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Trapped in transit: the plight and human rights of stranded migrants

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Introduction

Described as a ‘promising concept’ in 1982¹, the term ‘stranded migrant’ has increasingly crept into the vocabulary of academics, legal professionals, international institutions and the media in recent years. Yet it has not yet moved beyond this emerging status: it has no legal definition and remains a somewhat descriptive term. This paper does not attempt to arrive at a definition of stranded migrants. Rather, it examines the phenomenon itself whereby migrants, for a variety of reasons, find themselves trapped in transit countries.

Amnesty International commented in 2006 that ‘there is a need to lift the veil of invisibility on those migrant groups that are rarely in the public eye. These include: ... stranded migrants, including rejected asylum-seekers and people stranded in transit countries.’² Similarly, an IOM spokesman commented in 2005 (following media coverage of one particular group) that no one hears about the thousands of other stranded migrants in distress.³ Irrespective of one’s opinion as to the usefulness of the term ‘stranded migrant’, it cannot be denied that this phenomenon gives rise to a series of human rights and humanitarian concerns, and is certainly one worth talking about.

After providing a brief background, this paper will shed some light on the origin of the term and the ways in which it has been used and by whom. It will then tackle the phenomenon from a legal perspective, briefly outlining the human rights of stranded migrants and the correlating obligations of states.

The main body of the paper will examine the phenomenon using a thematic approach drawing information primarily, though not exclusively, from four case studies: Ukraine, Morocco, Mexico and Somalia. After providing some background on the situation in each of these locations, it will consider four dominant themes: who becomes stranded and why, what life is like for these migrants, the impact of various state laws and policies on stranded migrants and finally, the role of the international community in providing assistance and protection.

Background

The international community has recognized in recent years that the growing population of people on the move – especially in mixed migratory flows – has given rise to a series of new protection challenges. Not only does it pose new challenges for refugee protection, but gaps are also emerging for the protection of those who fall outside the refugee regime. For example, the 2005 Report of the Global Commission on International Migration recognized that ‘migrants who move for economic reasons may become destitute and vulnerable to human rights abuses while they are in transit, and require protection and assistance, even if they do not have a valid claim to refugee status.’⁴

¹ David S North, Centre for Labor and Migration Studies, book review of Kenneth F Johnson and Miles W Williams, ‘Illegal Aliens in the Western Hemisphere: Political and Economic Factors’, 1981.

² ‘Living in the Shadows: A Primer on the Human Rights of Migrants,’ Amnesty International, 2006, p27.

³ ‘IOM Calls Attention to Plight of Stranded Migrants,’ VOANEWS.com, Geneva, 18 December 2005.

⁴ ‘Migration in an Interconnected World: New Directions for Action,’ Report of the Global Commission on International Migration, October 2005, p 40.

Significantly, participants at the High Commissioner's Dialogue on Protection Challenges in December 2007⁵ made strong calls to similarly uphold the rights and protect the welfare of people who move for non-refugee related reasons, but who become vulnerable to abuse and exploitation, both during their journey and after they arrive. The High Commissioner noted in his Chairman's Summary that 'there are protection gaps or grey areas affecting those involved in mixed movements. This especially relates to migrants who are deemed to be "irregular" by the authorities, who fall outside the international refugee protection framework, but who nevertheless need humanitarian assistance and/or different kinds of protection.'⁶

This paper has been written against this backdrop, and also in the challenging context of a world in which irregular migration is on the rise, smuggling and trafficking thrive and states are tightening their border controls in response to concerns about sovereignty and security. As one report observed in 2006, 'illegal and transit migration, refugee flows, waves of asylum seekers and temporary contract labour migration are on the rise compared to legal labour migration and legal immigration, which used to be more characteristic of the post-war period... transit migrants spend an indefinite time in transit countries until they gain illegal entry into the West.'⁷

Stranded migrants: definition and concept

There is no generally accepted definition of stranded migrants.⁸ It has been described as 'one of these new "fashionable categories" ' which 'is no rigid scientific category but an emotionally connoted expression.'⁹ The author consulted a range of people as to their understanding of the term and their perceptions as to its usefulness. This included UNHCR staff at headquarters and in the field, staff from other international agencies and NGOs and academics and experts in migration and refugee law. Whilst most had come across the phenomenon of stranded migrants, not all – including the Special Rapporteur on the Human Rights of Migrants¹⁰ – had actually come across the term itself.

The earliest reference to stranded migrants was found in a 1981 review of a book about illegal aliens in the western hemisphere. The review commented on the 'promising concept of the 'stranded' migrant, one who has made it from Mexico to the rural Middle West, but who is isolated there and unable or unwilling to move on within the U.S. or to go back to Mexico.'¹¹ Whilst this paper examines a slightly different concept – migrants stuck in transit before entering their countries of desired destination – both situations give rise to similar issues.

⁵ The first meeting of the High Commissioner's Dialogue on Protection Challenges took place in Geneva, Switzerland, from 11-12 December 2007. It was chaired by UN High Commissioner for Refugees, António Guterres.

⁶ High Commissioner's Dialogue on Protection, Chairman's Summary, 21 January 2008.

⁷ Kelly Brewer and Deniz Yukseker, 'A Survey on African Migrants and Asylum Seekers in Istanbul,' Migration Research Program at the Koc University, 2005-2006, p9.

⁸ Stefanie Grant, 'The Legal Protection of Stranded Migrants,' in International Migration Law: Developing Paradigms and Key Challenges, (2007) R. Cholewinski, R. Perruchoud and E. MacDonald (eds) Chapter 2, p 30.

⁹ Comments taken from interviews with migration specialists, January and February 2008.

¹⁰ Jorge Bustamante.

¹¹ North, above.

The term ‘stranded migrant’ was used by the international community in the early 1990s, following the collapse of the USSR in December 1991. In 1994, UNHCR was called upon by the General Assembly to convene a regional conference to address the problems of refugees, displaced persons, other forms of involuntary displacement and returnees in the countries of the Commonwealth of Independent States and the relevant neighbouring States.¹² A preparatory meeting of experts in May 1995 – attended by a number of CIS and other interested States, UN organs and agencies and other international organizations and institutions – identified ‘stranded migrants’ to be one of the types of movements to be addressed in the process.

Subsequently, the 1996 declaration from the Commonwealth of Independent States (CIS) Conference,¹³ stated that ‘(a)ssisted return programmes, in particular those aimed at illegal migrants stranded in transit and at stranded students, as developed and implemented by IOM and other partners, can be useful in preventing irregular migration and providing humanitarian relief... The CIS countries are encouraged to develop such programmes, in cooperation with [the International Organization for Migration (IOM)].’¹⁴ Such encouragement continues today, as Central European states have been considered as ‘buffer zones’ against asylum-seekers, refugees and stranded would-be immigrants seeking to reach Western Europe.¹⁵

In recent years, of the international institutions, the term ‘stranded migrant’ has been used predominantly by IOM in relation to its voluntary return assistance programmes and Stranded Migrant Facility. In 2007, IOM also published a chapter entitled ‘The Legal Protection of Stranded Migrants’,¹⁶ which – to the author’s knowledge – is the first publication to specifically address this phenomenon. Its focus is on migrants who ‘find themselves legally stranded, because they are unable to remain lawfully in the country in which they are physically present, or move to another country, or return to their home country.’¹⁷

Amnesty International has also considered the plight of stranded migrants in a 2006 publication on the human rights of migrants: ‘Many migrants are stranded in countries of transit or destination: they have been denied the right to enter and remain legally, but are unable to return to their countries of origin. Some migrants cannot return to their countries of origin due to continuing insecurity, because there is no legal means to get there, or because it is impossible in practice for them to return.’¹⁸

Though not using the term explicitly, the 2005 Report of the Global Commission on International Migration also referred to the phenomenon: ‘While they are in transit,

¹² See General Assembly Resolution 49/173, 1994, ‘Comprehensive consideration and review of the problems of refugees, returnees, displaced persons and related migratory movements.’

¹³ Regional Conference to Address the Problems of Refugees, Displaced Persons, Other Forms of Involuntary Displacement and Returnees in the Countries of the Commonwealth of Independent States and Relevant Neighbouring States, Geneva, 30 - 31 May, 1996.

¹⁴ Regional Conference to Address the Problems of Refugees, Displaced Persons, Other Forms of Involuntary Displacement and Returnees in the Countries of the Commonwealth of Independent States and Relevant Neighbouring States (CISCONF/1996/5 11 June 1996) Geneva, 30 - 31 May 1996, Declaration.

¹⁵ Luise Druke, ‘Refugee policy in Eurasia: The CIS Conference and EU Enlargement Process 1996-2005,’ *New Issues in Refugee Research*, UNHCR, August 2006, p5.

¹⁶ Grant, above.

¹⁷ Grant, above, p29.

¹⁸ ‘Living in the Shadows...’, above, p6.

migrants who move in an irregular manner often find themselves exposed to danger, or become stranded for long periods of time while en route to their final destination.’¹⁹

In setting out the scope of this paper, it is useful to arrive at a working definition of stranded migrants. Essentially, this paper will consider the plight of those who leave their own country for reasons unrelated to refugee status, but who become destitute and/or vulnerable to human rights abuses in the course of their journey. With some possible exceptions, they are unable or unwilling to return to their country of origin, are unable to regularize their status in the country where they are to be found, and do not have access to legal migration opportunities that would enable them to move on to another state.

This definition is not concrete: the concept of stranded migrants is fuzzy and cannot be captured in a precise definition. Even the ‘workable’ definition above gives rise to a number of issues and questions. Can migrants who are unwilling (as opposed to unable) to return to their country really be considered stranded? If so, what makes them different from other irregular migrants who have migrated in search of a better life? Can migrants who are not illegal in a transit country – for example those who do not require a visa to enter a transit country, or migrant workers trapped due to the outbreak of hostilities – be considered stranded? Can asylum seekers be stranded migrants if, for example, they are precluded from accessing asylum procedures? Do stranded migrants have to cross an international border?

