

### Agenda Item 3

## **IRREGULAR SECONDARY MOVEMENTS OF REFUGEES AND ASYLUM SEEKERS**

### **STATEMENT ON BEHALF OF NGOs**

*Thank you, Mr. Chairman,*

*This statement has been drafted in consultation with, and is delivered on behalf of, a wide range of NGOs.*

NGOs welcome the invitation that has been extended to us by the facilitating states of the secondary movement strand to actively and directly participating in the core group, and look forward to further discussions on this important issue. The issue of secondary movement is not an isolated one, and must be considered in the context of principled approaches to responsibility- and burden-sharing, as well as the question of effective protection. However, most importantly, the primary aim of these discussions must be to ensure that refugees are able to enjoy protection in accordance with established human rights and refugee law principles.

#### **1. The content and scope of some of the concepts surrounding the movement of refugees**

The discussions on this topic are fundamentally a discussion about the concept of protection, and when and how and why protection sometimes can be considered to be “effective”. Unless this happens, we are concerned that the intent and purpose of the discussions surrounding this particular topic will be unclear and could damage efforts to improve the protection of refugees that are being discussed in the context of Convention Plus and the Forum.

- a) Irregular movements of refugees and asylum-seekers who have already found protection

The term “irregular movement” should only be used in the context of this discussion insofar as it is based on the principles set out in EXCOM Conclusion 58 of 1989. This Conclusion deals specifically with “[t]he phenomenon of refugees whether they have been formally identified as such or not (asylum-seekers), who move in an irregular manner from countries in which they have already found protection”. This Conclusion, and the language it uses, is wholly consistent with the object and purpose and principles of the 1951 Refugee Convention.

- b) Primary movement

In our view, the primary movement of a refugee does not end as soon as s/he sets foot in a country of first asylum or transit country. Indeed, it does not end until s/he *has found* effective protection. It is only after that point that it is possible to speak of a “secondary” movement. Restrictions or measures aimed at blocking access to protection would, in that sense, be a direct violation of the fundamental human right to seek and enjoy asylum from persecution.

### c) Secondary movement

Unlike “irregular movement of refugees and asylum-seekers from a country in which they have already found protection”, which has a clear legal meaning, there is no such agreement on “secondary movement”. Like “onward movement”, it denotes a fact, not a legal status. It reflects the practical reality that refugees move, but it does not speak to why they move.

We would like to draw your attention to one particular study that highlights the concerns we have when this contested definition is used. In a briefing published by Human Rights Watch (HRW) in September 2002 (*“Not for export”: Why the International Community Should Reject Australia’s Refugee Policies*), HRW warned about the dangers of the Australian government’s approach to what it saw as the problems of “secondary movement” to Australia. Australia justified a range of measures (the most prominent of which was the so-called “Pacific Solution”) targeting refugees and asylum-seekers, who, according to Australia, **could and should** have found safety and protection in their home regions - the Middle East and South Asia - or in transit countries. Because of this viewpoint, Australia argued that it did not have any (or a very limited) obligation to protect “secondary movers”. NGOs would argue that an agreed definition of “secondary movement” should therefore, not include any simplified language relating to what refugees in search of protection could and should have done. As the HRW briefing showed, the reasons behind the movement of the refugees towards Australia were complex, but founded in the human rights concerns they had.<sup>1</sup> Indeed, the issues of onward or secondary movement are so complex that passing judgment on what an individual *could* or *should* have done would be neither fruitful nor just.

## 2. Effective protection

At the forefront of any discussion about “secondary” or “onward” movement must be the centrality of the refugee and her/his right to protection. Any discussion on “secondary” or “onward” movement must therefore have as its starting point a clear articulation of what constitutes “effective protection”. The Lisbon Expert Roundtable, organized by UNHCR and the Migration Policy Institute in December 2002, provided a non-exhaustive set of elements considered to be critical factors for the appreciation of “effective protection” in the context of secondary movement of asylum-seekers. The European Commission and some states have begun developing their own ‘definitions’ of ‘effective protection’.

