

## **Advisory opinion on the rules of confidentiality regarding asylum information**

### **Introduction**

1. UNHCR has a direct interest in the application of the 1951 Convention relating to the Status of Refugees (hereafter “the 1951 Convention”) on the basis of its responsibility for providing international protection to refugees worldwide and for seeking permanent solutions for them.<sup>1</sup> Furthermore, under Article 35 of the 1951 Convention, UNHCR has a duty to supervise the application of the provisions of the 1951 Convention. This advisory opinion relates to the principles to be applied in relation to the issue of confidentiality in asylum procedures.

### **Principles governing the sharing of data on asylum claimants**

2. International human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference.<sup>2</sup> In international law, the right to privacy is generally defined as everyone’s right to know whether information concerning him/her is being processed, to obtain it in an intelligible form, without undue delay or expense, and to have appropriate rectification or erasures made in case of unlawful, unnecessary or inaccurate entries. Effective measures need to be taken to ensure that information concerning a person’s private life does not reach the hands of third parties that might use such information for purposes incompatible with international human rights law.
3. General principles governing confidentiality require that the sharing of information with an external party should not jeopardize the safety of the individual concerned or lead to the violation of his or her human rights. Art 17 of the International Covenant of Civil and Political Rights (ICCPR), to which Japan is a Party, states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.”<sup>3</sup> These principles are also reflected in the

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<sup>1</sup> See the Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428(V), 14 December 1950.

<sup>2</sup> See the right to privacy of the individual as enshrined in declarations and human rights treaties of relevance in Japan: Article 12 of the Universal Declaration of Human Rights of 10 December 1948, Article 17 of the International Covenant on Civil and Political Rights, Article 16 of the Convention on the Rights of the Child.

<sup>3</sup> See para. 10 of the General Comment No. 16 on Article 17 of the ICCPR, Human Rights Committee, HRI/GEN/1/Rev.12 at p. 23, explaining what this means for the individual: “...In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what

- Japanese legislation which strictly regulates confidentiality requirements imposed on administrative institutions.<sup>4</sup>
4. These principles governing the right to privacy are equally applicable to refugees and asylum-seekers, and other aliens, as they are to the nationals.<sup>5</sup> The right to privacy and its confidentiality requirements are especially important for an asylum-seeker, whose claim inherently supposes a fear of persecution by the authorities of the country of origin and whose situation can be jeopardized if protection of information is not ensured. It would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin until a final rejection of the asylum claim.
  5. Bearing these concerns in mind, the State that receives and assesses an asylum request must refrain from sharing any information with the authorities of the country of origin and indeed from informing the authorities in the country of origin that a national has presented an asylum claim. This applies regardless of whether the country of origin is considered by the authorities of asylum as a “safe country of origin”, or whether the asylum claim is considered to be based on economic motives. Likewise, the authorities of the country of asylum may not weigh the risks involved in sharing of confidential information with the country of origin, and conclude that it will not result in human rights violations.
  6. Article 25 of the Convention, which concerns administrative assistance, also reflects the fact that a refugee cannot rely on the national protection of his or her country of origin. It is also intended to prevent a refugee from being exposed to

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purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. ...”

<sup>4</sup> The “Act for Protection of Personal Data held by Administrative Organs”, which derives from the “Personal Data Protection Act”, was promulgated in 2003.

<sup>5</sup> See the United Nations Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live (1985), article 5(1): “Aliens shall enjoy, in accordance with domestic law and subject to the international obligation of the State in which they are present, in particular the following rights: [...] (b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence.” See further, for example, Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1980, article 1: “The purpose of this convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him (‘data protection’).” As stated in paragraph 26 of the Explanatory report on the 1980 Convention: “[...] The guarantees set out in the convention are extended to every individual regardless of nationality or residence. This provision is in accordance with the general principle of the Council of Europe and its member States with regard to the protection of individual rights. Clauses restricting data protection to a State’s own nationals or legally resident aliens would be incompatible with the convention.”