Issues such as these – which will be elaborated throughout the paper – have prompted a range of opinions as to the usefulness of ‘stranded migrants’ as a concept. It is generally perceived that ‘stranded’ is a useful way to describe the predicament of people who become stuck in transit, despite the fact that they may have different legal statuses. One commentator believes that it is a very useful term, as ‘it captures the fact that they can’t move, they don’t want to be where they are and they were on their way somewhere else... it describes their situation without making any judgments on their motivations as most other labels tend to – and their motivations seem extremely varied. It also doesn’t immediately put blame on policy like a lot of analysis...’²⁰ Others comment that the term ‘stranded migrant’ humanizes the situation and reflects the reality for a significant population of people in humanitarian need.

However, many have also uttered words of caution about developing yet another category of migrants: creating definitions can be a general disservice to migrants in need of protection. For example, an Amnesty International worker, who was involved in preparing the report mentioned above²¹, advised that it uses the term simply as ‘a useful shorthand.’ Amnesty International has not attempted to arrive at a meaningful definition and is wary of the term becoming institutionalized without being properly interrogated. Others similarly believe that the word ‘stranded’ merely describes a situation, not the status of people. Some have commented that no rights are attached to the title ‘stranded migrant’, so there is little point in arriving at a concrete definition. Finally, the word ‘stranded’ is used in everyday language: arguably, in the migration context, it is simply used to describe practical contexts or to refer to IOM programmes.

¹⁹ ‘Migration in an interconnected world...’, above, p33.

²⁰ Correspondence with a migration specialist, 30 January 2008.

²¹ ‘Living in the Shadows...’, above.

Whilst it is interesting to set out these different view points, this paper does not arrive at a definite conclusion as to the usefulness of the term 'stranded migrant'. The real issue at hand is the actual plight of those vulnerable migrants who are the subjects of this phenomenon, not the language used to describe them.

The human rights of stranded migrants

As 'stranded migrant' is not a legal category, there are no rights that specifically attach to persons in this predicament. The legal protection of stranded migrants has been considered elsewhere,²² and other recent reports provide comprehensive analyses of the human rights of irregular migrants more generally.²³ Therefore, this paper will not re-examine either subject in depth, but will briefly consider the rights and state obligations that are particularly relevant to stranded migrants. It should be kept in mind however, that it is often extremely difficult for migrants who lack legal status and/or documentation to actually claim their rights in practice.

Entry and the rights of irregular migrants

Every State has the sovereign right to regulate the admission and stay of non-citizens within its territory. However, this right must be exercised in accordance with international law.²⁴ Of particular relevance is the basic principle of human rights law that a migrant who enters a country in violation of immigration laws, or otherwise obtains irregular status within a country, is not deprived of his or her most fundamental human rights.

The core human rights treaties containing provisions that apply universally to all persons without distinction are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The fundamental rights of all persons regardless of status are wide-ranging and include the right to life, non-discrimination and *non-refoulement*. One difficulty faced by irregular migrants, however, is that they do not have the same rights as regular migrants to challenge expulsion or deportation under human rights law.²⁵

The most directly relevant international instrument for irregular migrants is the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Convention on Migrant Workers), which brings together virtually all the provisions of the earlier International Labour

²² See Grant, above.

²³ See, for example Living in the Shadows, above; 'Human Rights of Irregular Migrants,' Report of the Committee on Migration, Refugees and Population, Council of Europe Parliamentary Assembly, Doc. 10924, 4 May 2006; Stefanie Grant, 'International Migration and Human Rights,' Global Commission on International Migration, September 2005.

²⁴ The Human Rights Committee has stated that '[t]he question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations.' See General Comment 27[67] 1999 para 4.

²⁵ ICCPR Art 13, as cited in Stefanie Grant, 'International Migration and Human Rights,' Global Commission on International Migration, September 2005.

Organization (ILO) Conventions on migrant workers.²⁶ This Convention lists a number of rights as being applicable to all migrant workers and members of their families, whether in a regular or irregular situation.²⁷ Only 37 states have ratified this Convention, due in part to a common misunderstanding amongst non-signatory States that it encourages irregular migration. Also, it is unlikely that any European Union (EU) State will ratify unilaterally; this will require a coordinated approach by EU member States.²⁸

The right to return and statelessness

Everyone has the right to leave and return to his or her own country,²⁹ and States have a corresponding obligation – owed to other States – to readmit their nationals. The Human Rights Committee has commented that since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents.³⁰

A State's obligation to readmit its nationals only applies to those who have the documentation to prove their nationality. As will be discussed below, a number of stranded migrants do not have such documentation. UNHCR has commented in its 2006 Guidelines on International Protection that a 'lack of documentation and temporary inability to establish identity... should be, and in many cases is, easily overcome with

²⁶ ILO Convention No 97 (1949) and ILO Convention No 143 (1975).

²⁷ Non-discrimination (Art 7), freedom to leave any country and enter their country of origin (Art 8), the right to life (Art 9), freedom from torture and ill-treatment (Art 10), freedom from slavery or forced labour (Art 11), freedom of thought, conscience and religion (Art 12), freedom of opinion and expression (Art 13), freedom from arbitrary or unlawful interference with privacy, family, home, correspondence or other communications (Art 14), property rights (Art 15), liberty and security of person (Art 16), the right of migrants deprived of their liberty to be treated with humanity (Art 17), a fair and public hearing by a competent, independent and impartial tribunal (Art 18), prohibition of retroactive application of criminal laws (Art 19), no imprisonment for failure to fulfill a contract (Art 20), no destruction of travel or identity documents (Art 21), no expulsion on a collective basis or without fair procedures (Art 22), the right to consular or diplomatic assistance (Art 23), the right to recognition as a person before the law (Art 24), equality of treatment between nationals and migrant workers as to work conditions and pay (Art 25), the right to participate in trade unions (Art 26), equal access to social security (Art 27), the right of a child to a name, birth registration and nationality, and equality of access to public education (Art 28), respect for migrants' cultural identity (Art 31) and the right to repatriate earnings, savings and belongings (Art 32).

²⁸ These issues were discussed at the Committee on Migrant Workers celebration of the fifth anniversary of the entry into force of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 April 2008.

²⁹ Article 13(2) Universal Declaration of Human Rights: "Everyone has the right to leave any country, including his own, and to return to his country;" Article 12(4) of the International Covenant on Civil and Political Rights: 'No one shall be arbitrarily deprived of the right to enter his own country' (Note: The Human Rights Committee has commented that '[t]he scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.' See General Comment 27[67] 1999, para 20); Article 8(2) of the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: 'Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin'; and part of Article 10(2) of the Convention on the Rights of the Child: 'States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country.'

Note that the Human Rights Committee has interpreted his

³⁰ Human Rights Committee, General Comment No. 27, Freedom of Movement, 1999.

the assistance of the authorities of the State of origin.’³¹ Yet sometimes, when an individual seeks the protection of his or her State of nationality, the State does not assist in supplying the documentation enabling return. In such situations, migrants can be rendered de facto stateless.

Persuasive yet non-binding recommendations of the UN High Commissioner for Refugees (UNHCR) Executive Committee have encouraged States to, for example, ‘seek appropriate solutions for persons who have no genuine travel or other identity documents, including migrants and those who have been smuggled or trafficked, and where necessary and as appropriate, for the relevant States to cooperate with each other in verifying their nationality status.’³² Yet these are not legally binding obligations. Indeed, Grant has commented that ‘there is a need to review the concept of statelessness to protect those who are stateless de facto and to invigorate protection for those who are stateless de jure.’³³

Setting the scene: four case studies

All of the case studies that are the main focus of this paper – Ukraine, Morocco, Mexico and Somalia – are transit countries for migrants on their way to the west. Yet the situation for stranded migrants in each location is unique, so this paper will provide a brief background on each before entering into its thematic analysis.

Ukraine

The Commissioner for Human Rights commented in 2007 that ‘[t]he May 2004 European Union (EU) enlargement brought Ukraine to the forefront of international migration,’ adding that Ukraine is an appealing transit country for migrants on their way to the west.³⁴ Indeed, UNHCR noted in 2007 that the number of persons trying to cross Ukraine’s western border into the EU has grown tremendously: the number of irregular migrants identified by the State Border Guard Service increased by 19% from 2006 to 2007 (from 25,778 in 2006 to 31,783 in 2007).³⁵

It has also been observed that Ukraine, along with countries like Turkey and Bulgaria, hosts a growing stranded migrant population due to economic reasons, tightened border controls and/or new asylum regimes. Yet these countries lack the capacity – via readmission treaties or assisted voluntary returns – to manage such migration.³⁶ At the same time, the EU is putting pressure on the Ukraine Government to accept large

³¹ UNHCR Guidelines on International Protection: The Application of Article A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07, 7 April 2006, p15, para 42.

³² Excom Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII) 2006 para (1).

³³ Grant, above, p46.

³⁴ Council of Europe: Commissioner for Human Rights, Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to Ukraine, 10 - 17 December 2006, 26 September 2007, CommDH(2007)15, pp24-25.

³⁵ UNHCR Annual Protection Report on Ukraine, (Reporting Period January-December 2007), p40.

³⁶ Black Sea Cooperation on Migration, Aeneas 2005 Concept Note, International Organization for Migration, available at http://www.old.iom.int/en/news/Black_Sea_Forum_Concept_Note.pdf.

numbers of migrants and failed asylum seekers from the EU, and to step up efforts to enforce their common border.³⁷

Migrants in Ukraine come from a range of countries. COMPAS commented in 2007 that Chinese, Vietnamese, Bengalis, Indians, Iranians, Pakistanis, Tamils, Iraqis, Afghans, Kurds and Palestinians, Belarusians, Georgians, Moldovans and citizens from various CIS countries, as well as Somalis, West Africans and Egyptians are using Ukraine as a transit country on their way to Western Europe.³⁸ The irregular migrants in detention who were interviewed by Human Rights Watch in 2005 were from Afghanistan, Armenia, Azerbaijan, Bangladesh, Belarus, China, Côte d'Ivoire, Egypt, Georgia, India, Iran, Iraq, Kazakhstan, Lebanon, Moldova, Pakistan, Palestine, Romania, the Russian Federation (Chechnya and elsewhere), Somalia, Sri Lanka and Vietnam.³⁹

It is important to clarify that not all transit migrants in Ukraine are illegal: some migrate from visa free countries, so their stay in Ukraine is neither recorded nor illegal.⁴⁰ Some descriptions of stranded migrants, such as Amnesty's, refer to migrants who have been denied the right to enter and remain legally. However, the reality is that some migrants who do not require a visa in Ukraine still become stuck, due to an inability to enter the EU or return home. Considering Ukraine's human rights record with respect to migrants, their legal status does not necessarily preclude them from facing a range of human rights violations and needing some kind of assistance or protection.

