UNHCR
The UN Refugee Agency

# Selected Reference Materials

# Rescue at Sea, Maritime Interception and Stowaways

*November 2006*

## Introduction

Legal issues arising from the involvement of refugees and other persons of concern to UNHCR in maritime incidents such as rescue at sea, maritime interception or stowaway cases, are complex and subject to different areas of international law. Apart from international refugee and human rights laws, maritime obligations, especially, need to be considered.

This binder compiles applicable provisions of the international law of the sea, refugee, human rights and criminal law to assist UNHCR colleagues and other interested professionals to better understand the inter-relationship between these different areas of law. The compilation is not comprehensive, only key provisions have been chosen. Since refugee and human rights law provisions have been collected elsewhere, the references included form these areas of law are restricted to existing *refoulement* prohibitions and a few add provisions, recommendations and guidelines specifically relevant for maritime migration. The binder originally was prepared for a conference on rescue at sea and maritime interception in the Mediterranean. Recommendations adopted by the Parliamentary Assembly of the Council of Europe have therefore been included. It also contains background material of relevant conferences convened by UNHCR during the past years.

Apart from the reference to the UN Treaty Series, whenever possible, a website link has been added to enable easy access to the complete texts. For most texts, the reference refers to an official UN website. Where this was not possible, another website has been provided. Although such external websites have been carefully chosen, a guarantee about their content and quality cannot be made.

The publishers are grateful for any comments on the compilation or recommendation for the inclusion of further material in the next edition.

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UNHCR Geneva
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[1] UNHCR (publisher): Collection of international instruments and other legal texts concerning refugees and displaced persons, Geneva 1995.

[2] UNHCR (publisher): Collection of international instruments and other legal texts concerning refugees and displaced persons, Geneva 1995.

## INTERNATIONAL CRIMINAL LAW[3]



## RELEVANT CONFERENCE MATERIALS



[3] UNODC: Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, New York 2004.

# INTERNATIONAL LAW OF THE SEA

**United Nations Convention on the Law of the Sea (UNCLOS)** [4]
***Opened for signature 10 December 1982***
***Entered into force 16 November 1994***

UNCLOS defines the rights and obligations of governments, including flag states, in the various maritime zones under national jurisdiction and beyond areas of national jurisdiction, such as the high seas. As such, some of the provisions of the Convention are relevant to the treatment of refugees and asylum seekers at sea.

***Selected Provisions***

Article 17 - Right of innocent passage

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 18 - Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:

> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
>
> (b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 19 - Meaning of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

> ……
>
> (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
>
> ……
>
> (l) any other activity not having a direct bearing on passage.

[4] 1833 United Nations Treaty Series 397 electronically available at www.un.org/Depts/los.

Article 21 - Laws and regulations of the coastal State relating to innocent passage

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

……

(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

……

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Article 25 - Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

Article 27 - Criminal jurisdiction on board a foreign ship

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

(a) if the consequences of the crime extend to the coastal State;

(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or

……

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.

5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

Article 33 - Contiguous zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 38 – Right of transit passage

1. In straits referred to in article 37[5], all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and over flight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering,

[5] Article 37 limits the application of Section 2 (articles 37-44) of UNCLOS to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."

leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Article 39 - Duties of ships and aircraft during transit passage

1. Ships and aircraft, while exercising the right of transit passage, shall:

……

(b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;

(d) comply with other relevant provisions of this Part.

2. Ships in transit passage shall:

(a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;

……

Article 42 - Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

> ……
>
> (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

Article 44 - Duties of States bordering straits

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or over flight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

Article 52 - Right of innocent passage

1. Subject to article 53[6] and without prejudice to article 50[7], ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3.
…..

Article 54 - Duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic State and laws and regulations of the archipelagic State relating to archipelagic sea lanes passage

Articles 39, 40[8], 42 and 44[9] apply *mutatis mutandis* to archipelagic sea lanes passage.

Article 87- Freedom of the high seas

1. The high seas are open to all States, whether coastal or land locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. ….

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 92 - Status of ships

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

[6] Article 53 defines the "right of archipelagic sea lanes passage."
[7] Article 50 provides archipelagic States with the rights to the "delimitation of internal waters" within a State's archipelagic waters.
[8] Article 40 subjects "research and survey activities" during transit passage to authorization by States bordering straits.
[9] Article 44 sets forth the "duties of States bordering straits".

Article 98 - Duty to render assistance

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

Article 110 - Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96[10], is not justified in boarding it unless there is reasonable ground for suspecting that:

…….

(b) the ship is engaged in the slave trade;

……

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

[10] Articles 95 and 96 set forth the rules for "immunity of warships on the high seas" and "immunity of ships used only on government non-commercial service".

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

Article 111 - Right of hot pursuit

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:

(a) the provisions of paragraphs 1 to 4 shall apply *mutatis mutandis*;

(b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

Article 311 - Relation to other conventions and international agreements

1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.

2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.

5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.

6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

**Convention on the High Seas, 1958**[11]
***Adopted on 29 April 1958***
***Entered into force 30 September 1962***

This Convention defines the high seas and codifies generally accepted rules of international law dealing with navigation, piracy, smuggling, collision, the protection of cables and fishery. The Convention is superseded by the Convention on Law of the Sea (UNCLOS), although it remains in force for those States which are not a party to UNCLOS. It inter alia provides rules concerning rescue at sea.

***Selected Provision***

Article 12

1. Every State shall require the master of a ship sailing under its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers,

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

2. Every coastal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and--where circumstances so require--by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

[11]450 United Nations Treaty Series 397.
http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf.

**International Convention on Salvage**[12]
***Adoption: 28 April 1989***
***Entry into force: 14 July 1996***

The Convention defines the duties of the salvor, owner and ship master when assisting a vessel or a person in distress at sea.

***Selected Provisions***

Chapter I – General provisions

Article 1 – Definitions

For the purpose of this Convention:

(a) "Salvage operation" means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.

….

Chapter II – Performance of Salvage operations

Article 8 Duties of the salvor and of the owner and master

1. The salvor shall owe a duty to the owner of the vessel or other property in danger:

(a) to carry out salvage operations with due care;
(b) in performing the duty specified in paragraph (a), to exercise due care to prevent and minimize damage to the environment;
(c) whenever circumstances reasonably require, to seek assistance from other salvors; and
(d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

2. The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:

(a) to co-operate fully with him during the course of the salvage operations;
(b) in so doing, to exercise due care to prevent or minimize damage to the environment; and
(c) when the vessel or other property has been brought to a place of safety, to accept redelivery when reasonably requested by the salvor to do so.

Article 10 - Duty to render assistance

[12] 1953 United Nations Treaty Series 194. http://untreaty.un.org/English/UNEP/salvage_english.pdf.

1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.

2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.

3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.

Article 11 - Co-operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

**International Convention for the Safety of Life at Sea (SOLAS)** [13]
***Adoption: 1 November 1974***
***Entry into force: 25 May 1980***

SOLAS is regarded as the most important treaty concerning the safety of merchant ships. The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety. It obliges contracting States to establish Search and Rescue Services and ship masters to provide assistance to persons in distress at sea.

***Selected Provisions***

**Annex**

**Chapter V: Safety of Navigation**

Regulation 7
*Search and rescue services*

1. Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for rescue of persons in distress at sea around its coast. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers, and shall, so far as possible, provide adequate means of locating and rescuing such persons.

2. Each Contracting Government undertakes to make available information to the Organization concerning its existing search and rescue facilities and the plans for changes therein, if any.

3. Passenger ships to which chapter I applies shall have on board a plan for co-operation with appropriate search and rescue services in the event of an emergency. The plan shall be developed in co-operation between the ship, the company, as defined in regulation IX/1, and the search and rescue services. The plan shall include provisions for periodic exercises to be undertaken to test its effectiveness. The plan shall be developed based on the guidelines developed by the Organization.

Regulation 33
*Distress message: obligation and procedures*

1. The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter the log-book the reason for failing to proceed to the

[13] 1184 United Nations Treaty Series 3. http://www.austlii.edu.au/au/other/dfat/treaties/1983/22.html.

assistance of the person in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.

2. The master of a ship in distress or the search and rescue service concerned, after consultation, so far as may be possible, with the masters of ships which answer the distress alert, has the right to requisition one or more of those ships as the master of the ship in distress or the search and rescue service considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to coy with the requisition by continuing to proceed with all speed to the assistance of persons in distress.

3. Masters of ships shall be released from the obligation imposed by paragraph 1 on learning that their ships have not been requisitioned and that one or more other ships have been requisitioned and are complying with the requisition. The decision shall, if possible, be communicated to the other requisitioned ships and to search and rescue service.

4. The master of a ship shall be released from the obligation imposed by paragraph 1 and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 on being informed by the person in distress or by the search and rescue service or by the master of another ship which has reached such person that assistance is no longer necessary.

5. The provision of this regulation do not prejudice the Convention for the Unification of Certain Rules of Law relating to the Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention.[14]

[14] International Convention on Salvage, 1989, done at London on 28 April 1989, entered into force on 14 July 1996.

## AMENDMENTS TO THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974, AS AMENDED[15]

SOLAS amendments were proposed to address problems encountered by vessels attempting to fulfill their humanitarian obligations. As such the amendments complement the obligation of the ship's captain to render assistance by a corresponding obligation of states to cooperate in rescue situations. By the reinforcement of ship's captain obligation, the amendments provide better safety measures concerning persons in distress.

***Selected Provisions***

### CHAPTER V
### SAFETY OF NAVIGATION

**Regulation 2 – Definitions**

1 The following new paragraph 5 is added after the existing paragraph 4:

"5 *Search and rescue service.* The performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, ships, vessels and other craft and installations."

**Regulation 33 – Distress messages: obligations and procedure**

**2 The title of the regulation is replaced by the following:**

**"**Distress situations: obligations and procedures**"**

3 In paragraph 1, the words "a signal" in the first sentence are replaced by the word "information", and the following sentence is added after the first sentence of the paragraph:

"This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found."

4 The following new paragraph 1-1 is inserted after the existing paragraph 1:

"1-1 Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from

[15] IMO Doc. Resolution MSC. 153(78), Annex 3, adopted 20 May 2004.

the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable."

5 The following new paragraph 6 is added after the existing paragraph 5:

"6 Masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship."

Regulation 34 – Safe navigation and avoidance of dangerous situations

6 The existing paragraph 3 is deleted.

7 The following new regulation 34-1 is added after the existing regulation 34:

**Regulation 34-1**
**Master's discretion**

The owner, the charterer, the company operating the ship as defined in regulation IX/1, or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safety of life at sea and protection of the marine environment."

**International Convention on Maritime Search and Rescue (SAR)**[16]
***Adopted: 27 April 1979***
***Entry into force: 25 March 1980***

Objective of the 1979 Convention is the development of an international Search and Rescue plan, so that, no matter where an accident occurs, the rescue of persons in distress at sea will be co-coordinated by a SAR organization and, when necessary, by co-operation between neighboring SAR organizations. Although the obligation of ships to go to the assistance of vessels in distress was enshrined both in tradition and in international treaties (such as the International Convention for the Safety of Life at Sea (SOLAS), 1974), there was, until the adoption of the SAR Convention, no international system covering search and rescue operations. The Convention furthermore relates to the maritime obligation to assist persons in distress at sea.

***Selected Provisions***

**Annex**

Chapter 1
*Terms and definitions*

1.3 The terms listed below are used in the annex with the following meanings:

…

1.3.2 *Rescue*. An operation to retrieve persons in distress, provide for their initial medical treatment or other needs, and deliver them to a place of safety.

Chapter 2
*Organization and co-ordination*

2.1 Arrangements for provision and co-ordination of search and rescue services

2.1.1 Parties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts.

….

2.1.10 Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which the person is found.

[16] 1403 United Nations Treaty Series. http://www.admiraltylawguide.com/conven/searchrescue1979.html.

## AMENDMENTS TO THE INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE, 1979, AS AMENDED[17]

The amendments to the Annex of the SAR Convention aim at enhancing the cooperation between States, and at maintaining the integrity of the SAR services, by ensuring that people in distress at sea are assisted while minimizing the inconvenience for the assisting ship.

***Selected Provisions***

### CHAPTER 2
### ORGANIZATION AND CO-ORDINATION

#### 2.1 Arrangements for provision and co-ordination of search and rescue services

1. The following sentence is added at the end of the existing paragraph 2.1.1:

"The notion of a person in distress at sea also includes persons in need of assistance who have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility other than as provided for in the annex."

### CHAPTER 3
### CO-OPERATION BETWEEN STATES

#### 3.1 Co-operation between States

2. In paragraph 3.1.6, the word "and" is deleted in subparagraph .2, a full stop is replaced by "; and" in subparagraph .3 and the following new subparagraph .4 is added after the existing subparagraph .3:

".4 to make the necessary arrangements in co-operation with other RCCs to identify the most appropriate place(s) for disembarking persons found in distress at sea."

3. The following new paragraph 3.1.9 is added after the existing paragraph 3.1.8:

"3.1.9 Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships´ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In

[17] IMO Doc. Resolution MSC.155(78), Annex 5, adopted 20 May, 2004,entered into force on 1 July, 2006.

these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable."

## CHAPTER 4
## OPERATING PROCEDURES

### 4.8 Termination and suspension of search and rescue operations

4. The following new paragraph 4.8.5 is added after the existing paragraph 4.8.4:

"4.8.5 The rescue co-ordination centre or rescue sub-centre concerned shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea. It shall inform the ship or ships and other relevant parties concerned thereof."

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## AMENDMENTS TO THE CONVENTION ON FACILITATION OF INTERNATIONAL MARITIME TRAFFIC (FAL), 1965, AS AMENDED[18]

The FAL Convention main objectives are to prevent unnecessary delays in maritime traffic, to facilitate co-operation between Governments, and to secure the highest possible level of uniformity in formalities and other procedures. The 2002 amendments were adopted to address the issues that arise in connection with stowaways. The amendments establish an obligate thorough search of ships for stowaways on leaving high-risk ports and tighten the measures for preventing stowaways from hiding on board. The new provisions also recognize and reinforce the rights of stowaways notably by requiring humanitarian principles to be applied when dealing with stowaway cases (provision 4.4). Although the text of an international convention on Stowaways was adopted in 1957, this Convention never entered into force due to the lack of a sufficient number of ratifications.

***Selected Provisions***

**Section 1 - Definitions and general provisions**

**A. Definitions**

1 Add the following definitions:

"*Attempted stowaway.* A person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person, and who is detected on board the ship before it has departed from the port."

*"Port.* Any port, terminal, offshore terminal, ship and repair yard or roadstead which is normally used for the loading, unloading, repair and anchoring of ships, or any other place at which a ship can call."

*"Stowaway.* A person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities."

……

9 New Section 4 should be added as follows: **"Section 4 – Stowaways**

**A. General Principles**

**4.1** ***Standard.*** The provisions in this section shall be applied in accordance with international protection principles as set out in international instruments, such as the UN

[18] Resolution FAL.7.(29), adopted on 10 January 2002, entered into force on 1 May 2003 http://www.fco.gov.uk/Files/kfile/CM5893.PDF.

Convention relating to the Status of Refugees of 28 July 1951 and the UN Protocol relating to the Status of Refugees of 31 January 1967, and relevant national legislation.[19]

**4.2** ***Standard.*** Public authorities, port authorities, shipowners and their representatives and shipmasters shall co-operate to the fullest extent possible in order to prevent stowaway incidents and to resolve stowaway cases expeditiously and secure that an early return or repatriation of the stowaway will take place. All appropriate measures shall be taken in order to avoid situations where stowaways must stay on board ships indefinitely.

## B. Preventive measures

### 4.3. *Ship/Port preventive measures*

#### 4.3.1 *Port/terminal authorities*

**4.3.1.1** ***Standard.*** Contracting Governments shall ensure that the necessary infrastructure, and operational and security arrangements for the purpose of preventing persons attempting to stowaway on board ships from gaining access to port installations and to ships, are established in all their ports, taking into consideration when developing these arrangements the size of the port, and what type of cargo is shipped from the port. This should be done in close co-operation with relevant public authorities, shipowners and shore-side entities, with the aim of preventing stowaway occurrences in the individual port.

**4.3.1.2** ***Recommended Practice***. Operational arrangements and/or security plans should, *inter alia*, address the following issues where appropriate:

a) regular patrolling of port areas;

b) establishment of special storage facilities for cargo subject to high risk of access of stowaways, and continuous monitoring of both persons and cargo entering these areas;

c) inspections of warehouses and cargo storage areas;

d) search of cargo itself, when presence of stowaways is clearly indicated;

e) co-operation between public authorities, shipowners, masters and relevant shore-side entities in developing operational arrangements;

f) co-operation between port authorities and other relevant authorities (e.g. police, customs, immigration) in order to prevent smuggling of humans;

g) developing and implementing agreements with stevedores and other shoreside entities operating in national ports to ensure that only personnel authorized by these entities participate in the stowing/unstowing or loading/unloading of ships or other functions related to the ships stay in port;

[19] In addition, authorities may wish to consider the non-binding conclusion of the UNHCR Executive Committee on Stowaway Asylum-Seekers (1988, No. 53 (XXXIX)).

h) developing and implementing agreements with stevedores and other shoreside entities to ensure that their personnel having access to the ship is easily identifiable, and a list of names of persons likely to need to board the ship in the course of their duties is provided; and
i) encouragement of stevedores and other persons working in the port area to report to the port authorities, the presence of any persons apparently not authorised to be in the port area.

**4.3.2 *Shipowner/Shipmaster***

**4.3.2.1 *Standard.*** Contracting Governments shall require that shipowners and their representatives in the port, the masters as well as other responsible persons have security arrangements in place which, as far as practicable, will prevent intending stowaways from getting aboard the ship, and, if this fails, as far as practicable, will detect them before the ship leaves port.

**4.3.2.2 *Recommended Practice.*** When calling at ports and during stay in ports, where there is risk of stowaway embarkation, security arrangements should at least contain the following preventive measures:

- all doors, hatches and means of access to holds or stores, which are not used during the ships stay in port should be locked;

- access points to the ship should be kept to a minimum and be adequately secured;

- areas seaward of the ship should be adequately secured;

- adequate deck watch should be kept;

- boardings and disembarkations should, where possible, be tallied by the ships crew or, after agreement with the shipmaster, by others;

- adequate means of communication should be maintained; and

- at night, adequate lighting should be maintained both inside and along the hull.

**4.3.2.3 *Standard.*** Contracting Governments shall require that ships entitled to fly their flag, except passenger ships, when departing from a port, where there is risk of stowaway embarkation, have undergone a thorough search in accordance with a specific plan or schedule, and with priorities given to places where stowaways might hide. Search methods, which are likely to harm secreted stowaways shall not be used.

**4.3.2.4 *Standard.*** Contracting Governments shall require that fumigation or sealing of ships entitled to fly their flag may not be carried out until a search which is as thorough as possible of the areas to be fumigated or sealed has taken place in order to ensure that no stowaways are present in those areas.

*4.3.3 National Sanctions*

***4.3.3.1 Standard.*** Where appropriate, contracting Governments shall, according to their national legislation, prosecute stowaways, attempted stowaways and persons aiding stowaways in gaining access to ships.

***C. Treatment of the stowaway while on board***

***4.4 General principles – Humane treatment***

***4.4.1 Standard.*** Stowaway incidents shall be dealt with consistent with humanitarian principles, including those mentioned in Standard 4 .1. Due consideration must always be given to the operational safety of the ship and the safety and well being of the stowaway.

***4.4.2 Standard***. Contracting Governments shall require that shipmasters operating ships entitled to fly their flag, take appropriate measures to ensure the security, general health, welfare and safety of the stowaway while he/she is on board, including providing him/her with adequate provisioning, accommodation, proper medical attention and sanitary facilities.

***4.5 Work on board***

***4.5.1 Standard***. Stowaways shall not be required to work on board the ship, except in emergency situations or in relation to the stowaway's accommodation on board.

***4.6 Questioning and notification by the shipmaster***

***4.6.1 Standard.*** Contracting Governments shall require shipmasters to make every effort to establish the identity, including nationality/citizenship of the stowaway and the port of embarkation of the stowaway, and to notify the existence of the stowaway along with relevant details to the public authorities of the first planned port of call. This information shall also be provided to the shipowner, public authorities at the port of embarkation, the flag State and any subsequent ports of call if relevant.

***4.6.2 Recommended Practice.*** When gathering relevant details for notification the shipmaster should use the form as specified in appendix 3.

***4.6.3 Standard.*** Contracting Governments shall instruct shipmasters operating ships entitled to fly their flag that when a stowaway declares himself/herself to be a refugee, this information shall be treated as confidential to the extent necessary for the security of the stowaway.

***4.7 Notification of the International Maritime Organization***

***4.7.1 Recommended Practice.*** Public authorities should report all stowaway incidents to the Secretary General of the International Maritime Organization.

### *D. Deviation from the planned route*

***4.8 Standard.*** Public authorities shall urge all shipowners operating ships entitled to fly their flag to instruct their masters not to deviate from the planned voyage to seek the disembarkation of stowaways discovered on board the ship after it has left the territorial waters of the country where the stowaways embarked, unless:

- permission to disembark the stowaway has been granted by the public authorities of the State to whose port the ship deviates; or

- repatriation has been arranged elsewhere with sufficient documentation and permission for disembarkation; or

- there are extenuating security, health or compassionate reasons.

### *E. Disembarkation and return of a stowaway*

#### *4.9 The State of the first port of call according to the voyage plan*

***4.9.1 Standard.*** Public authorities in the country of the ship's first scheduled port of call after discovery of a stowaway shall decide in accordance with national legislation whether the stowaway is admissible to that State.

***4.9.2 Standard.*** Public authorities in the country of the ship's first scheduled port of call after discovery of a stowaway shall allow disembarkation of the stowaway, when the stowaway is in possession of valid travel documents for return, and the public authorities are satisfied that timely arrangements have been or will be made for repatriation and all the requisites for transit fulfilled.

***4.9.3 Standard.*** Where appropriate and in accordance with national legislation, public authorities in the country of the ship's first scheduled port of call after discovery of a stowaway shall allow disembarkation of the stowaway when the public authorities are satisfied that they or the shipowner will obtain valid travel documents, make timely arrangements for repatriation of the stowaway, and fulfil all the requisites for transit. Public authorities shall, further, favourably consider allowing disembarkation of the stowaway, when it is impracticable to remove the stowaway on the ship of arrival or other factors exist which would preclude removal on the ship. Such factors may include, but are not limited to when:

- a case is unresolved at the time of sailing of the ship; or

- the presence on board of the stowaway would endanger the safe operation of the ship, the health of the crew or the stowaway.

#### *4.10 Subsequent ports of call*

***4.10.1 Standard.*** When disembarkation of a stowaway has failed in the first scheduled port of call after discovery of the stowaway, public authorities of the subsequent ports of call shall examine the stowaway as for disembarkation in accordance with Standards 4.9.1, 4.9.2 and 4.9.3 .

### *4.11 State of Nationality or Right of Residence*

***4.11.1 Standard.*** Public authorities shall in accordance with international law accept the return of stowaways with full nationality/citizenship status or accept the return of stowaways who in accordance with their national legislation have a right of residence in their State.

***4.11.2 Standard***. Public authorities shall, when possible, assist in determining the identity and nationality/citizenship of stowaways claiming to be a national or having a right of residence in their State.

### *4.12 State of Embarkation*

***4.12.1 Standard.*** When it has been established to their satisfaction that stowaways have embarked a ship in a port in their State, public authorities shall accept for examination such stowaways being returned from their point of disembarkation after having been found inadmissible there. The public authorities of the State of embarkation shall not return such stowaways to the country where they were earlier found to be inadmissible.

***4.12.2 Standard***. When it has been established to their satisfaction that attempted stowaways have embarked a ship in a port in their State, public authorities shall accept disembarkation of attempted stowaways, and of stowaways found on board the ship while it is still in the territorial waters or if applicable according to the national legislation of that State in the area of immigration jurisdiction of that State. No penalty or charge in respect of detention or removal costs shall be imposed on the shipowner.

***4.12.3 Standard.*** When an attempted stowaway has not been disembarked at the port of embarkation he/she is to be treated as a stowaway in accordance with the regulation of this section.

### *4.13 The flag State*

***4.13.1 Standard.*** The public authorities of the flag State of the ship shall assist and co-operate with the master/shipowner or the appropriate public authority at ports of call in:

- identifying the stowaway and determining his/her nationality;
- making representations to the relevant public authority to assist in the removal of the stowaway from the ship at the first available opportunity; and
- making arrangements for the removal or repatriation of the stowaway.

### *4.14 Return of stowaways*

***4.14.1 Recommended Practice.*** When a stowaway has inadequate documents, public authorities should, whenever practicable and to an extent compatible with national legislation and security requirements, issue a covering letter with a photograph of the stowaway and any other important information. The letter, authorising the return of the stowaway either to his/her country of origin or to the point where the stowaway commenced his/her journey, as appropriate, by any means of transportation and specifying any other conditions imposed by

the authorities, should be handed over to the operator affecting the removal of the stowaway. This letter will include information
required by the authorities at transit points and/or the point of disembarkation.

***4.14.2 Recommended Practice***. Public authorities in the State where the stowaway has disembarked should contact the relevant public authorities at transit points during the return of a stowaway, in order to inform them of the status of the stowaway. In addition public authorities in countries of transit during the return of any stowaway should allow, subject to normal visa requirements and national security concerns, the transit through their ports and airports of stowaways travelling under the removal instructions or directions of public authorities of the country of the port of disembarkation.

***4.14.3 Recommended Practice.*** When a port State has refused disembarkation of a stowaway that State should, without undue delay, notify the Flag State of the ship carrying the stowaway of the reasons for refusing disembarkation.

### *4.15 Cost of return and maintenance of stowaways*

***4.15.1 Recommended practice***. The public authorities of the State where a stowaway has been disembarked should generally inform the shipowner, on whose ship the stowaway was found, or his representative, as far as practicable, of the level of cost of detention and return of the stowaway, if the shipowner is to cover these costs. In addition, public authorities should keep such costs to a minimum, as far as practicable and according to national legislation, if they are to be covered by the shipowner.

***4.15.2 Recommended Practice.*** The period during which shipowners are held liable to defray costs of maintenance of a stowaway by public authorities in the State where the stowaway has been disembarked should be kept to a minimum.

***4.15.3 Standard.*** Public authorities shall, according to national legislation, consider mitigation of penalties against ships where the master of the ship has properly declared the existence of a stowaway to the appropriate authorities in the port of arrival, and has shown that all reasonable preventive measures had been taken to prevent stowaways gaining access to the ship.

***4.15.4 Recommended practice.*** Public authorities should, according to national legislation, consider mitigation of other charges that might otherwise be applicable, when shipowners have co-operated with the control authorities to the satisfaction of those authorities in measures designed to prevent the transportation of stowaways."