- persecution through contact with the authorities of his or her country of origin and to prevent family members and/or associates who still remain in the country of origin being placed at risk.
7. Confidentiality in asylum procedures is particularly important because of the vulnerable situation in which refugees and asylum-seekers find themselves.<sup>6</sup> As discussed during the Global Consultations on International Protection,<sup>7</sup> “*the asylum procedure should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request*” and highlighted that “*no information on the asylum application should be shared with the country of origin*”.<sup>8</sup> This principle is also reflected at the European level in the draft “*EC Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*”, on which political agreement was reached by the Council of Ministers in April 2004.<sup>9</sup>
  8. The authorities must therefore seek in advance the written consent of asylum-seekers to check their personal data in the country of origin. In cases where an asylum-seeker believes that compelling evidence in his or her favor is obtainable from the country of origin, and that this evidence may be obtained only by disclosing certain of his or her personal data, he or she may occasionally request the authorities of the country of asylum for help in obtaining such evidence.

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<sup>6</sup> See, inter alia, “Informed decision-making in protection: the role of information,” ExCom Sub-Committee of the Whole on International Protection, 27 September 1993, paragraph 8: “*In developing and implementing an information strategy, UNHCR is [...] conscious of the need to ensure that national and international standards for the protection of personal data are observed, and that individuals do not suffer loss of protection through prejudicial disclosure.*” See Refworld 2003 CD-Rom issue 11, CDs 1& 3.

<sup>7</sup> The Global Consultations on International Protection is a process during which governments, intergovernmental and non-governmental organizations, refugee experts and UNHCR held discussions on various issues. Although not legally binding, the documents produced during this process reflect a broad consensus on protection issues. The Global Consultations documents have not been formally adopted by the Executive Committee in the form of Excom Conclusions but were incorporated into the Agenda for Protection, which has been endorsed by the Executive Committee and welcomed by the General Assembly.

<sup>8</sup> See “*Asylum Processes (Fair and Efficient Asylum Procedures)*”, Global Consultations on International Protection, EC/GC/01/12, 31 May 2001, paragraph 50 (m). The document is a collection of best state practice, including national legislation. The principles set out in this paper and recommendations therefore reflect a consensus of the law and good state practice.

<sup>9</sup> See Article 37(1) on procedural rules:

“*In addition, Member States shall ensure that within the framework of such a procedure: (d) where information is collected on the individual case for the purpose of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee, whose status is under reconsideration, nor jeopardize the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.*”

9. Procedural fairness requirements apply to the entire asylum process until a final decision is taken on an individual case. Depending on the system in the country of asylum, this includes administrative or judicial review proceedings, which are a full part of the refugee status determination procedure. In Japan, judicial review is the first opportunity for the asylum-seeker to have his or her claim examined by an independent appeal instance. Furthermore, the fact that judicial review before the courts is public does not amount to an automatic waiver of confidentiality.<sup>10</sup>
10. There may also be questions as to whether the confidentiality requirements continue to apply in situations where an asylum-seeker has voluntarily disclosed his or her identity and the fact that s/he has sought asylum through statements to the media. In UNHCR's view, while there might be a possibility that such information has come to the knowledge of the country of origin, this may not be interpreted as an explicit waiver of confidentiality. The country of asylum remains bound by the principle of confidentiality and personal data on the individual asylum claim must not be disclosed to the country of origin.

### **Exceptions to the rule against sharing information with the country of origin**

11. There is a general rule against sharing information with the country of origin. The disclosure of certain confidential information to the country of origin without the consent of the applicant may be justified in limited, exceptional circumstances, such as combating terrorism. These principles are reflected in a series of UNHCR documents, such as, "*Addressing Security Concerns without Undermining Refugee Protection - UNHCR's perspective, November 2001*",<sup>11</sup> and the "*Background Note on the Application of the Exclusion Clauses: Article*

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<sup>10</sup> In Japan, regulations on Court disclosure foresee the need to restrict access to information. See, in particular, Code of Civil Procedure, Article 91 Section 3 which limits the right to make copies of the records to the parties involved and a third party considered as having a prima-facie evidence as a stake holder. Moreover, Article 92 Section 1 stipulates that access to the records can be restricted, upon request, "*in cases which serious confidential information about the personal life of the concerned person is recorded, and when there is a threat that the concerned person will have significant interference to lead a social life if the third party has access to such record with confidential information*".