'Ukraine is failing every test when it comes to protecting migrants rights.' This controversial statement was made in 2005 by Holly Cartner, Europe and Central Asia director of Human Rights Watch/⁴¹ In 2006, Human Rights Watch examined this situation further, commenting that '[e]ffective protection in Ukraine is limited by a series of factors: lack of prior experience in managing migratory flows, a judicial tradition in which administrative law is not thoroughly developed or functional, institutional structures that are lagging behind, limited resources for social support and integration due to a strained economy, no tradition of asylum, and the lack of a human rights culture.'⁴²

Morocco

Morocco is a source, transit and destination country for migrants. Since the mid-1990s, it has encountered a growing number of irregular, mostly sub-Saharan African migrants attempting to cross into the EU, most of whom enter via Algeria at the Northern Moroccan border town of Oujda. UNHCR estimated in 2007 that there are between 10,000 and 15,000 irregular migrants in Morocco at any one time.⁴³

Migrants in Morocco come from an increasingly diverse array of countries and regions, such as Senegal, the Gambia, Sierra Leone, Liberia, Mali, Côte d'Ivoire, Ghana, and

³⁷ 'Ukraine: Migrants, Asylum Seekers Regularly Abused,' Human Rights Watch, November 30 2005.

³⁸ 'Ukraine – Europe's Mexico?' Central and East European Migration: Country Report 1, Centre on Migration Policy and Society (draft June 2007).

³⁹ Ukraine: On the Margins: Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union,' Human Rights Watch, Vol 17 No. 8(d) November 2005, p42.

⁴⁰ 'Ukraine – Europe's Mexico?...', above.

⁴¹ 'Ukraine: Migrants, Asylum Seekers Regularly Abused', above.

⁴² 'European Union: Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees,' Human Rights Watch, October 2006, p8.

⁴³ UNHCR Morocco 2007 Annual Protection Report (Reporting period January – December 2007) p7.

Nigeria as well as the Democratic Republic of Congo, Cameroon, Sudan and the Horn of Africa. Even migrants from China, India, Pakistan, and Bangladesh have recently migrated through Morocco via Saharan routes.⁴⁴ One commentator observed in 2006 that nationals of the Democratic Republic of Congo and Nigeria are ‘undoubtedly amongst the largest groups of undocumented migrants in Morocco,’ and nationals of Cote d’Ivoire and Cameroon are also ‘highly significant.’⁴⁵

In the Moroccan context, it is important not to oversimplify the phenomenon of transit migration. Whilst vast numbers of sub-Saharan Africans do migrate to Morocco in an attempt to reach Europe, their stories and migratory paths can vary considerably. They typically travel in stages, working to save for their onward journey and engaging locally based passeurs to smuggle them each step of the way.⁴⁶ Some migrants travel and work for years before reaching Morocco and may pass through a range of legal statuses during their journey. Arrival in Morocco may not have been part of their initial plan, and Collyer has written that ‘[t]here is no linear logic to their movements.’⁴⁷

Conversely, North Africa may have been their primary destination, or some might decide to stay in a country such as Morocco as a second-best option, should their attempt to venture into Europe fail. Hein de Haas has commented, therefore, that use of the term ‘transit migrant’ in this context is ‘often misleading.’⁴⁸ UNHCR has similarly noted that an increasing number of migrants settle in Morocco as they are prevented from moving onward to the European Union and lack the opportunity to return.⁴⁹

Research from 1997, when transit migration in Morocco was first identified, supports this observation. At this time, Congolese migrants barely stopped on their way through to Spain but in 2005, the 100 migrants interviewed for a research project on Saharan transit migration had spent an average of more than 15 months in Morocco.⁵⁰ The extent to which those migrants who prefer to stay in Morocco are actually stranded, as compared to those who have no choice but to remain, will be considered below.

Mexico

UNHCR estimates that half a million undocumented migrants cross Mexico’s southern border every year, mostly in an attempt to reach the United States or Canada.⁵¹ Most are economic migrants, the majority of whom are from Central America, especially Guatemala, El Salvador, Honduras and Nicaragua. In fact, 94% of the 179,000 foreigners in transit questioned and deported by Mexican authorities in 2006 were from Central America.⁵² The poorest migrants travel by foot or hang from trucks and trains,

⁴⁴ Hein de Haas, ‘Trans-Saharan Migration to North Africa and the EU: Historical Roots and Current Trends,’ MPI Migration Information Source, November 2006.

⁴⁵ Michael Collyer, ‘States of Insecurity: Consequences of Saharan Transit Migration,’ Centre on Migration, Policy and Society, Working Paper No. 31, University of Oxford, 2006, p11.

⁴⁶ Hein de Haas, ‘The myth of invasion: Irregular migration from West Africa to the Maghreb and the European Union,’ International Migration Institute research report, October 2007.

⁴⁷ Collyer, above, p17.

⁴⁸ Hein de Haas, 2006, above.

⁴⁹ Morocco 2007 Annual Protection Report, above, p7.

⁵⁰ This information was provided by a researcher who has specialized on migration in Morocco, January 2008.

⁵¹ ‘Mixed Migration in the Americas,’ UNHCR Asylum and Migration website <<http://www.unhcr.org/cgi-bin/texis/vtx/asylum?page=americas>> accessed 15 April 2008.

⁵² ‘United States – Mexico: Walls, Abuses and Deaths at the Borders, Flagrant Violations of the Rights of Undocumented Migrants on their Way to the United States’, No. 488/2, March 2008, International

while others sell their property and/or assets and sometimes borrow money from relatives or banks in order to pay so-called “coyotes” or “polleros” to arrange their transport.⁵³

Interception, detention and deportation practices in Mexico – at both its southern and northern borders – have intensified in recent years, as reflected by the participation of all the countries in the region in the “Puebla Process” (the multi-lateral Regional Conference for Migration). A recent report commented that ‘Mexico has become a guardian of the border. From Suichate River, border between Mexico and Guatemala, to Bravo River, the whole country has become a vast ‘stopper area,’ full of check points, police operations for mass arrests, detention points, police operations, for hundreds of thousands [sic] of migrants in transit to the north.’⁵⁴ The United States, at Mexico’s northern border, has also stepped up its efforts to curb irregular migration, as will be considered below.

A common comment made about Mexico, including by the Mexican National Commission on Human Rights (CNHD), is that it does not treat migrants on its territory with the fair treatment that it demands of the United States towards its nationals.⁵⁵ CNDH commented recently that ‘[e]ven though our country has not built fences to stop Central American migration, an invisible and painful wall has been erected: a wall of abuses and violations against the fundamental rights of migrants in irregular situation.’⁵⁶

Somalia

Somalia is a major transit country for people smuggled from the Horn of Africa, particularly Ethiopia, to the Gulf States.⁵⁷ A number of reports – including from a 2008 mission of the independent expert on the situation of human rights in Somalia⁵⁸ – comment on the apparent increase in the number of migrants arriving in the north-eastern port of Bossaso in Puntland, hoping to cross to Yemen and then on to Saudi Arabia and the Gulf States. UNHCR reported in March 2008 that the number irregular migrants crossing to Yemen has almost trebled during the first two months of this year compared to the same period last year.⁵⁹ Most are young males who have left Northeast Ethiopia in search of employment opportunities in the Gulf States or Saudi Arabia, but some are also asylum seekers with international protection needs.⁶⁰

Federation for Human Rights, p7.

⁵³ Ibid, p18.

⁵⁴ Ibid, pp4-15.

⁵⁵ ‘Migration: Labour on the Move: Opportunities and Challenges’, December 2007, International Organisation for Migration.

⁵⁶ Article from Mexican newspaper La Reforma, 7 January 2007, as cited in United States – Mexico: Walls, Abuses and Deaths at the Borders...’, above, p15.

⁵⁷ ‘Migration Initiatives’, International Organization for Migration, 2007, p 13.

⁵⁸ UN Human Rights Council, Report of the independent expert appointed by the Secretary-General on the situation of human rights in Somalia (Mr Ghanim Alnajjar), 17 March 2008. A/HRC/7/26, p15.

⁵⁹ ‘Massive rise this year in numbers crossing Gulf of Aden’, UNHCR News Service, Geneva, March 4.

⁶⁰ Ethiopia Annual Protection Report, reporting period January – December 2007, UNHCR pp13-14.

In 1992, the Government of Yemen – the only signatory to the 1951 refugee Convention in the Arabian peninsula – decided that all Somalis who register with UNCHR would be granted prima facie refugee status. Despite this, UNHCR reported that in 2007, 43% of the estimated 27,000 persons who crossed the Gulf of Aden to Yemen with the help of smugglers, were Ethiopian.⁶¹ Recently, however, this trend seems to be changing in response to the deteriorating security situation in South Central Somalia.⁶²

Whilst this is important background information, this paper is concerned with those migrants who do not cross to Yemen, but become stranded in Somalia. This is slightly different to the other case studies, as Yemen is not usually the desired destination country of migrants passing through Somalia: as mentioned, most intend to travel on to the Gulf States.

As a general statement, Somalia offers little hope for stranded migrants. A 2006 IRIN news article commented that Bossaso ‘has become a dangerous magnet, attracting more hopefuls than it can support. As a result, Bossaso has been overwhelmed by dependent groups – the internally displaced from other areas of Somalia, returnees from refugee camps and neighbouring countries, impoverished residents who have suffered catastrophic loss during the years of war and conflict – and, now, more recently, stranded migrants.’⁶³

The current situation for migrants stranded in Somalia (and, indeed, for most people in Somalia) is further complicated by what has been described as ‘the worst humanitarian crisis in Africa.’⁶⁴ The United Nations Office for the Coordination of Humanitarian Affairs commented on 11 April 2008 that the situation in Somalia is ‘deteriorating faster than expected, owing to an unusually harsh dry season, rising insecurity and soaring inflation rates.’⁶⁵

This has a direct impact on the life and security of migrants stranded in Somalia. For example, an insurgent group claimed responsibility for an explosion in Bossaso on 5 February 2008 that killed 24 and seriously injured over 90 others.⁶⁶ It took place near the Bossaso port, in an area densely populated with Ethiopian migrants. The authorities then demolished remaining settlements for security reasons, leaving hundreds homeless and forcibly relocated. The UN reported in February that ‘[a]bout 500 families remain homeless residing in mosques, around Bossaso beach, [in] basements of buildings and are still vulnerable to attacks.’⁶⁷ Whilst humanitarian organizations have continued to provide assistance in Somalia, this current climate has also reportedly reduced levels of international presence.

