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# Safe Journeys and Sound Policy: Expanding protected entry for refugees

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## **Executive summary**

Protected entry procedures are visa mechanisms that allow individuals to apply for entry into another country for the purpose of accessing protection under international refugee or human rights law. Procedures are made available within countries of origin or first asylum, their primary function being to ensure that asylum seekers and refugees can travel safely across international borders and avoid potentially dangerous or exploitative irregular journeys.

This Policy Brief draws on past and current State practice to outline what these procedures look like, and how they should operate as tools of refugee protection. It speaks to a core objective of the Global Compact on Refugees, which is to expand access to third-country solutions for refugees and asylum seekers.

Forced migration is currently at record highs worldwide, but not all those who are displaced will want or need to move outside their region of origin. UNHCR has identified a relatively small number of refugees, 1.4 million people, as needing resettlement under its annual program in 2020. This means that States could make a real difference by expanding the use of protected entry procedures and other complementary pathways to increase access to protection and solutions.

### **Key findings and recommendations**

This Policy Brief recommends that States should implement and/or expand protected entry procedures to increase access to safe pathways to protection.

Protected entry procedures should comply with the following criteria:

- Complement, and be additional to, other avenues to protection

By complementing – and never replacing – the right to seek asylum directly through national asylum procedures, and being additional to existing annual resettlement programs, a protected entry procedure is better placed to be gender-responsive and/or reach applicants with particular vulnerabilities. Protection safeguards should include ensuring that rejection does not prejudice an applicant's ability to apply for protection through other pathways, or reapply if their circumstances change.

- Be based on a multi-year commitment by States

This can provide predictability for refugees, partner organisations and States, better positioning national authorities in the destination country to plan for the housing, support services, educational and employment needs of refugees. In turn, a multi-year commitment enhances the strategic use of resettlement, encouraging host States to maintain protection space, and helping to ease conditions on the ground for other refugees and the local communities in which they live.

- Have transparent and flexible application criteria and processes

This can help asylum seekers to make an informed decision about whether they can apply and safely wait for their application to be finalised. Criteria ought to focus on protection factors and ought not discriminate on the basis of factors that are irrelevant. A flexible procedure can provide a safety net for those applicants who fall outside Convention criteria, but who are still in need of international protection, and allow asylum seekers to move between countries (of origin and/or first asylum and transit) while their application is in progress

# 1 Introduction

Asylum seekers can face difficult journeys in their attempt to access protection under international refugee and human rights law. Their ability to exercise the right to seek asylum may be impeded by visa restrictions and other border controls, potentially forcing them to undertake irregular modes of travel across dangerous land or sea routes. In the current era of record displacement, with more than 70 million people forced from their homes worldwide, safe access to protection is a critical global challenge.<sup>1</sup>

In response to this challenge, the United Nations General Assembly resolved in September 2016 to ‘expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries’, through the unanimous adoption of the New York Declaration for Refugees and Migrants (New York Declaration).<sup>2</sup> This message was reinforced in December 2018, when more than 180 states adopted a new non-binding international agreement known as the Global Compact on Refugees (GCR). A core objective of the GCR is to ‘expand access to third country solutions’, including through pathways for refugees and asylum seekers that complement the annual resettlement program operated by the United Nations High Commissioner for Refugees (UNHCR).<sup>3</sup> The GCR holds that complementary pathways must be offered by a larger number of countries, and ‘made available on a more systematic, organized, sustainable and gender-responsive basis’ with ‘appropriate protection safeguards’ in place.<sup>4</sup>

This Policy Brief examines complementary pathways known as ‘protected entry procedures’, which allow refugees and asylum seekers to apply for entry into another country for the purpose of accessing protection under international law. Procedures are made available within countries of origin or first asylum. The primary function of these procedures is to ensure asylum seekers and refugees can obtain travel authorisation that allows them to move safely across international borders and avoid taking potentially dangerous or exploitative irregular journeys.

Drawing on past and current practice by governments in Australia, Europe and the Americas, this Policy Brief offers recommendations to inform future implementation or expansion of safe and orderly pathways for refugees and asylum seekers. If protected entry procedures are to provide a safe pathway, they must complement and be additional to other avenues to protection, be based on a multi-year commitment by States and have transparent and flexible application criteria and processes.

## 1.1 The humanitarian and policy context

The analysis of protected entry procedures herein speaks to an international interest in the utility of complementary pathways as a means of responding to forced migration. In addition to protected entry, complementary pathways can include private or community sponsorship programs, as well as migration channels such as family reunion schemes, work or student visas that offer ‘protection sensitive’ entry requirements so as to be more accessible to refugees.<sup>5</sup> In keeping with the GCR objective of expanding access to third-country

solutions, and as set out in its Three-Year Strategy on Resettlement and Complementary Pathways (2019–21), UNHCR is aiming to expand access to resettlement so that within a decade, by 2028, 3 million refugees will benefit from protection and solutions in 50 countries – 1 million under UNHCR’s annual resettlement program and a further 2 million through complementary pathways.<sup>6</sup>

In addition to expanding access to third-country solutions, UNHCR notes that complementary pathways can help to meet two other core objectives of the GCR: easing pressure on host countries and enhancing refugee self-reliance. In this manner, complementary pathways are ‘an indispensable aspect’ of the GCR, and can contribute to more predictable and equitable responsibility-sharing for refugee solutions.<sup>7</sup>

