

Addressing Security Concerns without Undermining Refugee Protection*

- UNHCR's perspective -

A. Introduction

1. Security considerations have been permeating policy responses on a wide range of issues for more than a decade. Since 11 September 2001, concerns about threats to security emanating from international terrorism have intensified as a result of further high profile attacks and developments in many regions of the world. At times, possible linkages between international terrorism and movements of people have been alluded to. Fears that asylum-seekers and refugees would pose a threat to the host country have been fuelled by xenophobic rhetoric aimed at shoring up support for restrictive policies in the area of asylum.
2. In UNHCR's view, security and protection are not mutually exclusive. Giving primacy to a security focus at the expense of protection has failed to bring about desired results. It is, however, possible to ensure that those forced to leave their homes due to persecution, conflict and insecurity have access to international protection, while at the same time preserving the integrity of asylum channels.
3. UNHCR shares the legitimate concern of States to ensure that there should be no avenue for those supporting or committing terrorists acts to secure access to territory, whether to find a safe haven, avoid prosecution, or to carry out further attacks. An effective response to possible security threats cannot, however, come from measures seeking to restrict the movement of refugees and migrants and further limit access. This simply diverts refugee and migrant movements along other routes, aggravates their situation, and contributes to the flourishing business of smugglers and traffickers.
4. Instead, UNHCR calls for an integrated response that focuses on addressing asylum and migration flows, thereby enabling States to identify those entering their territory and respond to protection as well as security concerns in line with their obligations under international law. Appropriate mechanisms need to be in place in the field of asylum as in other areas.
5. The observations that follow are offered against this background, with a view to ensuring that counter-terrorism measures comply with the various aspects of international law, notably international human rights law, refugee law, and humanitarian law.

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B. General

6. UNHCR's main concern is twofold: that asylum-seekers and refugees may be victimized as a result of public prejudice and unduly restrictive legislative or administrative measures, and that carefully built refugee protection standards may be eroded. Current anxieties about international terrorism risk fuelling the perception of those seeking to reach safety as a threat to security. This can lead to heightened levels of fear and xenophobia manifesting themselves in hostile attitudes towards, and even physical attacks against, asylum-seekers and refugees. Such fears and anxieties can reinforce a growing trend toward the erection of barriers to keep out perceived dangers. In such a context, asylum-seekers have a difficult time in a number of States, either accessing procedures or overcoming presumptions about the validity of their claims, which stem from their ethnicity, or their mode of arrival. The fact that asylum-seekers have arrived irregularly does not vitiate the basis of their claim.

7. Any discussion on security safeguards should start by acknowledging that refugees are themselves escaping persecution and violence, including terrorist acts. Another starting point is that the international refugee instruments do not provide a safe haven to terrorists and do not protect them from criminal prosecution. On the contrary, they render the identification of persons engaged in terrorist activities possible and necessary, foresee their exclusion from refugee status and do not shield them against criminal prosecution, nor do they prevent extradition or expulsion.

8. UNHCR's overall conclusion is that dealing with the terrorist threat in the context of asylum does not necessitate amendment of the principles on which refugee protection is based, but requires a comprehensive and coordinated approach to addressing situations of mixed movements of refugees, migrants and others, with proper security and protection safeguards built in.

C. Admission/Access to refugee status determination

9. UNHCR appreciates that States may wish to strengthen border controls as one way of identifying security threats at the point of entry. Enhanced cooperation between border guards, intelligence services and immigration and asylum authorities of the State concerned, other States along travel routes and organizations such as INTERPOL, Europol and Frontex, as well as the use of systems such as Eurodac, could assist in the early identification of terrorist suspects. Increased security checks, including through the use of biometrics such as fingerprints, iris scans and/or facial characteristics, are reasonable measures, provided they are conducted in line with data protection principles and other relevant human rights standards. Proper screening measures are valid, if conducted in conformity with the principles of necessity, proportionality and non-discrimination, and subject to judicial control. Profiling based solely on a person's assumed nationality, race, religion or ethnicity would, in UNHCR's view, be discriminatory and inappropriate.