APPENDIX 3

**Form of Stowaway Details referred to in Recommended Practice 4.6.2**

| | |
|---|---|
| SHIP DETAILS | *ID-document type, e.g. Passport No.,* |
| *Name of ship:* | *ID Card No. or Seaman's book No.:* |
| *IMO number:* | *If yes,* |
| *Flag:* | *When issued:* |
| *Company:* | *Where issued:* |
| *Company address:* | *Date of expiry:* |
| | *Issued by:* |
| *Agent in next port:* | *Photograph of the stowaway:* |
| *Agent address:* | |
| *IRCS:* | |
| *Inmarsat number:* | |
| *Port of registry:* | |
| *Name of the Master:* | |
| **STOWAWAY DETAILS** | |
| *Date/time found on board:* | *General physical description of the stowaway:* |
| *Place of boarding:* | |
| *Country of boarding:* | |
| *Date/time of boarding:* | |
| *Intended final destination:* | |
| *Stated reasons for boarding the ship*[20]*:* | |
| *Surname:* | |
| *Given name:* | |
| *Name by which known:* | |
| *Gender:* | |
| *Date of birth:* | *First language:* |

[20] If the Stowaway declares himself to be a refugee or an asylum seeker, this information shall be treated as confidential to the extent necessary to the security of the Stowaway.

| | |
|---|---|
| *Place of birth:*<br>*Claimed nationality:*<br>*Home address:*<br><br>*Country of domicile:* | *Spoken:*<br>*Read:*<br>*Written:*<br><br>*Other languages:*<br>*Spoken:*<br>*Read:*<br>*Written:* |

**Other details:**

1) Method of boarding, including other persons involved (e.g. crew, port workers, etc.), and whether the stowaway was secreted in cargo/container or hidden in the shop:

2) Inventory of the Stowaway's possessions:

3) Statement made by the Stowaway:

4) Statement made by the Master (including any observations on the credibility of the information provided by the Stowaway).

Date(s) of Interview(s):

Stowaway's signature: Master's signature:

Date: Date:

# IMO guidelines

## GUIDELINES ON THE TREATMENT OF PERSONS RESCUED AT SEA[21]

THE MARITIME SAFETY COMMITTEE,

RECALLING Article 28(b) of the Convention on the International Maritime Organization concerning the functions of the Committee,

NOTING resolution A.920(22) entitled "Review of safety measures and procedures for the treatment of persons rescued at sea",

RECALLING ALSO the provisions of the International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended relating to the obligation of:

- shipmasters to proceed with all speed to the assistance of persons in distress at sea; and
- Governments to ensure arrangements for coast watching and for the rescue of persons in distress at sea round their coasts,

RECALLING FURTHER the provisions of the International Convention on Maritime Search and Rescue (SAR), 1979, as amended relating to the provision of assistance to any person in distress at sea regardless of the nationality or status of such person or the circumstances in which that person is found,

NOTING ALSO article 98 of the United Nations Convention on the Law of the Sea, 1982, regarding the duty to render assistance,

NOTING FURTHER the initiative taken by the Secretary-General to involve competent United Nations specialized agencies and programmes in the consideration of the issues addressed in this resolution, for the purpose of agreeing on a common approach which will resolve them in an efficient and consistent manner,

REALIZING the need for clarification of existing procedures to guarantee that persons rescued at sea will be provided a place of safety regardless of their nationality, status or the circumstances in which they are found,

HAVING ADOPTED, as its [seventy-eighth session], by resolution MSC.153(78) amendments to the SOLAS Convention, proposed and circulated in accordance with article VIII(b)(i) thereof, and by resolution MSC.155(78) amendments to the SAR Convention proposed and circulated in accordance with article III(2)(a) thereof,

REALIZING FURTHER that the intent of the new paragraph 1-1 of SOLAS regulation V/33, as adopted by resolution MSC.153(78) and paragraph 3.1.9 of the Annex to the SAR Convention as adopted by resolution MSC.155(78), is to ensure that in every case a place of

[21] Annex 34, Resolution MSC.167(78), adopted on 20May 2004. MSC 78/26/Add.2. http://www.navcen.uscg.gov/marcomms/imo/msc_resolutions/MSC167(78).pdf.

safety is provided within a reasonable time. It is further intended that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Contracting Government/Party responsible for the SAR region in which the survivors were recovered,

1. ADOPTS Guidelines on the treatment of persons rescued at sea the text of which is set out in the Annex to the present resolution;

2. INVITES Governments, rescue co-ordination centres and masters to establish procedures consistent with the annexed Guidelines as soon as possible;

3. INVITES Governments to bring the annexed Guidelines to the attention of authorities concerned and to ship owners, operators and masters;

4. REQUESTS the Secretary-General to take appropriate action in further pursuing his inter-agency initiative, informing the Maritime Safety Committee of developments, in particular with respect to procedures to assist in the provision of places of safety for persons in distress at sea, for action as the Committee may deem appropriate;

5. DECIDES to keep this resolution under review.

ANNEX

## GUIDELINES ON THE TREATMENT OF PERSONS RESCUED AT SEA[22]

### 1 PURPOSE

1.1 The purposes of these Guidelines are to provide guidance to Governments[23] and to shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea.

1.2 The obligation of the master to render assistance should complement the corresponding obligation of IMO Member Governments to co-ordinate and co-operate in relieving the master of the responsibility to provide follow up care of survivors and to deliver the persons retrieved at sea to a place of safety. These Guidelines are intended to help Governments and masters better understand their obligations under international law and provide helpful guidance with regard to carrying out these obligations.

### 2 BACKGROUND

**IMO Assembly resolution A.920(22)**

2.1 The IMO Assembly, at its twenty-second session, adopted resolution A.920(22) on the review of safety measures and procedures for the treatment of persons rescued at sea. That resolution requested various IMO bodies to review selected IMO Conventions to identify any gaps, inconsistencies, ambiguities, vagueness or other inadequacies associated with the treatment of persons rescued at sea. The objectives were to help ensure that:

.1 survivors of distress incidents are provided assistance regardless of nationality or status or the circumstances in which they are found;

.2 ships, which have retrieved persons in distress at sea, are able to deliver the survivors to a place of safety; and

.3 survivors, regardless of nationality or status, including undocumented migrants, asylum seekers and refugees, and stowaways, are treated, while on board, in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions.

2.2 Pursuant to resolution A.920(22), the Secretary-General brought the issue of persons rescued at sea to the attention of a number of competent United Nations specialized agencies and programmes highlighting the need for a co-ordinated approach among United Nations agencies, and soliciting the input of relevant agencies within the scope of their respective mandates. Such an inter-agency effort focusing on State responsibilities for non-rescue issues, such as immigration and asylum that are beyond the competence of IMO, is an essential complement to IMO efforts.

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[22] IMO Doc. Resolution MSC. 167(78), Annex 34, adopted by the Maritime Safety Committee on 20 May 2004.

[23] *Where the term Government is used in these Guidelines, it should be read to mean Contracting Government to the International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended, or Party to the International Convention on Maritime Search and Rescue, 1979, as amended, respectively.*

**SOLAS and SAR Convention amendments**

2.3 At its seventy-eighth session, the Maritime Safety Committee (MSC) adopted pertinent amendments to chapter V of the International Convention for the Safety of Life at Sea (SOLAS) and to chapters 2, 3 and 4 of the Annex to the International Convention on Maritime Search and Rescue Convention (SAR Convention). These amendments are expected to enter into force on 1 July 2006. At the same session the MSC adopted the current guidelines; these amendments provide for the development of such guidelines. The purpose of these amendments and the current guidelines is to help ensure that persons in distress are assisted, while minimizing the inconvenience to assisting ships and ensuring the continued integrity of SAR services.

2.4 Specifically, paragraph 1-1 of SOLAS regulation V/33 and paragraph 3.1.9 of the Annex to the SAR Convention, as amended, impose upon Governments an obligation to co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage.

2.5 As realized by the MSC in adopting the amendments, the intent of new paragraph 1-1 of SOLAS regulation V/33 and paragraph 3.1.9 of the Annex to the International Convention on Maritime Search and Rescue, 1979, as amended, is to ensure that in every case a place of safety is provided within a reasonable time. The responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered.

2.6 Each case, however, can involve different circumstances. These amendments give the responsible Government the flexibility to address each situation on a case-by-case basis, while assuring that the masters of ships providing assistance are relieved of their responsibility within a reasonable time and with as little impact on the ship as possible.

2.7 Some comments on relevant international law are set out at the appendix.

**3 PRIORITIES**

3.1 When ships assist persons in distress at sea, co-ordination will be needed among all concerned to ensure that all of the following priorities are met in a manner that takes due account of border control, sovereignty and security concerns consistent with international law:

*Lifesaving*

All persons in distress at sea should be assisted without delay.

*Preservation of the integrity and effectiveness of SAR services*

Prompt assistance provided by ships at sea is an essential element of global SAR services; therefore it must remain a top priority for shipmasters, shipping companies and flag States.

*Relieving masters of obligations after assisting persons*

Flag and coastal States should have effective arrangements in place for timely assistance to shipmasters in relieving them of persons recovered by ships at sea.

## 4 INTERNATIONAL AERONAUTICAL AND MARITIME SEARCH AND RESCUE MANUAL

4.1 The three-volume *International Aeronautical and Maritime Search and Rescue Manual* (IAMSAR Manual) has been developed and is maintained to assist Governments in meeting their SAR needs, and the obligations they have accepted under the SOLAS Convention, the SAR Convention and the Convention on International Civil Aviation. Governments are encouraged to develop and improve their SAR services, co operate with neighbouring States and to consider SAR services to be part of a global system.

4.2 Each volume of the IAMSAR Manual is written with specific SAR system duties in mind and can be used as a stand-alone document, or, in conjunction with the other guidance documents, as a means to attain a full view of the SAR system.

4.3 Volume I – *Organization and Management* discusses the global SAR system concept, establishment of national and regional SAR systems and co-operation with neighbouring States to provide effective and economical SAR services.

4.4 Volume II – *Mission Co-ordination* assists personnel who plan and co-ordinate SAR operations and exercises.

4.5 Volume III – *Mobile Facilities* – is intended to be carried aboard ships, aircraft and rescue units to help with performance of search, rescue or on-scene co-ordinator functions and with aspects of SAR that pertain to their own emergencies.

## 5 SHIPMASTERS

### General guidance

5.1 SAR services throughout the world depend on ships at sea to assist persons in distress. It is impossible to arrange SAR services that depend totally upon dedicated shore-based rescue units to provide timely assistance to all persons in distress at sea. Shipmasters have certain duties that must be carried out in order to provide for safety of life at sea, preserve the integrity of global SAR services of which they are part, and to comply with humanitarian and legal obligations. In this regard, shipmasters should:

.1 understand and heed obligations under international law to assist persons in distress at sea (such assistance should always be carried out without regard to the nationality or status of the persons in distress, or to the circumstances in which they are found);

.2 do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs;

.3 carry out SAR duties in accordance with the provisions of Volume III of the IAMSAR Manual;

.4 in a case where the RCC responsible for the area where the survivors are recovered cannot be contacted, attempt to contact another RCC, or if that is impractical, any other Government authority that may be able to assist, while recognizing that responsibility still rests with the RCC of the area in which the survivors are recovered;

.5 keep the RCC informed about conditions, assistance needed, and actions taken or planned for the survivors (see paragraph 6.10 regarding other information the RCC may wish to obtain);

.6 seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized; and

.7 comply with any relevant requirements of the Government responsible for the SAR region where the survivors were recovered, or of another responding coastal State, and seek additional guidance from those authorities where difficulties arise in complying with such requirements.

5.2 In order to more effectively contribute to safety of life at sea, ships are urged to participate in ship reporting systems established for the purpose of facilitating SAR operations.

## 6 GOVERNMENTS AND RESCUE CO-ORDINATION CENTRES

### Responsibilities and preparedness

6.1 Governments should ensure that their respective rescue co-ordination centres (RCCs) and other national authorities concerned have sufficient guidance and authority to fulfil their duties consistent with their treaty obligations and the current guidelines contained in this resolution.

6.2 Governments should ensure that their RCCs and rescue units are operating in accordance with the standards and procedures in the IAMSAR Manual and that all ships operating under their flag have on board Volume III of the IAMSAR Manual.

6.3 A ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea; therefore coastal States should relieve the ship as soon as practicable.

6.4 Normally, any SAR co-ordination that takes place between an assisting ship and any coastal State(s) should be handled via the responsible RCC. States may delegate to their respective RCCs the authority to handle such co-ordination on a 24-hour basis, or may task other national authorities to promptly assist the RCC with these duties. RCCs should be prepared to act quickly on their own, or have processes in place, as necessary, to involve other authorities, so that timely decisions can be reached with regard to handling survivors.

6.5 Each RCC should have effective plans of operation and arrangements (interagency or international plans and agreements if appropriate) in place for responding to all types of SAR

situations. Such plans and arrangements should cover incidents that occur within its associated SAR region, and should also cover incidents outside its own SAR region if necessary until the RCC responsible for the region in which assistance is being rendered (see paragraph 6.7) or another RCC better situated to handle the case accept responsibility. These plans and arrangements should cover how the RCC could co-ordinate:

.1 a recovery operation;

.2 disembarkation of survivors from a ship;

.3 delivery of survivors to a place of safety; and

.4 its efforts with other entities (such as customs and immigration authorities, or the ship owner or flag State), should non-SAR issues arise while survivors are still aboard the assisting ship with regard to nationalities, status or circumstances of the survivors; and quickly address initial border control or immigration issues to minimize delays that might negatively impact the assisting ship, including temporary provisions for hosting survivors while such issues are being resolved.

6.6 Plans of operation, liaison activities and communications arrangements should provide for proper co-ordination in advance of and during a rescue operation with shipping companies and with national or international authorities that may need to be involved in response or disembarkation efforts.

6.7 When appropriate, the first RCC contacted should immediately begin efforts to transfer the case to the RCC responsible for the region in which the assistance is being rendered. When the RCC responsible for the SAR region in which assistance is needed is informed about the situation, that RCC should immediately accept responsibility for co-ordinating the rescue efforts, since related responsibilities, including arrangements for a place of safety for survivors, fall primarily on the Government responsible for that region. The first RCC, however, is responsible for co-ordinating the case until the responsible RCC or other competent authority assumes responsibility.

6.8 Governments and the responsible RCC should make every effort to minimize the time survivors remain aboard the assisting ship.

6.9 Responsible State authorities should make every effort to expedite arrangements to disembark survivors from the ship; however, the master should understand that in some cases necessary co-ordination may result in unavoidable delays.

6.10 The RCC should seek to obtain the following information from the master of the assisting ship:

.1 information about the survivors, including name, age, gender, apparent health and medical condition and any special medical needs;

.2 the master’s judgment about the continuing safety of the assisting ship;

.3 actions completed or intended to be taken by the master;

.4 assisting ship’s current endurance with the additional persons on board;

.5 assisting ship's next intended port of call;

.6 the master's preferred arrangements for disembarking the survivors;

.7 any help that the assisting ship may need during or after the recovery operation; and

.8 any special factors (e.g., prevailing weather, time sensitive cargo).

6.11 Potential health and safety concerns aboard a ship that has recovered persons in distress include insufficient lifesaving equipment, water, provisions, medical care, and accommodations for the number of persons on board, and the safety of the crew and passengers if persons on board might become aggressive or violent. In some cases it may be advisable for the RCC to arrange for SAR or other personnel to visit the assisting ship to better assess the situation onboard, to help meet needs on board, or to facilitate safe and secure disembarkation of the survivors.

**Place of safety**

6.12 A place of safety (as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.

6.13 An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made.

6.14 A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.

6.15 The Conventions, as amended, indicate that delivery to a place of safety should take into account the particular circumstances of the case. These circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units. Each case is unique, and selection of a place of safety may need to account for a variety of important factors.

6.16 Governments should co-operate with each other with regard to providing suitable places of safety for survivors after considering relevant factors and risks.

6.17 The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.

6.18 Often the assisting ship or another ship may be able to transport the survivors to a place of safety. However, if performing this function would be a hardship for the ship, RCCs should attempt to arrange use of other reasonable alternatives for this purpose.

**Non-SAR considerations**

6.19 If survivor status or other non-SAR matters need to be resolved, the appropriate authorities can often handle these matters once the survivors have been delivered to a place of safety. Until then, RCCs are responsible for co-operation with any national or international authorities or others involved in the situation. Examples of non-SAR considerations that may require attention include oil spills, onscene investigations, salvage, survivors who are migrants or asylum seekers, needs of survivors once they have been delivered to a place of safety, or security or law enforcement concerns. National authorities other than the RCC typically have primary responsibility for such efforts.

6.20 Any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation of survivors from the assisting ship(s).

6.21 Although issues other than rescue relating to asylum seekers, refugees and migratory status are beyond the remit of IMO, and beyond the scope of the SOLAS and SAR Conventions, Governments should be aware of assistance that international organizations or authorities of other countries might be able to provide in such cases, be able to contact them rapidly, and provide any instructions that their RCCs may need in this regard, including how to alert and involve appropriate national authorities. States should ensure that their response mechanisms are sufficiently broad to account for the full range of State responsibilities.

6.22 Authorities responsible for such matters may request that RCCs obtain from the assisting ship certain information about a ship or other vessel in distress, or certain information about the persons assisted. Relevant national authorities should also be made aware of what they need to do to co-operate with the RCC (especially with regard to contacting ships), and to respond as a matter of urgency to situations involving assisted persons aboard ships.

APPENDIX

## SOME COMMENTS ON RELEVANT INTERNATIONAL LAW

1 A shipmaster's obligation to render assistance at sea is a longstanding maritime tradition. It is an obligation that is recognized by international law. Article 98 of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) codifies this obligation in that every "State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers ... to render assistance to any person found at sea in danger of being lost …". In addition to imposing an obligation on States to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea …".

2 The SAR Convention defines *rescue* as "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety."
SAR services are defined as "the performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, vessels and other craft and installations." SAR services include making arrangements for disembarkation of survivors from assisting ships. The SAR Convention establishes the principle that States delegate to their rescue co-ordination centres (RCCs) the responsibility and authority to be the main point of contact for ships, rescue units, other RCCs, and other authorities for co-ordination of SAR operations. The SAR Convention also discusses, with regard to obligations of States, the need for making arrangements for SAR services, establishment of RCCs, international co-operation, RCC operating procedures, and use of ship reporting systems for SAR.

3 The SAR Convention does not define "place of safety". However, it would be inconsistent with the intent of the SAR Convention to define a place of safety solely by reference to geographical location. For example, a place of safety may not necessarily be on land. Rather, a place of safety should be determined by reference to its characteristics and by what it can provide for the survivors. It is a location where the rescue operation is considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.

4 The SOLAS Convention regulation V/33.1 provides that the "master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so." Comparable obligations are contained in other international instruments. Nothing in these guidelines is intended in any way to affect those obligations. Compliance with this obligation is essential in order to preserve the integrity of search and rescue services. The SOLAS Convention, Article IV (cases of *force majeure*) protects the shipmaster insofar as the existence of persons on board the ship by reason of *force majeure* or due to the obligation for the master to carry shipwrecked or other persons, will not be a basis for determining application of the Convention's provisions to the ship. The SOLAS Convention also addresses in chapter V, regulation 7, the responsibility of Governments to arrange rescue services.

5 As a general principle of international law, a State's sovereignty allows that State to control its borders, to exclude aliens from its territory and to prescribe laws governing the entry of aliens into its territory. A State's sovereignty extends beyond its land territory and internal waters to the territorial sea, subject to the provisions of UNCLOS and other rules of international law. Further, as provided in Article 21 of UNCLOS, a coastal State may adopt laws and regulations relating to innocent passage in the territorial sea to prevent, among other things, the infringement of that coastal State's immigration laws.

6 Pursuant to Article 18 of UNCLOS, a ship exercising innocent passage may stop or anchor in the coastal State's territorial sea "only in so far as the same are incidental to ordinary navigation or are rendered by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress." UNCLOS does not specifically address the question of whether there exists a right to enter a port in cases of distress, although under customary international law, there may be a universal, albeit not absolute, right for a ship in distress to enter a port or harbour when there exists a clear threat to safety of persons aboard the ship. Such threats often worsen with time and immediate port entry is needed to ensure the safety of the vessel and those onboard. Nevertheless, the right of the ship in distress to enter a port involves a balancing of the nature and immediacy of the threat to the ship's safety against the risks to the port that such entry may pose. Thus, a coastal State might refuse access to its ports where the ship poses a serious and unacceptable safety, environmental, health or security threat to that coastal State after the safety of persons onboard is assured.

7 The Refugee Convention's prohibition of expulsion or return "refoulement" contained in Article 33.1 prohibits Contracting States from expelling or returning a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of the person's race, religion, nationality, membership of a particular social group or political opinion. Other relevant international law also contains prohibition on return to a place where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

8 Other relevant provisions, not all of which are under the competence of IMO, *inter alia*, include the following:

- International Convention on Maritime Search and Rescue, 1979, as amended, in entirety

- International Convention for the Safety of Life at Sea, 1974, as amended, chapter V, regulation 33

- Convention on Facilitation of International Maritime Traffic, 1965, in particular Section 6.C, Standards 6.8-6.10 International Convention on Salvage, 1983, Article 11

- United Nations Convention on the Law of the Sea, 1982, Article 98

- Resolution A.871(20) on Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases

- Resolution A.867(20) on Combating unsafe practices associated with the trafficking or transport of migrants by sea IMO Global SAR Plan – SAR.8/Circ.1 and addenda addresses (the Admiralty List of Radio Signals, Volume 5, is a practical alternative)

- United Nations Convention relating to the Status of Refugees, 1951 and its 1967 Protocol

- UN Convention against Transnational

- Organized Crime, 2000 and its Protocols, Protocol against the smuggling of migrants by land, sea and air; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

- MSC/Circ.896/Rev.1 on Interim measures for combating unsafe practices associated with the trafficking or transport of immigrants by sea

## REVIEW OF SAFETY MEASURES AND PROCEDURES FOR THE TREATMENT OF PERSONS RESCUED AT SEA[24]

*THE ASSEMBLY,*

RECALLING Articles 1 and 15(j) of the Convention on the International Maritime Organization concerning the purposes of the Organization and the functions of the Assembly in relation to regulations and guidelines concerning maritime safety; and also the general purpose of the Convention on Facilitation of International Maritime Traffic, 1965,

**DESIRING to ensure that the life of persons on board ships, including small craft, whether underway or at anchor, is safeguarded at any time pending their delivery to a place of safety,**

RECALLING the provisions of the United Nations Convention on the Law of the Sea, in particular article 98 thereof relating to the duty to render assistance,

RECALLING ALSO the provisions of the International Convention for the Safety of Life at Sea, 1974, as amended, relating to the obligation of:

- shipmasters to proceed with all speed to the assistance of persons in distress at sea; and

- Contracting Governments to ensure arrangements for coast watching and for the rescue of persons in distress at sea round their coasts,

RECALLING FURTHER the provisions of the International Convention on Maritime Search and Rescue, 1979, as amended, relating to the provision of assistance to any person in distress at sea regardless of the nationality or status of such person or the circumstances in which that person is found,

FURTHER RECALLING the provisions of the Convention on Facilitation of International Maritime Traffic, 1965, as amended, relating to the facilitation of, *inter alia*, the arrival and departure of ships engaged in emergency operations necessary to ensure maritime safety,

FURTHER RECALLING the provisions of the International Convention on Salvage, 1989, relating to the master's duty to render assistance to any person in danger of being lost at sea and to the need for co-operation between parties and public authorities in order to ensure the successful saving of lives in danger,

RECALLING FINALLY the provisions of:

(a) resolution A.773(18) on Enhancement of safety of life at sea by the prevention and suppression of unsafe practices associated with alien smuggling by ships,

[24] IOM Doc. A 22/Res.920, 22 January 2002, adopted by the Assembly on 29 November 2001, agenda item 8.

(b) resolution A.871(20) on Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases;

(c) resolution A.867(20) on Combating unsafe practices associated with the trafficking or transport of migrants by sea; and

(d) MSC/Circ.896/Rev.1 on Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea,

AFFIRMING that matters not regulated by the international conventions referred to above should continue to be governed, *inter alia*, by the rules and principles of customary international law,

NOTING the initiative taken by the Secretary-General to involve competent United Nations specialized agencies and programmes in the consideration of the issues addressed in this resolution, for the purpose of agreeing on a common approach which will resolve them in an efficient and consistent manner,

RECOGNIZING the need for the Organization to consider whether international measures, additional to those already agreed to, are necessary to improve safety at sea and reduce the risk to the lives of persons on board ships, in particular in rescue operations,

1. REQUESTS the Maritime Safety Committee, the Legal Committee and the Facilitation Committee, under the direction of the Council, to review on a priority basis the international conventions referred to above and any other IMO instruments under their scope, for the purpose of identifying any existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies and, in the light of such review, to take action as appropriate, so that:

- survivors of distress incidents are given assistance regardless of nationality or status or of the circumstances in which they are found;

- ships which have retrieved persons in distress at sea are able to deliver the survivors to a place of safety; and

- survivors, regardless of nationality or status, including undocumented migrants, asylum seekers, refugees and stowaways, are treated while on board in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions;

2. REQUESTS ALSO the Committees referred to above, when taking action as requested in operative paragraph 1, to take account of the rules and principles of general international law with respect to the duty to render assistance to persons in distress at sea, and to identify possible needs for codification and progressive development of these rules and principles;

3. REQUESTS FURTHER the Committees referred to above, when taking action as requested in operative paragraphs 1 and 2, to take account of the work of, and consult as appropriate with, other international organizations, including industry organizations, relating

to the search and rescue of persons in distress or in danger at sea, including persons who may be undocumented migrants or stowaways;

4. FURTHER REQUESTS the Secretary-General to pursue his initiative as referred to in the tenth preambular paragraph, and to inform the competent IMO bodies of developments in due course;

5. FINALLY REQUESTS the Secretary-General to submit a report to the twenty-third session of the Assembly on progress made in the interim.

## INTERIM MEASURES FOR COMBATING UNSAFE PRACTICES ASSOCIATED WITH THE TRAFFICKING OR TRANSPORT OF MIGRANTS BY SEA[25]

1 The Maritime Safety Committee, at its sixty-ninth session (11 to 20 May 1998), being concerned about the unsafe practices associated with the trafficking or transport of migrants by sea and recalling resolution A. 867 (20) on Combating unsafe practices associated with the trafficking or transport of migrants by sea, in particular operative paragraph 6 thereof, established a correspondence group to prepare Interim Measures for combating unsafe practices associated with the trafficking or transport of migrants by sea, which were eventually considered and approved by the Committee, at its seventieth session (7 to 11 December 1998) and disseminated by means of MSC/Circ.896.

2 To prevent and suppress unsafe practices associated with the trafficking or transport of migrants by sea, the Committee invited Member Governments to promptly convey to the Organization reports on relevant incidents and the measures taken, to enable the updating or revising of that circular, as necessary.