Several parliamentary and academic studies have already shown that protected entry can hold particular benefits for both refugees and destination countries. By enabling refugees and asylum seekers to seek authorisation for travel, individuals have greater agency and are better informed about their options for accessing protection. They may avoid an arduous journey, and a long and uncertain wait for what may be an unsuccessful protection claim.<sup>8</sup> According to UNHCR, this is an ‘important feature’ of complementary pathways, because refugees can ‘exercise control over their own solutions’.<sup>9</sup> In turn, procedures can ensure greater predictability for national authorities in planning for the housing, support services, educational and employment needs of refugees.<sup>10</sup> The European Commission has noted that this forward planning can increase public confidence in refugee resettlement, helping to address issues of xenophobia and racism within destination countries.<sup>11</sup> Procedures may also help to reconcile ‘migration control objectives with the obligation to protect refugees’, by utilizing existing mechanisms for migration controls and security checks that States already have in place at consular outposts.<sup>12</sup>

Most importantly, these studies have argued that expanded use of protected entry procedures could help reduce the need for refugees and asylum seekers to risk unsafe journeys and could diminish the market for people smuggling and trafficking.<sup>13</sup> These are critical issues in the current era of record displacement. During the period 2015 to 2018, for example, close to 10,000 people are believed to have died in the Mediterranean Sea after attempting to reach Europe aboard unseaworthy vessels.<sup>14</sup> The European Parliament has noted that in recent years approximately 90% of individuals granted protection within the EU have arrived by irregular means due to a lack of lawful options, and this had led to an ‘intolerable’ death toll on irregular routes to and within the region.<sup>15</sup> In February 2017 the United Nations Secretary-General’s Special Representative for International Migration reported that the international community’s goal ‘must be to offer alternatives’ to dangerous routes, and recommended that States establish complementary pathways and protection-sensitive migration channels to help ‘expand legal pathways for people fleeing countries in crisis’.<sup>16</sup>

A number of States have responded to this imperative in recent years, piloting and then expanding protected entry procedures for people fleeing designated countries. In 2012, Brazil established a humanitarian visa scheme for Haitians who were impacted by the deterioration of living conditions in their country after a major earthquake in 2010.<sup>17</sup> Since

2013, Brazil has offered humanitarian visas for individuals displaced by the civil war in Syria, through which asylum seekers can apply to travel to Brazil to access protection (see Section 3 below). In 2016, Costa Rica and UNHCR cooperated to establish a Protection Transfer Arrangement (PTA) that allows people at risk of persecution in Central America to access transit facilities en route to resettlement in a third country. And in Italy, France, Belgium and Andorra, faith-based organisations operate ‘Humanitarian Corridors’ for Syrians, Iraqis, Eritreans and other displaced groups, allowing people to fly to Europe safely and to be supported by local communities on arrival (detailed in Section 3 below). Together the Humanitarian Corridors have brought 2,600 people to safety in the past four years.<sup>18</sup> In 2019, UNHCR named Italy’s Humanitarian Corridors scheme as a regional winner of the prestigious Nansen Refugee Award. The agency praised the scheme as ‘a lifeline for those at greatest risk’ and an urgently needed pathway to protection.<sup>19</sup>

Elsewhere, protected entry procedures are a subject of ongoing policy debate and civil-society advocacy. In December 2018, the European Parliament voted to consider an EU-wide framework for humanitarian visas, which could provide pre-arrival clearance for asylum seekers to enter the territory of a member State. The move seeks to harmonise a varied approach to protected entry among member States and to address the current limited availability of safe pathways into Europe.<sup>20</sup> Meanwhile in the United States, where procedures have a long-standing role in the nation’s annual resettlement program, Senate Democrats sought to legislate in 2019 for Central American refugee children and their families to apply for protected entry at United States embassies in their countries of origin. This echoes a model previously implemented by the Obama administration in 2014 (see Section 3 below).<sup>21</sup> And in the Southeast Asian context, after thousands of Rohingya were stranded aboard vessels in the Bay of Bengal and the Andaman Sea in mid-2015, some academics and commentators suggested that an in-country program could offer a humane alternative to the protracted displacement of the Rohingya. This would be similar to the way the international community operated an ‘Orderly Departure Program’ for Vietnamese between 1979 and the late 1990s (at Section 3 below).<sup>22</sup>

In Australia protected entry procedures are a recurring subject in the national conversation on asylum policy, due in part to the existence of a little-known visa category for this purpose within Australia’s annual humanitarian program (see Section 3 below).<sup>23</sup> In 2011, a report by the Centre for Policy Development proposed that additional pathways such as in-country processing could improve Australia’s contribution to responsibility-sharing in the Asia-Pacific region.<sup>24</sup> In 2014, a High-Level Roundtable at Parliament House recommended in-country processing as a means of dissuading asylum seekers from attempting hazardous maritime journeys to Australia.<sup>25</sup> In 2016, the Australian Human Rights Commission argued that if the Australian government provided a greater number of safe, pre-authorised journeys through the visa subclass 201 and facilitated refugees’ access to skilled and student visas, this would hold a ‘dual benefit’ for protection seekers and the Australian government – expanded access to protection achieved ‘through a managed process’.<sup>26</sup> In 2019, the Kaldor Centre for International Refugee Law recommended that Australia expand access to safe pathways, including through the use of protected entry procedures, as one of the Centre’s seven principles for the nation’s refugee policy.<sup>27</sup>



## 2 Conceptual framework

Protected entry procedures are distinguished from other pathways by a ‘primary focus’ on providing individuals with a safe and orderly alternative to clandestine and potentially dangerous cross-border journeys.<sup>28</sup> Procedures allow refugees and asylum seekers to engage in direct communication with representatives of a prospective destination country about their chances of obtaining a durable solution before they attempt to travel to that territory.<sup>29</sup>

The term itself captures a range of mechanisms that enable individuals who are within their country of origin, or within a country of first asylum or transit, to apply for entry into another country for the purposes of accessing protection under international refugee or human rights law. Other terms employed historically or regionally may include ‘humanitarian visas’ or ‘humanitarian corridors’ (which are terms used in the GCR), or ‘protected transfer arrangements’. Where individuals are still within their country of origin, the procedure is commonly known as ‘in-country processing’.