<sup>11</sup> See paragraph 11: "*UNHCR recognizes that the sharing of data between States is crucial to combating terrorism. States should, though, also take into account 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 bona fide 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.*"

*1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003*".  
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12. Regarding persons found not to be in need of international protection<sup>13</sup> (that is, rejected cases after exhaustion of available legal remedies), the limited sharing of personal data with the authorities of the country of origin is legitimate in order to facilitate return, even if this is without the consent of the individuals concerned. Such cases usually arise when nationality is in question and/or the individual has no national travel or identification documents. However, disclosure should go no further than is lawful and necessary to secure readmission, and there should be no disclosure that could endanger the individual or any other person, not least disclosure of the fact that the individual has applied for asylum. Moreover, in the first instance everything should be done to secure the voluntary nature of return.
  
13. Outside the context of refugee status determination proceedings, there may be certain situations where asylum-seekers and refugees may quite naturally consent to sharing certain of their personal data with the country of origin. For example, some personal information will need to be shared, subject to the consent of the persons concerned, with the authorities of the country of origin in the context of organized voluntary repatriation arrangements, or to facilitate family reunification, transfer of assets, or voter registration and election procedures. Only necessary information should be released, for example in the context of organized voluntary repatriation, information that is necessary to obtain clearance for administrative formalities or in order to benefit from amnesty guarantees.

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<sup>12</sup> See section E (Annex to the Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003): “*Consideration of the exclusion clauses may lead to the sharing of data about a particular asylum application with other States, for example, to gather intelligence on an individual’s suspected terrorist activities. In line with established principles, information on asylum-seekers, including the very fact that they have made an asylum application, should not be shared with the country of origin as this may place such persons, their families, friends or associates at risk. In exceptional circumstances, where national security interests are at stake, contact with the country of origin may be justified. For example, this may be the only method by which to obtain concrete evidence about an individual’s previous and potentially ongoing terrorist activities. Even in such situations, the existence of the asylum application should still remain confidential. The principle of confidentiality continues in principle to apply even when a final determination of exclusion has been made. This is necessary to preserve the integrity of the asylum system – information given on the basis of confidentiality must remain protected.*”

<sup>13</sup> See Excom Conclusion No. 96 (LIV) on the return of persons found not to be in need of international protection, 2003: “*Observing that, for the purposes of this Conclusion, the term “persons found not to be in need of international protection” is understood to mean persons who have sought international protection and who after due consideration of their claims in fair procedures, are found neither to qualify for refugee status on the basis of criteria laid down in the 1951 Convention, nor to be in need of international protection in accordance with other international obligations or national law*”

## Adverse consequences of confidential asylum information with the country of origin

- *The integrity of the asylum system is seriously affected*
- *The asylum-seeker may become a refugee sur place*
- *The safety of the relatives or associates of the asylum-seeker remaining in the country of origin may be endangered.*

14. Asylum-seekers provide information to the country of asylum for their own protection and because they have a duty to co-operate with the authorities and to substantiate their claim. They do so on the understanding that the information they provide will not be shared with others without their consent. The practice of disclosing confidential information to the country of origin may inhibit asylum-seekers from fully explaining their cases, or even from making a claim for refugee status. Overall, it would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin.
15. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case. It will be necessary for the examiner to gain the confidence of the applicant. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed.<sup>14</sup>
16. Secondly, sharing with the country of origin, information about the asylum seeker, including the fact itself that the person applied for asylum, may constitute an aggravation of the person's position vis-à-vis the Government alleged to be responsible for his persecution. In a situation where the initial elements of the claim presented by the asylum-seeker would not lead to inclusion, sharing of confidential information with the country of origin, could well lead to the asylum-seeker becoming a refugee *sur place*.
17. Thirdly, this practice may endanger any relatives or associates of the asylum-seeker remaining in the country of origin and may lead to a risk for retaliatory or punitive measures by the national authorities against them.