3 The Committee, at its seventy-third session (27 November to 6 December 2000), established a biannual reporting procedure; instructed the Secretariat to issue biannual reports (MSC.3/Circ. series); and urged Governments and international organizations to promptly communicate all unsafe practices associated with the trafficking or transport of migrants by sea.

4 The Committee, at its seventy-fourth session (30 May to 8 June 2001), in the light of reports recorded and proposals made by Governments, approved amendments to the annex to MSC/Circ.896, the revised text of which is given at annex.

5 The use of the report format given in the Appendix to the annex is recommended for conveying information for the purposes mentioned in paragraphs 12, 15 and 22 of the Interim Measures.

6 Member Governments are invited to bring this circular and annex to the attention of all parties concerned.

7 The circular will be further revised in the light of the consideration of incident reports received by IMO and further submission by Member Governments, following the adoption, in December 2000, of the Convention against transnational organized crime, developed by the United Nations Commission on Crime Prevention and Criminal Justice together with the Protocol against smuggling of migrants by land, sea and air.

[25] IMO Circular MSC/Circ.896/Rev.1, adopted on 12 June 2001
http://www.imo.org/includes/blastDataOnly.asp/data_id=3881/896REV1.pdf.

## ANNEX

## INTERIM MEASURES FOR COMBATING UNSAFE PRACTICES ASSOCIATED WITH THE TRAFFICKING OR TRANSPORT OF MIGRANTS BY SEA

1 Pending entry into force of a Convention against transnational organized crime including trafficking in migrants this circular provides interim, non-binding measures for the prevention and suppression of unsafe practices associated with the trafficking or transport of migrants by sea.

**Definitions**

2 For purposes of this circular:

2.1 "Ship" means every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary, or other ship owned or operated by a Government and used, for the time being, only on government non-commercial service;

2.2 "Organization" means the International Maritime Organization; and

2.3 "unsafe practices" means any practice which involves operating a ship that is:

.1 obviously in conditions which violate fundamental principles of safety at sea, in particular those of the SOLAS Convention; or

.2 not properly manned, equipped or licensed for carrying passengers on international voyages,

and thereby constitute a serious danger for the lives or the health of the persons on board, including the conditions for embarkation and disembarkation.

**Purpose**

3 The purpose of this circular is to promote awareness and co-operation among Contracting Governments of the Organization so that they may address more effectively unsafe practices associated with the trafficking or transport of migrants by sea which have an international dimension.

**Recommended actions by States**

*Compliance with international obligations.*

4 Experience has shown that migrants often are transported on ships that are not properly manned, equipped or licensed for carrying passengers on international voyages. States should take steps relating to maritime safety, in accordance with domestic and international law, to eliminate these unsafe practices associated with the trafficking or transport of migrants by sea, including:

1 ensuring compliance with the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS)[26];

.2 collecting and disseminating information on ships believed to be engaged in unsafe practices associated with trafficking or transporting migrants;

.3 taking appropriate action against masters, officers and crew members engaged in such unsafe practices; and

4 preventing any such ship:

.1 from again engaging in unsafe practices; and

.2 if in port, from sailing.

5 Measures taken, adopted or implemented pursuant to this circular to combat unsafe practices associated with the trafficking or transport of migrants by sea should be in conformity with the international law of the sea and all generally accepted relevant international instruments, such as the United Nations 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

6 States should take, adopt or implement such measures in conformity with international law with due regard to:

.1 the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship; and

.2 the rights and obligations of the coastal State.

7 If any measures are taken against any ship suspected of unsafe practices associated with trafficking or transport of migrants by sea, the State concerned should take into account the need not to endanger the safety of human life at sea and the security of the ship and the cargo, or to prejudice the commercial and/or legal interests of the flag State or any other interested State.

*Co-operation.*

8 States should co-operate to the fullest extent possible to prevent and suppress unsafe practices associated with the trafficking or transport of migrants by sea, in conformity with the

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[26] It is recalled that:
-regulation 1 of chapter I of SOLAS Convention provides that SOLAS applies to ships engaged on international voyages;
-regulation 2 of the same chapter defines as:
*international voyage*, a voyage from a country to which the present Convention applies to a port outside such country, or conversely.
*passenger ship*, a ship which carries more than twelve passengers.
*cargo ship*, any ship which is not a passenger ship.
The trafficking of migrants will normally constitute an international voyage. When this practice occurs on board cargo ships, multiple infringements of the SOLAS Convention are therefore committed.

international law of the sea and all generally accepted relevant international instruments. It is consistent with international law for a flag State to authorize a vessel flying its flag to be boarded and inspected by a warship of another State, as described in paragraphs 12 and 20 below.

9 States should consider entering into bilateral or regional agreements to facilitate co-operation in applying appropriate, efficient and effective measures to prevent and suppress unsafe practices associated with the trafficking or transport of migrants by sea.

10 States should also encourage the conclusion of operational arrangements in relation to specific cases.

*Measures and Procedures.*

11 A State, which has reasonable grounds to suspect that a ship which:

.1 is flying its flag or claiming its registry, or

.2 is without nationality, or

.3 though flying a foreign flag or refusing to show its flag is, in reality, of the same nationality as the State concerned,

is engaged in unsafe practices associated with the trafficking or transport of migrants by sea, may request the assistance of other States in suppressing its use for that purpose. The States so requested should render such assistance as is reasonable under these circumstances.

12 A State which has reasonable grounds to suspect that a ship exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another State is engaged in unsafe practices associated with the trafficking or transport of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed[27], request authorization from the flag State to take appropriate measures in regard to that ship. The flag State may authorize the requesting State to, *inter alia*:

.1 board the ship;

.2 inspect and carry out a safety examination of the ship, and

.3 if evidence is found that the ship is engaged in unsafe practices, take appropriate action with respect to the ship, persons and cargo on board, as authorized by the flag State.

A State which has taken any action in accordance with this paragraph should promptly inform the flag State concerned of the results of that action.

13 A flag State may, consistent with paragraph 8, subject its authorization to conditions to be mutually agreed between it and the requesting State, including conditions relating to

[27] If registry is refuted, the situation is that described in paragraph 11.2 above.

responsibility and to the extent of effective measures to be taken including the use of force. A State shall take no additional actions without the express authorization of the flag State, except those necessary to relieve imminent danger or those that follow from relevant bilateral or multilateral agreements.

14 A State should respond expeditiously to a request from another State to determine whether a ship that is claiming its registry or flying its flag is entitled to do so, and to a request for authorization made pursuant to paragraph 12.

15 When a ship is found engaged in unsafe practices associated with the trafficking or transport of migrants by sea, States should:

.1 immediately report the findings of the safety examinations conducted pursuant to paragraph 12 to the administration of the State whose flag the ship is entitled to fly or in which it is registered; and

.2 immediately consult on the further actions to be taken after giving or receiving reports on the ship involved.

16 When there are reasonable grounds to suspect that a ship is engaged in unsafe practices associated with trafficking or transport of migrants by sea and it is concluded in accordance with the international law of the sea that the ship is without nationality, or has been assimilated to a ship without nationality, States should conduct a safety examination of the ship, as necessary. If the results of the safety examination indicate that the ship is engaged in unsafe practices, States should take appropriate measures in accordance with relevant domestic and international law.

17 When evidence exists that a ship is engaged in unsafe practices associated with the trafficking or transport of migrants by sea, States, in taking action pursuant to paragraphs 12 or 16, should:

.1 ensure the safety and the humanitarian handling of the persons on board and that any actions taken with regard to the ship are environmentally sound; and

.2 take appropriate action in accordance with relevant domestic and international law.

18 States should take required steps, in accordance with international law including SOLAS regulation I/19(c), to ensure that a ship involved in unsafe practices associated with the trafficking or transport of migrants by sea does not sail until it can proceed to sea without endangering the ship or persons on board, and to report promptly to the State whose flag the ship is entitled to fly, or in which it is registered, all incidents concerning such unsafe practices which come to their attention.

19 Contracting Governments to SOLAS 1974, as amended, should ensure that, when a request is received to transfer a ship to their flag or registry, the requirements listed in regulation I/14(g)(ii) are met, and appropriate inspections and surveys are conducted to ensure the ship will be used for the service specified in the certificates issued in accordance with chapter I of the 1974 SOLAS Convention.

20 Any action taken at sea pursuant to this circular shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

21 Each State should designate an authority or, where necessary, authorities to receive reports of unsafe practices, and to respond to requests for assistance, confirmation of registry or right to fly its flag and authorization to take appropriate measures.

22 Notwithstanding paragraph 20, ships providing assistance to persons in distress at sea, as required by the international law of the sea including SOLAS regulation V/10, and ships providing assistance in accordance with this circular, should not be considered as engaging in unsafe practices associated with the trafficking or transport of migrants by sea.

**Reports**

23 To prevent and suppress unsafe practices associated with trafficking or transport of migrants by sea, reports on incidents and the measures taken should be provided to the Organization by States concerned as soon as possible. This information will be used for the purpose of updating or revising this circular, as necessary.

24 Use of the report form given in the Appendix is recommended for conveying information for the purposes mentioned in paragraphs 12, 15 and 22.

**APPENDIX**

**REPORT ON UNSAFE PRACTICE ASSOCIATED WITH THE TRAFFICKING OR TRANSPORT OF MIGRANTS BY SEA**

Date: _____ Time: _____

Ship Name: _____ Name on Hull? Y/N

Official/Document Number:_____

Flag: _____ International Call Sign: _____

Homeport: _____ Homeport on Hull? Y/N

Description: _____
_____
_____

Type of Propulsion/Horsepower: _____ Gross Tonnage: _____

Location: _____ N/S_____ E/W_____

Last Port of Call (include date/time of departure): _____

Next Port of Call (include date/time of departure):_____

Owner/Charterer: _____
_____

Master:_____ Nationality:_____ Date of Birth:_____

Number of Crew/Nationality(ies) (if identified among persons on board): _____

Number of Migrants and other persons on board/ Nationality(ies):_____
_____

Number of Male Adults:_____ Number of Female Adults:_____
Number of Male Minors:_____ Number of Female Minors:_____

Brief Description of Incident and Measures taken (include date/time as necessary):_____
_____
_____
_____
_____
_____

Additional comments and recommendations (if any):_____
_____
_____
_____

Maritime Authority:_____

## GUIDELINES ON THE ALLOCATION OF RESPONSIBILITIES TO SEEK THE SUCCESSFUL RESOLUTION OF STOWAWAY CASES[28]

THE ASSEMBLY,

HAVING CONSIDERED the general purposes of the Convention on Facilitation of International Maritime Traffic, 1965, as amended, and in particular article III thereof,

NOTING with concern the number of incidents involving stowaways, the consequent potential for disruption of maritime traffic, the impact such incidents may have on the safe operation of ships and the considerable risks faced by stowaways, including loss of life,

RECALLING that the International Convention Relating to Stowaways, 1957, which attempted to establish an internationally acceptable regime for dealing with stowaways, has not yet come into force,

AGREEING that, for the purposes of this resolution, a stowaway is defined as a person who is secreted on a ship or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person, and who is detected on board after the ship has departed from a port and reported as a stowaway by the master to the appropriate authorities,

TAKING INTO ACCOUNT that some stowaways may be asylum-seekers and refugees, which should entitle them to such relevant procedures as those provided by international instruments and national legislation,

BEING AWARE that, in the absence of an internationally agreed procedure for dealing with stowaways, considerable difficulties are being encountered by shipmasters and shipping companies, shipowners and ship operators in disembarking stowaways from ships into the care of the appropriate authorities,

APPRECIATING Member Governments' difficulties in accepting stowaways for examination pending repatriation and then allowing the vessels concerned to sail,

RECOGNIZING, therefore, the need to establish practical and comprehensive guidance on procedures to be followed by all the authorities and persons concerned in order that the return or repatriation of a stowaway may be achieved in an acceptable and humane manner,

AGREEING that the existence of such guidance should in no way be regarded as condoning or encouraging the practice of stowing away and other illegal migration, and should not undermine efforts to combat the separate problems of alien smuggling or human trafficking,

BELIEVING that, at present, stowaway cases can best be resolved through close co-operation among all authorities and persons concerned,

[28] IMO Resolution A.871(20),adopted on 27 November 1997
http://www.pmaesa.org/Maritime/Res%20A.871(20).doc.

BELIEVING FURTHER that, in normal circumstances, through such co-operation, stowaways should, as soon as practicable, be removed from the ship concerned and returned to the country of nationality/citizenship or to the port of embarkation, or to any other country which would accept them,

RECOGNIZING that stowaway incidents should be dealt with humanely by all Parties involved, giving due consideration to the operational safety of the ship and its crew,

WHILST URGING national authorities, port authorities, shipowners and masters to take all reasonable precautions to prevent stowaways gaining access to vessels,

HAVING CONSIDERED the recommendations made by the Facilitation Committee at its twenty-fifth session,

1. ADOPTS the Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases, set out in the Annex to the present resolution;

2. URGES Governments to implement in their national policies and practices the procedures recommended in the annexed Guidelines;

3. URGES ALSO Governments to deal with stowaway cases in a spirit of co-operation with other parties concerned, on the basis of the allocation of responsibilities set out in the annexed Guidelines;

4. INVITES shipping companies, shipowners and ship operators to take on the relevant responsibilities set out in the annexed Guidelines and to guide their masters and crews as to their respective responsibilities in stowaway cases;

5. INVITES Governments to develop, in co-operation with the industry, comprehensive strategies to prevent intending stowaways from gaining access to ships;

6. REQUESTS the Facilitation Committee to continue to monitor the effectiveness of the annexed Guidelines on the basis of information provided by Governments and the industry, to keep them under review and to take such further action, including the development of a relevant binding instrument, as may be considered necessary in the light of developments;

7. REVOKES FAL.2/Circ.

ANNEX

## GUIDELINES ON THE ALLOCATION OF RESPONSIBILITIES TO SEEK THE SUCCESSFUL RESOLUTION OF STOWAWAY CASES

1 Masters, shipowners[29], port authorities, national administrations, and other bodies including security operators all have a responsibility to cooperate to prevent illegal access to a vessel while it is in port. However, no matter how effective routine port and ship security is, there will still be occasions when stowaways gain access to vessels, either secreted in the cargo or by surreptitious boarding.

2 For the purposes of the Guidelines a stowaway is defined as a person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person, and who is detected on board after the ship has departed from a port and reported as a stowaway by the master to the appropriate authorities.

3 The resolution of stowaway cases is difficult because of different national legislation in each of the potentially several countries involved: the country of embarkation, the country of disembarkation, the flag State of the vessel, the country of apparent, claimed or actual nationality/citizenship of the stowaway, and countries of transit during repatriation.

4 There are, however, some basic principles which can be applied generally. These are as follows:

.1 A recognition that stowaways arriving at or entering a country without the required documents are, in general, illegal entrants. Decisions on dealing with such situations are the prerogative of the countries where such arrival or entry occurs.

.2 Stowaway asylum-seekers should be treated in compliance with international protection principles as set out in international instruments[30] and relevant national legislation.

.3 The shipowner and his representative on the spot, the master, as well as port authorities and national administrations, should cooperate as far as possible in dealing with stowaway cases.

.4 Shipowners and their representatives on the spot, masters, port authorities and national administrations should have security arrangements in place which, as far as practicable, will prevent intending stowaways from getting aboard a ship or, if this fails, will detect them before a ship arrives at port. Where national legislation permits, national authorities should consider prosecution of stowaways for trespassing upon or damaging the property of the shipping company, or the cargo.

.5 All Parties should be aware that an adequate search may minimize the risk of having to deal with a stowaway case and may also save the life of a stowaway who may, for example, be hiding in a place which is subsequently sealed and/or chemically treated.

[29] Including any persons or party acting on behalf of the owner of the vessel.

[30] Reference is made to the provisions of the United Nations Convention relating to the Status of Refugees of 28 July 1951 and of the United Nations Protocol relating to the Status of Refugees of 31 January 1967.

.6 Countries should admit returned stowaways with full nationality/citizenship status of that country or a right of residence.

.7 The country of the original port of embarkation of a stowaway should normally accept the return of such a stowaway for examination pending final case disposition.

.8 Every effort should be made to avoid situations where a stowaway has to be detained on board a ship indefinitely. In this regard countries should co-operate with the shipowner in arranging the return of a stowaway to an appropriate country.

.9 Stowaway incidents should be dealt with humanely by all parties involved. Due consideration must always be given to the operational safety of the ship and to the well-being of the stowaway.

5 As a first step in addressing the issue, a framework of the various responsibilities, rights and liabilities of the parties involved needs to be identified and agreed. The following allocation of responsibility is suggested:

**.1 The master**

.1.1 to make every effort to determine immediately the port of embarkation of the stowaway;

.1.2 to make every effort to establish the identity, including the nationality/citizenship of the stowaway;

.1.3 to prepare a statement containing all information relevant to the stowaway, in accordance with information specified in the standard document annexed to these Guidelines, for presentation to the appropriate authorities;

.1.4 to notify the existence of a stowaway and any relevant details to his shipowner and appropriate authorities at the port of embarkation, the next port of call and the flag State;

.1.5 not to depart from his planned voyage to seek the disembarkation of a stowaway to any country unless repatriation has been arranged with sufficient documentation and permission given for disembarkation, or unless there are extenuating security or compassionate reasons;

.1.6 to ensure that the stowaway is presented to the appropriate authorities at the next port of call in accordance with their requirements;

.1.7 to take appropriate measures to ensure the security, general health, welfare and safety of the stowaway until disembarkation;

**.2 The shipowner or operator**

.2.1 to ensure that the existence of, and any relevant information on, the stowaway has been notified to the appropriate authorities at the port of embarkation, the next port of call and the flag State;

.2.2 to comply with any removal directions made by the competent national authorities at the port of disembarkation;

**.3 Country of first scheduled port of call after discovery of the stowaway (port of disembarkation)**

.3.1 to accept the stowaway for examination in accordance with the national laws of that country and, where the competent national authority considers that it would facilitate matters, to allow the shipowner and his named representative and the competent or appointed P&I Club correspondent to have access to the stowaway;

.3.2 to consider allowing disembarkation and provide, as necessary and in accordance with national law, secure accommodation which may be at the expense of the shipowner or agents, where:

.3.2.1 a case under .3.1 is unresolved at the time of sailing, or

.3.2.2 national authorities are satisfied that arrangements have been made and will be effected for the early return or repatriation of the stowaway by other means (which may be at the expense of the shipowner or agents), or

.3.2.3 a stowaway's presence on board would endanger the safe operation of the vessel;

.3.3 to assist, as necessary, in the identification of the stowaway and the establishment of his or her nationality/citizenship;

.3.4 to assist, as necessary, in establishing the validity and authenticity of a stowaway's documents;

.3.5 to give directions for the removal of the stowaway to the port of embarkation, country of nationality/citizenship or to some other country to which lawful directions may be made, in co-operation with the shipowner and his nominated representative;

.3.6 in co-operation with the shipowner and his and his nominated representatives to discuss repatriation or removal arrangements or directions with the master/shipowner or their appointed representatives, keeping them informed, as far as practicable, of the level of detention costs, while keeping these to a minimum;

.3.7 to consider mitigation of charges that might otherwise be applicable when shipowners have cooperated with the control authorities to the satisfaction of those authorities in measures designed to prevent the transportation of stowaways;

.3.8 to issue, if necessary, in the event that the stowaway has no identification and/or travel documents, a document attesting to the circumstances of embarkation and arrival to enable the return of the stowaway either to his

country of origin, to the country of the port of embarkation, or to any other country to which lawful directions can be made, by any means of transport;

.3.9 to hand over the document to the transport operator effecting the removal of the stowaway;

.3.10 to take proper account of the interests of, and implications for, the shipowner or agent when directing detention and setting removal directions, so far as is consistent with the maintenance of control, their duties or obligations to the stowaway under the law, and the cost to public funds.

**.4 The country of the original port of embarkation of the stowaway (i.e. the country where the stowaway first boarded the ship)**

.4.1 to accept any returned stowaway having nationality/citizenship or right of residence;

.4.2 to accept, in normal circumstances, a stowaway back for examination where the port of embarkation is identified to the satisfaction of the authorities of the receiving country;

.4.3 to apprehend and detain the stowaway, where permitted by national legislation, if the stowaway is discovered before sailing either on the vessel or in cargo due to be loaded; to refer the intended stowaway to local authorities for prosecution, and/or, where applicable, to the immigration authorities for examination and possible removal: no charge to be imposed on the shipowner in respect of detention or removal costs, and no penalty to be imposed;

.4.4 to apprehend and detain the stowaway, where permitted by national legislation, if the stowaway is discovered while the vessel is still in the territorial waters of the country of the port of his embarkation, or in another port in the same country (not having called at a port in another country in the meantime) no charge to be imposed on the shipowner in respect of detention or removal costs, and no penalty to be imposed.

**.5 The apparent or claimed country of nationality/citizenship of the stowaway**

.5.1 to make every effort to assist in determining the identity and nationality/citizenship of the stowaway and to document the stowaway, accordingly once satisfied that he or she holds the nationality/citizenship claimed;

.5.2 to accept the stowaway where nationality/citizenship is established.

**.6 The flag State of the vessel**

.6.1 to be willing, if practicable, to assist the master/shipowner or the appropriate authority at the port of disembarkation in identifying the stowaway and determining his or her nationality/citizenship;

.6.2 to be prepared to make representations to the relevant authority to assist in the removal of the stowaway from the vessel at the first available opportunity;

.6.3 to be prepared to assist the master/shipowner or the authority at the port of disembarkation in making arrangements for the removal or repatriation of the stowaway.

**.7 Any countries of transit during repatriation**

to allow, subject to normal visa requirements, the transit through their ports and airports of stowaways travelling under the removal instructions or directions of the country of the port of disembarkation.

APPENDIX

## STOWAWAY DETAILS

**SHIP DETAILS**

Name of Ship:
IMO Number:
Flag:
Company:
Company address:
Agent in next port:
Agent address:
IRCS:
Inmarsat Number:
Port of registry:
Name of master:

Photograph of stowaway

**STOWAWAY DETAILS**

Date/time found on board:
Place of boarding:
Country of boarding:
Time spent in country of boarding:
Date/time of boarding:
Intended port of destination:
Intended final destination (if different):
Stated reasons for boarding the ship:

Surname:
Given name:
Name by which known:
Religion:
Gender:
Date of birth:
Place of birth:
Claimed nationality:
ID document type:

Passport No:
When issued:
Where issued:
Date of expiry:
Issued by:

ID Card No:
When issued:
Where issued:
Date of expiry:
Issued by:

Seaman's Book No:
When issued:
Where issued:
Date of expiry:
Issued by:

Emergency passport No:
When issued:
Where issued:
Date of expiry:
Issued by:

Home address:

Home town:
Country of domicile:
Profession(s):
Employer(s): [names and addresses]

Address in country of boarding:

Height (cm):
Weight (kg):
Complexion:
Colour of eyes:
Colour of hair:
Form of head/face:
Marks/characteristics: [e.g. scars, tattoos, etc.]

First language:
Spoken Read Written

Other languages:
Spoken Read Written

Marital status:
Name of spouse:
Nationality of spouse:
Address of spouse:

Names of parents:
Nationality of parents:
Address of parents:

**OTHER DETAILS**

Method of boarding, including other persons involved (e.g. crew, port workers, etc.), and whether they were secreted in cargo/container or hidden in the vessel:
Inventory of stowaway's possessions:

Was the stowaway assisted in boarding the vessel, or assisted by any member of the crew? If so, was any payment made for this assistance?

Other information (e.g. names and addresses of colleagues, community leader, e.g. mayor, tribal chief, contacts in other parts of the world):

Statement made by stowaway:

Statement made by master (including any observations on the credibility of the information provided by the stowaway):

Date(s) of interview(s):

Stowaway's signature Master's signature

Date: Date:

# INTERNATIONAL REFUGEE LAW

**Convention Relating to the Status of Refugees and its 1967 Protocol**[31]
***Adopted 28 July 1951***
***Entered into force 22 April 1954***

The 1951 Convention defines who is a refugee, and sets out the rights of refugees in the host country. The most important of these rights is the right to be protected against *refoulement*. The convention also obliges States Parties to co-operate with UNHCR Its 1967 protocol withdraws the time and geographical limits of the Convention.

Article 1 - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

…

(2) [As a result of events occurring before 1 January 1951][32] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

…..

Article 31 - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

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[31] 189 United Nations Treaty Series 150 and 606 United Nation Treaty Series 267. http://www.ohchr.org/english/law/refugees.htm. http://www.ohchr.org/english/law/protocolrefugees.htm.

[32] State Parties to the 1967 Protocol relating to the Status of Refugees accepted to lift the time limitation of the 1951 Convention. Art. 1(2) of the Protocol reads as follows: For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in Article 1 A (2) were omitted.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 33 - Prohibition of expulsion or return ("*refoulement*")

1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 35 – Co-operation of the National Authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

**Convention Governing the Specific Aspects of Refugee Problems in Africa**
***Adopted 10 September 1969***
***Entered into force 20 June 1974***[33]

This regional instrument complements the 1951 Convention. It extends the refugee definition to people who may not be covered by the 1951 Convention but who are forced to move for a complex range of reasons including widespread human rights abuses, armed conflict and generalized violence.

***Selected Provisions***

Article I - Definition of the term "Refugee"

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

3. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

……

6. For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee.

Article II - Asylum

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees

[33] 1001 United Nations Treaty Series 45. http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf.

who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.

3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

Article VIII - Cooperation with the Office of the United Nations High Commissioner for Refugees

1. Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees.