Procedures share characteristics with complementary pathways generally and with third-country resettlement programs, in that they are directed at individuals in need of international protection and are mechanisms through which States can share responsibility for supporting and hosting refugees.<sup>30</sup> Unlike complementary pathways that involve private or community sponsorship, protected entry procedures do not necessarily rely on applicants having sponsors or other contacts in the destination country.

### 2.1 International refugee and human rights law

Under Art 1A(2) of the *1951 Convention relating to the Status of Refugees* (‘the Convention’), read in conjunction with the *1967 Protocol relating to the Status of Refugees* (‘the Protocol’), a refugee is defined as someone who is outside their country and is unable or unwilling to return there owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group.<sup>31</sup> The Convention and its Protocol are the core international legal instruments underpinning the system of international refugee protection, and are supplemented by additional instruments in Latin America and Africa that broaden the refugee definition.<sup>32</sup>

The cornerstone of refugee protection is the international legal principle of *non-refoulement*, which prohibits States from returning a person to a territory where they may be at risk of persecution or other serious harm. Here, the Convention and Protocol are complemented or supplemented by a body of international human rights law, which broadens the scope of *non-refoulement* to those who fall outside the Convention definition but who may also be at risk of persecution or other serious harm, and to whom States therefore have ‘protection obligations arising from international legal instruments and custom’.<sup>33</sup>

A State party to the Convention and/or Protocol has obligations to refugees who reach its territory. This includes, first and foremost, the prohibition on *refoulement* under Art 33(1) (see above). For a State to uphold this obligation, it must ensure fair, efficient and principled determination of protection claims (eg. allowing applicants access to translators and sufficient time to prepare their claims). For those determined to be refugees, a State has obligations to provide for a legal status that goes beyond *non-refoulement* and encompasses the full range of rights under the Convention that are oriented to successful settlement (such as the right to education, to access courts, to work and to obtain travel documents).

Protected entry procedures should always complement – and never replace – the ability of asylum seekers to independently access a State’s territory to apply for protection. If a State party to the Convention and/or Protocol implements protected entry procedures, it is choosing to exceed its formal legal obligations (under these instruments), because it is providing a means through which asylum seekers located elsewhere can apply to safely travel to its territory and access protection.

If a State chooses to implement protected entry procedures within a country of origin (known as ‘in-country’ processing, see Section 3 below), that State is offering protection to those who do not meet the Convention definition of a refugee as a person who is *outside* their country of origin. This decision not only exceeds that State’s legal obligations under the Convention, but also interacts with its legal obligations to other States under the principle of non-interference.<sup>34</sup> In-country processing therefore raises valuable questions about the willingness of one State to intervene in the affairs of another on behalf of a would-be refugee. These questions are reflected in the discussion and examples set out in Section 3 of this paper.

## **2.2 Resettlement and responsibility-sharing**

In-country processing and related protected entry procedures are discretionary measures that States can use to support the system of international refugee protection. This system is underpinned by the principles of international solidarity and responsibility-sharing among States, which hold that ‘refugee problems are the concern of the international community’ and their resolution depends on ‘the will and capacity of States’ to respond in concert ‘in a spirit of humanitarianism’.<sup>35</sup> International solidarity and responsibility-sharing may find expression in ‘financial and material assistance’ and ‘moral and political support’ for States that host refugees, as well as offers of third-country resettlement (‘resettlement’).<sup>36</sup>

Resettlement involves the transfer of a refugee from a country of first asylum to a third country, where that individual is admitted with permanent residence status.<sup>37</sup> Resettlement has been endorsed by the international community as ‘an instrument of protection’.<sup>38</sup> As part of UNHCR’s core mandate, the agency promotes resettlement as one of three ‘durable solutions’, alongside voluntary repatriation and local integration. In 2018, UNHCR oversaw the resettlement of refugees to 27 countries, including Canada, Australia, the United States, France and Sweden.

Under the resettlement program overseen by UNHCR, individuals may be considered for resettlement if they are refugees under the Convention *and* fall within one of seven additional priority areas: refugees with specific legal and/or physical protection needs (including the risk of *refoulement*); survivors of torture and/or violence; refugees with medical needs; women and girls at risk; refugees seeking family reunification; children and adolescents at risk; and, refugees for whom there is no foreseeable alternative durable solution.<sup>39</sup>

Resettlement chances are limited, however, because together States offer a very small number of places each year relative to the number of refugees identified by UNHCR. In 2018, States accepted just 55,680 refugees through UNHCR's program, along with an additional 37,000 refugees through other schemes; this compared to the more than 1.2 million refugees identified by UNHCR as being in need of resettlement that year.<sup>40</sup> In addition, when UNHCR refers a case to a prospective resettlement country, that country then conducts its own assessment of a refugee's case against additional selection criteria – an often lengthy process. While some countries offer a small number of places for cases deemed 'emergency' or 'urgent' by UNHCR, the majority of resettlement cases take many months to process. Under Australia's annual refugee resettlement program in 2017–18, for example, successful applicants waited more than 12 months to be processed by Australia's Department of Home Affairs.<sup>41</sup>