### **Obtaining country of origin information (COI) without undermining refugee law standards**

18. In case of a suspicion that an asylum-seeker has used forged documents to support his or her application, a credibility assessment and confirmation of the

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<sup>14</sup> See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraphs 198 and 200.

authenticity of submitted evidence may be obtained through various means without affecting the basic procedural safeguards with respect to confidentiality.

19. UNHCR recognizes that access to accurate and reliable information is an essential condition for identifying who is, and who is not, in need of international protection. Such information is also crucial for preparing for the return of persons found not to be in need of international protection. UNHCR therefore welcomes any initiatives taken by States to tackle these challenges, as long as such initiatives respect fundamental principles of human rights and refugee protection, as explained above.
20. Some jurisdictions may be reluctant to rely on country of origin information produced from secondary sources, and request that country of origin information to be based on primary research. Likewise, some States, particularly in Europe, are increasingly checking claims made by asylum-seekers with information sources in the country of origin.
21. Such checking may be carried out by a fact-finding mission dispatched from the country of asylum, or by an embassy official on the ground. Alternatively, checking may be carried out by, for example, employing the research services of a local lawyer or of an independent organization. The information sources consulted may include, *inter alia*, private individuals, local non-governmental organisations (NGOs), international organisations and local and national authorities. To further enhance a report's authoritative and unbiased nature, government fact-finding missions would benefit from the participation of independent experts and/or NGO representatives. This would not only increase transparency but also lend more objectivity and authority to the findings. Another method would be to create an independent oversight body, such as, for example, the Independent Advisory Panel established by the UK Home Office.<sup>15</sup>
22. Recourse to information sources in the country of origin can therefore, in appropriate circumstances, be a useful means of helping to establish the facts of a claim for refugee status. However, in all cases, there is a need to ensure that national and international standards for the protection of personal data are observed. The reliability of the information gathered is another critical issue and may depend, *inter alia*, upon the question and how it is asked, who the source of information is and how he or she perceives the questioner and the purpose of the question, why the source chooses to respond and whether he or she may be under any pressure from any other quarter. Government officials from the country of

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<sup>15</sup> For additional information, see <http://www.apci.org.uk/>

origin of an asylum-seeker claiming fear of persecution from that same Government, may not be regarded as objective sources of information.

### **Concluding remarks and recommendations**

23. UNHCR shares the legitimate concern of States to clearly distinguish between persons who need international protection and those who have no valid claim for refugee status. It is a State's prerogative, and in fact its duty, to make a determination on refugee status based on all available evidence presented in the case. Human rights standards prescribe the State's obligation to protect the right to privacy of the individual and its inherent protection against information reaching the hands of persons not authorized to receive or use it. The possible risks to the individual asylum-seeker caused by information reaching the wrong people, but also the detrimental effect of misuse of information to the asylum system as a whole are very serious in nature. Consequently, strict adherence to the fundamental principles and refugee protection is vital, and exceptions should only be allowed under well-defined and specific circumstances.

### Summary of recommendations

- If the authorities responsible for assessing an asylum claim, whether administrative or judicial, deem it necessary to collect information from the country of origin, such requests must be couched in the most general and anonymous terms, and should never include names or data by which the asylum-seeker or his or her family could be identified in the country of origin. Such authorities however must not communicate with entities in the country of origin of the claimant (whether governmental or non-governmental) to verify or authenticate declarations or documents provided by the asylum-seeker.
- Confidentiality requirements apply throughout the asylum procedure, including judicial review.
- If research is conducted on an individual case to verify a fact or a document, the written consent of the individual has to be sought in advance, unless, exceptionally, a legitimate overriding security interest is at stake.