsible for the examination of an asylum claim. Orbit situations result in considerable hardship for the asylum seekers concerned, and in a serious challenge to the principle of responsibility-sharing that underpins the international regime of refugee protection.

The operation of the Dublin Convention has indeed reduced the number of “orbit cases”, yet other problems have arisen in its implementation, which the European Commission recently summarised in a working document for the consideration of Member States. In particular, problems of interpretation and evidence relating to the established criteria for determining the responsible State have caused asylum seekers to spend many months in uncertainty as to which State will eventually consider their claims.

UNHCR also finds it problematic that any Member State retains, under the Dublin Convention, the possibility to shift responsibility for examining the claim to a non-party State outside the Union, by operation of the “safe third country” notion. Furthermore, it has become apparent that an agreement on allocation and transfer of responsibility, such as the Dublin Convention, cannot operate well unless there exists, among the contracting States, a sufficient degree of harmonisation in substantive and procedural standards. The disparity of national standards in key areas, such as the interpretation of the refugee definition or conditions for the reception of asylum seekers, challenges many of the assumptions on which the Dublin Convention is implicitly based.

The international legal framework

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.

With particular reference to re-admission agreements, the Parliamentary Assembly of the Council of Europe has recommended that Member States “review their own immigration and asylum policies with a view to guaranteeing access to their territory and to their asylum procedures to all persons seeking international protection” and “re-examine readmission agreements with a view to guaranteeing access to the asylum procedure for every potential asylum-seeker.” (Recommendation 1489 (2001) on Transit Migration in Central and Eastern Europe, adopted on 22 January 2001).

In November 1994, the Council of the European Union proposed a specimen re-admission agreement, and recommended that it be used flexibly by Member States when negotiating such agreements with countries outside the EU. The specimen deals, *inter alia,* with the re-admission of third country nationals, but it makes no specific provision for asylum seekers. It contains, nonetheless, a clause to the effect that States’ obligations arising from the 1951 Convention, the 1967 Protocol and other relevant international treaties, will not be affected by the re-admission agreement.

The Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the Community (the Dublin Convention) was adopted in June 1990 but entered into force in 1997 only, between all Member States of the European Union. In January 2001, the European Community entered into an agreement with Iceland and Norway, whereby the provisions of the Dublin Convention shall be implemented by these two non-EU countries and applied in their relations with the Member States, as well as in their mutual relations.

According to Art. 3 of the Dublin Convention, an application for asylum made by an alien within the territory, or at the border of, the Union shall be examined by a single Member State, which shall be determined in accordance with a number of criteria defined in the Convention itself. Each Member State retains, however, the right to examine an application for asylum submitted to it, even if such examination is not its responsibility under the agreed criteria. Furthermore, any Member State may, for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires.

The criteria stipulated by the Dublin Convention for allocating responsibility to examine a claim in substance are, in descending order of priority:
- (close) family links
- possession of a valid residence permit
- possession of a visa
- irregular entry into the territory; and
- regular entry into the territory.

Where no State can be designated as responsible on the basis of the above criteria, the first Member State with which the application for asylum is lodged shall be responsible for examining it.

Transfer and re-admission for the purpose of determining refugee status: basic principles

In background paper No. 2, UNHCR has observed that the mere circumstance that the applicant has been in a country where he/she could have sought protection before entering the territory of the State with which he/she is lodging an asylum claim does not, in and by itself, provide the latter State with sufficient grounds for refusing to consider the application in substance. By the same token, a mutual agreement to re-admit asylum seekers who are third country nationals cannot be based on this circumstance alone.

As explained above, what is at stake in the inclusion of asylum seekers in the "target group" of re-admission agreements is, in the final analysis, the allocation of responsibility for examining an asylum application in a manner consistent with the imperatives of refugee protection. UNHCR considers that any analysis of the issues involved here must be based on an understanding that the responsibility for examining an asylum application lies primarily with the State to which this application been submitted. While this State may be relieved from such responsibility if another State will consider the application, it is essential that any agreements that may be concluded to this end aim at identifying and achieving the most appropriate solution in respect of those applicants who, after due consideration of their claims, are found to be in need of protection as refugees.

A central consideration in any discussion of States' responsibility for the processing of asylum claims must be the interest of the refugee to have his/her claim determined fairly and promptly in an environment supportive of his/her psychological and social needs, with special account being taken of family and/or other humanitarian circumstances.

With this overriding protection concern in mind, the Executive Committee of UNHCR has advised that transfers of responsibility for considering asylum applications should only be explored in cases where the applicant has a connection or close link with another State. This principle applies to transfers under the operation of a bilateral agreement, upon recognition of a close connection between the asylum seeker and the other contracting State. The same principle applies, *a fortiori*, to the drafting of multilateral agreements, the declared purpose of which is to allocate responsibility for examining asylum applications in substance. In such agreements, the criteria for transfer and re-admission flow logically from those set for the allocation of responsibility.
A multilateral instrument of the "Dublin" type must necessarily contain, alongside criteria for allocation of responsibility, agreed mechanisms for the transfer of the applicant, and the shifting of procedures, from the State in which the applicant finds himself to the State responsible for examining the application. The complexity of such processes requires that these mechanisms of information, consultation, implementation and control be defined with great care. It is of paramount importance, from a protection point of view, that these mechanisms operate smoothly and promptly, to avoid undue delays in the identification of persons in need of international protection – which remains the central objective of the exercise. Strict time limits must, therefore, be set.

Another important consideration in the implementation of bilateral or multilateral transfer agreements is the protection of the

asylum seeker's personal data, in order not to expose the asylum seeker or his family to any unintended risk.

Concluding observations

There is an evident value in instituting formal arrangements which limit the possibilities for refugees to seek asylum in one country after another. UNHCR agrees with States that asylum seekers should in principle submit their claim in only one country that has accessible, fair and effective procedures for determining refugee status in accordance with established international standards. However, the fact that a person has the possibility to seek and enjoy asylum in a given country should not take precedence over every other consideration as asylum is not just about numbers and legal definitions. Most importantly, the connections which an asylum seeker may have with a particular country, whether through the presence of family members or through linguistic, cultural or historical ties, are key considerations.

Once it is accepted that appropriate measures are necessary to limit the so-called "asylum-shopping" problem, the corollary to this is that there must be at least one country in the world willing and able to provide protection and quality, durable asylum to each and every refugee. In UNHCR's view, this is best achieved by defining universal rules on the proper apportionment of responsibilities for receiving asylum seekers. Unilateral policies and practices necessarily affect other States, and problems will only be shifted rather than resolved.

UNHCR therefore welcomes and promotes co-operation among States to ensure the effective functioning of the international refugee protection system, including through appropriate mechanisms for the transfer and re-admission of asylum seekers. As the organisation at the centre of the international protection system, UNHCR legitimately expects the more affluent States to share the global responsibility for refugee protection in three important ways:

- by pursuing liberal policies towards those people who seek asylum on their territories;

- by establishing and strengthening resettlement programmes for those refugees who are unable or, for valid reasons, are unwilling to remain in their country of first asylum; and

- by providing adequate financial and technical assistance which enables the less prosperous States to discharge effectively their refugee protection responsibilities.

UNHCR hopes these essential elements will remain at the centre of re-admission agreements, whether bilateral or multilateral. It is also important that arrangements for the appropriate allocation of responsibility for receiving and determining asylum claims take into account the inter-dependence between admission policies and return policies. As noted in background paper No.1, society's readiness to support the admission of increased numbers of asylum-seekers and refugees depends to a large extent on how governments deal with the return of the unsuccessful asylum seekers.

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UNHCR Geneva, May 2001