UNHCR has encouraged resettlement countries to consider adopting a flexible, multi-year approach to planning their respective annual humanitarian intakes, to ensure predictability for stakeholders and to enhance protection on a broader scale.<sup>42</sup> In this way, the strategic benefits of resettlement go beyond those afforded to the individual refugees who are granted a durable solution and to the communities in which they settle. These benefits include the 'unlocking' of protracted refugee situations through the resettlement of large groups, as well as the enhancement of resilience and 'protection space' within countries of first asylum that may host thousands or millions of displaced people.<sup>43</sup> The resettlement of some refugees can help to ease conditions on the ground for others, who may integrate locally or voluntarily return home should conditions improve in their country of origin. In turn, these strategic benefits can further the goal of reducing unsafe journeys, because research indicates that asylum seekers are unwilling to risk a dangerous or exploitative mode of travel if waiting for a resettlement place represents a viable and safe alternative, and if they can access employment, education or support services in the country of first asylum.<sup>44</sup>

The current limited availability of resettlement places is out of step with global needs, and with the importance of resettlement as a durable solution and an expression of international solidarity and responsibility-sharing. This is why expanded access to third-country solutions is a core objective of the GCR, and why complementary pathways are a means of contributing to the GCR's promotion of 'predictable and equitable burden- and responsibility sharing'.<sup>45</sup> The following section describes the various ways in which protected entry procedures function in countries of origin and countries of first asylum or transit.

### **3 Protected entry procedures**

Protected entry procedures vary in design and scale, but tend to be implemented in response to the protection needs of a designated group or groups fleeing a particular country. The procedure itself may involve submitting an application online or at a consular outpost of the destination country, or with visiting representatives of that country. Applicants' claims for protection may be fully assessed before departure or, alternatively, applicants may undergo pre-screening and then receive permission to move to a transit country where they complete the assessment process, or to travel directly to the destination country as an asylum seeker who must lodge their claim for protection on arrival. In addition to the States offering access to protection, procedures may involve a range of stakeholders such as UNHCR, the International Organization for Migration (IOM), and non-government and faith-based organisations working on the ground in countries of origin, transit or resettlement.

#### **3.1 Procedures in countries of origin ('in-country processing')**

Where protected entry procedures are implemented in a country of origin, this is known as 'in-country processing'. As noted at Section 2.1 above, applicants in this process do not meet the Convention definition of a refugee as a person who is *outside* their country of origin. Experts note that the mechanism has 'inherent limitations', for reasons outlined below, but can nonetheless be a life-saving additional and complementary pathway.<sup>46</sup>

In-country processing raises a unique set of considerations. The first is that an applicant to an in-country program remains within the territory of a State that is either unable to protect them from the consequences of civil conflict or lawlessness (such as gang violence), or is itself the persecutor. Guidance notes for Australia's In-Country Special Humanitarian Visa (subclass 201) note that 'there may be significant bilateral sensitivities' involved in assessing applicants in their home country as being subject to persecution 'and assisting their departure from that country'.<sup>47</sup> For these reasons, local or international organisations working within a country of origin may play an important role as neutral actors, such as: liaising between the settling State and national authorities; referring and helping to verify asylum seekers' claims; and, assisting successful applicants to obtain travel documents and safely depart that country. IOM conducts medical screening and/or makes travel arrangements for successful applicants in several in-country programs, including the PTA for Central Americans, Brazil's humanitarian visa for Haitians, and Australia's subclass 201. It is worth noting that large-scale in-country programs will likely require the direct involvement of the country of origin; for example, at various stages during the Orderly Departure Program in Vietnam, Vietnamese authorities publicised the pathway through state media channels and provided facilities at airports for international organisations to conduct pre-departure interviews with applicants.<sup>48</sup> While the Orderly Departure Program came about through a special set of circumstances (detailed at 'Example 2' below), more generally the involvement of a country of origin can raise questions about how or whether that State is encouraging the exile of unwanted minorities or dissidents, and avoiding 'its responsibility to establish the conditions permitting return'.<sup>49</sup>

The second consideration concerns eligibility criteria. In-country programs tend to be designed for individuals with specific protection needs; criteria may be based on the five grounds under Art 1A(2) of the Refugee Convention with additional priority profiles (e.g. women and girls in specific circumstances) or a 'nexus' to one or more of those grounds (for example, gang violence inflicted as a result of actual or perceived political opinion).<sup>50</sup> The challenge here is that by targeting very specific categories of individuals a program may exclude others who are equally at risk, which underscores why protected entry procedures must be additional and complementary to other pathways.<sup>51</sup> A flexible approach to program eligibility can also provide a safety net for those who do not meet the criteria but are still in humanitarian need. For example, under the United States' Central American Minors (CAM) program, applicants who were determined not to have a well-founded fear of persecution on Convention grounds could be granted humanitarian parole entry into the United States (this status was for two years with the prospect of renewal).<sup>52</sup> Program criteria should be transparent, and settlement should provide for spouses, children or other close relatives, in accordance with the principle of family unity, to ensure applicants can make a well-informed decision about the suitability of that pathway for themselves and their family.

The third consideration is the ability of individuals to safely participate in an in-country application process. A person whose life or safety is at risk, but is still within their country of origin, may move between locations, leaving them without access to regular internet or telephone services.<sup>53</sup> It may be too dangerous or difficult for that person to physically attend an embassy or other processing point.<sup>54</sup> These challenges make the liaison role of trained, resourced and independent local or international organisations especially important. Additional practical measures include establishing application centres in several locations across a country of origin, and ensuring that these centres are located 'in buildings where other activities are taking place' so as to mask applicants' reasons for entry.<sup>55</sup> A 2018 study noted that apps or other data-management tools could help applicants to obtain information about a procedure and to liaise with relevant partner organisations during the application process.<sup>56</sup> While procedures should operate with transparency, there could be justifiable exceptions for safety reasons; under the PTA in Central America, for example, individuals are not immediately advised that their case has been referred for consideration under the PTA by local partner organisations, and UNHCR notes this measure is intended to keep both individuals and partner organisations safe and to reduce the chances of 'fraudulent cases coming forward'.<sup>57</sup> Following this initial stage, and where necessary, applicants to the PTA may be accommodated in safe houses.