2. The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.

# Conclusion adopted by the Executive Committee on International Protection

## Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV)[34]

*The Executive Committee,*

*Noting* the discussions which took place on interception measures at the Standing Committee[35] as well as in the context of the Global Consultations on International Protection;[36]

*Concerned* about the many complex features of the evolving environment in which refugee protection has to be provided, including the persistence of armed conflict, the complexity of current forms of persecution, ongoing security challenges, mixed population flows, the high costs that may be connected with hosting asylum-seekers and refugees and of maintaining individual asylum systems, the growth in trafficking and smuggling of persons, the problems of safeguarding asylum systems against abuse and of excluding those not entitled to refugee protection, as well as the lack of resolution of long-standing refugee situations;

*Recognizing* that States have a legitimate interest in controlling irregular migration, as well as ensuring the safety and security of air and maritime transportation, and a right to do so through various measures;

*Recalling* the emerging legal framework[37] for combating criminal and organized smuggling and trafficking of persons, in particular the Protocol Against the Smuggling of Migrants by Land, Sea and Air, which, inter alia, contemplates the interception of vessels enjoying freedom of navigation in accordance with international law, on the basis of consultations between the flag State and the intercepting State in accordance with international maritime law, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea;

*Noting* the saving clauses contained in each of the Protocols[38] and the reference to the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the principle of non-refoulement;

*Recalling* also the duty of States and shipmasters to ensure the safety of life at sea and to

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[34] Conclusion adopted by the Executive Committee on international Protection of Refugees, 233. http://www.unhcr.org/excom/EXCOM/3f93b2894.html.
[35] EC/50/SC/CRP17, 9 June 2000.
[36] EC/GC/O1/13, 31 May 2001, Regional Workshops in Ottawa, Canada and in Macau.
[37] The United Nations Convention Against Transnational Organized Crime, 2000 and its Supplementary Protocols Against the Smuggling of Migrants by Land, Sea and Air; and to Suppress and Punish Trafficking in Persons, Especially Women and Children.
[38] Article 19 of the Smuggling Protocol and Article 14 of the Trafficking Protocol.

come to the aid of those in distress or in danger of being lost at sea, as contained in numerous instruments of the codified system of international maritime law[39]; recalling also Conclusions of the Executive Committee of relevance to the particular needs of asylum-seekers and refugees in distress at sea[40] and affirming that when vessels respond to persons in distress at sea, they are not engaged in interception;

*Recognizing* also that States have international obligations regarding the security of civilian air transportation and that persons whose identities are unknown represent a potential threat to the security of air transportation as contained in numerous instruments of the codified system on international aviation law;[41]

*Understanding* that for the purposes of this conclusion, and without prejudice to international law, particularly international human rights law and refugee law, with a view to providing protection safeguards to intercepted persons, interception is one of the measures employed by States to:

i. prevent embarkation of persons on an international journey;

ii. prevent further onward international travel by persons who have commenced their journey; or

iii. assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;

where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the traveling public as well as persons being smuggled or transported in an irregular manner;

(a) *Recommends* that interception measures be guided by the following considerations in order to ensure the adequate treatment of asylum-seekers and refugees amongst those intercepted;
i. The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons;

ii. All intercepted persons should be treated, at all times, in a humane manner respectful of their human rights. State authorities and agents acting on behalf of the intercepting State should take, consistent with their obligations under international law, all appropriate

[39] Including *inter alia* the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, 1974, as amended and the International Convention on Maritime Search and Rescue, 1979, as amended.
[40] In particular No. 15(XXX), No. 20(XXXI), No. 23(XXXII), No. 26 (XXXIII), No. 31 (XXXIV), No. 34 (XXXV) and No. 38 (XXXVI).
[41] Including, *inter alia*, the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

steps in the implementation of interception measures to preserve and protect the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment of persons intercepted;

iii. Interception measures should take into account the fundamental difference, under international law, between those who seek and are in need of international protection, and those who can resort to the protection of their country of nationality or of another country;

iv. Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions;

v. The special needs of women and children and those who are otherwise vulnerable should be considered as a matter of priority;

vi. Intercepted asylum-seekers and refugees should not become liable to criminal prosecution under the Protocol Against the Smuggling of Migrants by Land, Sea or Air for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met;

vii. Intercepted persons who do not seek or who are determined not to be in need of international protection should be returned swiftly to their respective countries of origin or other country of nationality or habitual residence and States are encouraged to cooperate in facilitating this process;[42]

viii. All persons, including officials of a State, and employees of a commercial entity, implementing interception measures should receive specialized training, including available means to direct intercepted persons expressing international protection needs to the appropriate authorities in the State where the interception has taken place, or, where appropriate, to UNHCR;

(b) Encourages States to generate and share more detailed information on interception, including numbers, nationalities, gender and numbers of minors intercepted, as well as information on State practice, having due consideration for security and data protection concerns subject to the domestic laws and international obligations of those States;

(c) Encourages States to further study interception measures, including their impact on other States, with a view to ensuring that these do not interfere with obligations under international law.

[42] See Conclusion on the return of persons found not to be in need of international protection. (A/AC.96/987, para. 21).

## No. 53 (XXXIX) Stowaway Asylum-Seekers[43]

*The Executive Committee,*

*Recognizing* that stowaway asylum-seekers often find themselves in a particularly vulnerable situation in need of international protection and durable solutions;

*Recalling* its Conclusion No. 15 (XXX) on Refugees without an Asylum Country adopted at the thirtieth session of the Executive Committee;

*Reaffirming* the necessity of giving proper attention to the needs of stowaway asylum-seekers including arranging for their disembarkation, determining their refugee status and, whenever required, providing them with a durable solution;

*Noting* that there are at present no general and internationally recognized rules dealing specifically with stowaway asylum-seekers and at the same time recognizing that asylum-seekers should be given the special consideration that their situation demands;

*Recommended* that States and UNHCR take into account the following guidelines when dealing with actual cases of stowaway asylum-seekers:

1. Like other asylum-seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.

2. Without prejudice to any responsibilities of the flag State, stowaway asylum-seekers should, whenever possible, be allowed to disembark at the first port of call and given the opportunity of having their refugee status determined by the authorities, provided that this does not necessarily imply durable solution in the country of the port of disembarkation.

3. Normally UNHCR would be requested to assist in finding a durable solution for those found to be refugees, based on all relevant aspects of the case.

[43] Conclusion adopted by the Executive Committee on International Protection of Refugees, 99. http://www.unhcr.org/excom/EXCOM/3ae68c4374.html.

## No. 23 (XXXII) PROBLEMS RELATED TO THE RESCUE OF ASYLUM-SEEKERS IN DISTRESS AT SEA[44]

*The Executive Committee,*

*Adopted* the following conclusions on problems related to the rescue of asylum-seekers in distress at sea.

1. It is recalled that there is a fundamental obligation under international law for ships' masters to rescue any persons in distress at sea, including asylum-seekers, and to render them all necessary assistance. Seafaring States should take all appropriate measures to ensure that masters of vessels observe this obligation strictly.

2. Rescue of asylum-seekers in distress at sea has been facilitated by the willingness of the flag States of rescuing ships to provide guarantees of resettlement required by certain coastal States as a condition for disembarkation. In has also been facilitated by the agreement of these and other States to contribute to a pool of resettlement guarantees under the DISERO scheme which should be further encouraged. All countries should continue to provide durable solutions for asylum-seekers rescued at sea.

3. In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities.

4. As a result of concerted efforts by many countries, large numbers of resettlement opportunities have been, and continue to be, provided for boat people. In view of this development, the question arises as to whether the first port of call countries might wish to examine their present policy of requiring resettlement guarantees as a precondition for disembarkation. Pending a review of practice by coastal States, it is of course desirable that present arrangements for facilitating disembarkation be continued.

5. In view of the complexity of the problems arising from the rescue, disembarkation and resettlement of asylum-seekers at sea, the High Commissioner is requested to convene at an early opportunity a working group comprising representatives of the maritime States and the coastal States most concerned, potential countries of resettlement, and representatives of international bodies competent in this field. The working group should study the various problems mentioned and elaborate principles and measures which would provide a solution and should submit a report on the matter to the Executive Committee at its thirty-third session.

[44] Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the Recommendation of the Sub-Committee o the Whole on International Protection of Refugees http://www.unhcr.org/excom/EXCOM/3ae68c4344.html.

## No. 20 (XXXI) PROTECTION OF ASYLUM-SEEKERS AT SEA[45]

*The Executive Committee,*

(a) *Noted* with grave concern the continuing incidence of criminal attacks on refugees and asylum-seekers in different areas of the world, including military attacks on refugee camps and on asylum-seekers at sea;

(b) *Expressed* particular concern regarding criminal attacks on asylum-seekers at sea in the South China Sea involving extreme violence and indescribable acts of physical and moral degradation, including rape, abduction and murder;

(c) *Addressed* an urgent call to all interested Governments to take appropriate action to prevent such criminal attacks whether occurring on the high seas or in their territorial waters;

(d) *Stressed* the desirability for the following measures to be taken by Governments with a view to preventing the recurrence of such criminal attacks:

(i) increased governmental action in the region to prevent attacks on boats carrying asylum-seekers, including increased sea and air patrols over areas where such attacks occur;

(ii) adoption of all necessary measures to ensure that those responsible for such criminal attacks are severely punished;

(iii) increased efforts to detect land bases from which such attacks on asylum-seekers originate and to identify persons known to have taken part in such attacks and to ensure that they are prosecuted;

(iv) establishment of procedures for the routine exchange of information concerning attacks on asylum-seekers at sea and for the apprehension of those responsible, and cooperation between Governments for the regular exchange of general information on the matter;

(e) *Called* upon Governments to give full effect to the rules of general international law – as expressed in the Geneva Convention on the High Seas of 1958 – relating to the suppression of piracy;

(f) *Urged* Governments to co-operate with each other and with UNHCR to ensure that all necessary assistance is provided to the victims of such criminal attacks;

(g) *Called* upon the United Nations High Commissioner for Refugees in co-operation with the International Committee of the Red Cross and other interested organizations

[45] http://www.unhcr.org/excom/EXCOM/3ae68c435c.html.

actively to seek the co-operation of the international community to intensify efforts aimed at protecting refugees who are victims of acts of violence, particularly those at sea.

## No. 15 (XXX) REFUGEES WITHOUT AN ASYLUM COUNTRY[46]

*The Executive Committee,*

Considered that States should be guided by the following considerations:

**General principles**

(a) States should use their best endeavours to grant asylum to *bona fide* asylum-seekers;

(b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of *non-refoulement*;

(c) It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum;

(d) Decisions by States with regard to the granting of asylum shall be made without discrimination as to race, religion, political opinion, nationality or country of origin;

(e) In the interest of family reunification and for humanitarian reasons, States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted;

**Situations involving a large-scale influx of asylum-seekers**

(f) In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge. States which because of their geographical situation, or otherwise, are faced with a large-scale influx should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing. Such States should consult with the Office of the United Nations High Commissioner for Refugees as soon as possible to ensure that the persons involved are fully protected, are given emergency assistance, and that durable solutions are sought;

(g) Other States should take appropriate measures individually, jointly or through the Office of the United Nations High Commissioner for Refugees or other international bodies to ensure that the burden of the first asylum country is equitably shared;

**Situations involving individual asylum-seekers**

(h) An effort should be made to resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria. In elaborating such criteria the following principles should be observed:

[46] http://www.unhcr.org/excom/EXCOM/3ae68c960.html.

(i) The criteria should make it possible to identify in a positive manner the country which is responsible for examining an asylum request and to whose authorities the asylum-seeker should have the possibility of addressing himself;
(ii) The criteria should be of such a character as to avoid possible disagreement between States as to which of them should be responsible for examining an asylum request and should take into account the duration and nature of any sojourn of the asylum-seeker in other countries;
(iii) The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account;
(iv) Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State;
(v) Reestablishment of criteria should be accompanied by arrangements for regular consultation between concerned Governments for dealing with cases for which no solution has been found and for consultation with the Office of the United Nations High Commissioner for Refugees as appropriate;
(vi) Agreements providing for the return by States of persons who have entered their territory from another contracting State in an unlawful manner should be applied in respect of asylum-seekers with due regard to their special situation.

(i) While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration;

(j) In line with the recommendation adopted by the Executive Committee at its twenty eighth session (document A/AC.96/549, paragraph 53(6), (E) (i)), where an asylum-seeker addresses himself in the first instance to a frontier authority the latter should not reject his application without reference to a central authority;

(k) Where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present asylum country due to fear of persecution or because his physical safety or freedom are endangered, the authorities of the second country should give favourable consideration to his asylum request;

(l) States should give favourable consideration to accepting, at the request of the Office of the United Nations High Commissioner for Refugees, a limited number of refugees who cannot find asylum in any country;

(m) States should pay particular attention to the need for avoiding situations in which a refugee loses his right to reside in or to return to his country of asylum without having acquired the possibility of taking up residence in a country other than one where he may have reasons to fear persecution;

(n) In line with the purpose of paragraphs 6 and 11 of the Schedule to the 1951 Convention, States should continue to extend the validity of or to renew refugee travel documents until the refugee has taken up lawful residence in the territory of another State. A similar practice should as far as possible also be applied in respect of refugees holding a travel document other than that provided for in the 1951 Convention.

# UNHCR guidelines and Position Papers

## GUIDELINES ON INTERNATIONAL PROTECTION: The application of Article 1A(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 (excerpt)[47]

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees* in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, re-edited, Geneva, January 1992). They should additionally be read in conjunction with UNHCR's Guidelines on International Protection on gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01) and on "membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02), both of 7 May 2002.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff carrying out refugee status determination in the field.

### The application of Article 1A(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

### I. INTRODUCTION

1. Trafficking in persons, the primary objective of which is to gain profit through the exploitation of human beings, is prohibited by international law and criminalized in the national legislation of a growing number of States. Although the range of acts falling within the definition of trafficking varies among national jurisdictions, States have a responsibility to combat trafficking and to protect and assist victims of trafficking.

2. The issue of trafficking has attracted substantial attention in recent years, but it is not a modern phenomenon. Numerous legal instruments dating from the late nineteenth century onwards have sought to address various forms and manifestations of trafficking.[48]

[47] http://www.unhcr.org/publ/PUBL/443b626b2.pdf.

[48] It has been estimated that between 1815 and 1957 some 300 international agreements were adopted to suppress slavery in its various forms, including for example the 1910 International Convention for the Suppression of the White Slave Traffic, the 1915 Declaration Relative to the Universal Abolition of the

These instruments remain in force and are relevant to the contemporary understanding of trafficking and how best to combat it. The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the "Trafficking Protocol")[49] supplementing the 2000 United Nations Convention against Transnational Organized Crime (hereinafter the "Convention against Transnational Crime")[50] provides an international definition of trafficking. This represents a crucial step forward in efforts to combat trafficking and ensure full respect for the rights of individuals affected by trafficking.

3. Trafficking in the context of the sex trade is well documented and primarily affects women and children who are forced into prostitution and other forms of sexual exploitation.[51] Trafficking is not, however, limited to the sex trade or to women. It also includes, at a minimum, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[52] Depending on the circumstances, trafficking may constitute a crime against humanity and, in armed conflict, a war crime.[53] A common characteristic of all forms of trafficking is that victims are treated as merchandise, "owned" by their traffickers, with scant regard for their human rights and dignity.

4. In some respects, trafficking in persons resembles the smuggling of migrants, which is the subject of another Protocol to the Convention against Transnational Crime.[54] As with trafficking, the smuggling of migrants often takes place in dangerous and/or degrading conditions involving human rights abuses. It is nevertheless essentially a voluntary act entailing the payment of a fee to the smuggler to provide a specific service. The relationship between the migrant and the smuggler normally ends either with the arrival at the migrant's destination or with the individual being abandoned en route. Victims of trafficking are distinguished from migrants who have been smuggled by the protracted nature of the exploitation they endure, which includes serious and ongoing abuses of their human rights at the hands of their traffickers. Smuggling rings and trafficking rings are nevertheless often closely related, with both preying on the vulnerabilities of people seeking international protection or access to labour markets abroad. Irregular migrants relying on the services of smugglers whom they have willingly

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Slave Trade, the 1926 Slavery Convention, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

[49] Entered into force on 25 December 2003.

[50] Entered into force on 29 September 2003.

[51] Bearing in mind the prevalence of women and girls amongst the victims of trafficking, gender is a relevant factor in evaluating their claims for refugee status. See further, UNHCR, "Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (hereinafter "UNHCR Guidelines on Gender-Related Persecution"), HCR/GIP/02/01, 7 May 2002, paragraph 2.

[52] See Article 3(a) of the Trafficking Protocol cited in paragraph 8 below.

[53] See, for instance, Articles 7(1)(c), 7(1)(g), 7(2)(c) and 8(2)(xxii) of the 1998 Statute of the International Criminal Court, A/CONF.183/9, which specifically refer to "enslavement", "sexual slavery" and "enforced prostitution" as crimes against humanity and war crimes.

[54] The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air (entered into force on 28 January 2004).

contracted may also end up as victims of trafficking, if the services they originally sought metamorphose into abusive and exploitative trafficking scenarios.

5. UNHCR's involvement with the issue of trafficking is essentially twofold. Firstly, the Office has a responsibility to ensure that refugees, asylum-seekers, internally displaced persons (IDPs), stateless persons and other persons of concern do not fall victim to trafficking. Secondly, the Office has a responsibility to ensure that individuals who have been trafficked and who fear being subjected to persecution upon a return to their country of origin, or individuals who fear being trafficked, whose claim to international protection falls within the refugee definition contained in the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (hereinafter "the 1951 Convention") are recognized as refugees and afforded the corresponding international protection.

6. Not all victims or potential victims of trafficking fall within the scope of the refugee definition. To be recognized as a refugee, all elements of the refugee definition have to be satisfied. These Guidelines are intended to provide guidance on the application of Article 1A(2) of the 1951 Convention to victims or potential victims of trafficking. They also cover issues concerning victims of trafficking arising in the context of the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The protection of victims or potential victims of trafficking as set out in these Guidelines is additional to and distinct from the protection contemplated by Part II of the Trafficking Protocol.[55]

[55] Part II of the Trafficking Protocol concerns the protection of victims of trafficking. It covers areas such as ensuring the protection of privacy and identity of the victims; providing victims with information on relevant court and administrative proceedings, as well as assistance to enable them to present their views and concerns at appropriate stages of criminal proceedings against offenders; providing victims with support for physical, psychological and social recovery; permitting victims to remain in the territory temporarily or permanently; repatriating victims with due regard for their safety; and other measures.

# INTERCEPTION OF ASYLUM-SEEKERS AND REFUGEES: THE INTERNATIONAL FRAMEWORK AND RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH[56]

## I. INTRODUCTION

1. Irregular migration has become a major challenge for many States in different parts of the world. The increase in the number of arrivals without the required documentation has raised concerns about the ability of States to control borders and access to their territory. In recent years, Governments have renewed efforts to prevent irregular migration and to combat the smuggling and trafficking of persons, in particular when undertaken by organized criminal groups.[57]

2. Many of those who are being smuggled or trafficked are migrants in search of a better life, hoping to find employment opportunities and economic prosperity abroad. Others are asylum-seekers and refugees who flee from persecution, armed conflict, and other threats to their life and freedom. Both groups are exploited by criminal traffickers or smugglers who seek to make illicit profit from offering their services to the vulnerable and the disadvantaged.

3. In order to combat human smuggling and trafficking, States have adopted, *inter alia*, the practice of "intercepting" persons travelling without the required documentation - whether in the country of departure, in the transit country, within territorial waters or on the high seas, or just prior to the arrival in the country of destination. In some instances, interception has affected the ability of asylum-seekers and refugees to benefit from international protection.

4. Based on a working definition outlined below, this paper describes the current State practice on interception. It sets out the international legal and policy framework in which interception takes places, including its impact on asylum-seekers and refugees, and puts forward a number of recommendations for a comprehensive, protection-oriented approach.

## II. INTERCEPTION AND OTHER MEASURES AGAINST IRREGULAR MIGRATION

[56] Executive Committee of the High Commissioner's programme,18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000.
http://www.unhcr.org/excom/EXCOM/3ae68d144.pdf.

[57] UNHCR supports the distinction made by the Vienna Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (created by the General Assembly in its resolution 53/111 of 9 December 1998) between smuggled migrants and trafficked persons. As currently defined in the two draft Protocols supplementing the main Draft Convention, trafficking concerns the recruitment and transportation of persons for a criminal purpose, such as prostitution or forced labour, and usually involves some level of coercion or deception. Smuggling, on the other hand, involves bringing a migrant illegally into another country, but normally without continued exploitation of the smuggled person after arrival.

5. The paragraphs that follow describe various types of interception as practised by States, the reasons for these measures and their impact on asylum-seekers and refugees. They are introduced by a brief summary of current discussions at international level that relate to irregular migration.

A. International Cooperation against smuggling and trafficking of persons

6. Interception has been discussed within the context of a number of processes and consultations, in particular at the regional level, with a focus *inter alia* on combating irregular migration. These include the Asia-Pacific Consultation (APC), the South Asian Association for Regional Cooperation (SAARC), the Inter-Governmental Consultations (IGC), the Budapest Process in Europe, and the Regional Conference on Migration ("Puebla Process") in the Americas.

7. Initiated in 1991, the Budapest process created a structured framework between the European Union and Central and Eastern European countries for the prevention of irregular migration and related control issues. This process resulted in the adoption of recommendations *inter alia* relating to pre-entry and entry controls, return and readmission, information exchange, technical and financial assistance and measures to combat organized crime with regard to trafficking and smuggling of persons. In Latin America, within the framework of the Regional Conference on Migration, Member States have been discussing programmes for the return of undocumented migrants from outside the region to countries of origin with the assistance of the International Migration for Migration (IOM), in particular those intercepted on boats in international waters.

8. Other examples of a comprehensive approach are provided by the country-specific action plans of the European Union's High Level Working Group on Asylum and Migration (HLWG). These plans address the phenomenon of composite flows and comprise a number of elements relating to the root causes of migratory and refugee movements. They also contain control measures to combat irregular migration, such as increasing the number and effectiveness of airline liaison officers and immigration officials posted abroad.

9. The issue of combating smuggling and trafficking of persons has also featured prominently on the agenda of the European Union and of several international organizations, including the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), the International Organization for Migration (IOM), the Inter-Parliamentary Union, and several United Nations agencies, such as the International Labour Organization (ILO)

B. Interception and State Practice

(i) Defining interception

10. An internationally accepted definition of interception does not exist. Its meaning has to be derived from an examination of past and current State practice. For the purpose of this paper, interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.

(ii) Description of interception practices

11. Interception of undocumented or improperly documented persons[58] has taken place for many years, in a variety of forms. Although interception frequently occurs in the context of large-scale smuggling or trafficking of persons, it is also applied to individuals who travel on their own, without the assistance of criminal smugglers and traffickers.

12. The practice can occur in the form of physical interception or - as it is sometimes called - interdiction of vessels suspected of carrying irregular migrants or asylum-seekers, either within territorial waters or on the high seas. Some countries try to intercept boats used for the purpose of smuggling migrants or asylum-seekers as far away as possible from their territorial waters. Following the interception, passengers are disembarked either on dependent territories of the intercepting country, or on the territory of a third country which approves their landing. In most instances, the aim after interception is return without delay of all irregular passengers to their country of origin.

13. Aside from the physical interdiction of vessels, many countries also put in place a number of administrative measures with the aim of intercepting undocumented migrants. At key locations abroad, such as the main transit hubs for global migratory movements, States have deployed extraterritorially their own immigration control officers in order to advise and assist the local authorities in identifying fraudulent documents. In addition, airline liaison officers, including from private companies, have been posted at major international airports both in countries of departure and in transit countries, to prevent the embarkation of improperly documented persons. A number of transit countries have received financial and other assistance from prospective destination countries in order to enable them to detect, detain and remove persons suspected of having the intention to enter the country of destination in an irregular manner.

(iii) Reasons for interception

14. Such interception practices have been adopted by States for a variety of reasons. Given their concern over a global increase in irregular migration and the number of spontaneous arrivals, interception is mostly practiced in order to disrupt major smuggling and trafficking routes. More specifically, in the case of smuggled asylum-seekers, States have expressed their apprehension as to undocumented arrivals who submit applications for asylum or refugee status on grounds which do not relate to any criteria justifying the granting of protection. These States consider that the smuggling of such persons will

[58] In this paper, the term “undocumented” or “improperly documented” persons refers to those who are not in possession of the required documentation for travel to and entry into the country of intended destination.

lead, or indeed is already leading, to the misuse of established status determination procedures, and risks decreasing their ability to offer asylum and protection on the same terms as in the past.

15. Many of the undocumented asylum-seekers are found to be irregular movers, that is refugees who had already found protection in another country and for whom protection continues to be available.[59] The perception is spreading, especially among traditional resettlement countries, that such refugees are seeking to circumvent established resettlement channels by using the services of criminal smugglers.

16. Finally, States have pointed out that smuggling often endangers the lives of migrants, in particular those travelling in unseaworthy boats. Their interception contributes to the rescue of persons in distress at sea and can help to save lives.

C. Impact on asylum-seekers and refugees

17. States have a legitimate interest in controlling irregular migration. Unfortunately, existing control tools, such as visa requirements and the imposition of carrier sanctions, as well as interception measures, often do not differentiate between genuine asylum-seekers and economic migrants. National authorities, including immigration and airline officials posted abroad, are frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection.

18. Immigration control measures, although aimed principally at combating irregular migration, can seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum. As pointed out by UNHCR in the past, the exclusive resort to measures to combat abuse, without balancing them by adequate means to identify genuine cases, may result in the *refoulement* of refugees.[60]

19. Recent bilateral arrangements for intercepting and arresting asylum-seekers in a transit country, including women and children, have given rise to particular protection concerns. In the absence of an effective protection regime in the transit country, intercepted asylum-seekers are at risk of possible *refoulement* or prolonged detention. The refusal of the first country of asylum to readmit irregular movers may also put refugees "in orbit", without any country ultimately assuming responsibility for examining their claim. Current efforts to increase cooperation between States for the purposes of intercepting and returning irregular migrants also fail to provide adequate safeguards for the protection of asylum-seekers and refugees. In UNHCR's view, it is therefore crucial to ensure that interception measures are implemented with due regard to the international legal framework and States' international obligations.

[59] See Conclusion No. 58 (XL) of 1989 (A/AC.96/737, para.25) concerning the problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection.
[60] See Note on International Protection of 3 July 1998 (A/AC.96/898), para. 16.

## III. THE INTERNATIONAL LEGAL FRAMEWORK

20. International law provides important parameters for States undertaking interception as a means to combat irregular migration. Reference to these parameters is to be found within a complex framework of existing and emerging international legal principles deriving from international maritime law, criminal law, the law of State responsibility, human rights law and, in particular, international refugee law.

### A. International refugee law

#### (i) Interception and non-refoulement

21. The fundamental principle of *non-refoulement* reflects the commitment of the international community to ensure that those in need of international protection can exercise their right to seek and enjoy in other countries asylum from persecution, as proclaimed in Article 14 (1) of the Universal Declaration of Human Rights. It applies whenever a State or one of its agents contemplates the return of persons "in any manner whatsoever" to territories where they may be subjected to persecution, irrespective of whether or not they have been formally recognized as refugees.[61] The overriding importance of the observance of *non-refoulement* – both at the border and within the territory of a State - has been repeatedly reaffirmed by the Executive Committee which has also recognized that the principle is progressively acquiring the character of a peremptory rule of international law.[62]

22. The direct removal of a refugee or an asylum-seeker to a country where he or she fears persecution is not the only manifestation of *refoulement*. The removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution constitutes indirect *refoulement*, for which several countries may bear joint responsibility.

23. The principle of *non-refoulement* does not imply any geographical limitation. In UNHCR's understanding, the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and human rights law.

#### (ii) Interception and illegal entry

24. The indiscriminate application by States of interception measures to asylum-seekers derives from the assumption that genuine refugees should depart from their country of origin or from countries of first asylum in an orderly manner. However, some countries

[61] Conclusion No. 6 (XXVIII) of 1977 (A/AC.96/549, para.53(4)).
[62] Conclusion No. 25 (XXXIII) of 1982 (A/AC.96/614, para.70(1)).

of origin impose strict exit control measures, which makes it difficult for refugees to leave their countries legally.

25. The fact that asylum-seekers and refugees may not be able to respect immigration procedures and to enter another country by legal means has been taken into account by the drafters of the 1951 Convention relating to the Status of Refugees. Article 31 (1) of the 1951 Convention prohibits the penalization of refugees for illegal entry or presence, provided they come directly from countries where their life was threatened and show "good cause" for violating applicable entry laws.