10. UNHCR continues to work with States to develop and implement protection-sensitive border management systems. Some years ago, UNHCR developed a *10 Point Plan on Refugee Protection and Mixed Migration*, which provides practical suggestions for management strategies and entry systems. At its core lie measures to

ensure that refugees and asylum-seekers (and others with specific needs) travelling irregularly are identified, protected against *refoulement* and given access to asylum procedures. A robust capacity to receive, assist, register and screen arrivals supports counter-terrorism and security measures by enabling States to make distinctions between different categories among the arrivals as well as allowing for the early identification of people who may constitute a security risk.¹

11. The summary rejection of asylum-seekers at borders or points of entry may amount to *refoulement*. All persons have the right to seek asylum. An application for asylum must be determined on its own merits, and not against negative and discriminatory presumptions deriving from the ethnic origin or religious faith of the claimant.

12. The refugee definition, properly applied, should lead to either non-inclusion or exclusion of those responsible for serious criminal, including terrorist, acts. Since issues of exclusion are often complex, UNHCR continues to advocate that they should continue to be dealt with in the regular asylum procedure, which allows for a full factual and legal assessment in the individual case by qualified personnel.

13. Where there is a reasonable possibility that exclusion issues may arise in the case of an individual pursuing an asylum claim, States have an evident interest in expedient decision making processes. In such cases UNHCR continues to support a proper factual and legal assessment, but believes this could be accomplished through prioritized and expedited consideration of the claim by a specialized “exclusion unit” within the refugee status determination process. Such a unit would have expertise in relevant areas of refugee law and criminal law, specialist knowledge of terrorist organizations, and clear communication links with intelligence services and criminal enforcement agencies. Specialist expertise and clearly focused resources would enable prompt and quality decision making. UNHCR promotes the redesign of the asylum process to accommodate the setting up and operating of such a unit.

14. If an asylum-seeker is wanted by national courts in the country of asylum, the examination of the claim could be deferred pending the completion of criminal procedures. In cases involving an extradition request from the country of origin, asylum and extradition procedures may be conducted in parallel but the determination of the refugee claim needs to precede the decision on extradition. An asylum-seeker may, however, be extradited to a country other than the country of origin, provided there is no risk of persecution and access to a refugee status determination procedure is guaranteed. In this context, UNHCR recalls the obligation of States to bring terrorists to justice as asserted in SCR 1373 of 28 September 2001 and reaffirmed most recently in SCR 2178 of 24 September 2014.

15. In humanitarian crises, including large-scale influxes and complex or mixed cross-border population movements where existing responses are not suited or adequate, temporary protection or stay arrangements may be implemented as an

¹ For more information, please see UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011: <http://www.refworld.org/docid/4d9430ea2.html>

appropriate multilateral response to ensure protection against *refoulement* and appropriate treatment for those in need of international protection. Reception arrangements in such situations require proper systems for the identification, registration and documentation of beneficiaries, including identity and security screening.²

D. Restrictions on the movement of asylum-seekers

16. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereinafter “1951 Refugee Convention”) as well as human rights law do not preclude restrictions on the movement of asylum-seekers, including detention, albeit as the exception rather than the rule, if necessary in circumstances prescribed by law and subject to due process safeguards. Detention would justifiably be deemed necessary, where there are solid reasons for suspecting links with terrorism in the individual case.³ Policies which apply automatic detention of all asylum-seekers entering irregularly or coming from particular countries, as are being implemented and/or considered in a number of States in response to the resurgence of fears about terrorism, are not supported by UNHCR. They would, in UNHCR’s view, contradict long established standards on detention agreed by States, and could be seen as an arbitrary, even discriminatory response which could then come into conflict with international legal norms.

E. Sharing of data on asylum-seekers

17. UNHCR recognizes that the sharing of data between States is crucial, provided it is done in line with established principles and standards of data protection, and with due consideration for what is permissible under international refugee law and international human rights law.⁴ States should thus take into account, *inter alia*, the well-established principle that information on asylum-seekers should not be shared with the country of origin. This could endanger the safety of the asylum-seeker and/or family members remaining in the country of origin. Best State practice indeed incorporates a strict confidentiality policy. Should it exceptionally be deemed necessary to contact the authorities in the country of origin, in case there is suspicion of terrorist involvement and the required information may only be obtained from these authorities, there should be no disclosure of the fact that the individual has applied for asylum.