A flexible application process can also help to address safety concerns. This includes allowing applicants to move into a country of first asylum before processing is completed. For example, under a United States program for individuals formerly employed by, or associated with, the United States government in Iraq, applicants can be either within Iraq or in a country of first asylum, or have moved from one to the other during the application process.<sup>58</sup> Flexibility is particularly important if the assessment of claims and relevant health and security checks cannot be expedited. Under Australia's visa subclass 201 cases are finalised in around 6 months, but applicants must remain within their country of origin. The PTA in Central America involves an assessment of Hondurans, Guatemalans or

Salvadorans within their home countries before applicants are transferred to Costa Rica to wait for resettlement, but that in-country stage can still take several months.<sup>59</sup>

Like other protected entry procedures, in-country programs should complement – and never replace – the ability of individuals to access other resettlement programs and national asylum procedures. No matter how a program is designed and implemented, there are many reasons why applicants or prospective applicants may still be forced to cross an international border in search of protection. Given the difficulties involved in accessing individuals at risk within their own countries, it is also highly likely that an in-country program will only ever reach a small proportion of those people who have protection needs within the designated group(s). Those who do apply will generally not have access to legal assistance in the same way as those who lodge applications through national asylum procedures.<sup>60</sup> Individuals at heightened risk may be unable to wait for an in-country process to be completed.<sup>61</sup>

If an in-country program is to provide a complementary pathway for some – those who are eligible, can participate in the application process, and can wait for their cases to be finalised – then that program should be based on a multi-year commitment on the part of the State(s) offering access to protection. Past practice suggests that awareness of, and confidence in, a program among prospective applicants is developed over time, through word-of-mouth networks and demonstrated protection outcomes. So too is the capacity of partner organisations on the ground, because their ability to plan and refer applicants for consideration under a procedure can be improved through an ongoing commitment from other stakeholders. For example, under the PTA the transfer of individuals to safety in Costa Rica depends on commitments from resettlement countries; UNHCR reported in late 2018 that for this reason the program has operated below capacity.<sup>62</sup> Where a procedure is established for locally-engaged staff in a conflict zone, who have risked their safety and that of their family in the service of another country, a multi-year commitment is an important demonstration of goodwill on the part of the State(s) offering access to protection.<sup>63</sup>

### **Example 1: Australia's In-country Special Humanitarian Visa**

Australia provides access to protection for people who are subject to persecution and are still within their home countries, through the In-country Special Humanitarian Visa (subclass 201). Applications must be submitted to an immigration post outside Australia.

The subclass 201 is reserved for exceptional cases; there is no set annual quota, and guidelines for decision-makers state that Australia's capacity to assist individuals who are within their home countries is 'extremely limited'.<sup>64</sup> While technically open to applicants from any country, who may 'self-refer', in practice the sub-class 201 is usually awarded to individuals who fall within designated priority areas and their cases are referred by UNHCR or other organisations. These priorities are designated by the Australian government but are not necessarily made public – a lack of transparency that does not serve the interests of applicants who self-refer. In 2017–18 Australia received 5,794 applications under the subclass 201, and accepted just 1,078 of those cases, most of whom were Yazidis from Iraq.<sup>65</sup>

In 2008 and 2012 the Australian government publicly announced that ‘Locally-Engaged Employees’ in Iraq and Afghanistan, respectively, would be considered under the subclass 201. More than 550 former employees of Australian forces in Iraq were granted settlement ‘in recognition of the personal security situation they will face as Australia withdraws its combat forces from southern Iraq’.<sup>66</sup> Similarly, the consideration of locally-engaged Afghan staff was announced by government as a reflection of ‘Australia’s moral obligation to current and former employees who have provided valuable support to Australia’s efforts in Afghanistan’.<sup>67</sup> Some former locally-engaged staff have been denied entry to Australia and are said to remain at risk in Afghanistan; Australian military veterans continue to lobby Australia’s Minister for Home Affairs on their behalf, claiming that some applicants were excluded under overly strict criteria, or ‘were found eligible [but] are still waiting for a response’ five years on.<sup>68</sup>

## **Example 2: The Orderly Departure Program in Vietnam**

The Orderly Departure Program (ODP) in Vietnam is a rare example of in-country processing on a large scale. Under the ODP hundreds of thousands of Vietnamese were granted permission to leave their country and settle abroad between 1979 and the late 2000s. It formed a key part of the international community’s attempt to address the dangers faced by the more than one and a half million Vietnamese refugees who fled their country by boat or over land in the years following the end of the United States’ war in Vietnam in 1975. The program was based on a Memorandum of Understanding (MoU) signed between UNHCR and the Socialist Republic of Vietnam (SRV) in May 1979, with support from the United States.<sup>69</sup>

The ODP provided for the settlement of humanitarian and family reunion cases, and the majority of those who departed – more than 523,000 people in total – were admitted to the United States as immigrants, parolees, or under that country’s refugee program.<sup>70</sup> Priority cohorts for the United States included former political prisoners and re-education camp detainees, and children of American servicemen. Vietnamese were also admitted to countries such as Australia and France, often under the family reunion stream of those countries’ annual immigration programs. As agreed under the MoU, the ODP functioned through an exchange of lists between the SRV and participating resettlement countries. ‘List A’ was compiled by the SRV; ‘List B’ was compiled on behalf of settlement countries; and ‘List C’ named those who appeared on both.<sup>71</sup>