(iii) Interception and irregular movement

26. Many intercepted asylum-seekers and refugees have moved from a country other than that of their origin. The phenomenon of refugees who move in an irregular manner from countries in which they had already found protection, in order to seek asylum or resettlement elsewhere, is a growing concern. The return of such refugees to countries of first asylum can be envisaged whenever the refugees will be protected there against *refoulement*; will be permitted to remain there and treated in accordance with recognized basic human standards until a durable solution has been found.[63]

27. However, in the absence of specific agreements to allow refugees who moved in an irregular manner to re-enter the country in which they had already found protection, efforts to return irregular movers have not always been successful. In addition, refugees who initially found protection in the country of first asylum, sometimes feel compelled to depart spontaneously, for instance due to a deterioration of protection standards in the country of first asylum. This may require concerted international efforts to address such problems, and to assist States in building their capacity to establish effective protection mechanisms, not least in an effort to promote international solidarity.

B. The emerging legal framework for combating criminal and organized smuggling and trafficking of persons

28. In its resolution 53/111 of 9 December 1998, the General Assembly decided to establish an intergovernmental Ad Hoc Committee for the purpose of elaborating a comprehensive international convention against organized crime, including the drafting of international instruments addressing the trafficking in persons, especially women and children, and the smuggling in and transport of migrants.

29. UNHCR, along with other international organizations, has actively participated in the discussions of the Ad Hoc Committee in Vienna.[64] The Office shares the concerns raised

[63] Conclusion No. 58 (XL) of 1989 (A/AC.96/737, para. 25).

[64] Note by the United Nations High Commissioner for Human Rights, International Organization for Migration, United Nations High Commissioner for Refugees, and the United Nations Children's Fund on

by many States that the criminal and organized smuggling of migrants, on a large scale, may lead to the misuse or abuse of established national procedures for both regular immigrants and asylum-seekers.

30. The current draft Protocol against the Smuggling of Migrants by Land, Air and Sea,[65] prepared by the Ad Hoc Committee, includes a draft provision which would authorize States Parties to intercept vessels on the high seas, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea.[66]

31. It is encouraging that efforts in this context are directed to elaborating international instruments which not only serve the purpose of punishing criminal smugglers and traffickers, but which also provide proper protection to smuggled and trafficked persons, in particular asylum-seeking women and children. It is important that the current draft Protocols maintain explicit references to the 1951 Convention and the 1967 Protocol and, as regards the draft Protocol against Smuggling of Migrants, to the principle of *nonrefoulement*. UNHCR also appreciates that delegations in Vienna repeatedly stated that these instruments do not aim at punishing or criminalizing persons who are being smuggled or trafficked.

32. The safeguards contained in the current draft Protocols should be maintained and, where appropriate, further strengthened, through appropriate references to international refugee law and human rights law. In UNHCR's view, the elaboration of these two Protocols represents a unique opportunity to design an international framework which could provide a solid legal basis for reconciling measures to combat the smuggling and trafficking of persons, including through interception, with existing obligations under international law towards asylum-seekers and refugees.

## IV. RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH

33. In the absence of a comprehensive approach, the application of stringent measures alone for intercepting undocumented migrants is unlikely to be successful, and may well adversely affect refugees and asylum-seekers. The adoption of interception policies in certain regions, in isolation from other measures, risks diverting the smuggling and trafficking routes to other regions, thereby increasing the burden on other States.

34. Together with States and other international and national actors, UNHCR is prepared to contribute to the ongoing discussion on the problem of organized smuggling as it affects asylum-seekers and refugees. Further progress will require a protection-oriented approach which addresses the problem through a variety of measures. The following elements are intended as basis for a discussion within the Executive Committee on a

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the Protocol concerning migrant smuggling and trafficking in persons (A/AC.254/27) of 8 February 2000, and Corrigendum (A/AC.354/27/Corr.1) of 22 February 2000.

[65] A/AC.254/4/Add.1.Rev.5.

[66] See draft Article 7 *bis*.

comprehensive approach, with a view to the possible adoption of a conclusion on such an approach:[67]

(a) Interception and other enforcement measures should take into account the fundamental difference, under international law, between refugees and asylum-seekers who are entitled to international protection, and other migrants who can resort to the protection of their country of origin;

(b) Intercepted persons who present a claim for refugee status should enjoy the required protection, in particular from *refoulemen*t, until their status has been determined. For those found to be refugees, intercepting States, in cooperation with concerned international agencies and NGOs, should undertake all efforts to identify a durable solution, including, where appropriate, through the use of resettlement;

(c) Alternative channels for entering asylum countries in a legal and orderly manner should be kept open, in particular for the purpose of family reunion, in order to reduce the risk that asylum seekers and refugees will resort to using criminal smugglers. By adopting appropriate national legislation, States should enforce measures to punish organized criminal smugglers and to protect smuggled migrants, in particular women and children;

(d) States should, furthermore, examine the outcome of interception measures on asylum-seekers and refugees, and consider practical safeguards to ensure that these measures do not interfere with obligations under international law, for instance, through establishing an appropriate mechanism in transit countries to identify those in need of protection, and by training immigration officers and airline officials in international refugee law;

(e) In order to alleviate the burden of States that are disproportionally affected by large numbers of spontaneous and undocumented asylum-seekers and refugees, other States should give favourable consideration to assisting the concerned governments in providing international protection to such refugees, based on the principle of international solidarity and within a burden-sharing framework;

(f) In regions in which only a few countries have become party to the 1951 Convention and the 1967 Protocol, States Parties should actively promote a broader accession to the 1951 Convention and the 1967 Protocol throughout that region, including the establishment of fair and effective procedures for the determination of refugee status, in particular in transit countries, and the adoption of implementing legislation;

(g) In cases where refugees and asylum-seekers have moved in an irregular manner from a country in which they had already found protection,[68] enhanced efforts should be undertaken for their readmission including, where appropriate, through the assistance of

[67] The desirability of a comprehensive approach by the international community to the problems of refugees has been already acknowledged in Conclusion No. 80 (XLVII) of 1996 (A/AC.96/878, para. 22).

[68] Conclusion No. 58 (XL) (A/AC.96/737, para.25).

concerned international agencies. In this context, States and UNHCR should jointly analyze possible ways of strengthening the delivery of protection in countries of first asylum. There could also be more concerted efforts to raise awareness among refugees of the dangers linked to smuggling and irregular movements;

(h) In order to discourage the irregular arrival of persons with abusive claims, rejected cases which are clearly not deserving of international protection under applicable instruments should be returned as soon as possible to countries of origin, which should facilitate and accept the return of their own nationals. States should further explore proposals to enhance the use and effectiveness of voluntary return programmes, for instance with the assistance of IOM.

## V. CONCLUSION

35. Interception, whether implemented physically or administratively, represents one mechanism available to States to combat the criminal and organized smuggling and trafficking of migrants across international borders. UNHCR invites governments to examine possibilities to ensure, through the adoption of appropriate procedures and safeguards, that the application of interception measures will not obstruct the ability of asylum-seekers and refugees to benefit from international protection. Further analysis of the complex causes of irregular migration may be necessary, including their relationship with poverty and social development. Only a comprehensive approach, respecting principles of international refugee and human rights law, is likely to succeed in both combating irregular migration and in preserving the institution of asylum.

# Recommendation of the Parliamentary Assembly of the Council of Europe[69]

## Recommendation 1645 (2004)[70]:

### Access to assistance and protection for asylum-seekers at European seaports and coastal areas

1. The Parliamentary Assembly is deeply concerned about the increasing number of people who put their life and safety at risk by attempting to enter the territory of Council of Europe member states on board unsafe and overcrowded boats or hiding on board ships, secreted in containers, trailer carriers or other facilities, travelling in conditions of extreme hardship which sometimes result in their death.

2. The Assembly recalls its Recommendation 1467 (2000) on clandestine immigration and the fight against traffickers, in which it voiced its shock at the death of fifty-eight Chinese clandestine passengers who were found in a container in the port of Dover, and affirms its dismay at the death of eight Turkish nationals of Kurdish origin, including three children, found in a container in the port of Wexford (Ireland) in 2001. To these dramatic deaths innumerable other persons should be added who have lost their lives drowning in the Strait of Gibraltar, the Adriatic, the Aegean and off the shores of Sicily, while fleeing from hardship, extreme poverty, discrimination and persecution.

3. The Assembly reaffirms its recommendations designed to improve the protection and treatment afforded to asylum-seekers, in particular its Recommendation 1163 (1991) on the arrival of asylum-seekers at European airports; Recommendation 1236 (1994) on the right of asylum; Recommendation 1309 (1996) on the training of officials receiving asylum-seekers at border points; Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe; Recommendation 1374 (1998) on the situation of refugee women in Europe; and Recommendation 1440 (2000) on the restrictions on asylum in the member states of the Council of Europe and the European Union.

4. Despite statistics gathered by the International Maritime Organisation (IMO), it is not possible to know how many people manage to gain clandestine entry into Council of Europe member states by travelling on board ships or unsafe craft, as shipping companies do not systematically report stowaway and rescue incidents. However, the increasing number of those who are apprehended while trying to do so, as well as the number of unfortunate victims, show that this is not a negligible phenomenon.

5. Aware that this manner of entry can be used by genuine asylum-seekers as well as other migrants, the Assembly reiterates that those in need of international protection should neither be punished nor deprived of the right to lodge an asylum application in

[69] *Assembly debate* on 29 January 2004 (6th Sitting) (see Doc.10011, report of the Committee on Migration, Refugees and Population, rapporteur: Mr Danieli). *Text adopted by the Assembly* on 29 January 2004 (6th Sitting).
[70] http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/EREC1645.htm.

compliance with the 1951 Geneva Convention on the Status of Refugees on account of their clandestine manner of entry or attempted entry.
6. The Assembly is concerned that effective access to the asylum procedure for those who arrive at European seaports or coastal areas may be hindered by legal and practical hurdles, including lack of independent legal advice, limited availability of professional interpreters and inadequate information on how to lodge an asylum application. In addition, in the case of clandestine passengers, there is a concern that their effective access to the asylum procedure may be impeded by an unclear and non-harmonised legal framework applying to them as well as by the concurrent responsibilities of several actors.

7. The Assembly regrets that often, especially in cases of large-scale arrivals in coastal areas, the only interviews taking place before the adoption of an expulsion order have the exclusive purpose of determining the identity and the nationality of the person concerned, with the result that a number of potential refugees may be returned in breach of the principle of *non-refoulement* risking their lives and safety. On the contrary, effective access to the asylum procedure should imply that every person seeking entry into a Council of Europe member state should have the possibility of expressing the reasons why he or she is trying to do so in full, in an individual interview with the relevant authorities of the country.

8. Similarly, the Assembly fears that the effective exercise of the right of appeal against the refusal to receive an asylum application, or against expulsion, may be nullified by expeditious or accelerated procedures that do not allow sufficient time to lodge an appeal, by inadequate information, lack of independent and free legal advice and representation and by the limited availability of professional interpreters.

9. The Assembly also notes with regret that, despite the large numbers of asylum-seekers and migrants arriving on European shores every year, permanent reception facilities in the areas concerned are still the exception, and that their material and humanitarian conditions are often below acceptable standards.

10. The Assembly therefore recommends that the Committee of Ministers:

i. instruct the relevant committees to review the law and practice of Council of Europe member states regarding access to the asylum procedure for people arriving at European coastal areas, especially in cases of group or mixed arrivals, and on this basis, to make appropriate recommendations to member states;

ii. instruct the relevant committees to review the law and practice of Council of Europe member states applicable to clandestine passengers who wish to lodge an asylum application, with a view to drafting a code of good practice and, on this basis, make appropriate recommendations to member states;

iii. call on member states to:

*a*. ensure that those who wish to apply for asylum at seaports and coastal areas are granted unimpeded access to the asylum procedure, including through interpretation in their language or, if this is not possible, in a language they understand, and to free and independent legal advice;

*b*. ensure that every person seeking entry at seaports or coastal areas be given the possibility of explaining in full the reasons why he or she is trying to do so, in an individual interview with the relevant authorities;

*c*. set up a system to ensure the permanent availability of independent and professional legal advice and representation in the field of asylum and migration at seaports and coastal areas, and monitor its quality;

*d*. take full responsibility for immigration control at seaports, including through the investment in methods of prevention and detection and, where necessary, the reinforcement of police and immigration staff, working in partnership with private actors involved in seaport activities;

*e*. improve international co-operation between police, judicial and immigration authorities through the exchange of intelligence and information with a view to dismantling networks of smugglers operating at European and international level;

*f*. introduce harmonised criminal legislation to punish the smuggling of migrants and the trafficking of human beings;

*g*. ensure that vulnerable persons, such as unaccompanied minors and separated children, the elderly, the sick and pregnant women who arrive at seaports or coastal areas, even if they do not apply for asylum, be given appropriate assistance and accommodation pending their being sent back or being granted legal status; in addition, unaccompanied minors and separated children should be provided with effective legal guardianship as soon as their presence comes to the attention of the authorities of a member state;

*h*. establish appropriate and permanent reception structures in coastal areas and near seaports, to provide accommodation for the new arrivals, whether they apply for asylum or not;

*i*. accept responsibility for processing asylum applications of clandestine passengers when the first port of call on the planned route of the ship is on their national territory;

*j*. in the context of their responsibilities for immigration control, conduct sea patrolling operations in such a way as to fully comply with the 1951 Geneva Convention on the Status of Refugees and the 1950 European Convention on Human Rights, by avoiding sending people back to countries where they would be at risk of persecution or human rights violations;

iv. ask the Council of Europe Development Bank to give positive consideration to funding requests from member states to build such reception structures;

v. invite the United Nations High Commission for Refugees (UNHCR) to:

*a*. continue its work on the issue of clandestine passengers who are in need of international protection;

*b*. continue co-operation with the international community and, in particular, with the IMO and the European Union in the search for effective solutions for clandestine passengers, including consideration of the viability of a single legal instrument on the treatment of clandestine passengers seeking asylum, rules on the determination of the state responsible for processing their asylum applications, their treatment on board ship and the maximum duration of custody on board ship.

**Recommendation of the Parliamentary Assembly of the Council of Europe**[71]

**Recommendation 1449 (2000)**[72]

**Clandestine migration from the south of the Mediterranean into Europe**

1. The Parliamentary Assembly is deeply concerned at the number of victims of clandestine migration in the Mediterranean and by the extremely dangerous and inhuman conditions in which clandestine migrants, a large number of whom are women and minors, find themselves every day.
2. The Assembly notes the absence of exact figures and a shortage of reliable studies concerning clandestine migration from the south of the Mediterranean into Europe.
3. The Assembly believes that living under clandestine conditions invariably deprives people of their fundamental and social rights and their human dignity and exposes them to insecure living conditions for as long as they remain clandestine.
4. The Assembly recalls that emigration is a fundamental human right.
5. The Assembly considers that the complex problems caused by clandestine migration into and within the Council of Europe's member states require urgent solutions to which the Organisation can and must contribute in an active and specific manner.
6. The Assembly is convinced that this phenomenon, which is particularly pronounced in the Mediterranean, cannot be remedied without open and innovative dialogue and lasting co-operation between the countries on its northern and southern shores, and that the ever closer involvement in the Assembly's work of the states on the southern shore of the Mediterranean, such as Morocco, would be a decisive step in the battle against the true causes of clandestine migration.
7. The Assembly acknowledges that clandestine migration is not restricted to the Strait of Gibraltar alone and that illegal migrants also come from regions other than North Africa, in particular eastern Europe, South America and sub-Saharan Africa.
8. The Assembly recalls its earlier work on the strengthening of co-operation in the Mediterranean, for example its Recommendation 1359 (1998) on sustainable development in the Mediterranean and Black Sea basins, its Recommendation 1329 (1997) on the follow-up to the Mediterranean Conference on Population, Migration and Development (Palma de Mallorca, 15-17 October 1996), its Recommendation 1306 (1996) on migration from the developing countries to the European industrialised countries, its Recommendation 1249 (1994) on co-operation in the Mediterranean Basin, its Recommendation 1211 (1993) on clandestine migration: traffickers and employers of clandestine migrants, and its Recommendation 1154 (1991) on North African migrants in Europe.
9. The Assembly considers that promoting mobility and free circulation of people in Europe on the one hand and stepping up border controls on the other is somewhat contradictory and counter-productive for co-operation in the Mediterranean Basin.

[71] Assembly debate on 28 January 2000 (8th Sitting) (see Doc. 8599, report of the Committee on Migration, Refugees and Demography, rapporteur: Mrs Guirado). Text adopted by the Assembly on 28 January 2000 (8th Sitting).
[72] http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/EREC1449.htm.

10. The Assembly is convinced that the restrictions on lawful migration actually increase the likelihood of people entering Europe illegally and strengthen the image of a Fortress Europe, and that clandestine migration in the Mediterranean has increased since the early 1990s, suggesting that the action taken to date has been of limited effect.

11. The Assembly notes that these measures are an ever stronger incentive to those who exploit the hopes of others in what is in fact a cruel traffic in human beings, using increasingly sophisticated and inhuman means to make money out of clandestine migration.

12. The Assembly is alarmed at the increasing number of women, minors and other vulnerable persons among clandestine passengers.

13. The Assembly considers that restrictions of this kind have no humanitarian foundation and that the groups they hit worst are those most in need of practical solutions to the hardship and inequalities and development differentials they experience daily in their countries south of the Mediterranean.

14. The Assembly therefore recommends that the Committee of Ministers:

i. invite the Spanish authorities to set up a permanent migration monitor in southern Spain (the most sensitive point of entry for Mediterranean-Europe emigration) in conjunction with the Council of Europe. Its chief objective would be to analyse the intrinsic dynamics of clandestine migration and the outlook for migration movements across the Mediterranean, and to conduct research into the number of clandestine migration victims as well as the causes and effects of clandestine migration in the Mediterranean and the impact and practices of trafficking in human beings and organised crime in the region;

ii. establish or step up dialogue with the competent authorities, ministries and non-governmental organisations on the southern shores of the Mediterranean with a view to implementing on-going co-operation on the economic, political and sociological causes of the problem;

iii. make this co-operation a reality, involving the International Organization for Migration (IOM), through new joint approaches to such sensitive issues as:

a. the possibility of temporary or seasonal work for migrants;
b. the role of consulates in the implementation of visa policies;
c. the readmittance of clandestine migrants;
d. police co-operation between the two shores of the Mediterranean;
e. the role of third party states and states of destination;

iv. support the corresponding policies of decentralised co-operation, as promoted by the Congress of Local and Regional Authorities of Europe;

v. support the "trans-Med", programme of the Council of Europe's North-South Centre in the fields of awareness-raising, information on the social and cultural phenomena linked to immigration and the role migrants can play in co-operation and development in both the country of arrival and the country of origin;

vi. promote, in co-operation with the IOM, notably in the framework of its strategy on the western Mediterranean, an education and information policy on clandestine migration, both north and south of the Mediterranean;

vii. consider the possibilities, at a forthcoming quadripartite meeting, of the MEDA programme financing projects and programmes designed to improve the humanitarian situation of clandestine migrants in the Mediterranean;

viii. invite the member states, particularly those on the northern shore of the Mediterranean:

a. to step up bilateral co-operation with the southern shore of the Mediterranean in the field of illegal migration;

b. to set up independent structures to receive clandestine migrants and ensure that their fundamental rights are respected after their arrival;

ix. invite the receiving states to develop, in co-operation with non-governmental organisations and local authorities, training and development aid programmes at local level in the migrants' countries of origin.

# INTERNATIONAL HUMAN RIGHTS LAW

# INTERNATIONAL HUMAN RIGHTS LAW

Human rights law focuses on preserving the dignity and well-being of every individual. Acknowledging the complementary nature of international refugee and human rights law and considering the multifaceted linkages between refugee issues and human rights the following chapter offer a compilation of human rights norms and instruments which are of particular relevance for the protection of refugees, asylum-seekers and other persons of concern.

## Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[73]

***Adopted 10 December 1984***
***Entered into force 26 June 1987***

***Selected Provision***

Article 3

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

## International Covenant on Civil and Political Rights[74]

***Adopted 16 December 1966***
***Entered into force 23 March 1976***

***Selected Provisions***

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance

[73] 213 United Nations Treaty Series 221. http://www.ohchr.org/english/law/cat.htm.
[74] 999 United Nations Treaty Series 171. http://www.ohchr.org/english/law/ccpr.htm.

with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to

guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to

apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

**International Covenant on Economic, Social and Cultural Rights**
***Adopted on 16 December 1966***
***Entered into force on 3 January 1976***[75]

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

[75] 993 United Nations Treaty Series 14531 http://www.ohchr.org/english/law/cescr.htm.

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d ) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

**Human Rights Committee, General Comment 31[76]**
**Nature of the General Legal Obligation on States Parties to the Covenant**[77]
*Adopted 29 March 2004*

***Selected Paragraphs***

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

**Convention on the Rights of the Child[78]**
***Adopted 20 November 1989***
***Entered into force 2 September 1990***

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

[76] http://www.ohchr.org/english/bodies/hrc/comments.htm.
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument.
[77] International Covenant on Civil and Political Rights.
[78] 1577 UNTS 27531 http://www.ohchr.org/english/law/crc.htm.

**International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**[79]

***Adopted 18 December 1990***
***Entered into force 1 July 2003***

The Convention, also known as the Migrants Rights Convention, is the most comprehensive international treaty on the rights of all migrants and members of their families. It sets forth international standards for the treatment, welfare and rights of migrant workers regardless of their status, as well as setting out the obligations of the states who host them.

***Selected Provisions***

Article 8

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.

2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

Article 10

No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 17

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

4. During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or

[79] 2220 UNTS 39481 http://www.ohchr.org/english/law/cmw.htm.

her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.

5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.

7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.
2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

Article 35

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration as provided in part VI[80] of the present Convention.

Article 68

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

(b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

[80] Part VI of the Convention addresses "Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families".

(c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

Article 70

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

Article 71

1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.

2. As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.

## Recommended Principles and Guidelines on Human Rights and Human Trafficking (excerpt)[81]

### Recommended Principles on Human Rights and Human Trafficking[82]

#### The primacy of human rights

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.

2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.

3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

#### Preventing trafficking

4. Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.

5. States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.

6. States shall exercise due diligence in identifying and eradicating public-sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking shall be investigated, tried and, if convicted, appropriately punished.

#### Protection and assistance

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

8. States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.

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[81] Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1). http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument .

[82] The term "trafficking", as used in the present Principles and Guidelines, refers to the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (article 3 (a)).

9. Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.

10. Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.

11. Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

**Criminalization, punishment and redress**

12. States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts[83] and related conduct.[84]

13. States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.

14. States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.

15. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.

16. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.

17. States shall ensure that trafficked persons are given access to effective and appropriate legal remedies.

[83] For the purposes of the present Principles and Guidelines, the "component acts" and "component offences" of trafficking are understood to include the recruitment, transportation, transfer, harbouring or receipt of persons over eighteen years of age by means of threat, force, coercion or deception for the purpose of exploitation. The recruitment, transportation, transfer, harbouring or receipt of a person under eighteen years of age constitute component acts and component offences of trafficking in children. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, articles 3 (a) and 3 (c).

[84] For the purposes of the present Principles and Guidelines, conduct and offences "related to" trafficking are understood to include: exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, article 3 (a).

## Selected Recommended Guidelines on Human Rights and Human Trafficking

### Guideline 1: Promotion and protection of human rights

**Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.
2. Consulting with judicial and legislative bodies, national human rights institutions and relevant sectors of civil society in the development, adoption, implementation and review of anti-trafficking legislation, policies and programmes.
3. Developing national plans of action to end trafficking. This process should be used to build links and partnerships between governmental institutions involved in combating trafficking and/or assisting trafficked persons and relevant sectors of civil society.
4. Taking particular care to ensure that the issue of gender-based discrimination is addressed systematically when anti-trafficking measures are proposed with a view to ensuring that such measures are not applied in a discriminatory manner.
5. Protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.
6. Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.
7. Establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions. Consideration should be given to assigning this role to independent national human rights institutions where such bodies exist. Non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures.
8. Presenting detailed information concerning the measures that they have taken to prevent and combat trafficking in their periodic reports to the United Nations human rights treaty-monitoring bodies.[85]

[85] The human rights treaty-monitoring bodies include the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against

9. Ensuring that bilateral, regional and international cooperation agreements and other laws and policies concerning trafficking in persons do not affect the rights, obligations or responsibilities of States under international law, including human rights law, humanitarian law and refugee law.

10. Offering technical and financial assistance to States and relevant sectors of civil society for the purpose of developing and implementing human rights-based anti-trafficking strategies.

**Guideline 2: Identification of trafficked persons and traffickers**

**Trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process — such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place.**

**States are also obliged to exercise due diligence in identifying traffickers,[86] including those who are involved in controlling and exploiting trafficked persons.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.

2. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.

3. Ensuring cooperation between relevant authorities, officials and non-governmental organizations to facilitate the identification and provision of assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness.

4. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required.

5. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

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Women; the Committee on the Elimination of Racial Discrimination; the Committee against Torture; and the Committee on the Rights of the Child.

[86] The term "traffickers", where it appears in the present Principles and Guidelines, is used to refer to: recruiters; transporters; those who exercise control over trafficked persons; those who transfer and/or maintain trafficked persons in exploitative situations; those involved in related crimes; and those who profit either directly or indirectly from trafficking, its component acts and related offences.

6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.

7. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

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**Guideline 6: Protection and support for trafficked persons**

**The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.

2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.

3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.

4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.

5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.

6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.

7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).

8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

**Guideline 7: Preventing trafficking**

**Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information.**

**States, in partnership with intergovernmental and non-governmental organizations and where appropriate, using development cooperation policies and programmes, should consider:**

1. Analysing the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues.
2. Developing programmes that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups.
3. Improving children's access to educational opportunities and increasing the level of school attendance, in particular by girl children.
4. Ensuring that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage and health and security issues, including exposure to HIV/AIDS) as well as avenues available for legal, non-exploitative migration.
5. Developing information campaigns for the general public aimed at promoting awareness of the dangers associated with trafficking. Such campaigns should be informed by an understanding of the complexities surrounding trafficking and of the reasons why individuals may make potentially dangerous migration decisions.
6. Reviewing and modifying policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws.
7. Examining ways of increasing opportunities for legal, gainful and non-exploitative labour migration. The promotion of labour migration by the State should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrant workers.
8. Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations.
9. Adopting measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.

# INTERNATIONAL CRIMINAL LAW

**Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime**[87]

***Adopted 15 November 2000***
***Entered into force 25 December 2003***

The basic purpose of the Protocol is to prevent and combat trafficking, to protect and assist victims and to promote international cooperation. The protection of, and assistance to, victims is specified as a core purpose of the Protocol. The Protocol requires that particular attention be paid to combat and prevent trafficking in women and children, while maintaining the basic principle that all forms of trafficking should be covered by the Protocol. A definition of the term "trafficking in persons" is provided in the Protocol, as well as a number of mandatory requirements relating to protection of and assistance to trafficked persons that State Parties are obliged to fulfil. The savings clause in Article 14 ensures that the Protocol does not affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian, human rights and refugee law.