⁶¹ Ibid.

⁶² ‘Human Smuggling and Human Trafficking in Somalia,’ UN Office for the Coordination of Humanitarian Affairs Somalia, 21 November 2007.

⁶³ ‘Somalia: Tragic Cargo – Part 1’, IRIN UN Office for the Coordination of Humanitarian Affairs, 8 June 2006.

⁶⁴ This observation was made in ‘Somalia: Proceed With Caution,’ Refugees International Bulletin, March 31, 2008.

⁶⁵ UN News Service, Somalia: UN says humanitarian situation worsening faster than expected, 11 April 2008.

⁶⁶ ‘Human Smuggling and Human Trafficking in Somalia,’ above.

⁶⁷ ‘Somalia Humanitarian Overview,’ Vol. 1 Issue 2 – February 2008, p3.

Who becomes stranded, and why?

From a legal perspective, migrants become stranded because they have no option to regularize their status, they cannot move on lawfully to a third country and their nationality is not effective in enabling them to return home. However, from a practical perspective, the reasons are more wide-ranging. The extent to which a migrant is stranded can be considered along a spectrum, with legally stranded at one end, and those who are 'subjectively' stranded at the other. It is useful to keep this in mind whilst reading this section.

Firstly, this section will examine the primary reasons why migrants become stranded, namely border controls and a lack of documentation and/or resources. It will also consider the more complex 'subjective' reasons why some migrants are unwilling to return, and could be considered stranded. Secondly, it will consider some different groups of people who become stranded, including rejected asylum seekers, migrants abandoned by smugglers, victims of trafficking and migrants trapped due to the outbreak of hostilities.

Impact of border controls

One of the main reasons why migrants find themselves stuck in transit countries is tightened border controls in destination countries. Of particular interest here are the policies and controls of the EU, the United States and Yemen.

Since the 1990s, the EU has attempted to tighten the borders of its member States and externalize border controls, looking to transit countries to host, detain and process refugees, migrants and asylum seekers. One aspect of current EU policy is the conclusion of readmission agreements, whereby countries outside the EU agree to accept the return of migrants and asylum seekers who have transited through their territories on their way to the EU.⁶⁸ Hein de Haas has commented that EU states pressure North African countries, for example, to sign such agreements in exchange for development aid, financial support for border controls, military equipment and limited numbers of temporary work permits for immigrants.⁶⁹

Similar pressure is placed on Ukraine. Human Rights Watch has pointed out that the EU is Ukraine's biggest donor, commenting in late 2006 that '[g]iven the strategic, political and economic importance to Ukraine of its relationship with the EU, the government in Kyiv has a clear interest in cooperating with the EU on the management of migration and asylum flows on the EU's terms.'⁷⁰ At Ukraine's western border, a great number of migrants fail to enter the EU and are turned away by Slovakia, Hungary or Poland, all of which have bilateral readmission agreements with Ukraine.⁷¹ In 2006, Ukraine signed a readmission agreement with the EU. Although the return provision will only come into effect two years after Ukraine ratifies (which UNHCR reports it had not done by the end of 2007), NGOs⁷² and the Council of Europe's European Commission Against Racism

⁶⁸ 'European Union: Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees,' above, p3.

⁶⁹ Hein de Haas, 2007, p iv.

⁷⁰ 'European Union: Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees,' above, p12.

⁷¹ Council of Europe: Commissioner for Human Rights Report, 2007, above. p25.

⁷² For example, Human Rights Watch, World Report 2008 - Ukraine, 31 January 2008.

and Intolerance have expressed concern that Ukraine is not ready to implement this agreement in accordance with international human rights standards.⁷³

Both the US and Yemen are also intensifying their border controls to prevent irregular migration. Security at Mexico's northern border with the United States has increased since 1994 when it introduced Operation Guardian and signed NAFTA along with Canada and Mexico. Since 2001, security measures have further intensified. In 2006, for example, 6000 National Guards were sent to give support to Border Patrols and the Secure Fence Act was passed, which led to the construction of a 700 mile long fence.⁷⁴ The authorities in Yemen have similarly adopted increasingly restrictive measures to prevent boat arrivals from Somalia. In particular, they have reinforced patrols on the Red Sea in order to intercept smugglers' boats⁷⁵

Whilst such measures are designed to deter and prevent irregular migration, they have not always had the desired effect. Hein de Haas notes that in Northern Africa, rather than leading to a decline in migration, EU policies 'have led to the swift diversion of migration routes, increasing 'illegality' and reliance on smuggling as well as increasing the risks, costs and suffering of the migrants involved'.⁷⁶ Similarly, reports about Ukraine indicate that the real impact of EU policies is an increase in human rights abuses against irregular migrants. In the United States, despite increased controls, the number of migrants crossing from Mexico into the United States doubled between 1993 and 2004. Similarly, despite the extremely dangerous nature of the sea crossing from Somalia to Yemen (for more reasons than just border controls), the numbers have increased since 2005.⁷⁷ It is important, therefore, not to over-simplify the impact of border controls on migrants becoming stranded, though there is a definite causal link in many cases.

Lack of documentation

A lack of documentation is one of the most commonly cited reasons – sometimes coupled with a lack of financial resources – as to why migrants become stranded. Migrants' documents may be lost, stolen or destroyed by smugglers or traffickers. Some migrants even destroy their documents themselves, through fear of deportation. In some situations, migrants who lack documentation are reluctant to make themselves known to the authorities and thus do not attempt to avail themselves of the protection of their State of nationality. In other situations, migrants who do seek protection from their State face delays in being identified and in obtaining new documents: this occurs in Ukraine, for example, due either to the absence of Embassies or the unwillingness of Embassy staff to travel to some locations where migrants are stranded in detention.

Where, however, migrants have left the country of which they are nationals and are unable to avail themselves of the protection and assistance of their national authorities, they may become *de facto* or 'effectively' stateless.⁷⁸ Grant has commented that 'at its most acute, migrants who are stranded find themselves without protection in the country

⁷³ Council of Europe: European Commission Against Racism and Intolerance (ECRI), Third Report on Ukraine, Adopted on 29 June 2007, 12 February 2008. CRI(2008)4, p 15.

⁷⁴ Sara Miller Llana, 'In Central America, child migrants now face perils alone,' The Christian Science Monitor, August 3, 2007.

⁷⁵ 'North Africa, Middle East, Turkey and the Gulf States', 2007, FIDH.

⁷⁶ Hein de Haas, 2007, above, p iv.

⁷⁷ 'Human Smuggling and Human Trafficking in Somalia,' 2007, above.

⁷⁸ UN, A Study of Statelessness, UN Docs. E/1112; E/1112/Add.1 (August 1949).

in which they are physically present, without protection from their country of nationality, and without international protection.’⁷⁹ Many victims of trafficking, for example, are rendered effectively stateless as their traffickers confiscate their identity documents, leaving them unable to establish their identity and nationality status.⁸⁰

In Mexico, inadequate consular assistance leaves some migrants in a situation that could also amount to *de facto* statelessness. In 2007, UNHCR protection staff, COMAR and the National Immigration Institute all referred to cases of migrants who appeared to possess a nationality, but who were refused consular assistance and were therefore unable to exercise the right to a passport and/or to return to their country of nationality. To address this, in June 2007 Mexico adopted a circular establishing a simple statelessness determination procedure to determine *de jure* and *de facto* statelessness, which is the first of its kind in Latin America.⁸¹

Some stranded migrants are legally stateless, despite there being a legal regime on *de jure* statelessness⁸² and the fact that UNHCR has a clear mandate to protect such persons. Many become stuck in detention for indefinite periods of time because no State – including the State from which they migrated – will grant them entry. An example is the 2004 High Court of Australia case where a Palestinian was detained in Australia upon arrival without a visa. His visa application was refused, but he could not be removed, as he did not have a country of nationality. The court upheld his indefinite detention.⁸³

Lack of financial resources

Another significant reason as to why migrants become stranded is a lack of financial resources to move on to a third country or return home. Most have engaged the services of smugglers, many of whom steal their money, force them to pay more than they agreed or abandon them with no choice but to pay other smugglers to continue their journey. Some migrants, especially those who pay different smugglers in stages (which is typical for migrants travelling to Morocco), underestimate the cost of their journey and have exhausted their resources by the time they reach transit countries. Additionally, many migrants have debts to pay back home, which places a further burden on their finances.

In some cases, migrants who run out of finances can approach their Embassies for assistance to return home. However, not all States have the capacity to fund their return. Similarly, transit countries will not necessarily have the finances to deport migrants stranded on their territory. For example, IOM reported in 2002 that its mission in Armenia was periodically approached for assistance by a small group of migrants from South Asia who had been abandoned by smugglers. The Armenian authorities could not

⁷⁹ Grant, above, p29.

⁸⁰ ‘Living in the Shadows...’, above, para (s).

⁸¹ Standard Inspection of UNHCR’s Operations in Mexico and Central America (5-16 June 2007) INS/07/09 p18, para 62. Note that this procedure is likely to be reviewed under the reform of the immigration legal regime that is currently underway in Mexico.

⁸² 1954 Convention relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness.