The ODP took some years to gain momentum, due to distrust between the United States and the SRV and, at least initially, uncertainty on the part of prospective applicants.<sup>72</sup> A lack of confluence between the lists meant that some Vietnamese were denied access to the program and were forced to pursue clandestine departure by boat or by land into neighbouring countries. In 1989, the ODP was expanded as part of a suite of repatriation and resettlement measures known as the Comprehensive Plan of Action (CPA), a scheme aimed at resolving the displacement of Vietnamese in Southeast Asia. Academic analysis of the ODP tends to view the program as a process that took years to provide for at-risk cohorts and only reached full potential as part of the CPA, but which ultimately proved ‘an

invaluable component of the international response' to displacement from Vietnam.<sup>73</sup> With these historical lessons in mind, some academics and commentators have raised the ODP as an example of how the international community could use in-country processing as one component of a comprehensive response to future large-scale displacement in Southeast Asia, in which a suite of responsibility-sharing mechanisms would enhance protection space in the region by encouraging 'frontline' States to keep their borders open to asylum seekers, and countries farther afield to increase their resettlement commitments.<sup>74</sup>

### **3.2 Procedures in countries of first asylum or transit**

When implemented in countries of first asylum or transit, protected entry procedures commonly allow asylum seekers to apply for short-term entry to the destination State and to complete the process of applying for protection once they have arrived. Some procedures require applicants to self-fund their travel, while others involve faith-based organisations or other NGOs paying for asylum seekers' flights, assisting them to lodge applications under national asylum procedures, and supporting their integration into the new community. In the process of applying for a visa, asylum seekers will undergo identity and security checks conducted by the destination State. Beyond these standard checks, any assessment of eligibility ought to focus on protection factors, and particular vulnerabilities, and ought not discriminate on the basis of factors that are irrelevant.

Procedures are often designed for individuals from designated countries or for cohorts with particular protection needs. The 'Humanitarian Corridors' (the Corridors) scheme in Italy, for example, was established in by Italian faith-based organisations December 2015 in response to an increased number of asylum seekers attempting to cross the Central and Eastern Mediterranean into Europe, and with an initial focus on asylum seekers fleeing Syria (see Example 4 below).

Within a designated country or cohort, some procedures may focus on individuals or families with specific protection needs. For example, under the 2015 agreement between the Italian government and a coalition of faith-based organisations to implement the Humanitarian Corridors, the 'criteria for identification of beneficiaries' includes the strength of the person's protection claim, plus any particular vulnerabilities they may have, either as individuals or within family groups.<sup>75</sup> As a result, families with children in need of high-level medical treatment, and victims of human trafficking, have been among those selected for admission to Italy.

Eligibility based on Convention grounds, for applicants from any country of origin, does not necessarily lead to an unmanageably high application rate at consular outposts, nor lead to high numbers of rejected asylum seekers within the territory of the destination State. For example, during the period 1995 to 2001 a procedure operated by Switzerland attracted several hundred applications each year, of whom one in six were permitted entry to Switzerland. A 2002 European Commission study concluded that the Swiss model proved 'fears of massively boosted caseloads are unfounded', and reported that of those who travelled on to Switzerland, a 'clear majority' were ultimately granted protection.<sup>76</sup> Recent



studies have recommended that a pilot phase ‘prior to full roll out’ can help to gauge visa demand and allocate resources, while clear criteria and ongoing training for local partner organisations can help to improve initial referrals, and lessen the risk of applicants waiting through a lengthy application process only to receive a negative outcome.<sup>77</sup>

As with in-country processing, protected entry procedures in countries of first asylum or transit must be additional and complementary to the ability of individuals to access national asylum procedures or resettlement programs. The duration of identity and security checks, and any other steps before travel authorisation is granted, require balancing procedural safeguards with the needs of individual protection-seekers, who may not be able to wait through a lengthy process.<sup>78</sup> An efficient process can incentivise asylum seekers to submit an application.<sup>79</sup> It goes without saying that a rejection under this procedure should not prejudice that individual’s ability to apply through national asylum procedures should they arrive on the State’s territory by other means. Furthermore, unsuccessful applicants ought to know the reason for their rejection and if possible have the ability to appeal for reconsideration. Should that individual’s circumstances and risk of *refoulement* change, a procedure should be flexible enough to allow them to apply again.<sup>80</sup>

Procedures should also be based on multi-year commitments from participating States and provide transparent criteria and flexible procedures. Asylum seekers who are granted a visa may not necessarily travel to the destination country immediately, or ever, but are better placed to make decisions about their future if they can have confidence that the pathway will remain open and have an informed understanding of what to expect if they travel onward to that country. For example, under Italy’s Humanitarian Corridors, staff working for faith-based organisations in Lebanon and other countries of first asylum or transit conduct several interviews with applicants and their accompanying family members, in an effort to make sure that each individual has realistic expectations about life in Italy and the asylum process once they arrive.

### **Example 3: Brazil’s humanitarian visas for Syrians**

Since 2013 the government of Brazil has offered humanitarian visas for Syrians and other nationals affected by the civil war in Syria.<sup>81</sup> Applicants can approach Brazilian consular outposts in the Middle East, and UNHCR has worked with the Brazilian government to make this application process ‘more efficient and secure’ by providing training and sharing expertise and information.<sup>82</sup> The temporary visa is issued for ‘humanitarian reasons’, ‘resulting from the deterioration of people’s living conditions on Syrian territory or in the border regions as a result of the armed conflict in the Syrian Arab Republic’.<sup>83</sup>