F. Exclusion from refugee status

18. Those responsible for serious crimes are legally excluded from refugee status by virtue of the terms of the international refugee instruments. UNHCR encourages

² For more information, please see UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014: <http://www.refworld.org/docid/52fba2404.html>

³ For more information, please see UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012: <http://www.refworld.org/docid/503489533b8.html>

⁴ For more information, please see UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, May 2015: <http://www.refworld.org/docid/55643c1d4.html>

States to use the exclusion clauses rigorously, albeit appropriately.⁵ It also encourages States which have not already done so, to incorporate the exclusion clauses of the 1951 Refugee Convention into national legislation. This is consistent not only with the dictates of refugee law, but also with Security Council resolutions which call on States not to provide refuge to terrorists, in particular SCR 1373 (2001) and SCR 1624 of 14 September 2005 which call for appropriate measures with regard to asylum-seekers. As affirmed in these and numerous other resolutions adopted by the Security Council and the General Assembly, however, such measures need to conform to international law, including international human rights law, refugee law and humanitarian law.

19. The crimes to which article 1F(a) of the 1951 Refugee Convention refers – crimes against peace, war crimes and crimes against humanity – are those so defined in international instruments and are to be interpreted in the light of a number of evolving sources of international criminal law. Crimes which, in peacetime, would be properly qualified as acts of terrorism, will generally meet the definition of war crimes if committed in the context of an armed conflict. Under certain circumstances, such acts may also constitute crimes against humanity.

20. Article 1F(c) concerns acts contrary to the purposes and principles of the United Nations. Many of the acts within the scope of this provision may only be committed by persons acting on behalf of States or quasi-States, because the United Nations' purposes and principles are intended to be a guide for States in their relations with each other. However, acts which are properly considered to be of a terrorist nature, and which, given their gravity and nature, are capable of affecting international peace and security or friendly relations between States, may also fall within the scope of this exclusion ground. UNHCR accepts that individuals who are not holding a position of authority within a State may be excluded based on article 1F(c) provided it is established that they incurred individual responsibility for the acts in question.

21. Notwithstanding the above, article 1F(b) remains a central provision. This exclusion clause refers to “serious non-political crimes” (committed outside the country of refuge prior to admission), but this would generally encompass acts prohibited under relevant international conventions and protocols pertaining to terrorism, notwithstanding any political motives behind such acts. In line with approaches developed in the extradition context, which are relevant also in the context of exclusion, violent acts of terrorism are likely to fail the predominance and proportionality tests used in many jurisdictions to determine the political character of an offence.

22. In view of the seriousness of the issues and the consequences of an incorrect decision, the application of any exclusion clause should continue to be individually assessed, based on available evidence, and conform to basic standards of fairness and

⁵ For more information, please see UNHCR, *Guidelines on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003: <http://www.refworld.org/docid/3f5857684.html> and its accompanying *Background Note*: <http://www.refworld.org/docid/3f5857d24.html>

justice. As mentioned earlier, this assessment should be located within the refugee status determination process, albeit taking place in specially tailored procedures for exclusion.

23. The assessment should also, in UNHCR's view, be sensitive to certain additional considerations. Firstly, in determining whether exclusion is justified, it is not sufficient to rely on the designation as "terrorist" of a particular crime, person or group. Rather than focusing on the label, it is necessary to determine whether the acts in question constitute crimes within the scope of article 1F. Secondly, exclusion requires a determination that the person concerned incurred individual liability for the acts in question, be it as a perpetrator or through his or her participation in the commission of these acts by another person. Thirdly, even though exclusion proceedings do not equate with a full criminal trial, the standard of proof ("serious reasons for considering") has to be a higher threshold than a mere suspicion and, in UNHCR's view, should be more than the balance of probabilities.