⁸³ *Al-Kateb v Godwin* (2004) HCA 37.

fund their return, so their only option was to raise the funds themselves, leaving many stranded without state assistance or employment.⁸⁴

Whilst it is often said that migrants are not the poorest of the poor, the ways in which they fund and carry out their journeys often leave them financially vulnerable. As the sections below will explore, in most cases irregular migrants struggle to earn an income in transit countries: they therefore become trapped in their irregular status, as they cannot raise the funds to leave but have no options to regularize their status. As one commentator said in relation to Morocco: '[g]iven the structure of smuggling operations it is clear that those who have money and want to leave, don't get stuck in Morocco.'⁸⁵

Unwillingness to return

It is not always easy to distinguish between being migrants who are unable to return or move on to a third country, and those who are unwilling. This is a particular issue in relation to return. Raising the funds to leave one's country is not usually an easy task: in Mexico, for example, a migrant's family or community might pool their funds, or the migrant may have to sell assets or take out a loan to fund the journey. In many cases, a migrant is considered by his or her family and/or community as an investment, so returning empty-handed is simply not an option. A BBC news story commented in relation to migrants in Morocco that 'to go home is to accept a humiliating loss of face.'⁸⁶ An International Organization for Migration (IOM) article about migrants in Libya similarly observed that '[t]he humiliation of returning home empty-handed, in debt and often in a worse economic situation than before they left, is also a situation that forces many migrants to continue staying in Libya with an irregular status.'⁸⁷

The issue of debt is significant for many stranded migrants. The UN News Service has commented, for example, that debt incurred back home is one of the greatest fears held by Ethiopian migrants stranded in Bossaso: 'Whether the individual borrows through friends, family or formal financial institutions, the assumption is that this debt will be met through opportunities found abroad.'⁸⁸ A clear example is of the 18 year old Fatuma, whose family gave her enough money to pay brokers, cover the costs of travel to and accommodation in Bossaso and buy food and water. Her money was stolen and she was left stranded, washing dishes in a food kiosk for several cents a day. The article reported that '[s]he would love to go back to Ethiopia, but is stuck: "I borrowed too much money," she said.'⁸⁹

In some circumstances, however, migrants are clearly not stranded in transit countries, as it is their choice to remain. A 2006 report noted, for example, that in October and November 2005, removal by the Moroccan authorities to countries of origin became more common. Yet some migrants who were returned made their way back to Morocco. At the time the report was written, Nigerians who had been removed to Lagos in 2004 had already returned, and others removed as far as Senegal in November 2005 were on

⁸⁴ 'Irregular Migration and Smuggling of Migrants from Armenia,' January 2002, IOM, page 27.

⁸⁵ Collyer, above, p15.

⁸⁶ Alix Kroeger, 'Migrants' scant hopes for summit,' BBC News Rabat, 7 November 2006, <http://news.bbc.co.uk/2/hi/africa/5168682.stm>.

⁸⁷ '[Libya] IOM: funds needed to assist stranded migrants,' 23/11/2007, Migration and Asylum Working Group of the Euro-Mediterranean Human Rights Network, <http://mawgeng.unblog.fr/2007/11/23/libya-iom-funds-needed-to-assist-stranded-migrants-231107/>

⁸⁸ 'Somalia: Tragic Cargo – Part 1', above.

⁸⁹ Ibid.

their way back.⁹⁰ Similarly, in a 2005-2006 survey, 133 African migrants and asylum seekers in Istanbul were asked whether they wanted to return to their countries, and only 18 said yes.⁹¹

So how does one distinguish between migrants who feel they are unable to go home, and those who just don't want to? Is this even necessary? From a legal perspective, the notion of being stranded necessarily entails an inability to return to one's country of origin. Yet as this section has revealed, some migrants do not perceive return as a viable option and are subjectively, as opposed to objectively, stranded.

Rejected asylum seekers

Many migrants who become stranded have had claims for asylum rejected. The reason for their subsequent inability to return is usually, as already explored, a lack of documents and/or finances. In 2003, the United Nations Executive Committee 'remain[ed] seriously concerned, as regards the return of persons found not to be in need of international protection, that some countries continue to restrict the return of their own nationals, either outright or through laws and practices which effectively block expeditious return.'⁹² It called on States to cooperate actively to establish the identity and nationality of persons without genuine travel or identity documents, and to find practical solutions for them to be issued with genuine travel documents.⁹³

Similarly, the 2005 Report of the Global Commission on International Migration commented that '[a]sylum seekers whose claims have been definitively rejected but who are unable to gain the documents required for them to re-enter their country of origin should also be helped to find an interim solution to their plight, pending the time when return becomes possible.'⁹⁴ These statements and calls to States reveal that State cooperation with the return of rejected asylum seeker remains an issue.

Returning to the hazy notion of being stranded, not all rejected asylum seekers feel they are able to return home, even if they do have the practical means. A recent example was considered in a 2008 article in *The Economist* about the plight of Iraqi asylum seekers who make their way to prosperous countries like Australia or in Europe. Those who have their claims for asylum rejected do not necessarily want to return. However, those who remain 'are stuck in legal limbo, destitute and dependent on charity. If they then commit crimes, the host country deports them instantly.' The article comments that 'Britain offers modest financial inducements to assist "voluntary" returns to Iraq; refugee advocates call this a euphemism.'⁹⁵

Ineffective asylum procedures

One element of the UNHCR Executive Committee's definition of migrants who are not in need of international protection is that they have had due consideration of their claims

⁹⁰ Collyer, above, p128.

⁹¹ Brewer and Yukseker, above, p54.

⁹² UNHCR Executive Committee Conclusion No. 96 (LIV) on the return of persons found not to be in need of international protection (2003) para (a).

⁹³ Ibid, para (e).

⁹⁴ 'Migration in an interconnected world: New directions for action,' above, p 38.

⁹⁵ 'Rich countries have wobbled in their treatment of the most vulnerable', *The Economist*, 21 February 2008.

in fair procedures.⁹⁶ So what about migrants whose claims were not considered fairly? One commentator has observed that some asylum seekers, ‘often among the most destitute, are stranded in countries, where the asylum systems are not yet sufficiently developed and where they are often unable to legalize their stay.’⁹⁷ Some cannot access refugee status determination procedures at all, whilst others are denied procedural rights during the process, such as access to legal representation.

Ukraine provides a good case study, as refugee status determination was suspended from summer 2001 until late 2002.⁹⁸ One researcher interviewed a Syrian asylum seeker in 2004 who claimed that several years previously, his documents had been stolen. He had filed a report with the police and applied for replacement documents from the Syrian embassy in Moscow, but was refused: ‘From August 2001 to August 2002, the whole year, I sat in the apartment of my brother, a student, fearing to go out on the street as problems could arise with the police and migration services as result of not having documents. During that period, they were not accepting applications for refugee status.’⁹⁹ In other words he was stranded, not only in Ukraine, but also within the confines of his brother’s apartment.

Another issue in Ukraine has been the imposition of time limits on applications for asylum. Article 9 of the *Law on Refugees* used to grant a mere three days for illegal entrants to apply for asylum and five days for legal entrants. This was amended in 2005 to require applications to be made ‘without delay’. Although the State Committee informed the Commissioner for Human Rights in 2006 that this new provision is ‘efficient’,¹⁰⁰ it is a vague provision that could potentially preclude asylum seekers with valid claims from accessing asylum procedures.

Whether persons in these situations should be called ‘stranded migrants’ is debatable: asylum seekers fall within the framework of protection as they have the right to seek and enjoy asylum.¹⁰¹ But where they are precluded from accessing this right, they can find themselves in a similar situation to other stranded migrants and can be vulnerable to the same human rights abuses. However, using the term ‘stranded migrant’ in this context might imply a lack of recognition that such persons could be refugees. For example, Human Rights Watch recommended in 2007 that IOM should avoid using language such as ‘transit migrants’ or ‘stranded migrants’ when speaking of the entire population of those held in Libyan detention centers.’ In the absence of an effective asylum regime in Libya, Human Rights Watch commented that ‘such labels are misleading and lend credence to those who argue erroneously that Libya has no refugees on its territory.’¹⁰²

⁹⁶ UNHCR Executive Committee Conclusion No. 96 (LIV) on the return of persons found not to be in need of international protection (2003) preambular paragraphs. Note that this definition was only for the purposes of this Conclusion.

⁹⁷ Volker Turk, ‘Freedom from fear: Refugees, the broader forced displacement context and the underlying international protection regime,’ 2008.

⁹⁸ Greta Uehling, ‘Unwanted Migration: Combating and unwittingly creating irregular migration in Ukraine,’ New Issues in Refugee Research, UNHCR, Working Paper No. 109, p5.

⁹⁹ Ibid, p10.

¹⁰⁰ Council of Europe: Commissioner for Human Rights Report, above, p27.

¹⁰¹ Article 14(1) of the Universal Declaration of Human Rights.

¹⁰² Human Rights Watch’s Statement to the IOM Council, 2 December 2007, at its 2007 Council Meeting (94th Session).

Victims of trafficking

Trafficking can be an issue in relation to stranded migrants in two respects: firstly, victims of trafficking can become stranded and secondly, irregular migrants can be at heightened risk of becoming victims of trafficking.¹⁰³ In relation to the first respect, this paper has already commented that many victims of trafficking have their documents confiscated, which can render them effectively stateless. Mexico provides an example in relation to the second respect, as many illegal immigrants have become victims of traffickers along the Guatemalan border, where the growing presence of gangs such as Mara Salvatrucha and Barrio 18 have made the area especially dangerous for undocumented and unaccompanied women and children.¹⁰⁴

Outbreak of hostilities

The outbreak of war and/or hostilities can cause migrants to become stranded. In fact, one IOM representative recalls that IOM first considered the 'stranded migrant' concept in the context of the first Gulf war.¹⁰⁵ A more recent example is Lebanon, where the outbreak of hostilities in July 2006 led to the displacement of a large number of stranded migrant workers. Some governments could not afford to evacuate their citizens, so IOM and the United Nations transported stranded migrants across the border to Syria: in August 2006, IOM reported having evacuated over 8,500 migrants.¹⁰⁶

Other recent examples where IOM has helped stranded migrants to escape from conflict situations include evacuating migrants who had fled to Jordan from Iraq during the Second Gulf War and also migrants who fled the violence in Liberia and Côte d'Ivoire in 2003.¹⁰⁷ Again, this highlights the fuzzy nature of the stranded migrant concept, as these migrant workers were not necessarily irregular, but nonetheless became stranded in need of protection and assistance.