The application process recognises that refugees may not possess all the documentation that would ordinarily be required for a visa, and if they cannot provide a criminal background check issued by their country of citizenship or current residence, they are asked to sign a statement confirming they have no criminal history.<sup>84</sup> Applicants are exempt from paying visa fees, but do finance their own travel. Following their arrival in Brazil, asylum seekers have 90 days in which to register their entry with federal authorities and can submit their protection claim under national asylum procedures. They are granted access to work rights,

although some Syrians have reportedly experienced challenges in having their professional qualifications recognized in Brazil.<sup>85</sup> In the first three years of the scheme, 8,500 people successfully applied for the visa, and UNHCR praised Brazil's initiative as 'an important gesture of solidarity in a global refugee crisis'.<sup>86</sup> More recent figures indicate that Syrian asylum seekers continue to be among the largest groups of asylum seekers in Brazil.<sup>87</sup>

#### **Example 4: Italy's 'Humanitarian Corridors'**

The Humanitarian Corridors provide protected entry into Italy for asylum seekers in designated countries of first asylum. The Corridors were established in December 2015, through agreement by a coalition of faith-based organisations, including the Community of Sant'Egidio, the Federation of Evangelical Churches in Italy and Tavola Valdese, with the foreign and interior ministries of the Italian government.<sup>88</sup> In the first two years of the program 1,000 people, mostly Syrians from Lebanon were permitted to fly into Rome and lodge applications for protection. The program has since been renewed in Lebanon and extended into Ethiopia and Niger, with the inclusion of the Italian Bishops Conference. Every few weeks, asylum seekers alight at Rome's Fiumicino airport and are greeted by welcome banners, breakfast, and smiling representatives of the Italian government. The new arrivals then travel on to towns and cities across Italy, where members of faith-based organisations have volunteered to assist them in their new life, providing accommodation, language classes and skills training.

The Corridors utilise short-stay visa provisions in the EU Visa Code. Aside from the provision of security checks and visas by Italian authorities, and the processing of protection claims under Italy's domestic asylum procedure, the participating faith-based organisations carry the responsibility for funding and operating the program.

Italy's Humanitarian Corridors have since been replicated by faith-based organisations on a smaller scale elsewhere in Europe, including in France, Belgium and Andorra, and as at October 2019 the four schemes have enabled at least 2,600 asylum seekers to safely enter Europe and apply for protection.<sup>89</sup> Significantly, the Corridors were named a regional winner of UNHCR's prestigious Nansen Award in 2019, a prize that honours 'those who have gone to extraordinary lengths to support forcibly displaced and stateless people'.<sup>90</sup>

## 4 Recommendations

The GCR holds that complementary pathways ought to be offered by a larger number of countries, and ‘made available on a more systematic, organized and gender-responsive basis’ with ‘appropriate protection safeguards’. With these goals in mind, and drawing on the analysis in Section 3 above, this section sets out how protected entry procedures can best allow asylum seekers and refugees to move safely across international borders to access protection.

### Complementarity and additionality

Protected entry procedures are designed to help individual asylum seekers and refugees to avoid taking potentially dangerous or exploitative irregular journeys. A State that offers protected entry must therefore do so in addition to any existing resettlement quotas it may offer, and ensure that a procedure does not preference the admission of one group of refugees at the expense of others. A procedure must complement – and never replace – access to national asylum procedures, resettlement or other pathways. Through this complementarity and additionality, a procedure is better placed to reach applicants with particular vulnerabilities or profiles, such as women and girls at risk, and operate on a more ‘gender-responsive basis’ as called for under the GCR.

Appropriate protection safeguards, as emphasised under the GCR, include the ability of rejected applicants to appeal or to apply again if their circumstances and risk of *refoulement* change.<sup>91</sup> Safeguards also include ensuring that rejection does not prejudice an individual’s ability to apply for protection under national asylum procedures should they make their own way to a State’s territory.

### A multi-year commitment

Under its Three-Year Strategy on Resettlement and Complementary Pathways (2019–21), UNHCR is aiming to expand access to resettlement to ensure that 50 countries offer protection and solutions to 3 million refugees within the next decade – 2 million of those through complementary pathways. By making a multi-year commitment to offer protected entry, one that is additional to any existing national resettlement program, States can help to meet this goal, and ensure that complementary pathways are implemented and expanded on ‘a more systematic and organised’ basis as envisaged under the GCR. A multi-year commitment can provide predictability for partner organisations and for refugees themselves, and better position national authorities in the destination country to plan for the housing, support services, educational and employment needs of refugees. In turn, such a commitment enhances the strategic use of resettlement, encouraging host States to maintain protection space, and helping to ease conditions on the ground for other refugees and the local communities in which they live.

## **Transparency and flexibility**

Transparent eligibility criteria can help asylum seekers to make an informed decision about whether they can apply to a protected entry procedure, whether they can safely wait for their application to be finalised, and whether that pathway is best suited to their needs and those of their family. Criteria ought to focus on protection factors, and particular vulnerabilities, and ought not discriminate on the basis of factors that are irrelevant. A flexible approach to program eligibility can help to provide a safety net for those applicants who fall outside Convention criteria, but who are still in need of international protection. Flexibility should also be built into the application procedure, to allow asylum seekers to move between countries (of origin and/or first asylum and transit) while their application is in progress. In accordance with the principle of family unity, a procedure should allow for successful applicants to be admitted to the State offering protection with their spouse and/or dependents or other close relatives.

## **5 Conclusion**

Forced migration is currently at record highs worldwide, but not all those who are displaced will want or need to move outside their region of origin, and UNHCR has identified a relatively small number of refugees, 1.4 million people, as needing resettlement under its annual program in 2020. This means that States could make a real difference by expanding the use of protected entry procedures and other complementary pathways to increase access to protection and solutions. In turn, greater access to third country solutions can contribute to more predictable and equitable responsibility-sharing as envisaged under the GCR, and help to enhance protection space and ease conditions in countries that are hosting large numbers of displaced people. The system of international protection relies on States working together to secure protection and solutions for refugees. In this context, protected entry procedures, where implemented with predictability, transparency and flexibility, can be a valuable additional and complementary pathway to protection.