**Preamble**

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, *inter alia*, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and

[87] http://www.ohchr.org/english/law/protocoltraffic.htm.

punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

## I. General provisions

### Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

### Article 2

Statement of purpose

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

### Article 3

Use of terms

For the purposes of this Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph ( a ) of this article;

(d) "Child" shall mean any person under eighteen years of age.

**Article 4**

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

**Article 5**

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

## II. Protection of victims of trafficking in persons

**Article 6**

Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons,

including, *inter alia*, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

**Article 7**

Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

**Article 8**

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

## III. Prevention, cooperation and other measures

**Article 9**

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.
3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

**Article 10**

Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

**Article 11**

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

**Article 12**

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

**Article 13**

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

## IV. Final provisions

### Article 14

Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

### Article 15

Settlement of disputes

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

### Article 16

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

**Article 17**

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

**Article 18**

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed

amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

**Article 19**

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

**Article 20**

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness whereof, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

## Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime[88]

***Adopted 15 November 2000***
***Entered into force 28 January 2004***

The protocol provides for a definition of "smuggling" and requires State Parties to make the smuggling of migrants for financial or other material benefit a criminal offence under their national laws. The fundamental policy set by the Protocol is that its focuses its strategy to combat smuggling on the act of smuggling and not on migration itself. The Protocol also contains safeguards in relation to the rights, legal status and safety of smuggled migrants and illegal residents, including those who are also asylum-seekers. One of the key safeguards is the reference to international law, including international humanitarian human rights and refugee law in the savings clause, Article 19 of the Protocol. The Protocol also contains provisions on prevention of smuggling of migrants, and on general and specific forms of cooperation and assistance for the prevention, investigation and prosecution of offences covered by the UN Convention on Transnational Organized Crime and the Protocol.

### Preamble

*The States Parties to this Protocol,*

*Declaring* that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels,

*Recalling* General Assembly resolution 54/212 of 22 December 1999, in which the Assembly urged Member States and the United Nations system to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned, and encouraged, where relevant, interregional, regional and subregional mechanisms to continue to address the question of migration and development,

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88 www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf.
The Protocol provides Contracting States with an effective tool to combat and prevent human smuggling. The Protocol is designed to fight cross-border crimes by obliging signatories to adopt national legislative measures, to open information channels and to promote cooperation in enforcement of international law. However, the new laws do not aim to dictate domestic migration policy and migration flow. They recognize that migration in itself is not a crime and therefore not liable to criminal prosecution. Migrants are victims in need of protection; therefore emphasis is placed on the criminalization of the smugglers and the organized criminal groups behind them. Chapter II of the Protocol reflects relevant provisions of IMO advisory Circular (MSC/Circ.896) *Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea*, which notes the unsafe conditions of the migrants voyages on ships that are not intended carrying passengers, and outlines measures to be taken by to eliminate these unsafe practices associated with the trafficking or transport of migrants by sea. The Circular remains an effective guideline for States that are not signatories to the Protocol.

*Convinced* of the need to provide migrants with humane treatment and full protection of their rights,

*Taking into account* the fact that, despite work undertaken in other international forums, there is no universal instrument that addresses all aspects of smuggling of migrants and other related issues,

*Concerned* at the significant increase in the activities of organized criminal groups in smuggling of migrants and other related criminal activities set forth in this Protocol, which bring great harm to the States concerned,

*Also concerned* that the smuggling of migrants can endanger the lives or security of the migrants involved,

*Recalling* General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing illegal trafficking in and transporting of migrants, including by sea,

*Convinced* that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument against the smuggling of migrants by land, sea and air will be useful in preventing and combating that crime,

*Have agreed as follows*:

## I. General provisions

*Article 1*

*Relation with the United Nations Convention against Transnational Organized Crime*

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.

*Article 2*

*Statement of purpose*

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

*Article 3*

*Use of terms*

For the purposes of this Protocol:

(a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

(c) "Fraudulent travel or identity document" shall mean any travel or identity document:

(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

(ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder;

(d) "Vessel" shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

*Article 4*

*Scope of application*

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

*Article 5*

*Criminal liability of migrants*

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

*Article 6*

*Criminalization*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document;

(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article;

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

## II. Smuggling of migrants by sea

*Article 7*

*Cooperation*

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

*Article 8*

*Measures against the smuggling of migrants by sea*

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

(a) To board the vessel;

(b) To search the vessel; and

(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

*Article 9*

*Safeguard clauses*

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

(a) Ensure the safety and humane treatment of the persons on board;

(b) Take due account of the need not to endanger the security of the vessel or its cargo;

(c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

(d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

## III. Prevention, cooperation and other measures

*Article 10*

*Information*

1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;

(b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;

(c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;

(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;

(e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and

(f) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.

2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

*Article 11*

*Border measures*

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

*Article 12*

*Security and control of documents*

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

*Article 13*

*Legitimacy and validity of documents*

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.

*Article 14*

*Training and technical cooperation*

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

2. States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct. Such training shall include:

(a) Improving the security and quality of travel documents;

(b) Recognizing and detecting fraudulent travel or identity documents;

(c) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;

(d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and

(e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.

3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.

*Article 15*

*Other prevention measures*

1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

*Article 16*

*Protection and assistance measures*

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

*Article 17*

*Agreements and arrangements*

States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

(a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or

(b) Enhancing the provisions of this Protocol among themselves.

*Article 18*

*Return of smuggled migrants*

1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

6. States Parties may cooperate with relevant international organizations in the implementation of this article.

7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.

**IV. Final provisions**

*Article 19*

*Saving clause*

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

*Article 20*

*Settlement of disputes*

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

*Article 21*

*Signature, ratification, acceptance, approval and accession*

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

*Article 22*

*Entry into force*

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

*Article 23*

*Amendment*

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

*Article 24*

*Denunciation*

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

*Article 25*

*Depositary and languages*

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

# RELEVANT CONFERENCE MATERIALS

**Meeting of State Representatives on Rescue at Sea and Maritime Interception in the Mediterranean**
**Madrid, 23 -24 May 2006**

**Background Discussion Paper**[89]

## Reconciling Protection Concerns with Migration Objectives

### I. Introduction

Migrant and refugee flows have long been a challenge to the States bordering the Mediterranean Sea. The perilous journey by sea, with the increasing involvement of criminal smuggling rings, is one undertaken by many, including from sub-Saharan Africa, wishing to reach Europe. All Mediterranean States are affected by these maritime movements to a greater or lesser degree, the main routes being through the Maghreb via the Spanish enclaves of Melilla and Ceuta or directly to the southern coast of Spain; through Libya and Tunisia, via Malta or the small island of Lampedusa to Sicily or the mainland of Italy; and from Turkey through the Dodecanese to Greece or Sicily. Due to increased patrols in the Mediterranean, a route through Mauritania to the Canary Islands has been frequently used of late. The human tragedy associated with the rising death toll at sea has brought an added dimension of "humanitarian crisis" to these maritime movements. Intense media coverage has highlighted the plight of the individuals concerned and pushed the issue high up the political agenda in many countries.

Quantifying the scale of the movement is problematic as, by definition, illegal migrants are clandestine and seek to avoid detection. Estimates of those who arrive safely and those who perish en route are, at best, grounded on the rather limited statistical information available on incidents of rescue and interception that are officially recorded. Despite this lack of hard data, there is no doubt that a significant number of people do attempt to enter Europe by sea, and that the very visible nature of the phenomenon places this mode of travel at the very centre of the political discourse on irregular migration.

Qualifying and characterizing the movement is equally challenging. The term "boat people" has now entered into common parlance and tends to be applied without distinction to migrants, asylum-seekers and refugees alike. Broad and indiscriminate usage of such a generic term is illustrative of an increased blurring of the distinctions which exist between different categories of migrants - those who travel in search of work, better living conditions, educational opportunities and a brighter future, and those who as asylum-seekers and refugees may be pursuing similar goals, but whose initial flight is motivated by a fear of persecution, and who are therefore in need of international protection. Those pursuing the Mediterranean route include people in an asylum-seeking situation, as well as others who seek to use the asylum channel as the only viable means of accessing Europe. These mixed flows create complex challenges for States and international organizations alike, generating scenarios which cannot be

[89] This paper is based on a discussion paper prepared for the Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean, that took place in Athens, 12-13 September 2005.

resolved from within the narrow confines of international maritime law, but which demand comprehensive solutions drawing upon a number of cross-cutting and interconnected policy concerns.

At issue are:

- the legitimate security interests of States, including the necessity to maintain effective border and immigration controls and to prevent and combat transnational organized crimes such as smuggling and trafficking;
- the need to maintain security and stability in international shipping, and above all to preserve the integrity and effectiveness of the international search and rescue regime, including the vital role of commercial shipping in responding quickly and decisively to distress calls and incidents involving small vessels encountered in distress at sea;
- the obligation to respect the rights and dignity of all persons rescued at sea regardless of their status and, in the particular case of asylum-seekers and refugees, to meet their specific protection needs in accordance with international refugee law, notably to ensure prompt access to fair and efficient status determination procedures, in full compliance with the principle of *non-refoulement*;
- the need to organize, in a safe and human manner, the prompt return to their countries of origin or other countries where they could be readmitted, of those irregular migrants, who are not in need of international protection or have compelling reasons to stay.

In March 2002, UNHCR convened an Expert Round Table in Lisbon on the topic of Rescue-at-Sea; Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees. The summary of discussions emerging from that meeting highlights the main challenges involved in adequately responding to maritime scenarios involving asylum-seekers and refugees. Since then, UNHCR has been working closely with key partners, especially the International Maritime Organization (IMO), to help ensure that the proposals put forward at the Lisbon Roundtable have been shared with States in their discussions on their obligations in responding to such scenarios. These collaborative efforts have contributed to the endorsement by IMO Member States of crucial legislative amendments and accompanying guidelines to strengthen certain practical and operational aspects of the international search and rescue regime. Notwithstanding this progress, maritime migration continues to pose complex challenges, as graphically illustrated by current realities in the Mediterranean, which test the ability of States and international organizations to respond adequately.

Building upon the Lisbon Expert Roundtable and related achievements, UNHCR has secured EU funds in order to further explore the challenges of maritime migration in a specific geographical setting. This objective is part of a broader EU-funded project which aims at strengthening the asylum space in North Africa though the implementation of a range of capacity-building activities, the mobilization of governments in the region, and the formulation of a comprehensive migration management strategy responding in a balanced manner to the asylum and migration concerns at stake. Two conferences on rescue and interception at sea have been scheduled for this purpose, one of experts and one of States.

The expert meeting took place in Athens in September 2005. The discussions and recommendations that emerged from that meeting have provided the framework for the forthcoming meeting of States representatives in Madrid.[90] They touched on a broad range of subjects such as the new developments in maritime law, strengthening the existing search and rescue regime, the importance of preserving the integrity of this regime, practical problems facing ship masters, and disembarkation procedures. They also contained a series of proposals on improving information gathering and exchange, strengthening international cooperation, and developing more comprehensive responses to the deeper problems underlying the irregular movements by sea and the distress of those resorting to such means.

This paper aims to review and revalidate the key themes of the discussions that took place both in Lisbon and in Athens. It briefly examines provisions from the different strands of international law that bear on the question of rescue at sea and maritime interception, particularly in the case of asylum-seekers and refugees. It also touches upon collective efforts that have been either proposed or actively pursued to tackle the phenomenon of maritime migration in the Mediterranean, and suggests elements that should be further explored to address the current situation more effectively within a regional cooperative framework. In doing so, it aims to provide a catalyst for discussion between States in order to build consensus on a cooperative, responsibility sharing approach to the protection needs of persons of concern to UNHCR, caught up in mixed flows across the Mediterranean.

## II. The legal framework

The broad policy and legal framework governing rescue-at-sea and the interception of asylum-seekers and refugees rests on the applicable provisions of international maritime law and on general principles of international law, in interaction with international refugee law. Aspects of international human rights law - and, especially in the Mediterranean context, the jurisprudence of the European Court on Human Rights – are also of importance. The international legal regime and related States' policies and practices for combating transnational organized crime are additional factors which must be taken into consideration in defining policy priorities which underpin responses to the issue of irregular migration.

Clandestine migrants, asylum-seekers and refugees at sea may be encountered in a variety of contexts: interception by coastal state patrols; relief operations involving commercial vessels; or as stowaways aboard commercial vessels. Each scenario raises specific challenges and the law (primarily international maritime law in interaction with other bodies of law as specified above) has therefore developed distinct but complementary regimes to provide an appropriate framework in response to each scenario:

- the search and rescue regime, understood as relief operations undertaken by vessels coming to the aid of persons in distress at sea;

[90] Expert meeting on Interception and Rescue in the Mediterranean; Cooperative Responses, 12-13 September 2005, Athens, Greece - Summary of Discussions and Recommendations.

- the stowaway regime;

- interception practices for the purpose of migration control.

## A. The search and rescue regime

Aiding those in peril at sea is an age-old maritime tradition, also enshrined in contemporary maritime law as codified in several Conventions:

- the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[91]
- the 1958 Convention on the High Seas[92]
- the 1974 International Convention for the Safety of Life at sea (SOLAS)[93]
- the 1979 International Convention on Maritime Search and Rescue (SAR).[94]

The SOLAS and SAR Conventions are central to the integrity of the global search and rescue regime. The IMO is responsible for ensuring that the Conventions are kept up to date and are fully respected by States and other maritime actors. The IMO Maritime Safety Committee (MSC) and its Sub Committee on Radio-communications and Search and Rescue (COMSAR) are key fora within which these instruments are debated and monitored by the maritime community.

The term "rescue at sea" has been defined in the SAR Convention as: "*an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.*"[95]

To this end, the system of international maritime law foresees different sets of responsibilities: the **responsibility of the master** to provide assistance; and the **responsibility of States** to promote the establishment, operation and maintenance of an adequate and effective search and rescue service. Responding to a call from IMO's Assembly for a review of the relevant provisions of international maritime law in the wake of the Tampa incident, intensive discussions have taken place within IMO in recent years to clarify the practical interrelationship between the roles and responsibilities that come into play in a rescue scenario, and to address the practical challenges that have arisen in the implementation of the search and rescue regime. The focus of discussion within IMO has concentrated on the contentious issue of disembarkation.

One concrete outcome of the legislative review undertaken by IMO has been the adoption by the maritime safety committee (MSC) of new amendments to the SOLAS and SAR Conventions and the drafting of accompanying guidelines which set out in detail the complementary roles, obligations and procedures for commercial vessels responding to distress situations. These amendments[96] impose upon governments an obligation to coordinate and cooperate, to ensure *inter alia* that:

[91] 1982 UNCLOS, Article 98.
[92] 1958 Convention on the High Seas, Article12.
[93] Annex to the 1974, SOLAS Convention, Chapter V, Regulation 7 and Regulation 33.
[94] Annex to the 1979 SAR Convention, Chapter 1.3.2. and Chapter 2.1.10.
[95] Annex to the 1979 SAR Convention, Chapter 1.3.2.
[96] Entry into force scheduled for 1 July 2006.

- Masters of ships providing assistance by embarking persons at sea are released from their obligations with minimum further deviation from the ship's intended voyage.
- Survivors assisted are disembarked from the assisting ship and delivered to a place of safety as soon as reasonably practicable.

Effective implementation of the regime outlined by IMO is premised upon the full cooperation of States. This is has proven elusive in some cases, not least because the practical realities of disembarkation touch upon a key area in which the interaction between international maritime law and concerns about migration control and refugee protection have resulted in tensions. Recognizing that such issues cannot be adequately resolved by reference to maritime law alone, IMO has convened an inter-agency working group involving sister agencies with specific competence in related areas of law and practice, namely the Office of Legal Affairs (OLA) /Division for Ocean Affairs and the Law of the Sea; UNHCR with reference to international refugee law; the Office of the High Commissioner for Human Rights; the United Nations Office on Drugs and Crime/ODC, with respect to questions of transnational organized crime; and the International Organization for Migration, with respect to issues relating to irregular migration in general. The inter-agency working group has been effective in ensuring a broad based and holistic examination of the issues, but has proved to have only limited sway in securing the kind of practical solutions which remain within the realm of States.

**B. The stowaway regime**

Stowaways tend to be less visible than those rescued under dramatic circumstances, but the treatment of stowaway cases remains an important component of any overall response to maritime migration. States periodically provide IMO with statistics on stowaway cases[97]. However, there are gaps in the global data available on the number of stowaways annually, particularly those who subsequently apply for asylum. UNHCR itself has compiled some limited statistical data, based on the small number of stowaway cases brought to its attention.

The UNHCR Executive Committee has considered stowaways on a number of occasions, and produced a series of non-binding guidelines relating to the protection needs of refugee and asylum-seeking stowaways. ExCom Conclusion N.53 (XXXIX) of 1988 on Stowaway Asylum-seekers provides *inter alia* that stowaway asylum-seekers must be protected against forcible return to their country of origin and should, whenever possible, be allowed to disembark at the first port of call for their asylum application to be determined by the local authorities.

The text of an International Convention relating to Stowaways was adopted by the Diplomatic Conference on Maritime Law at its session in 1957. The Convention has, however, failed to attract a sufficient number of ratifications needed to bring it into force. In the absence of an internationally binding instrument dealing with stowaways, IMO has sought to provide solutions to the problem of stowaways by addressing this

[97] IMO Circulars on stowaway incidents are issued quarterly (also available through the IMO website - www.imo.org).

matter through the IMO committee system, principally through the Facilitation Committee which is responsible for a broad range of issues underpinning the effective functioning of maritime traffic. The January 2002 session of the Facilitation Committee considered some provisions on stowaways which have subsequently been incorporated into the Convention on Facilitation of International Maritime Traffic (FAL Convention) of 1965.

According to the definition contained in the annex to the FAL Convention a stowaway is,

"*a person who is secreted on a ship, or in a cargo which is subsequently loaded into a ship, without the consent of the ship owner or the master or any responsible person and who is detected on board after the ship has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities.*"[98]

The focus of the FAL regime remains to ensure that stowaways incidents are resolved "*expeditiously and secure that an early return or repatriation of the stowaway will take place*".[99] However, reflecting refugee protection concerns, the General Principles endorsed by the Facilitation Committee make specific reference to the 1951 Convention relating to the Status of refugee, stating that "*the provisions in this section shall be applied in accordance with international protection principles as set out in international instruments, such as the UN Convention relating to the Status of Refugee of 28 July 1951 and the UN Protocol of 31 January 1967, and any relevant national legislation*".[100]

On the issue of stowaways, the Council of Europe has commended IMO for their work on the FAL Convention provisions on stowaways. It has, however, expressed the view that the international community should go further in the search for effective solutions for stowaway cases, including "*consideration of the viability of a single legal instrument on the treatment of stowaway asylum-seekers, including rules on the determination of the State responsible for processing the asylum application of stowaways, their treatment on board ship and the maximum duration of custody on board ship*".[101]

In UNHCR's experience, disembarkation of stowaway asylum-seekers can be extremely difficult to achieve. As a result, stowaway asylum-seekers remain on board for lengthy periods of time, whilst negotiations are pursued ashore in search of a State willing to permit disembarkation. A successful outcome depends largely on the nationality of the stowaway, the availability of identifying documentation, the vessel's future schedule and, most importantly, cooperation of the immigration authorities and port officials at the vessel's future ports of call.

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[98] 1965 Convention on Facilitation of International Maritime Traffic, as amended, 10 January 2002, IMO Resolution FAL.7 (29), Section 1.1.
[99] Ibid. Section 4.2.
[100] Ibid. Section 4.1.
[101] Report of the Committee on Migration, Refugees and Population, Doc. 100115, December 2003; see also Council of Europe Parliamentary Assembly, Recommendation 1645 (2004) on Access to assistance and protection of asylum-seekers at European seaports and coastal areas.

## C. The interception regime

An internationally accepted definition of the term "interception" does not exist. However within the context of the international protection of refugees, the Executive Committee of the United Nations High Commission for Refugees has provided the following authoritative guidance:
*"Understanding that for the purposes of this conclusion, and without prejudice to international law, particularly international human rights law and refugee law, with a view to providing protection safeguards to intercepted persons, interception is one of the measures employed by States to:*
*(i) prevent embarkation of persons on an international journey;*
*(ii) prevent further onward international travel by persons who have commenced their journey; or*
*(iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law."*[102]

A wide range of concerns and objectives motivate States to engage in interception practices. Concerned with a global increase in irregular migration, States try to disrupt major smuggling and trafficking networks by intercepting people en route. In the context of maritime movements, the humanitarian imperative to come to the aid of those travelling in unseaworthy vessels constitutes an added element of interception practices. Maritime interception may take place either in the territorial waters of the intercepting State, in the contiguous waters or on the high seas.

As a general principle of international law, the control of external borders, restrictions on the right of aliens to access national territory and laws governing the entry of aliens, all constitute the valid exercise of State sovereignty. However, such activities must always be exercised in compliance with the fundamental principles of international human rights law, which embodies clear standards with respect to the rights of individuals, regardless of their status. State action is also framed within the context of international refugee law, including the obligation to respect the right to seek and enjoy asylum so that those people who risk persecution can leave their home country and seek protection in another. The 1951 Convention relating to the Status of Refugees, and its 1967 Protocol, which constitute the core instruments of international refugee law, provide a definition of those entitled to benefit from its protections and establishes key principles such as non-penalization for illegal entry and *non-refoulement.*[103]

<u>Protection safeguards in interception measures</u>
The prohibition with regard to the *refoulement* of refugees contained in Article 33 of the 1951 Convention obliges States to consider the risk posed to an individual asylum-seeker or refugee before taking steps to remove them. This principle underpins the exercise of the right to seek and enjoy in other countries asylum from persecution, as proclaimed in Article 14 (1) of the Universal Declaration of Human Rights. The principle of *non-refoulement* is broadly acknowledged as being embedded in customary international law[104] and is applicable by all States even if they are not party

[102] Conclusion on Protection Safeguards in Interception Measures (No. 97 (LIV) – 2003).
[103] See 1951 Convention, Articles 1, 31 and 33.
[104] The continuing relevance and resilience of the principle of *non-refoulement* and its applicability as embedded in customary international Law have been acknowledged in the Preamble of the Declaration of States Parties adopted unanimously at the Ministerial meeting of States Parties, organized jointly by

to the 1951 Convention. In UNHCR's understanding, the principle of *non refoulement* does not contain any geographical restrictions and the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Likewise the human rights norms recognized as peremptory, such as the prohibition of return to States where the person may be at risk of torture or inhumane or degrading treatment, are to be implemented by all States.

States' authorities have an obligation to identify asylum-seekers and refugees among those intercepted. The question remains, however, as to the most appropriate location at which to undertake the determination of status. Processing aboard ship is one option. However the limited facilities on board, combined with the possible trauma of those intercepted may not offer optimal conditions and standard requirements (such as confidentiality, access to information and to the competent authority, presence of an interpreter). It is important to note that the State of disembarkation will generally be the State whose refugee protection responsibilities are first engaged. However, the transfer of responsibility for determining refugee status to another State is permissible under conditions of appropriate safeguards.

## III. Regional policies – Elements for a cooperative framework

### A. An overview of recent policies and practices

Towards coordinated policies

The challenges posed by illegal immigration across the maritime borders of the EU Member States have placed this issue prominently on the political agenda of the European Union. Recognizing that "*insufficiently managed migration can result in humanitarian disaster*"[105], the EU is committed to intensifying cooperation in order to prevent further loss of life at sea. The Hague Programme, adopted at the European Council of November 2004, identified, among the policy priorities to be pursued up to 2010, the necessity to ensure a more orderly and managed entry into the EU of persons in need of international protection. This objective complements earlier efforts, adopted in 2003, to develop a coordinated and effective management of the maritime borders.[106]

In December 2005, the European Council adopted a conclusion on a global approach to migration putting a specific focus on Africa and the Mediterranean. The conclusion recognized the increasing importance of migration in the EU's relations to third countries, particularly neighbouring countries. The EU aims at further strengthening the dialogue and cooperation with those countries on migration issues, including return management and the tackling of root causes of migration. The conclusion was accompanied by a concrete work program, setting out priorities in the initiatives relating to the dialogue between the EU and Africa.[107]

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Switzerland and UNHCR on 12-13 December 2001, to commemorate the Convention's 50th anniversary. See the UNHCR "Agenda for Protection" - Declaration of States parties, United Nations General Assembly Doc. A/57/12/Add.1.

[105] The Hague Program, Presidency Conclusion, adopted on 5 November 2004, Council Doc. 14292/04, Annex 1, OJ C53/1, 3 March 2005.

[106] Feasibility Study on the control of the European Union's maritime borders - Final Report, Council Doc. 11490/1/03, Rev. 1, Annex, 19 September 2003.

[107] Global approach to migration: Priority actions focusing on Africa and the Mediterranean, Presidency Conclusion, adopted 17 December 2005, Council Doc. 15914/05.

In parallel with these efforts towards coordinated policies at the EU level, a number of other initiatives have sought to facilitate consultations and cooperation among Mediterranean countries. They include, for example, the "5+5" Regional Migration Dialogue, the Dialogue on Mediterranean Transit Migration (OSCE contact group) as well as certain aspects of the "Barcelona Process".

Cooperation at an operational level

The Program of measures to combat illegal immigration across the maritime borders of the Member States of the European Union[108] adopted by the European Council in November 2003, has led to intensified operational cooperation among EU members, in the form of joint operations and pilot projects. Under a regulation adopted in October 2004 by the European Council[109], a European Agency for the Management of the External Borders (FRONTEX) was set up in Warsaw, to help Member States in implementing community legislation on the control and surveillance of EU borders, including maritime borders, and to coordinate their operational cooperation.

Specific operations to monitor and control sea borders have been launched. Recently, a EU financed "Project Seahorse" is planning to control irregular migration *inter alia* through joint patrols in the Mediterranean as well as the Atlantic. Under the operational lead of Spain, patrols involving Morocco, Mauritania, Senegal, Cape Verde, Italy, Germany, Portugal, France and Belgium will cooperate to promote an effective policy to prevent illegal migration, including efforts to stop human trafficking. This project also foresees the creation of three Regional Maritime Surveillance Centres on Spain's Atlantic and Mediterranean coasts. The project is scheduled to operate from 2006 to 2008.

Cooperative maritime interception initiatives are undertaken cooperatively by EU Member States. They take place primarily in the territorial waters of the various States concerned – those of EU members as well as of non-EU members - with disembarkation in EU States. Agreement has been reached, for example, between Italy and Albania as part of their co-operative response to the movement of clandestine migrants across the Adriatic.

Cooperation with North-African States (Libya)

The recent large-scale and recurrent flows of irregular migrants, crossing from Libya to the islands of Malta and Lampedusa (Italy), and from the coasts of Morocco and Mauritania to Spain, the European Union have highlighted the need for cooperation on illegal immigration with North African countries. The most advanced cooperation has been achieved with Libya.