Abandonment by smugglers

Migrants who engage the services of human smugglers are often abandoned, sometimes far from their destination. Numerous reports tell of migrants being abandoned in the deserts of Africa and Mexico and in deserted parts of Somalia. They are often stranded in an immediate, critical sense as they may be lost and left without food or water. For those who find some kind of assistance – sometimes having walked for days in harsh conditions, vulnerable to being attacked and robbed – they are usually still stranded, as their smugglers will invariably have stolen their money and documentation.

An example is the town of Zouerat, which was described by India's national newspaper in 2006 as 'Mauritania's default holding tank for desert-stranded migrants'. Indians, Bangladeshis and Pakistanis travel long distances, with the goal of reaching Europe, but some are stranded after being abandoned by smugglers in the desert with little water, no

¹⁰³ 'Human Smuggling and Human Trafficking in Somalia,' above.

¹⁰⁴ United States Department of State, 2007 Country Reports on Human Rights Practices - Mexico, 11 March 2008.

¹⁰⁵ Interview with IOM, Geneva, 1 April 2008.

¹⁰⁶ Report of the Director General on the Work of the Organization for the Year 2006, International Organization for Migration, 94th session, MC/2224, 22 May 2007, p27.

¹⁰⁷ 'Migrants Too Often Overlooked During Crises, Says IOM on International Migrants Day,' 18 December 2006, available at

<http://www.iom.int/jahia/Jahia/newsArticleEU/cache/offonce?entryId=12386>.

food and no passports. A news article described the plight of one group, who was left for five days in the Sahara. They had lain down to die but were found by Mauritanian soldiers, who took them to Zouerat. Five months later, the plane that was meant to return them to India had still not arrived, and they told reporters that without documents, they had no choice but to attempt to make it to Spain through the desert.¹⁰⁸

The life of stranded migrants

Irregular migrants are particularly vulnerable to human rights violations and abuse. Amnesty International has commented that '[t]hose who lack official status and the protection of the law are often denied the right to education, health and housing services and are condemned to live and work in appalling and degrading conditions.'¹⁰⁹ This section will examine what life is like for stranded migrants in relation to racism and xenophobia, employment, housing and detention. It will reveal that stranded migrants, particularly in the case studies considered, have a range of protection and assistance needs.

Racism and xenophobia

Anti-immigrant sentiments, racism and xenophobia are considerable problems for many stranded migrants. Such attitudes and sentiments – sometimes deliberately fuelled by politicians or the media – can preclude migrants from accessing their basic rights, which can further contribute to their marginalization.¹¹⁰ Some politicians go so far as to propose anti-immigrant measures to gain public support, despite the high probability that they will end up being challenged and nullified by the judiciary.¹¹¹

Xenophobia and racism are particular concerns for migrants stranded in Ukraine. A 2004 report noted that one reason why the prevention of illegal migration gained public support in Ukraine was 'the mass popularization of threats of an "invasion" of foreigners' which was a favourite topic of the Ukrainian media.'¹¹² Another report referred to the misconception that irregular migrants are somehow 'faulty' to begin with, reinforced when migration officials speak of them as 'dregs' of society¹¹³

Employment

It can be extremely difficult for irregular migrants to find work, and if they do, their irregular status can make them particularly vulnerable to human rights abuses. African asylum seekers and migrants who were recently interviewed in Istanbul, for example, cited a lack of income earning opportunities as their biggest problem.¹¹⁴ A lack of job prospects is also a problem in Morocco, where unemployment is an issue across the board. However, some migrants stranded in Morocco receive money from family and

¹⁰⁸ 'South Asian migrants stranded in the wasteland of Sahara,' The Hindu, online edition of India's National Newspaper, 1 May 2006, <http://www.hindu.com/2006/05/01/stories/2006050100301500.htm>.

¹⁰⁹ 'Living in the Shadows...', above, p2.

¹¹⁰ Stefanie Grant, 'International migration and human rights,' A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005, p7.

¹¹¹ Statement of Jorge G. Bustamante, Special Rapporteur on the human rights of migrants, Second Session of the Human Rights Council, 18 September 2006.

¹¹² Olena Malynovska, 'International Migration in Contemporary Ukraine: Trends and Policy,' Global Migration Perspectives, No. 14, October 2004, p 23.

¹¹³ Uehling, above, p12.

¹¹⁴ Brewer and Yukseker, above, p52.

friends abroad, while others are able to find jobs in petty trade, construction and the informal service sector.¹¹⁵

Similarly, a shadow economy provides some employment opportunities for asylum seekers and irregular migrants in Ukraine, and they can sometimes turn to the migrant community for help. In some countries, however, like Morocco and Tunisia, employment of irregular migrants is further complicated by the adoption of severe measures against the illegal employment of foreign labour.¹¹⁶

Reports on irregular migrants in Mexico suggest that some employment opportunities exist in the informal sector: migrants can spend several months working before attempting to cross into the US, and others who fail to make the crossing work in Mexico to raise the funds to try again. Yet those who work are particularly vulnerable to human rights violations due to their irregular status. During a visit to Mexico in 2008, the Special Rapporteur on the Human Rights of Migrants expressed particular concern about both child labour and the prevalence of human rights abuses against women in the workforce.¹¹⁷

Migrants stranded in Bossaso face considerable difficulties earning enough to survive, let alone repay debts and/or fund an onward journey. They have been described as ‘hapless migrants,’ living ‘a hand-to-mouth existence’, working in menial jobs such as washing dishes or selling tea, earning as little as a few US cents a day. A 2006 report told of one Somali migrant who had been stuck in Bossaso doing menial work for over two years. At the time of interview, she was sweeping and cleaning in a restaurant for about 30,000 Somali shillings (US\$2) a day.¹¹⁸ Her situation raises another query about the stranded migrant concept: can it be used to describe persons who have not crossed an international border? She was a Somali who had come to Bossaso hoping to find work at the port or leave Somalia. She became stuck, unable to go back or move on, forced to face the same abuses and violations as the stranded Ethiopian migrants who lived in similar conditions.

Housing

Accommodation can also be a problem for stranded migrants, due partly to a lack of resources but also due to their undocumented status. Many Ethiopian migrants in Bossaso are homeless, and sleep under small scraps of plastic sheeting next to the port wall.¹¹⁹ In Morocco, housing is a considerable expense: though living in poor areas, undocumented migrants pay two or three times the price that Moroccans pay.¹²⁰

However, not all irregular migrants in Morocco can find accommodation. A BBC News Article, for example, described the situation of 60 migrants hiding in a church basement, and commented that ‘[t]he men go out at first light to search for food and only return

¹¹⁵ Hein de Haas, ‘Morocco’s Migration Experience: A Transitional Perspective’ *International Migration* Vol. 45 (4) 2007, p51.

¹¹⁶ Mohamed Saib Musette et al, ‘Report on legislation concerning international migration in central Mahgreb,’ *International Migration Papers 77E*, Labour Migration in Africa series, International Labour Organization, 2006.

¹¹⁷ ‘Special Rapporteur on the Human Rights of Migrants Concludes Visit to Mexico’ UNHCR Press Release, 15 March 2008.

¹¹⁸ ‘Somalia: Tragic Cargo, Part Two’, IRIN, UN Office for the Coordination of Humanitarian Affairs, 14 June 2006.

¹¹⁹ ‘Somalia: Tragic Cargo – Part 1’, above.

¹²⁰ Collyer, above, p26.

under cover of darkness,'¹²¹ due to a fear of being caught by the authorities and expelled. A lack of documents is a particular problem in Ukraine, as landlords are often reluctant to rent apartments to undocumented migrants. Even some shelters for the homeless – including some religious establishments – are unwilling to open their doors to migrants without documents.

Detention

The Jesuit Refugee Service has commented generally that 'unsuccessful asylum applicants, and undocumented migrants, may be kept behind bars indefinitely waiting for their home country to accept them back – which in many cases will never occur.'¹²² This is a particular problem in Ukraine and Mexico.

According to Ukrainian law, those detained for lacking identification documents can be detained in vagabonds' centres for up to 30 days.¹²³ However, in 2005 HRW interviewed migrants who had been detained for longer, sometimes more than fifty days, and also those 'who were repeatedly arrested for lacking identification documents because the embassies of their home countries were slow in providing the documents or had refused to confirm their identities.'¹²⁴

Those detained for entering Ukraine without permission or for attempting to cross from Ukraine into the EU without permission can be detained for the period necessary to prepare for deportation, up to a maximum six months (with some exceptions). Again, HRW interviewed persons who had been detained for longer, including one Indian who had been detained for 11 months in Cernihiv vagabonds' centre, waiting for documentation to clarify his status. He asked, 'If the embassy is not responding for two years and eight months, how long do I have to stay here?'¹²⁵

In Mexico, articles 118-127 of the General Population Law provide for penalties of up to 10 years imprisonment for migrants who are undocumented or have an illegal status. A migrant can be detained indefinitely where he/she provides false information regarding his/her general details, there is no diplomatic representation from his/her country of origin in Mexico, it is not possible to obtain his/her identity and travel documents, there is no available travel itinerary for deportation or the transit of aliens in third countries is forbidden.

Though standards obviously differ between individual detention centres and between those in Ukraine and those in Mexico, migrants can be detained in poor conditions, resulting in a range of human rights violations. Issues include overcrowding, violence, inadequate healthcare, deprivation of appropriate bedding and clothing and inadequate access to exercise, fresh air, natural light and food. Detainees can also lack basic rights such as access to medical assistance, legal assistance and interpretation, the right to

¹²¹ Alix Kroeger, 'Migrants' scant hopes for summit,' BBC News Rabat, 7 November 2006, <http://news.bbc.co.uk/2/hi/africa/5168682.stm>.

¹²² Jesuit Refugee Service, 'Flee for your life and risk imprisonment without crime,' <http://www.with.jrs.net/files/det-en.pdf>.

¹²³ Section 11 of the Law on Militia, cited in Ukraine: On the Margins: Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union,' Human Rights Watch, Vol 17 No. 8(d) November 2005, p43.

¹²⁴ Ukraine: On the Margins...', above, p43.