24. Where there is sufficient proof that an asylum-seeker belongs to an extremist group involved in the commission of serious crimes, including those considered to be of a terrorist nature, the information available about this group may support a finding that anyone who voluntarily becomes, or remains, a member may be considered to have incurred individual responsibility for the crimes in question. In asylum procedures, this may give rise to a rebuttable presumption of individual liability in such cases, resulting in the burden of proof shifting to the asylum-seeker. The position of the individual in the organization concerned, including the voluntariness of his or her membership, as well as the fragmentation of certain groups would nevertheless be examined and taken into account in reaching a determination on exclusion.

25. UNHCR fully appreciates the need to tackle the financing and other forms of support of terrorist groups, in line with SCR 1373 (2001) and subsequent resolutions as well as the 1999 International Convention for the Suppression of the Financing of Terrorism. Providing funds to such groups would in principle amount to an excludable crime or give rise to individual responsibility for other crimes – this being said, the particulars of each case would need to be considered, as not all such acts may reach the gravity required to fall under article 1F. Depending on the particular circumstances, where the amounts are small and provided on a sporadic basis, for example, the offence may not reach the level of seriousness required.

26. If an exclusion clause applies, the individual cannot benefit from international refugee protection under the 1951 Refugee Convention. The excluded individual may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international instruments. Where it is possible for the State concerned to exercise jurisdiction over the acts which gave rise to exclusion, UNHCR recommends the initiation of criminal proceedings.

G. Cancellation and revocation of refugee status

27. Generalized suspicions based on religious, ethnic or national origin or political affiliation do not justify a general review process, much less a re-opening of a final refugee status determination. Cancellation of refugee status – that is, a decision which

invalidates the initial recognition as a refugee – normally only follows evidence of fraud or misrepresentation regarding facts central to the refugee decision. This means that refugee status may be cancelled, if it emerges that the “inclusion” criteria were not met at the time, for example because the individual was fleeing legitimate prosecution rather than persecution, or if one of the exclusion clauses would have applied, had all the relevant facts been known. Revocation of refugee status would be appropriate if it is established, in procedures offering adequate safeguards, that there are serious reasons for considering that the person has committed acts within the scope of article 1F(a) or (c) of the 1951 Refugee Convention after recognition as a refugee.⁶

H. Expulsion, including to the country of origin

28. UNHCR is concerned that States may be inclined to expel groups or individuals based on religious, ethnic or national origin or political affiliation, on the mere assumption that they may be involved in terrorism. International refugee law, in particular article 33(2) of the 1951 Refugee Convention, does not prohibit the expulsion of recognized refugees, provided however that it is established in the individual case that the person constitutes a danger to the security or the community of the country of refuge. As this danger should outweigh the risks upon return, UNHCR notes that such expulsion decisions must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.

29. Expulsion and exclusion are two different processes. Exclusion denies refugee status to persons considered undeserving because they have committed certain serious crimes or heinous acts, while at the same time preventing fugitives from escaping justice for such crimes. Exclusion protects the integrity of the institution of asylum. Expulsion aims to protect the country of refuge and hinges on the appreciation of a present or future threat. The threshold for returning refugees to their country of origin – as an exception to the *non-refoulement* principle – has to be particularly stringent.

I. Extradition

30. International refugee law does not preclude the extradition of recognized refugees or asylum-seekers. Extradition may, however, be granted only if the surrender of the wanted person to the requesting State is in conformity with the principle of *non-refoulement*. More specifically, article 33(1) of the 1951 Refugee Convention establishes a mandatory bar to the extradition of a refugee to his or her country of origin, except in the circumstances expressly provided for in article 33(2). A refugee may, however, be extradited to a country other than the country of origin, provided this would not expose him or her to a risk of persecution either in the country that requested the extradition or another country.

⁶ For more information, please see UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004: <http://www.refworld.org/docid/41a5dfd94.html>

31. Asylum-seekers subject to an extradition request from the country of origin enjoy protection against *refoulement* pursuant to article 33(1) of the 1951 Refugee Convention while their claim is being considered, including at the appeals stage. In such cases, any information related to the extradition request will need to be considered, in light of all relevant circumstances. Asylum and extradition procedures may be conducted in parallel. The host State's obligations under international refugee law require, however, that the asylum claim be determined by a specialized body competent to assess eligibility for international protection, and that the determination on the asylum claim must precede the decision on the grant of extradition.