Effective protection must be located within a given set of international legal standards. However, the definitions used by many states are premised on a desire for “effective protection” to provide a justification for return. We believe therefore that UNHCR should be encouraged to prepare an authoritative statement on the scope and concept of “effective protection” in order to inform this discussion.

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<sup>1</sup> The main reasons identified through the HRW research as cited in *“Not for export”: Why the International Community Should Reject Australia’s Refugee Policies* (HRW, September 2002) were the risk of forced return (*refoulement*); on-going persecution (some were unable to escape their original persecutors when they arrived in their countries of first asylum); lack of legal status; the risk of arrest and detention (often because of the lack of legal status and work permits) and discriminatory denial of access to labour market, housing, health care and education

<sup>2</sup> See for expansion on this part Amnesty International, *UK/EU/UNHCR: Unlawful and unworkable – extra-territorial processing of asylum claims*, 18 June 2003 (AI Index: IOR 61/004/2003).

Once the scope and content of “effective protection” is resolved, any question of return should be considered in two stages:

First, what are the elements of effective protection in the country? Here, questions of legal, physical, material and social protection should be taken into account.

Second, if protection is effective, when is return possible? This question ought to take into account *inter alia* the following issues:

- i. Would return be consistent with principles of international responsibility- and burden-sharing?
- ii. Is there access to durable solutions?
- iii. Would it be fair and reasonable in all the circumstances to return the person? For example, the identification of the most appropriate country of asylum should as far as possible take into account the intentions of the asylum seeker, ensure respect for the basic human rights of the asylum seeker and take family links into consideration, including the best interest of the child in cases of separated children..

### **3. Survey**

NGOs propose that there be more than one group-specific survey undertaken within the secondary movement strand. We understand that there are funding implications to this proposal, but urge that at least one more population of refugees and asylum seekers from at least one more region is surveyed. This is especially important in order to safeguard objectivity and also to ensure that any generic conclusions derived from the results of the survey can be widely applicable. We also stress that any conclusions thus derived must be primarily and explicitly aimed at protecting the rights of refugees and asylum seekers. The scope and intent of any such survey must also reflect this primary purpose. In order to ensure that the results of the survey accurately reflect the experience of refugees and asylum seekers engaged in onward or secondary movement, we urge that the voices of refugees and asylum seekers are heard throughout this survey, while at the same time ensuring that appropriate steps are taken to protect individuals being interviewed. In particular, we would point to the need to incorporate international standards of data protection in order to ensure that no refugee or asylum seeker who participates in the survey is exposed, either directly or indirectly, to abuse of their fundamental human rights as a result of their participation. NGOs stand ready to provide information from our research and work on the ground on the situation of Somali asylum seekers and refugees.

### **4. Not about migration management/control**

Any discussion of 'irregular secondary movement' necessarily speaks to issues of fundamental human rights. While we recognise the interest of states to control what are viewed as “irregular and unauthorised movements” NGOs wish to make explicit that the exercise of state sovereignty necessarily includes compliance with obligations, such as those under international human rights and refugee law standards, which states have voluntarily assumed. It should explicitly be recognised that this discussion is not, and should not be, an exercise in migration management or control. It must also be kept in mind that responsibility- and burden-sharing arrangements can never provide an excuse for states to divest themselves of the legal responsibility to protect refugees in their territory, or indeed to violate in any way the fundamental human rights of refugees and asylum seekers, in particular the principle of *non-refoulement*. Refugees who are forced, through not having found access to effective protection, to engage in secondary

irregular movements are often at risk of suffering human rights abuses as a direct consequence of deterrence/interdiction measures carried out by states. In such circumstances, there is a responsibility to establish accountability for such abuses and to find remedies against these abuses.

*Thank you.*

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<sup>2</sup> *High Commissioner's Summary of the Inaugural Meeting of the Forum, 27 June 2003.*