¹²⁵ Ibid, p44.

challenge the lawfulness of their detention and the opportunity to communicate with family, friends and the outside world.¹²⁶

State policies and legislation

In general, laws and/or policies addressing irregular migration in the transit countries examined are either inadequate in sufficiently protecting the human rights of stranded migrants or ineffectively enforced. The possible reasons for this include the way in which States focus on discouraging illegal migration, succumb to pressure from western neighbours to better police irregular migration, are overwhelmed by the sheer magnitude of irregular migration and/or lack the political incentive to address such a controversial phenomenon. It is noteworthy that at the 2006 High-Level Dialogue on Migration and Development, whilst a number of source countries listed human rights as the top priority of migration policy, ‘a sizeable number of states, source and destination, made little or no mention of rights at all.’¹²⁷

Inadequate protection of human rights

Mexico’s General Population Law is a good example of legislation does not sufficiently protect the rights of irregular migrants. Indeed, IOM has commented that whilst migration in Mexico has undergone enormous transformations, the legal framework remains practically unchanged.¹²⁸ The National Human Rights Commission has written to Congress calling, for example, for the elimination of article 123 of the General Population Law, which makes it a crime to enter Mexico illegally.¹²⁹

IOM agrees, commenting that other aspects also need revision, including the excessive discretion given to the authorities, the lack of harmonization with international instruments to which Mexico is a signatory, the lack of protection of vulnerable groups such as women and children and the lack of access to justice for irregular migrants.¹³⁰ On this last point, in 2007 the UN Committee Against Torture similarly expressed concern about article 33 of the Constitution, which grants the executive branch exclusive powers to expel any foreigner whose stay is deemed inappropriate from the national territory immediately and without need for a prior court decision.¹³¹

Lack of enforcement of legislation

Even where states have legislation that offers some protection to irregular migrants, this is not always enforced. In Morocco, for example, law 02/03 offers a number of protections against mistreatment towards foreigners who are taken to the border for expulsion. It also recognizes the right of foreign nationals to challenge an expulsion

¹²⁶ See ‘Ukraine: On the Margins...’, above; Council of Europe: Commissioner for Human Rights Report, above.

¹²⁷ Philip Martin, Susan Martin and Sarah Cross, ‘High-Level Dialogue on Migration and Development,’ International Migration, Vol 45(1) 2007.

¹²⁸ ‘Migration: Labour on the Move: Opportunities and Challenges’, December 2007, International Organisation for Migration, p25.

¹²⁹ Human Rights Watch, Mexico’s National Human Rights Commission: a Critical Assessment, 13 February 2008, Volume 20, No. 1(B), p 84.

¹³⁰ ‘Migration: Labour on the Move: Opportunities and Challenges’, above, p25.

¹³¹ UN Committee Against Torture (CAT), UN Committee against Torture: Conclusions and Recommendations, Mexico, 6 February 2007. CAT/C/MEX/CO/4, p4.

decision before an administrative tribunal, with provisions for access to an interpreter and/or legal counsel.¹³²

However, various reports on the experiences of migrants at the border indicate that such protections can be ignored by State authorities.¹³³ For example, Amnesty International reported in 2007 that one group of 53 migrants was expelled to the border between Western Sahara and Mauritania by the Moroccan authorities and, being left without food or water, died of dehydration.¹³⁴ The Association of Moroccan Workers in France reported that 450 immigrants were abandoned in the desert area along the Algerian border near Oujda: they were fired on by Algerian soldiers and some women were abused or raped by both Moroccan and Algerian policemen, as well as a Nigerian gang at the border. The government denied that these events occurred.¹³⁵

Enforcement is important not only in relation to laws that protect the rights of irregular migrants, but also laws that regulate violations of those rights. In Mexico, for example, arrests by people with no legal power to do so are common, and are usually used as a means to extort money: '[s]uch extortions frequently include threats, beatings, sexual harassment or rape of female migrants and kidnappings.' This is despite the fact that only INM and Preventive Federal Police officers have legal powers to intercept a person and demand information on his/her migration status.¹³⁶

Yet acting outside this legal framework, even where it blatantly violates the rights of migrants, often goes unpunished. The UN Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, went on a seven day visit to Mexico in March 2008 and noted 'reports of rampant impunity for instances of corruption, including bribery and extortion, violence against women and trafficking in children. The Special Rapporteur is concerned that the impunity seems to be linked to abuses of power at the municipal, state and federal levels.'¹³⁷

Focus on discouraging illegal migration

One of the most significant factors that – from a human rights perspective – has adversely affected migration policy in many countries, is the perception by States that irregular migration is a problem and a threat. During discussions on addressing irregular migration at the 2006 High-Level Dialogue on Migration and Development, for example, destination countries highlighted as particular issues border control, security, regulating flows and return policies. The delegate from the Russian Federation commented bluntly that 'We regard illegal migration as a threat to our security.'¹³⁸

In relation to Ukraine, Human Rights Watch commented in 2008 that reforms in recent years 'still have not led to a clear migration policy or a unified, efficient migration

¹³² Hein de Haas 2006, above.

¹³³ Collyer, above, p24.

¹³⁴ Amnesty International, Amnesty International Report 2007 - Morocco / Western Sahara , 23 May 2007.

¹³⁵ United States Department of State, 2007 Country Reports on Human Rights Practices - Morocco [including Western Sahara], 11 March 2008.

¹³⁶ United States – Mexico: Walls, Abuses and Deaths at the Borders, Flagrant Violations of the Rights of Undocumented Migrants on their Way to the United States, No. 488/2, March 2008, International Federation for Human Rights, p48.

¹³⁷ 'Special Rapporteur on the Human Rights of Migrants Concludes Visit to Mexico' UNHCR Press Release, 15 March 2008.

¹³⁸ Martin, Martin and Cross, above.

service.’¹³⁹ On 20 July 2007, the National Council for Security and Defence adopted a decision on ‘Directions of the State Migration Policy of Ukraine.’¹⁴⁰

However, a UNHCR staff member commented recently that whilst Ukraine is attempting to strengthen its migration policy and management – including via its draft concept paper on the State migration policy of Ukraine – its policies, law and procedures are being developed and implemented in an increasingly restrictive manner. The government has the goal of countering illegal migration, rather than providing legal migration opportunities. A 2007 ManattJones-Mexico News Brief suggests that Mexico is taking a similar approach, with INM launching a program to register undocumented immigrants from Central America with photographs and fingerprints and to penalize anyone who gives aid to these immigrants.¹⁴¹

The international community’s response

Whilst stranded migrants fall into a protection gap, as they are not protected by the international refugee regime and are usually deemed irregular by the authorities in transit countries, a range of international actors have been working to address this issue and/or provide stranded migrants with various forms of assistance and protection.¹⁴² As the International Federation of Red Cross and Red Crescent Societies (IFRC) commented at the High Commissioner’s Dialogue in 2007, ‘The question that should be addressed by this forum is not “if we should give assistance and protection to people who are not entitled to international refugee protection”, but *how* we can complement one another in addressing the needs of migrants that fall outside the scope of those who have a legal claim to international protection, and how we can strengthen governments’ responsibility in this matter.’¹⁴³ Indeed, complementing each other is the key, as there are limits – due to funding or mandate restrictions – to what each international actor can do alone.

Regional initiatives

Some regional initiatives have considered how to deal with stranded migrants, usually in relation to return. For example, the Action plan for the 2006 Euro-African Ministerial Conference on Migration and Development in Rabat called on the provision of financial assistance ‘to help in the voluntary return of illegal immigrants stranded in transit countries and for readmission mechanisms in all involved countries, as well as for the reinsertion of illegal migrants when back home.’¹⁴⁴

The 2005 Berne Initiative International Agenda for Migration Management comments that ‘the challenge for policy makers is to develop effective, efficient, fair and

¹³⁹ Human Rights Watch, World Report 2008 - Ukraine, 31 January 2008.

¹⁴⁰ Ukraine Annual Protection Report, above, p10.

¹⁴¹ ‘Mexico to Fingerprint Central American Migrants’, 8 October 2007, available at <http://www.manattjones.com/newsletters/newsbrief/20071014.htm>.

¹⁴² Besides those discussed below, these include: the Office of the High Commissioner for Human Rights; the International Labour Organization (ILO) where the ILO Conventions apply; UN Human Rights Treaty Bodies, especially Committee on Migrant Workers; and Special procedures of UN human rights institutions, especially Special Rapporteur on Human Rights of Migrants.

¹⁴³ Trygve G. Nordby, IFRC Special Envoy on Migration, Draft keynote speech for the High Commissioner’s Dialogue on Protection Challenges, Geneva, 11-12 December 2007.

¹⁴⁴ ‘Euro-African Migration and Development conference opens in Moroccan capital city,’ Mahgreb Arab Presse, July 10 2006, http://www.map.ma/eng/sections/regional/euro-african_migrati3509/view.

transparent border control procedures that are consistent with international human rights, refugee protection and humanitarian standards,' and lists the provision of assistance to migrants stranded or in danger as one effective practice with regard to border control.¹⁴⁵ In relation to Mexico, the vice Ministers of a Puebla Process meeting in Panama in 2004 endorsed a document entitled 'General Framework for Implementation of the Program on Multilateral Cooperation for the Assisted Return of Extra-Regional Migrants Stranded in Member Countries of the Regional Conference on Migration.'¹⁴⁶

International cooperation

The main international agencies to be considered in this section are UNHCR and IOM, though it is acknowledged that many other actors, including the IFRC¹⁴⁷ and a number of NGOs, also provide assistance to stranded migrants. In fact, IOM and UNHCR often work in cooperation with other actors. For example, in 2007 UNHCR published its 10 Point Plan of Action for Refugee Protection and Mixed Migration for Countries along the Eastern and South Eastern Borders of the European Union Member States: in Ukraine in 2008, UNHCR will work closely with government, the Soderkoping Process, ECRE, IOM and NGOs within this framework.¹⁴⁸

Similarly, the UNHCR 10 Point Action Plan on Refugee Protection and Mixed Migration was officially launched in Morocco in July 2006. UNHCR Rabat is the Chair of the United Nations Theme Group on Migration, which is a platform for joint or complementary action by all UN agencies in implementing the United Nations Development Assistance Framework 2007 – 2011 objective to support the authorities to put in place a sound migration management strategy.