## Endnotes

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- <sup>5</sup> *Ibid* 19 [95]. See also Australian Human Rights Commission, *Pathways to Protection: A Human Rights-based Response to the Flight of Asylum Seekers by Sea* (Report, 2016) 34–4 (*Pathways to Protection*).
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- <sup>10</sup> COM 2004 (n 8) 7.
- <sup>11</sup> *Ibid* 6.
- <sup>12</sup> Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, Danish Centre for Human Rights, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum Procedure* (Final Report, 2002) 5, 22. See also Wouter van Ballegooij and Cecilia Navarra, ‘Humanitarian Visas: European Added Value Assessment Accompanying the European Parliament’s Legislative Own-initiative Report’ (Research Paper, European Parliamentary Research Service, October 2018) (*Humanitarian Visas*) annex 2 (‘The Added-Value of EU Legislation on Humanitarian Visas – Economic Aspects’) 170–1.
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<sup>30</sup> See further *Complementary Pathways* (n 7) 5.

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<sup>46</sup> Faye Hipsman and Doris Meissner, *In-Country Refugee Processing in Central America: A Piece of the Puzzle*

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<sup>55</sup> Hipsman and Meissner (n 46) 12; *In-Country Programs* (n 53) 52.

<sup>56</sup> *Annex on Legal Aspects* (n 13) 101.

<sup>57</sup> *Evaluation* (n 50) 16.

<sup>58</sup> The program is for former employees and associates of US or multi-national forces in Iraq (including translators) or of organisations contracted to US or US-based media or non-government organisations. This intake falls under Priority-2 (P-2) category (otherwise known as Direct Access) of the United States Refugee Admissions Program (USRAP), which is administered by the US Department of State. P-2 provides for persons from designated groups who are of special humanitarian concern to the United States, allowing them to apply for admission directly to US authorities without referral from UNHCR or a non-governmental organisation. See further Andora Bruno, *Refugee Admissions and Resettlement Policy* (Congressional Research Service Report, 18 December 2018) 6.

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<sup>75</sup> *Technical Protocol for the Implementation of the Project: Opening of Humanitarian Corridors, Italian Ministry of Foreign Affairs and International Cooperation, Ministry of Interiors, Community of Sant'Egidio, Federation of Evangelical Churches in Italy and Waldensian Church*, signed December 2015 (Memorandum of Understanding) art. 3.

<sup>76</sup> Noll, Fagerlund and Liebaut (n 12) 4, 129, 136.

<sup>77</sup> *Annex on Legal Aspects* (n 13) 101; *Evaluation Management Response* (n 61) 31.

<sup>78</sup> Noll, Fagerlund and Liebaut (n 12) 75–6.

<sup>79</sup> Andreas Backhaus, Mikkel Barslund and Augusta Nannerini, 'A Union Humanitarian Visa Framework' (2019) 9 (3) *Migration Policy Practice* 1, 6. ; Gregor Noll and Thomas Gammeltoft-Hansen, *Humanitarian Visas Key to Improving Europe's Migration Crisis* (Policy Brief, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2016) 3.

<sup>80</sup> *Annex on Legal Aspects* (n 13) 123.

<sup>81</sup> See further Babar Baloch, 'UN Refugee Agency Welcomes Brazil Announcement of Humanitarian Visas for Syrians' (Press Release, UNHCR, 27 September 2013) <https://www.unhcr.org/524555689.html>.

<sup>82</sup> Karin de Gruijl, 'Brazil and UNHCR Strengthen Partnership to Help Refugees Fleeing the Syria Conflict', *UNHCR* (Web Page, 7 October 2015) <https://www.unhcr.org/en-us/news/latest/2015/10/5615130c6/brazil-unhcr-strengthen-partnership-help-refugees-eeing-syria-conlict.html>.

<sup>83</sup> The translation of Normative Resolution No 17 passed on 20 September 2013 by the Brazilian Government is found in: Marília Caligari and Rosana Baeninger, 'From Syria to Brazil' [2016] (51) *Forced Migration Review* 1, 96.

<sup>84</sup> 'Brazil Simplifies Humanitarian Visa Application for Syrians', *Brazil-Arab News Agency (ANBA)* (online, 10 October 2019) <https://anba.com.br/en/brazil-simplifies-humanitarian-visa-application-for-syrians/>; Jubilut, de Andrade and de Lima Madureira (n 17) 77.

<sup>85</sup> Gilberto M. A. Rodrigues, José B. Sala and Débora C. de Siqueira, 'Visa and Qualifications: Syrian Refugees in Brazil' [2017] (56) *Forced Migration Review* 1, 53.

<sup>86</sup> Gruijl (n 82); Jubilut, de Andrade and de Lima Madureira (n 17) 77.

<sup>87</sup> IRIN, 'Should Europe Follow Brazil's Example on Humanitarian Visas?' *refworld* (Web Page, 29 October 2015) <https://www.refworld.org/docid/56332e684.html>; Calegari and Baeninger (n 83) 96; Rodrigues, Sala and de Siqueira (n 85) 52.

<sup>88</sup> See further: Community of Sant'Egidio, *Humanitarian Corridors in Europe. Dossier: Humanitarian Corridors in Italy, France, Belgium and Andorra, the Principality of Monaco: Story and Figures*

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(online, September 2019) <https://www.santegidio.org/pageID/34176/langID/en/File-Humanitarian-corridors-in-Europe.html>.

<sup>89</sup> Community of Sant'Egidio (n 18).

<sup>90</sup> Bigg (n 19).

<sup>91</sup> *Annex on Legal Aspects* (n 13) 123.