At the beginning of June 2005, the European Council adopted Conclusions on initiating dialogue and cooperation with Libya on migration issues and launched an *ad hoc* cooperation process on migration issues with Libyan authorities, to identify practical measures to tackle illegal immigration such as training, reinforcement of

[108] Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union, Council Doc. 15445/03, 28 November 2003.

[109] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L349/1 of 25 November 2004.

institution building, asylum issues and increasing public awareness of the dangers of illegal migration.[110] A plan has been elaborated which considers joint action with Libya to prevent deaths at sea and to promote operational projects involving Egypt, Libya and Niger.[111] It also provides concrete and immediate actions to strengthen border control measures.

Furthermore, a seminar organized by the European Commission and Malta was held on 20 July, 2005, bringing together 15 European States, Libya, the European Commission and Frontex. Under the title "*Action Plan for Saving Life at Sea and in the Desert*" discussions resulted in the endorsement of a seven point set of conclusions geared towards improving cooperation in the Mediterranean region, in particular with Libya.

The broader approach

EU policy on irregular migration across the Mediterranean is not restricted only to border control measures. Both the Commission, in its Communication of 30 November 2005,[112] and the Presidency Conclusions of December 2005[113], take a broader approach, based on dialogue and cooperation with countries of origin and transit and including assistance to develop capacities for refugee protection. EU funding has already started to strengthen the migration management capacities of North African countries, including facilities for the identification of persons in need of international protection.

Building on these efforts, UNHCR has submitted a follow-up project proposal for EU funding of which the main objective is to develop and implement a comprehensive strategy aimed at the creation of an effective asylum space in the region, through (i) reinforcing UNHCR's own presence and role in North Africa, including by deployment of roving teams to address emergency situations, to establish a fair and efficient asylum process (ii) adopting a national legislative framework in asylum and refugee matters for each of the countries in the region, (iii) building the capacity of competent Government and non-Government institutions through training and technical assistance, (iv) promoting the admission and stay of refugees by establishing burden-sharing arrangements which would entail the stay/self-reliance of those refugees who are in a position to do so, the resettlement of a fixed quota by third countries, and the voluntary return for those that are able to avail themselves of this option, and, (v) the safe and dignified return of rejected asylum-seekers to their countries of origin.

EU funding is also supporting projects to improve the capacities of EU Member States in the case of the arrival of large groups of irregular arrivals. An example has been the strengthening of reception capacity in Lampedusa. Likewise, the Communication on Strengthened Practical Cooperation, issued by the Commission in February 2006, proposes to set up rapid-reaction migration units to better respond to the particular

[110] Council Conclusion: Cooperation with Libya on immigration issues, 2664th Council Meeting, Justice and Home Affairs, 2-3 June 2005, Council Doc. 8849/05, Press 114, p.15-20.
[111] Signed by the Ministers of Interior and Justice of the EU, then ratified by the European Council in June 2005.
[112] Communication from the Commission: Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, COM(2005)621 final, 30 November 2005.
[113] Global approach to migration: Priority actions focusing on Africa and the Mediterranean, Presidency Conclusion, adopted 17 December 2005, Council Doc. 15914/05.

pressure on the systems of Member states which face sudden influxes of irregular migrants.[114]

### B. An overview of current challenges

In addition to the overriding humanitarian imperative of preventing deaths and reducing suffering associated with irregular maritime migration, a number of key challenges arise from the perspective of the international protection of refugees.

**Adequate reception capacity and processing arrangements:** In recent years, countries receiving a high number of arrivals by sea have increased their reception capacity by building reception centres close to arrival points, along the coast. These reception centres are generally intended to provide temporary accommodation pending the outcome of an initial assessment of claims. However, with the large number of boat arrivals, offering adequate reception capacity structures has become a real challenge for receiving countries, especially when the intended destination of boat people are small Mediterranean islands like Malta and Lampedusa.

The report of the Council of Europe Committee on Migration, Refugees and Population[115], recommends the Committee of Ministers to call on member states to *inter alia*: establish appropriate and permanent reception structures in coastal areas and near seaports, to provide accommodation to the newly-arrived, whether they apply for asylum or not; ensure that those who wish to apply for asylum at seaports and coastal areas are granted unimpeded access to the asylum procedure, including through interpretation services and independent legal advice; and accept responsibility for processing asylum applications of stowaways when they are the first port of call of the planned route of the ship.

**Access to the asylum procedure for people in need of international protection:** Ensuring access to an asylum procedure is the key condition for identifying people in need of international protection. It is linked with the *non-refoulement* principle mentioned earlier. Lack of capacity and the fear of attracting even greater numbers of applicants are often cited as justification for limiting or denying access to asylum procedures. UNHCR has, however, made proposals to States suggesting modalities to ensure efficient processing, in a manner that is consistent with international standards.

**Implementation of return measures:** The return of people not in need of international protection is essential to safeguarding respect for asylum and maintaining a functional asylum space. The efficient and expeditious return of persons found not in need of international protection and having no other compelling reasons justifying stay, is key to deterring smuggling and trafficking of persons. However, and as stated in Executive Committee Conclusion No.96, people should be returned, *"humanely and with full respect for their human rights and dignity to countries of origin."*[116]

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[114] Communication from the Commission: Strengthened practical cooperation, COM(2006)67 final, 17 February 2006.

[115] See Council of Europe Parliamentary Assembly, Recommendation 1645 (2004) on Access to assistance and protection of asylum-seekers at European seaports and coastal areas; Report of the Committee on Migration, Refugees and Population, Doc. 100115, December 2003.

[116] Conclusion on the return of persons found not to be in need of international protection (No. 96 (LIV) - 2003).

## IV. Concluding observations

Responding to the multiple challenges of irregular maritime migration in the Mediterranean, demands the full engagement and cooperation of States and international and regional organizations, each contributing their particular experience and expertise to the design of effective solutions. The phenomenon has profound causes that legal provisions alone cannot resolve. The degree to which strengthened provisions of international maritime law can effectively contribute to solutions will be determined by the willingness of States to implement them in good faith, and in combination with other measures addressing the root causes that compel people to take to the seas in the first instance. The problem is a shared one, and comprehensive solutions will remain elusive unless all actors are willing to share fully in applying effective and fair solutions, which avoid solving one aspect of the problem at the expense of others.

At the European level, recent policy measures show a clear willingness to develop common approaches and actions in border management, including maritime borders.
What can be achieved in the Mediterranean region will depend upon the capacity of States to move forward in a spirit of international solidarity and responsibility sharing The challenge is that of reconciling humanitarian tradition and obligations with immigration control imperatives, while ensuring coherence and consistency in the response to maritime and migration concerns.

**UNHCR**
**8 May 2006**

**Meeting of State representatives**
**on**
**Rescue at sea and maritime interception in the Mediterranean**[117]

**UNWTO Headquarters, Capitán Hayan 42,**
**Madrid,**
***23-24 May 2006***

**Summary of proceedings**

1. The meeting brought together representatives of the following States: Albania, Algeria, Austria (EU Presidency), Cyprus, Egypt, France, Greece, Holy See, Italy, Lebanon, Libya, Malta, Mauritania, Morroco, the Netherlands, Norway, Spain, Syria, Tunisia, Turkey, and the United Kingdom.

2. The meeting was convened and chaired by the office of the United Nations High Commissioner for Refugees. It was also attended by the following intergovernmental institutions: European Commission, Frontex, League of Arab States, United Nations Office of Legal Affairs, Office of the United Nations High Commissioner for Human Rights, International Maritime Organization, International Organization for Migration, the Council of Europe, and the International Federation of Red Cross and Red Crescent Societies.[118]

3. A list of participants is provided in annex to this summary.

4. An earlier meeting of experts, convened by UNHCR in Athens in September 2005, had put forward a number of recommendations. These had been shared with participants ahead of the meeting, together with a background discussion paper. The latter provided information on the legal framework governing the search and rescue regime and the stowaway regime, as well as an overview of recent policies and practices in the Mediterranean region, and of current challenges.

5. These documents, together with a range of other relevant reference materials were made available to all participants at the meeting.

Opening address

6. The meeting was opened on behalf of the Spanish Government by H.E. Ambassador Pombo, who outlined a number of specific aspects of the maritime migratory movements being witnessed, and drew attention to the global context in which they were taking place.

Towards a cooperative response to irregular maritime movements in the Mediterranean

[117] Meeting organized with funding from the EU.
[118] Apologies for absence were received from the United Nations Office on Drugs and Crime; the International Labour Office; the Organization for Security and Cooperation in Europe; and the International Centre for Migration Policy Development.

7. A keynote statement was delivered by Mrs. Feller, UNHCR's Assistant High Commissioner for Refugees. A brief summary of the main messages contained in this speech is provided in the Chairman's summary, of the meeting, to be found in Annex 1. This summary also contains the main features of discussions under the substantive items appearing below.

Responding to irregular maritime migration: key challenges facing the Mediterranean States.

8. Under this item, States shared their perspectives, as countries of departure, transit or destination around the Mediterranean, describing trends they had observed and the major challenges they faced. Those most frequently mentioned included the following:

- The growing pressure of immigration as a global phenomenon was prompted by growing economic disparities, and the desperation of those seeking to better their lives for themselves and their families. Measures of control were pushing the movements to open up new routes, both to the south and to the east, but were powerless to stem them. For some speakers, the real challenge lay in addressing their root causes, through a global approach based on international solidarity and burden sharing;
- Migration in the Mediterranean posed immense humanitarian challenges with estimates of a probable death toll in the thousands;
- The perception on the part of receiving countries was that governments were not in control of their borders. This perception was finding powerful and hostile echoes in the press and public opinion;
- Problems could not be solved by any one State, but needed to be addressed at a regional as well as international level. Cooperation among all countries involved was key: scarce resources should be pooled.
- There was a general lack of clarity as to when and how interception was justified. The fact that intercepted migrants frequently lacked documentation served to compound these problems. There was also no clear international legislation allocating responsibility for disembarkation.
- Information and training were inadequate. More needed to be done, together improvements to the technical capacity of receiving countries, often working in extremely difficult conditions;
- More vigorous and effective action needed to be taken against smugglers in order to bring them to justice.

Current practices in responding to irregular maritime migration

9. Discussions under this item included a series of presentations on the responses being developed by States, sometimes acting in cooperation with each other, and with international or regional organizations. Several States described the functioning of arrangements in place for rescue at sea and interception, including recent projects such as project Sea Horse being introduced by Spain, in cooperation with countries of departure. Others, such as Albania and Italy focused on arrangements for the reception of arrivals, including screening and the management of asylum claims. The presentations were followed by discussions in which participants were able to obtain

further information on various aspects of specific interest to them, and to learn from practices that were being applied in situations similar to their own.[119]

The role of international and regional organizations

10. Under the chairmanship of the International Maritime Organization (IMO), a series of presentations[120] provided information on the work being undertaken by organizations to assist States to respond to the challenges of irregular maritime migration. They were as follows:

- United Nations Office of Legal Affairs (Division for Ocean Affairs and the Law of the Sea) (DOALS) on existing maritime law and recent developments;
- IMO, including an update on amendments to the Conventions on Search and Rescue and on Safety of Life at Sea, and accompanying IMO guidelines;
- International Organization for Migration (IOM) on their cooperation with various countries around the Mediterranean (complementing information provided in earlier discussions on cooperative arrangements being applied in Lampedusa, Italy);
- Office of the United Nations High Commissioner for Human Rights (OHCHR) on relevant human rights conventions and remaining gaps in terms of ratifications, implementation and existing mechanisms;
- Council of Europe, on relevant activities, including recommendations put forward by the Parliamentary Committee on Migration, Refugees and Population;
- League of Arab States on issues of data collection and trends, as well the serious problems posed by human trafficking.

The European Union's response to irregular maritime migration

11. This session was chaired by Austria, holding the European Union Presidency, and referred to the global approach on migration to which the European Union was committed. Better management of migration was a key priority for Member States. The EU had taken numerous steps to respond to this phenomenon, taking into account the human rights of migrants with particular attention to persons in need of international protection. Coooperation with third countries was considered indispensable for the EU.

12. The representative of the European Commission gave details of the various initiatives taken at both policy and practical levels to address the challenges of irregular migration, including movements by sea. This was followed by a presentation by the representative of Frontex, who specified the objectives and activities of this agency to secure the external borders of the European Union, including its maritime borders. Such activities included measures to reduce loss of life and protect citizens.[121]

[119] Texts of presentations by Albania and Spain are available, upon request.
[120] Idem for presentations by UNDOALS, IOM, OHCHR and the Council of Europe.
[121] Idem for presentation by Frontex.

Summary of discussions

13. UNHCR presented a brief summary of the main features that had emerged from discussions during the meeting (see Annex 1). It concluded with three wishes on the part of UNHCR concerning possible follow-up to the work accomplished in Madrid.

Closure of the meeting

H.E. Ambassador Pombo (Spain) observed that the meeting had provided an opportunity for a useful and informative exchange. He recalled the difficult balance that needed to be struck between necessary border control and meeting humanitarian needs. Migratory movements represented a major phenomenon that needed to be studied and understood, and approached responsibly in a cooperative and responsible manner. The meeting in Madrid had been a step in this direction.

**Expert meeting**
**on**
**Interception and Rescue in the Mediterranean;**
**Cooperative Responses**

**12 – 13 September 2005, Athens, Greece.**

**Summary of discussions and recommendations**

The meeting brought together 35 participants, drawn from international organizations, academia, non-governmental organizations, the shipping industry and some national maritime and migration authorities, to discuss different aspects of irregular maritime migration in the Mediterranean with a view to compiling practical suggestions for the consideration of State representatives meeting in Madrid, 17-18 October 2005[122]. Taking as a starting point the summary of an earlier roundtable on *Rescue at sea: Specific Aspects relating to the Protection of Asylum seekers and Refugees*, discussions in Athens covered:

- Recent developments in the international legal framework in responding to situations of stowaways and rescue at sea;
- Review of current State, IGO and NGO initiatives relevant to the issues of stowaways, rescue at sea and interception;
- Reconciliation of protection obligations and migration control objectives – practical suggestions for States;
- Endorsement of a set of principles and recommendations for presentation to the meeting of State representatives.

Beside the plenary sessions, participants divided into working groups to consider: (1) issues around reconciling search and rescue obligations with migration objectives and protection concerns and; (2) identifying gaps and building capacity in the Mediterranean as far as mechanisms for co-ordination and cooperation are concerned.

The following propositions relate principally to the specific aspects considered by the working group. They do not represent the individual views of each participant, but broadly reflect the tenor of the general discussion.

**1. IMO normative framework**

Participants welcomed the amendments[123] to the International Convention for the Safety of Life at Sea of 1974 (the SOLAS Convention) and to the International Convention on Maritime Search and Rescue of 1979 (the SAR Convention), as well as the related IMO Guidelines on the Treatment of Persons Rescued at Sea, recognizing their contribution to clarifying legal responsibilities in relation to disembarkation in rescue scenarios;

[122] The meeting of States representatives was eventually postponed for logistical reasons and at time of writing a new date has yet to be fixed.
[123] Amendments were extensively discussed within the International Maritime Organization prior to endorsement by the Maritime Safety Committee (MSC) in May 2004 and are expected to enter into force on 1 July 2006.

- States should be encouraged to support the above mentioned Convention amendments, which in particular provide clarity on the responsibility of Contracting Governments/Parties to provide a place of safety, or to ensure that a place of safety is provided, under the coordination of the SAR region in which the survivors were recovered;

- States should avoid the categorization of interception operations in the Mediterranean Sea as SAR operations, as this might lead to confusion with respect to disembarkation responsibilities.

**2. Preserving the integrity of the SAR regime**

In order to safeguard the basic premises of the SAR regime and the integrity of the legal framework and the humanitarian tradition upon which the regime has been elaborated:

- Ship masters should not be seen as part of the problem, rather their actions in saving lives should be recognized and supported by States;

- Shipping companies should not be penalized in any manner whatsoever for disembarking or attempting to disembark people rescued at sea;

- States should not impose, as a precondition for disembarkation, a requirement that shipping companies or their insurers cover the repatriation costs of stowaways or people rescued at sea;

- States should not impose penalties on shipping companies for the disembarkation of stowaways, when these people claim to be in need of international protection, (irrespective of the final outcome of their asylum request);

- Disembarkation formalities and Standard Operating Procedures should protect the interests of the shipping industry and the basic needs of individuals rescued at sea;

- Disembarkation procedures should be more harmonized, speedy, and more predictable on the Mediterranean shores to avoid recurrent case-by-case time consuming negotiation problems, which can endanger the lives of those rescued;

- As preventive measures, all States should strictly implement safety standards before authorizing any boat to move from their ports or shores.

**3. Possible consequences of not addressing the practical problems faced by ship masters**

Experience along the Mediterranean shores over recent years suggests that States should be more attuned to the potentially negative consequences of imposing penalties and disproportionate burdens on private actors such as the shipping industry, including the following protection issues:

- Shipmasters may be reluctant or even refuse to respond to calls for support made by SAR authorities;

- Shipmasters may turn a blind eye to situations of distress at sea;

- Shipmasters may feel encouraged to attempt disembarkation of stowaways and illegal or clandestine persons rescued at sea, to avoid any risk of being accused of involvement in smuggling operations;

- Shipmasters may be tempted to seek irregular or illegal solutions, including the worst case scenario of people being throw overboard;

- Shipmasters may feel tempted to encourage persons rescued at sea to jump from their ships to reach nearby shores by swimming;

- Shipping companies and their insurers may be tempted to systematically commit themselves to paying repatriation related costs for stowaways and people rescued at sea in order to ensure the disembarkation, irrespective of individual protection needs or whether the place of disembarkation can be considered as safe.

It should be underlined that experts identified these potential consequences without wishing to suggest that they necessarily represent any practice amongst commercial shipping interests. However such risks and the negative consequences which can result from the pressures placed on masters and shipping companies, including the heavy financials costs borne, may undermine the effective functioning of the SAR regime and add to the rising number of casualties among the person trying to cross the Mediterranean Sea.

**4. Disembarkation procedures**

- The participants recognized that the problems related to rescue at sea and disembarkation cannot be isolated but are an essential component of a continuum of processes and procedures. The interlinkages between asylum and migration objectives may compound the difficulties of ensuring prompt disembarkation. However there was consensus that the maritime regime should govern disembarkation procedures;

- Within the objective of preserving the integrity of the SAR regime and of ensuring effective solutions to stowaway incidents, the consequences of the Dublin II Regulation as far as disembarkation at Mediterranean seaports is concerned should be carefully monitored to prevent placing a disproportionate burden on some States. Any such consequences should be considered under the European Commission's forthcoming report on the application of Dublin II Regulation in 2006 with a view to making any necessary changes to the Regulation;

- Greater predictability in terms of disembarkation could result from more harmonized practices in the Mediterranean, in accordance with what is foreseen in the IMO Guidelines;

- Procedures should additionally clarify basic reception standards applicable in ports of disembarkation in terms of assistance, access to independent interpreters and procedural safeguards, including information about seeking asylum and access to legal advice, applying to the identification and differentiation of those who claim to be in need of international protection;

- These procedures should also define the legal conditions, under which detention or other restrictions on freedom of movement can be applied, judicial review of such measures, and address the specific rights and needs of children and other vulnerable categories of persons;

- Those claiming to need international protection should be allowed to enter the asylum national procedure without delay or should be referred to UNHCR in countries where no asylum procedure exists. During the status determination procedure asylum seekers should have access to UNHCR as well as to relevant NGOs;

- Those not seeking asylum or found not be in need of international protection or have any other compelling humanitarian reasons to remain, should be returned to their country of origin in humane and safe conditions. IOM and other organization may offer support to States in implementing assisted voluntary return programmes.

**5. Improving information management and fostering better cooperation**

Taking note of the lack of standardized information, on incidents of stowaways and rescue at sea, as well as on disembarkation and interception, which would enable the States and organizations concerned to quantify the problem and design a comprehensive strategy accordingly, the participants agreed that;

- Improved communication procedures and a better understanding and analysis of the challenges involved with disembarkation may facilitate the identification and realization of timely and fair solutions;

- In the specific case of rescue at sea, shipping and/or insurance companies should inform IMO, UNHCR and other relevant actors, in a timely manner, of any cases claiming protection needs to ensure the monitoring of disembarkation of the persons rescued and the effective observance of IMO guidelines 6.17 (i.e. protection from disembarkation in territories where the lives of the freedom of those alleging a need for protection would be threatened);

- Where disembarkation proves problematic, shipping and/or insurance companies should promptly inform IMO, UNHCR and other relevant actors in order to faster cooperation in finding a disembarkation solution, reducing the inconvenience caused to the shipping company and prolonged protection problems for the individuals concerned;

- Shipping and insurance companies should provide regular statistics to IMO on incidents of stowaways and people rescued at sea;

- States should try to compile and provide harmonized statistical information on the number and profile of persons intercepted and disembarked as stowaways or following a rescue. This would include at a minimum age, nationality, gender, place of interception and outcome in terms of subsequent procedural handling through migration control mechanisms or asylum processing[124];

- Cases of refusal of disembarkation should be documented by shipping companies and reported to the IMO. This information would then be used by relevant inter-governmental organizations to better quantify the problem and devise solutions with the concerned States;

- With IMO and UNHCR support, shipping companies should ensure that shipmasters are made aware of the practical consequences resulting from the IMO guidelines on the treatment of persons rescued at sea through the provision of multilingual information material.

**6. Comprehensive responses that go beyond interception operations**

- States in North Africa must be encouraged to accede to and comply with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. They must also be encouraged and supported in developing fair and effective asylum systems;

- While States have a sovereign prerogative to protect their borders, interception operations in isolation cannot be regarded as offering comprehensive solutions and some interception practices may in fact be incompatible with respect for fundamental human rights including the right to leave any country, return to ones own country and the right to seek and enjoy asylum safeguarded by articles 13 and 14 of the Universal Declaration on Human Rights;

- Interception measures which fail to consider protection needs may result in refoulement;

- There is a need to explore with States, relevant IGOs and non-governmental actors the feasibility of devising mass information campaigns to inform prospective clandestine passengers of the risks associated with irregular maritime migration. Such campaigns would need to encompass the various risks associated with overland travel en route to the prospective embarkation point;

- Information campaigns should target prospective passengers concentrated in specific areas in countries of transit and in North African States, as well as migrant populations on the move in Sub-Saharan countries;

- The information should include relevant contact details of competent authorities, NGOs, IGOs providing services in the field of asylum and migration management and information on locally accessible asylum or migration procedures.

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[124] . For the European Union States Members, this approach would be consistent with the EU Council "Regulation on Community statistics on migration and international protection" adopted on September 14th, 2005.

**7. Burden and responsibility sharing**

- The participants recognized that unilateral and bilateral approaches do not necessarily create comprehensive solutions for the Mediterranean and may in fact result in shifting the problems on to neighboring countries;

- There is a need for States to develop a shared understanding of their respective responsibilities in responding to the protection needs of intercepted persons seeking asylum, especially in relation to interception operations on the High Seas;

- Burden and responsibility sharing efforts can contribute to the satisfactory resolution of rescue at sea situations, for example UNHCR could be encouraged to contact its partners to put in place adequate burden-sharing arrangements or standby resettlement programmes to assist;
- There is an urgent need for improved intra-European burden sharing as well as cross Mediterranean approaches;

- States in North Africa should be encouraged to cooperate in providing durable solution to persons recognized as refugees in their respective asylum procedures;

- States where stowaways and rescued persons are disembarked should ensure appropriate access to status determination procedures. Longer term responses including resettlement should be considered as burden and responsibility sharing measures, in particular in support of States with limited integration capacity and those disproportionately affected due to their geographical location.

**8. Areas of renewed international cooperation**

- Recognizing and encouraging the work undertaken under existing multilateral fora such as the Barcelona Process, IOM *5+5 Regional Migration Dialogue* and the ICMPD's *Mediterranean Transit Migration* initiative, participants insisted on the necessity to further address the issues within a regional framework bringing together all the relevant actors;

- The participants noted the complexity of the push and pull factors affecting irregular maritime migration in the Mediterranean characterized by serious risk and various forms of exploitation affecting the "boat people", including during their land journey before arriving to a port of departure;

- The participants recognized the validity of States' efforts to take more decisive action against organized criminal rings on both sides of the Mediterranean shores, stemming their exploitation of desperate migrants who pay considerable sums only to be exposed to life threatening situations;

- The participants called for renewed cooperation, including protection for witnesses and victims who assist in identifying and bringing to justice the smugglers and traffickers;

- In line with the provisions of the United Nations Convention Against Transnational organized Crime and its supplementary Protocols Against smuggling and trafficking, the participants encouraged States to act transparently and to make public the full details of readmission agreements with countries of transit and origin. Such agreements should include adequate safeguards for those "boat people" in need of international protection;

- The participants encouraged the further development and better co-ordination of assisted voluntary return options;

- Multilateral cooperation in addressing the root causes of these movements should not be limited to the building of an asylum capacity in North African States or the establishment of migration policies aimed at detaining and returning "boat people" not in need of international protection, but should also include a proper review of options to create orderly migration and protection channels which would provide alternative opportunities for migrants. Measures to tackle onward movement from North Africa should be developed in the context of a broader, longer-term multilateral commitment to address the root causes of refugee movements in sub-Saharan Africa.

**Rescue-at- Sea**
**Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees**

**Expert Roundtable, Lisbon 25 – 26 March 2002.**
**Summary of Discussions**

This Expert Roundtable addressed the question of rescue-at-sea and specific aspects relating to the protection of asylum-seekers and refugees, basing the discussion on UNHCR's *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (March 2002). The roundtable was composed of 33 participants from governments, the shipping industry, international organisations, non-government organisations, and academia. The first day was organised around two expert panels, while the second day was divided into two working groups to consider (1) guidelines on rescue-at-sea and disembarkation and (2) an international cooperative framework.

The following propositions relate principally to specific aspects of rescue-at-sea by non-State vessels. They do not represent the individual views of each participant, but reflect broadly the tenor of the general discussion.

1. The integrity of the global search and rescue regime already in place and governed by the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) was fully recognised, and needs to be scrupulously protected.

2. Rescue-at-sea is first and foremost a humanitarian issue, with the fact of distress the priority defining feature, and rescue and alleviation of distress the first and absolute imperative, regardless of who the people are and how they came to be where they are.

3. The undertaking to rescue is an obligation of ships' masters, provided for under maritime law, and an old humanitarian tradition. The duty of the master begins with the actual rescue and ends when the rescue is complete which necessitates delivery to a place of safety.

4. The duty of the master does not entail other responsibilities, such as determining the character or status of the people rescued.

5. To ensure full and effective discharge of duties with respect to rescue, it is important that the professional judgment of the master is respected, with regard to the determination of when and where to land the persons rescued. Factors influencing the exercise of this judgment will be the safety and wellbeing of the ship and its crew, and the appropriateness of the place of landing, defined by one or a combination of factors, such as its safety, its closeness, and its location on the ship's schedule.