In Somalia, the protection and humanitarian needs of economic migrants, asylum seekers and displaced people have, since early 2007, been addressed by a joint agency Mixed Migration Task Force comprising the United Nations Office for the Coordination of Humanitarian Affairs, UNHCR, the United Nations Children's Fund, IOM, the Danish Refugee Council and Norwegian Refugee Council. They have been actively working on the development of a rights-based inter-agency framework to respond to the protection and humanitarian needs of vulnerable groups within the migration flow,¹⁴⁹ and also on the implementation of longer term regional responses focusing, for example, on economic opportunities for Ethiopian migrants.'¹⁵⁰ As IOM has commented, 'the challenge facing the Task Force is to ensure that all needs are addressed and there are no gaps.'¹⁵¹

¹⁴⁵ Berne Initiative International Agenda for Migration Management, International Organization for Migration and the Federal Office for Migration, Switzerland, 2005, p33.

¹⁴⁶ Declaration from the Regional Conference on Migration (Puebla Process) IX Meeting, Panama City, May 20-2, 2004. Note: the author was not able to find further information about this program.

¹⁴⁷ The components of the International Red Cross and Red Crescent Movement act according to humanitarian needs, not legal status. Thus, they provide humanitarian assistance to migrants irrespective of their claim to international protection.

¹⁴⁸ Ukraine Annual Protection Report, above.

¹⁴⁹ UN Security Council, Report of the Secretary-General on the situation in Somalia, 14 March 2008. S/2008/178.

¹⁵⁰ 'Human Smuggling and Human Trafficking in Somalia,' above.

¹⁵¹ 'Migration: Labour on the Move: Opportunities and Challenges', above, p22.

IOM

IOM provides assisted voluntary return to stranded migrants under its Humanitarian Assistance to Stranded Migrants Programme (HASM) and using its Stranded Migrant Facility, a new funding mechanism launched in 2005. In its first year of operation in 2006, HASM assisted 203 migrants to voluntarily return home.¹⁵² If it had more funding and could therefore promote the programme more, IOM is confident there would be a greater demand for services. The programme is essentially a gap filler: it is aimed at assisting stranded migrants regardless of their status – smuggled or trafficked, irregular or regular – so long as there is an established need and a confirmed desire to move and the migrants are not eligible for any other programme administered by IOM or other agencies.

The country of origin or transit or an individual stranded migrant can approach IOM for assistance. Assistance is generally limited to providing a plane ticket home, as the program has been set up to find solutions, rather than offer protection. However, IOM can offer further assistance if it has the funds. For example, IOM works with UNHCR and the authorities in Morocco to provide reintegration assistance to stranded migrants on return. When deciding whether to provide assistance to an individual, IOM looks at the person's real vulnerability and need. The decision to provide assistance is made quickly, especially where the person has documents. Where the person does not have documents, IOM engages in diplomatic work to obtain them. However, if the country of origin refuses to accept the return of a stranded migrant, there is nothing that IOM can do.¹⁵³

IOM operates return programmes in all of the case studies considered in this paper. For example, in 2006, 41 persons were assisted to return home from Ukraine.¹⁵⁴ IOM also offers some other kinds of assistance to stranded migrants. For example, it opened an office in Bossaso in December 2007¹⁵⁵ that will focus on outreach and advocacy. If further funds become available from the international community, IOM said in 2007 that it will design migration management programmes that build the regional authorities' capacity to cope with migration in Somalia. It will also help the government to develop the legislation, training, documentation and specialist skills and technical equipment needed to safeguard the migrants' rights.¹⁵⁶

UNHCR

Some concerns were raised at the 2007 High Commissioner's Dialogue on Protection Challenges about UNHCR's mandate with regard to migration management. UNHCR has consistently reaffirmed that its role in mixed migration is not an extension of its mandate, nor is it anything new: it 'fits squarely within its mandate to provide protection

¹⁵² Requests originated for migrants stranded in Europe (34%), followed by Africa (30%), Asia (23%) and the Americas (13%), with the respective caseloads returning to Africa (43%), Asia (32%), Europe (16%) and the Americas (9%): see Report of the Director General on the Work of the Organization for the Year 2006, 94th session, MC/2224, 22 May 2007, pp3 and 28.

¹⁵³ Most of this information was obtained during an interview with IOM staff in Geneva, 1 April 2008.

¹⁵⁴ Report of the Director General on the Work of the Organization for the Year 2006, 94th session, MC/2224, 22 May 2007, p16.

¹⁵⁵ Monthly Cluster Report, Humanitarian Response in Somalia, UN Office for the Coordination of Humanitarian Affairs Somalia, January 2008.

¹⁵⁶ 'Migration: Labour on the Move: Opportunities and Challenges', above, p22.

space for refugees.’¹⁵⁷ In 2007, Erika Feller, the Assistant High Commissioner for Protection, commented simply that it is ‘really important for UNHCR to play a role in relation to the management of mixed migration situations by states, because it will be to the detriment of refugee protection if we don’t.’¹⁵⁸

The Chairman’s Summary from the Dialogue noted that ‘No single agency has the capacity or mandate to address the complex issue of mixed migration alone. However, the solution lies not in redesigning mandates, but in forging more effective partnership mechanisms. There was a strong call for UNHCR to work in close partnership with States and other organizations, notably with IOM, to create synergies and fill the gaps in this area.’ Participants recognized that UNHCR can appropriately play a convener role, especially where the preservation of protection space is at issue.¹⁵⁹

The issues related to stranded migrants can have a real impact on UNHCR’s work in ensuring the protection of those in need under its mandate. The UNHCR Representative in Morocco, for example, has commented that ‘[i]n the Moroccan context we cannot make significant headway with the protection of refugees and asylum-seekers if the protection of stranded migrants having arrived in irregular or onward movements is not also addressed.’¹⁶⁰ He commented that if UNHCR builds an effective asylum system, yet there is nothing for those without papers, the system is exposed to abuse.

Ukraine provides an example, as under the Ukrainian Law on Refugees, all persons in detention who apply for refugee status must be released. This serves as an incentive for migrants without valid claims – including those who are stranded – to apply for asylum anyway, thereby impacting on UNHCR’s caseload. Where stranded migrants in detention do not apply, UNHCR Ukraine reports that the State Border Guards or Ministry of Interior have sometimes brought those who have been detained for six months without being identified or documented by their Embassies, to the offices of IOM, UNHCR or their implementing partners to provide short term support and look into longer term solutions.¹⁶¹

Conclusion

Dr Katrine Camilleri, 2007 Nansen Award winner, recently considered the plight of migrants held in Malta's detention centres. Not all needed protection in the refugee sense, yet all without exception believed that they had no choice but to leave their home countries. One asylum seeker from Congo said that ‘...Those who are safe stay in their country. To cross many countries – to cross the desert, to cross the Mediterranean Sea – is not safe because you can be killed for your money; you can drown in the rough seas... We took these risks only because we are human beings trying to find freedom.’¹⁶²

¹⁵⁷ High Commissioner’s Dialogue on Protection Challenges Chairman’s Summary, 21 January 2008.

¹⁵⁸ Erika Feller, ‘Q&A: Why UNHCR cares about migration flows,’ December 2007

<http://www.unhcr.org/cgi-bin/texis/vtx/asylum?page=interview>.

¹⁵⁹ High Commissioner’s Dialogue on Protection Challenges Chairman’s Summary, 21 January 2008.

¹⁶⁰ E-mail from Johannes van der Klaauw to Jeff Crisp, Rebecca Dowd et al, 30 January 2008.

¹⁶¹ Correspondence with UNHCR staff in Ukraine.

¹⁶² Dr Katrine Camilleri, 2007 Nansen Award winner, at side event to the 58th meeting of UNHCR Executive Committee on Refugee Protection and Mixed Migration: The Mediterranean Challenges, 2 October 2007.

The international community has recognized, and this paper has confirmed, that there is a considerable population of migrants who move for non-refugee related reasons but who become vulnerable to abuse and exploitation, both during their journey and after they arrive. This paper has considered, more specifically, that for a variety of reasons and in a variety of contexts, a number of migrants find themselves stuck in transit countries, mostly in an irregular situation, unable (or perhaps unwilling) to move on lawfully to a third country or return to their countries of origin.

It is beyond the scope of this paper to consider the possible solutions to the stranded migrant phenomenon in any depth. However, a number of brief comments and/or recommendations can be made. Firstly, in developing policies and approaches to migration management, States must work together on a bilateral and regional level where appropriate, but must also revise and enact their own national legislation to ensure that the human rights of all migrants are adequately protected. Secondly, when looking to solutions, States and the international community should be wary of focusing solely on the return of stranded migrants: without also providing reintegration assistance, many migrants will be returned to a worse situation than that which drove them to leave.

Thirdly, it should be emphasized that the best way to reduce irregular migration is to create more legal migratory channels. As the UN High Commissioner for Refugees has commented, '[e]ither they come legally, in an organized way, or they come illegally and they will come anyway, and there is no border policy that can avoid that.'¹⁶³ Fourthly, whilst it is the ultimate responsibility of States to provide protection and assistance to migrants, the international community should continue to work together to identify and fill gaps in that provision.

To use Amnesty International's language, when the 'veil of invisibility' that has kept stranded migrants from the public eye¹⁶⁴ is lifted, we discover a group of particularly vulnerable migrants with a range of protection and assistance needs. Some find themselves caught in both a physical gap between their country of origin and country of desired destination, and also in a protection gap between the country in which they are situated, their country of origin and the international protection regime.

Whilst the international community is working to help these migrants, it is ultimately the responsibility of States. And so finally, there is a fundamental need to change the way in which many governments and societies think about irregular migration, to reverse anti-immigrant sentiments and to promote ratification of the Convention on Migrant Workers. By harnessing migration as a positive force, rather than as a threat to sovereignty and national security, States can not only benefit from this unavoidable phenomenon, but can also ensure that the human rights of migrants form the fundamental basis for the management of migration.

¹⁶³ Alix Kroeger, 'Migrants' scant hopes for summit,' BBC News Rabat, 7 November 2006, <http://news.bbc.co.uk/2/hi/africa/5168682.stm>.

¹⁶⁴ See 'Living in the Shadows...', above, p27.