32. In case of a request for the extradition of an asylum-seeker from a country other than the country of origin, the asylum procedure may be suspended and the wanted person may be extradited, provided it is established that this would not give rise to a risk of persecution and arrangements are made to ensure that he or she will have access to a determination of the asylum claim in line with the standards required under the 1951 Refugee Convention after the completion of criminal proceedings. In cases where extradition may not proceed for reasons related to a risk of persecution or other kinds of serious harm upon surrender, prosecution in the country of asylum is, in UNHCR's view, the appropriate response, in line with the principle *aut dedere aut judicare* ("extradite or prosecute").⁷

J. Increasing criminal law enforcement

33. UNHCR would welcome the adoption of a comprehensive Convention on International Terrorism and of other international or regional instruments, to serve also as an agreed framework for national legislation. UNHCR has already provided comments on the draft Convention and several pieces of national legislation. The closure of jurisdictional loopholes and clarity about the definition of terrorist offences are important for combating terrorism effectively.

34. UNHCR appeals to governments, however, to ensure that the terms of international instruments and of domestic legislation do not imply any unwarranted linkages between asylum-seekers/refugees and terrorists. In addition, definitions need to be quite precise. If definitions are too broad and vague, there is a risk that the "terrorist" label could be abused by some for political ends, for example to criminalize activities of political opponents. This is a matter of concern to UNHCR. It could well lead to recriminations amounting to persecution.

K. The continuing importance of resettlement and other regular avenues to reach safety

35. As the number of forcibly displaced has reached 60 million worldwide, with many of them fleeing situations of protracted conflict and violence, continued support for resettlement is vital. UNHCR continues to seek diversification in the number of resettlement countries globally and to strengthen its programmes, from emergency

⁷ For more information, please see UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008: <http://www.refworld.org/docid/481ec7d92.html>

processing through to more systematic use of resettlement to address durable solutions needs of refugees. UNHCR also works with States to provide other safe pathways for admission, such as humanitarian admission, humanitarian visas, private sponsorship, family reunification, scholarships, medical evacuation, and labour mobility initiatives, which complement existing resettlement programmes and enable persons in need of international protection to reach safety.

36. In recent years, several countries have increased their commitments to offer resettlement or other forms of humanitarian admission, yet there are also signs that support for such programmes may decrease, particularly for certain groups. This would be counterproductive. In any case, UNHCR supports the enhancement of security screening, including the fingerprinting of candidates for resettlement and other forms of admission, to ensure the integrity of these processes.

37. In Europe, UNHCR has welcomed the adoption of the European Relocation and Resettlement schemes. These schemes incorporate security measures and checks, including proper registration. Together with UNHCR's global resettlement programme, family reunification, private sponsorship, and humanitarian and student visa schemes, they provide regular avenues which offer an alternative to irregular movement.

L. Combating racism and xenophobia

38. Equating asylum with a safe haven for terrorists is not only legally wrong, but it serves to vilify refugees in the public mind and promotes the singling out of persons of particular races, nationalities or religions for discrimination and hate-based harassment.

39. Recent security incidents in Europe and elsewhere have resulted in the emergence of uninformed and polarized discourse in some instances. The full application of the 1951 Refugee Convention and of immigration policies more generally represent key aspects of a wider response to current challenges in this area. As the Secretary-General of the United Nations also warned on 20 November 2015 after terrorist attacks in Beirut and in Paris, we must guard against “misplaced suspicions” about refugees and migrants who can help fight violent extremism, adding that such distortions and discrimination “only play into the hands of terrorists trying to sow divisions and fear.”

40. Continued resolute leadership is called for at this particularly difficult time to de-dramatize and de-politicise the humanitarian challenges of protecting refugees and to provide a better understanding of refugees and the right to seek asylum.

UNHCR
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