6. The master has the right to expect the assistance of coastal States with facilitation and completion of the rescue, which occurs only when the persons are landed somewhere or otherwise delivered to a safe place.

7. A non-State vessel, under a competent master and crew, is not an appropriate place in which to screen and categorize those rescued or devise solutions for them, whatever

these might be. Nor is it appropriate to use the ship as, in effect, a "floating detention centre"

8. On completion of the rescue, following delivery to a place of safety, other aspects of the matter come to the fore. These include screening for protection needs, conditions of stay and treatment, and realisation of solutions. Their resolution will depend variously on factors such as, or considerations relating to, the preceding situation of the persons concerned and their mode of transport, as well as on how best to achieve a balancing of responsibilities of all concerned.

9. International law does not prescribe how such additional aspects of the problem must be resolved, though certain provisions of international maritime law, considered as customary international law, are of great importance. The legal gaps concern where disembarkation should take place and which parties are responsible for follow-up action and effecting solutions. International law does, however, more generally give indicators of how they might be resolved. It offers a framework for resolution of the situation, albeit that there are important gaps to be filled by evolving practice together with further development of the law.

10. In terms of the law, human rights principles are an important point of first reference in handling the situation. This body of law requires certain rights to be respected regardless of the formal status of the persons concerned. The law also imposes some general constraints on how the people can be treated. In other words, human rights law prescribes that, wherever and by whomever, certain standards must be upheld and certain needs addressed. Refugee law is similarly prescriptive as regards the refugee component in the rescued caseload.

11. Practice and State policies help to fill the legal gaps, with the laws likely to follow rather than precede practice. The International Maritime Organisation is encouraged to undertake a legal gaps analysis (within its focal point structure), with a view to encouraging positive development of the law.

12. Policy makers are encouraged to recognise:

- The issue of "boat people" is best approached as a challenge, not a crisis.
- Signals are important and the wrong ones should not be sent either to States generally or to ships' masters, which would have the effect of undermining the integrity of global search and rescue activities.
- Any measures to combat people smuggling must not undermine international refugee protection responsibilities.
- The issue is multi-disciplinary and must be approached as such.

13. General responsibilities concerning rescue should be accepted as including that:

- Coastal States have a responsibility to facilitate rescue through ensuring that the necessary enabling arrangements are in place.
- Flag States are responsible for ensuring that ships' masters come to the assistance of people in distress at sea.
- The international community as a whole must cooperate in such a way a to uphold the integrity of the search and rescue regime.

14. Determining the character or status of those rescued by non-State vessels must normally be undertaken on dry land. If asylum-seekers and refugees are found to be

among them, the State providing for disembarkation will generally be the State whose refugee protection responsibilities are first engaged. This entails in principle ensuring access to fair and efficient asylum procedures, and the provision of adequate conditions of reception. The transfer of responsibility for determining refugee status to another State is permissible under international law under certain conditions and provided that appropriate protection safeguards are in place. Furthermore, disembarkation, particularly when it involves large numbers of people rescued, does not necessarily mean the provision of durable solutions in the country of disembarkation.

15. International cooperative efforts to address complex rescue-at-sea situations should be built around burden-sharing arrangements. These arrangements could encompass the processing of asylum applications and/or the realization of durable solutions, such as resettlement. They should furthermore address, as appropriate, the issue of readmission to first countries of asylum and/or safe third countries, as well as return arrangements for those found not to be in need of international protection. Preventative action concerning people smuggling is another important aspect of any international cooperative framework.

16. In follow-up to this expert roundtable, there was support for the more systematic compiling of empirical data on the scale and the scope of the problem. This, coupled with an analysis of the data, should be done by the varying actors from their various perspectives. UNHCR, for its part, would consolidate guidance on rescue-at-sea involving asylum-seekers and refugees. The
International Maritime Organisation's inter-agency initiative will be informed of the outcome of this Expert Roundtable and IMO is encouraged to utilise its existing mechanisms to address any inadequacies in the law. UNHCR's Executive Committee and the UNHCR, IOM consultative mechanism, Action Group on Asylum and Migration (AGAMI) were considered as other appropriate fora to take the discussion further.

**UNHCR**
**11 April 2002**

**Expert roundtable Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees, held in Lisbon, Portugal on 25-26 March, 2002.**

**Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea[125]**

## I. Introduction

1. The phenomenon of people taking to the seas in search of safety, refuge, or simply better economic conditions is not new. The mass exodus of Vietnamese boat people throughout the 1980s was followed in the 1990s by large-scale departures from places such as Albania, Cuba and Haiti. The term "boat people" has now entered into common parlance, with asylum-seekers and migrants trying to reach the closest destination by boat, in the Mediterranean, the Caribbean and the Pacific regions.
Since the vessels used are often overcrowded and un-seaworthy, rescue-at-sea, disembarkation and processing of those rescued has re-emerged as an important but difficult issue for States, international organisations, the shipping industry and, of course, the vulnerable boat people themselves. In an effort to stem the flow of boat people, destination States have increasingly resorted to interception measures within the broader context of migratory control measures, albeit that in some instances adequate protection safeguards have not been evident.

2. This paper examines provisions from different strands of international law that bear on the rescue-at-sea of asylum-seekers and refugees. It focuses on relevant norms, and highlights areas of law which require clarification. It also looks at institutional collective efforts to tackle this issue in the past and suggests elements that could be explored further to address the current situation more effectively within an international co-operative framework.

## II. General legal framework

3. The legal framework governing rescue-at-sea and the treatment of asylum-seekers and refugees rests on the applicable provisions of international maritime law, in interaction with international refugee law. Aspects of international human rights law and the emerging regime for combating transnational crime are also relevant. The following paragraphs set out the more pertinent legal provisions and offer an interpretation, which would, though, benefit from analysis and further elaboration.

### A. International maritime law

4. Aiding those in peril at sea is one of the oldest of maritime obligations. Its importance is attested by numerous references in the codified system of international maritime law as set out in several conventions, namely:

- the United Nations Convention on the Law of the Sea of 1982, (UNCLOS);
- the International Convention for the Safety of Life at Sea of 1974, as amended, (SOLAS);

[125] http://www.unhcr.org/protect/PROTECTION/3e5f35e94.pdf.

- the International Convention on Maritime Search and Rescue of 1979, as amended, (SAR);
- the 1958 Convention on the High Seas (to the extent that it has not been superseded by UNCLOS).

*Responsibilities of different actors*

5. These conventions explicitly contain the obligation to come to the assistance of persons in distress at sea.[126] This obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved. The legal framework also foresees different sets of responsibilities that need to be considered both independently and to the degree to which they inter-relate.

6. The responsibility of the ship master[127] – The ship master is responsible for providing assistance and/or rescue. International maritime law does, however, not elaborate on any continuing responsibility of the master once a rescue has been effected. Indicative of the nature of the responsibility assumed by the master is the fact that he or she may be criminally liable under national law for failing to uphold the duty to render assistance whilst commanding a vessel under the flag of certain States.[128] In addition, the master bears responsibilities not only to those rescued but also for the general safety of his vessel. Effecting a rescue may, under certain circumstances, result in danger to both, as for example when the number of persons rescued outnumbers those legally permitted to be aboard and exceeds the availability of lifejackets and other essential safety equipment.

7. The responsibility of coastal States - This is stipulated as the obligation to develop adequate search and rescue services. The relevant instruments do not expand on the responsibility of coastal States for disembarkation or landing of those rescued nor any consequent follow up actions.[129] Obviously, coastal States with particularly long

[126] See for example, paragraph 2.1.10 of Chapter 2 of the Annex to SAR, 1979, which states, "*Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found"*. Regulation 15 of Chapter V of the Annex to SOLAS, obliges each State to "*ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea around its coasts*." Article 98(1) of UNCLOS, 1982, states that every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers, *inter alia*, to render assistance to any person found at sea and in danger of becoming lost. Some of these provisions have become so universally recognised as to be considered customary international law.

[127] The obligation of ship masters to provide assistance is repeatedly articulated in international maritime law. First codified in 1910, it is incorporated in Article 98 of UNCLOS and Article 10 of the 1989 Salvage Convention. It is also explicitly mentioned in SOLAS (V/7). All three conventions require the master of a ship, so far as he can do without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea and to proceed with all possible speed to the rescue of persons in distress. It is again specifically mentioned in SOLAS (V/33) but is not referred to in SAR, the emphasis of which is more on the responsibilities of States Parties to that Convention.

[128] This is the case in the UK and in Germany, for example.

[129] The obligation of States to render assistance to persons in distress at sea is an enshrined principle of maritime law. Article 98 of UNCLOS requires every coastal State to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements, to co-operate with neighbouring states for this purpose. The detail of

coastlines, those with a large coverage area for search and rescue operations and those located on major shipping routes, would be otherwise particularly affected.

8. The responsibility of flag States – Flag States are of course bound by the dictates of international maritime law, but in practice responsibilities can be difficult to locate given the distinction between those vessels that have a clear relationship to the flag under which they sail and those operating under the open registry system - so called *flags of convenience*.[130] Flag State responsibility has been invoked partly on the basis of the vessel being considered a "floating extension" of the State in question, which is problematic as regards *flags of convenience.* While this position may not have a firm legal grounding, it seems to have contributed to the practice of attributing certain responsibilities to flag States and/or the commercial vessels operating under their authority. For example, with regard to the treatment of stowaways, a practice has evolved which holds ship owners largely responsible for any stowaways found aboard their vessels.[131]

9. The nature of flag State responsibility is also affected by the distinction between commercial vessels and vessels owned or operated by a government and used only on government non-commercial service. Such *State vessels* include, *inter alia*, naval vessels, coast guard vessels and national lifeboats specifically tasked with search and rescue operations. Where such vessels engage in rescue operations within territorial waters, the responsibility for those rescued would devolve on that State. This may arguably be the case even where such scenarios occur on the high seas, particularly if the rescue occurs in the context of interception measures.

10. The roles and responsibilities of international agencies and the international community as a whole – International agencies, such as the International Maritime Organisation (IMO), UNHCR and the International Organisation for Migration (IOM) have specific but differing responsibilities towards persons rescued-at-sea. IMO has the widest and most direct set of responsibilities. It oversees the development of international maritime law, with emphasis on safety aspects, providing technical advice and assistance to States to ensure that they respect their obligations. UNHCR

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search and rescue obligations is to be found in SAR, which defines rescue as involving not only the retrieving of persons in distress and the provision of initial medical care but also their delivery to a place of safety. The SAR Convention expands further on the technical obligations of States vis-à-vis rescue operations but without specifically mentioning the question of disembarkation or landing of those rescued.

[130] In relation to flag States, Article 6 of the Convention on the High Seas, 1958, states: "*Ships shall sail under the flag of one State only and save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.*" In addition and more specifically on the point of non-commercial vessels, Article 9 of the same Convention states that, "*Ships owned or operated by a State and used only on government non commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.*"

[131] Despite efforts to promote shared responsibilities for resolving the problem of stowaways, as exemplified by the development of IMO *Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases* (under the auspices of the FAL Committee/Convention of the Facilitation of Maritime Traffic), practice continues to focus on the responsibilities of the shipping companies, including to the extent of obliging them to re-assume responsibility for those stowaways disembarked and considered under national asylum systems but whose cases are ultimately rejected. It is worth noting that the Guidelines were developed to fill the gaps resulting from the fact that the 1957 International Convention Relating to Stowaways has yet to enter into force.

has a specific responsibility to guide and assist states and other actors on the treatment of asylum-seekers and refugees found at sea and to monitor compliance with refugee protection responsibilities in such scenarios.[132] IOM plays a specific role regarding the needs of migrants at sea, as part of its broader mandate to address issues related to migration. The international community as a whole has a responsibility in terms of developing appropriate responsibility-sharing mechanisms involving States and other actors in order to ensure appropriate responses to the array of scenarios involving migrants, asylum-seekers, refugees and others facing difficulties at sea. Responsibilities assumed by the international community extend not only to response measures but also include preventative actions.[133]

*Delivery to a place of safety*

11. The obligation to come to the aid of those in peril at sea is beyond doubt. There is however, a lack of clarity, and possibly lacunae, in international maritime law when it comes to determining the steps that follow once a vessel has taken people on board.

12. The SAR definition of rescue[134] implies disembarkation since the requirement of delivery to a place of safety cannot be considered to be met by maintaining people on board the rescuing vessel indefinitely. Neither SAR nor other international instruments elaborate, however, on the criteria for disembarkation. Recent discussions at IMO fora have also highlighted the lack of clarity on this issue. Faced with this gap in the law, UNHCR has consistently argued for prompt disembarkation at the next port of call.[135]

13. The effectiveness of the international search and rescue regime rests on the swift and predictable action of all actors. This however, poses a particular challenge where it transpires that there are asylum-seekers and refugees among those rescued.
In such instances, States have questioned the extent of their responsibilities and have delayed, and even blocked, disembarkation, arguing that this would result in a strain on their asylum systems, encourage irregular movement and even contribute to smuggling operations. These concerns are valid and need to be fully reflected in the design of an international co-operative framework to deal with the situation of asylum-seekers rescued at sea.

14. From the perspective of the master, the security of his vessel and the health and safety of those aboard are of paramount concern. Existing guidelines and procedures

[132] For further detail on the competence of UNHCR please refer to Annex 1, *Background Note; Concerning the Competence of the United Nations High Commissioner for Refugees (UNHCR), in relation to rescue-at-sea matters,* as distributed to the participants in COMSAR 6, Working Group 1, during the Committee session held in London, 18 to 20 February 2002.
[133] See for example the Preamble to the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, 2000*, which acknowledges the need to strengthen international co-operation in order to address the root causes of migration.
[134] Described in the Annex, Chapter 1, paragraph 1.3.2 as, *"an operation to retrieve persons in distress, provide for their medical or other needs, and deliver them to a place of safety"*.
[135] The term "next port of call" is nowhere mentioned in international maritime law in connection with rescue-at-sea but has been used in this context by UNHCR's Executive Committee in a number of its Conclusions on the subject.

rarely take sufficient account of the potential for danger if the ship were prevented from proceeding immediately to the first appropriate port of call.
Health and safety concerns include:

- insufficient water and provisions for the number of people on board;
- insufficient medical care for the number of people on board;
- medical emergencies at sea;
- exceeding the number of persons legally permitted to be on board;
- insufficient life-saving equipment for the number of people on board;
- insufficient accommodation for the number of people on board;
- risk to the safety of both crew and passengers if the persons taken on board display aggressive or violent behaviour or threaten to do so.

15. From UNHCR's perspective, the pressing humanitarian challenge in any rescue situation is to ensure an immediate life-saving solution for the plight of severely traumatised persons, without an over-emphasis on legal and practical barriers. It is crucial that ship masters are actively facilitated in their efforts to save lives, confident that safe and timely disembarkation will be guaranteed.

16. In consequence, there are a number of factors, which come into play when considering the question of disembarkation or landing of rescued persons and in particular of asylum-seekers and refugees. These include; i) legal obligations; ii) practical, security and humanitarian concerns; and iii) commercial interests. On occasion, these differing considerations may be perceived as competing or conflicting interests and there is a need for a deeper analysis of the interplay between them. UNHCR believes that guidance on formulating the most appropriate responses can be found in an analysis of the interface between international maritime law and other relevant bodies of international law and practice, and in particular the dictates of international refugee law.

B. International refugee law[136]

17. International maritime law assumes that the nationality and status of the individual are of no relevance vis-à-vis the obligation to rescue.[137] By contrast, international refugee law is premised on the understanding that a person has a well founded fear of persecution, on specific grounds, before he or she can avail of international protection. Clarification of status is therefore crucial in the refugee context to determine obligations owed to the refugee. It is clear that a ship master is not the competent authority to determine the status of those who fall under his temporary care after a rescue operation. Ensuring prompt access to fair and efficient asylum procedures is

[136] The main body of international refugee law, comprised of the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and numerous Conclusions of the Executive Committee of UNHCR (EXCOM Conclusions), is further complemented by international human rights law. Much of the emphasis of international refugee law is placed on the identification of those who meet the definition of a refugee contained in Article 1 A(2) of the 1951 Convention and thus benefit from international protection. Please note that Article 11 of the 1951 Convention makes explicit reference to refugee seamen. See p. 82 of *Convention Relating to the Status of Refugees; Its History, Contents, and Interpretation, a Commentary by Nehemiah Robinson,* republished by UNHCR in 1997, for further information on the rationale behind this provision and the obligations it imposes on flag States. The 1957 Hague Agreement Relating to Refugee Seamen further elaborates on these specific obligations.
[137] As specified for example in the Annex, Chapter 2, paragraph 2.1.10 of the SAR Convention.

therefore key to ensuring the adequate protection of asylum-seekers and refugees amongst those rescued.

18. State responsibility under international refugee law, and in particular the 1951 Convention relating to the Status of Refugees, is activated once it becomes clear that there are asylum-seekers among those rescued. Consistent with the object and purpose of the 1951 Convention and its underlying regime, the responsibilities of States to ensure admission, at least on a temporary basis, and to provide for access to asylum procedures have been elaborated upon in a number of Executive Committee Conclusions of UNHCR's Programme (EXCOM Conclusions).
Whilst not exhaustive, these include:

- EXCOM Conclusion No. 22 (1981), Part II A, para. 2 states: "In all cases the fundamental principle of *non-refoulment*, including - non-rejection at the frontier - must be scrupulously observed."
- EXCOM Conclusion No. 82 (1997), para. d, (iii) reiterates: "The need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs"

- EXCOM Conclusion No. 85 (1998), para. q: "…. reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining status and protection needs."

19. The 1951 Convention defines those on whom it confers protection and establishes key principles such as non-penalisation for illegal entry and *non-refoulment*.[138] It does not, however, set out specific procedures for the determination of refugee status as such. Despite this it is clearly understood and accepted by States that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention.[139] States require such procedures to identify those who should benefit from international protection under the 1951 Convention, and those who should not.

20. The principle of access to fair and efficient procedures is equally applicable in the case of asylum-seekers and refugees rescued at sea. The reasons motivating their flight and the circumstances of their rescue frequently result in severe trauma for the persons concerned. In UNHCR's view, this provides added impetus for prompt disembarkation followed by access to procedures to determine their status. Achieving this objective requires clarity on a number of key issues, including: i) the identification of asylum-seekers among those rescued, as well as, ii) the determination of the State responsible under international refugee law for admission and processing of the asylum-seekers.

[138] 1951 Convention Relating to the Status of Refugees, Articles, 1, 31 and 33.
[139] See, EXCOM Conclusion No. 81 (XLVII) 1997, para. (F) (A/AC.96/895, para 18); EXCOM Conclusion No. 82 (XLVIII) 1997 para. (d)(iii) (A/AC/96/895); EXCOM Conclusion No 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3). It should be noted that in mass influx situations, access to individual procedures may not prove practicable and other responses may be required.

*The identification of asylum-seekers*

21. As regards the first question, at a land border, the identification of an asylum-seeker usually occurs through the lodging of an asylum request with the competent State authorities. This may be done by a formal written application or verbally, to the border authorities at the point of entry. In the case of rescue-at-sea, the mechanism of lodging an asylum application is unclear.

22. While the legal regime applicable on board ship is that of the flag State, this does not mean that *all* administrative procedures of the flag State would be available and applicable in such situations. The master will not be aware of the nationality or status of the persons in distress and cannot reasonably be expected to assume any responsibilities beyond rescue. The identification of asylum-seekers and the determination of their status is the responsibility of State officials adequately trained for that task.

23. In UNHCR's view, the identification and subsequent processing of asylum-seekers is an activity most appropriately carried out on dry land. Onboard processing, both in the form of initial screening and more comprehensive determination, has been attempted in past refugee crises. It proved problematic in various respects, including *inter alia,* ensuring adequate access to translators, safeguarding the privacy of the interviews carried out under difficult conditions on board ship, ensuring access to appropriate counsel and providing appropriate appeal mechanisms.

24. Onboard processing may be appropriate in some limited instances depending on the number and conditions of the persons involved, the facilities on the vessel and its physical location. It would, however, be impractical for situations involving large numbers of people or where their physical and mental state is not conducive to immediate processing. Onboard processing is inappropriate where the rescued persons are aboard a commercial vessel. The first priority in most instances remains prompt and safe disembarkation followed by access to fair and efficient asylum procedures. An effective response to the challenge of properly identifying asylum seekers should therefore acknowledge that the status of the rescued persons is best determined by the appropriate authorities after disembarkation.

*Determination of the State responsible under international refugee law*

25. This raises the question of determining the State responsible under international refugee law for admitting the asylum-seekers (at least on a temporary basis) and ensuring access to asylum procedures. International refugee law, read in conjunction with international maritime law, suggests that this is generally the State where disembarkation or landing occurs. This will normally be a coastal State in the immediate vicinity of the rescue.

26. The flag State could also have primary responsibility under certain circumstances. Where it is clear that those rescued intended to request asylum from the flag State, that State could be said to be responsible for responding to the request and providing access to its national asylum procedure. In the event that the number of persons rescued is small, it might be reasonable for them to remain on the vessel until they can be disembarked on the territory of the flag State. Alternatively, circumstances might

necessitate disembarkation in a third State as a transitional measure without that State assuming any responsibility to receive and process applications. Arguably, and even on the high seas, the responsibility accruing to the flag State would be stronger still, where the rescue operation occurs in the context of interception measures. The cumulative effect of the original intended destination and the deliberate intervention of the State to prevent the asylum-seeker from reaching the final destination underpins such an argument.[140]

27. The Executive Committee of UNHCR has formulated a number of Conclusions in relation to rescue-at-sea emphasising the question of disembarkation and admission. These Conclusions reflect the experience of the 1980s, which was characterised by serious concerns that refusals to permit disembarkation, especially if only requested on a temporary basis, would have the effect of discouraging rescue-at-sea and undermining other international obligations. Whilst the current situation is not as acute as that faced during the 1980s, there are similarities and now, as then, lives are at risk. The underlying need to uphold the obligation to rescue in full compliance with the consequent obligations that arise under international refugee law remains paramount.

28. The most salient guidance from EXCOM Conclusions includes the following:

- EXCOM Conclusion No. 14 (1979), para. c, notes as a matter of concern: " …that refugees had been rejected at the frontier… in disregard of the principle of *non-refoulment* and that refugees, arriving by sea had been refused even temporary asylum with resulting danger to their lives…."
- EXCOM Conclusion No. 15, (1979) para. c, states: "It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."
- EXCOM Conclusion No.23, (1981) para. 3 states "In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities."

29. In summary, the Executive Committee pronouncements, taken in conjunction with the obligation under international maritime law to ensure delivery to a place of safety, call upon coastal States to allow disembarkation of rescued asylum-seekers at the next port of call.[141]

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[140] EXCOM Conclusion No. 15 (XXX) of 1979 states, *inter alia*, "*The intentions of the asylumseeker as regards the country in which he wishes to request asylum should as far as possible be taken into account."* This does not imply an unfettered right of asylum-seekers to pick and choose at will the country in which they intend to request asylum. Rather the reference is framed in the context of situations involving individual asylum-seekers and is but one of a number of criteria. It does, however, provide guidance as to how to address the problem of refugees without an asylum country.

[141] As previously noted, the term "next port of call" in connection with disembarkation or landing of rescued persons is unknown as such to maritime law but rather results from EXCOM Conclusions.

“Next port of call”

30. Since the “next port of call” with reference to the disembarkation of rescued persons is nowhere clearly defined, there are a number of possibilities, which would need to be further explored to clarify this concept. In many instances, especially when large numbers of rescued persons are involved, it will in effect be the nearest port in terms of geographical proximity given the overriding safety concerns. Under certain circumstances, it is also possible to conceive the port of embarkation as the appropriate place to effect disembarkation, arising from the responsibility of the country of embarkation to prevent un-seaworthy vessels from leaving its territory. Another option would be the next scheduled port of call. This would be appropriate, for instance, in cases where the number of people rescued is small and the safety of the vessel and those on board is not endangered nor likely to necessitate a deviation from its intended course. There may be instances where the next port of call may not be the closest one but rather the one best equipped for the purposes of receiving traumatised and injured victims and subsequently processing any asylum applications. In other situations, involving State vessels intercepting illegal migrants, the nearest port of that State could be regarded as the most appropriate port for disembarkation purposes. From a safety and humanitarian perspective, ensuring the safety and dignity of those rescued and of the crew, must be the overriding consideration in determining the point of disembarkation.

31. With due regard to all of these considerations the development of criteria that help to define the most appropriate port for disembarkation purposes will be informed by the following factors:

- the legal obligations of States under international maritime law and international refugee law;
- the pressing safety and humanitarian concerns of those rescued;
- the safety concerns of the rescuing vessel and the crew;
- the number of persons rescued and the consequent need to ensure prompt disembarkation;
- the technical suitability of the port in question to allow for disembarkation;
- the need to avoid disembarkation in the country of origin for those alleging a well founded fear of persecution;
- the financial implications and liability of shipping companies engaged in undertaking rescue operations.

C. International human rights law

32. International human rights law also contains important standards in relation to those in distress and rescued at sea. The safe and humane treatment of all persons rescued regardless of their legal status or the circumstances in which they were rescued is of paramount importance. Basic principles such as the protection of the

right to life, freedom from cruel, inhuman or degrading treatment and respect for family unity by not separating those rescued must be upheld at all times.[142]

D. International criminal law

33. Questions of international criminal law arise where the rescue operation is necessitated as a consequence of smuggling operations. People smuggling may indeed be a factor when large numbers of persons are found on poorly equipped and un-seaworthy vessels, flouting the basic standards of maritime safety. Combating this crime is a matter of concern for States world-wide, alarmed by its scale and scope and the huge profits generated from it.

34. The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, while not yet in force, constitutes the most comprehensive legal instrument, to date, covering smuggling of persons.[143] Under the Protocol, the fact that migrants, including asylum-seekers and refugees, were smuggled does not deprive them of any rights as regards access to protection and assistance measures. In the context of rescue-at-sea, it is crucial that the rights of those rescued are not unduly restricted as a result of actions designed to tackle the crime of people smuggling. Criminal liability falls squarely upon the smugglers and not on the unwitting users of their services.

35. With respect to the special circumstances of asylum-seekers and refugees, it should be noted that the Protocol contains a general saving clause in its Article 19 to ensure compatibility with obligations under international refugee law.[144] It is clear from the formulation of Article 19 that there is no inherent conflict between the standards set by the international law to combat crimes and those contained in international refugee law. Combating crime does not mean a diminution of the rights of asylum-seekers and refugees.

## III. The international co-operative framework

36. Given the complexity of rescue-at-sea situations, not least due to the involvement of different actors and sets of responsibilities, there is a need for an effective international co-operative framework in this area. The overriding objective of such a framework is to develop responses defining responsibilities in a manner that can be activated without undue delay.

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[142] For further discussion of the applicable human rights standards please see *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/01/17, the contents of which can be considered to apply *mutatis mutandis* in rescue situations.

[143] Article 16(1) obliges States to take "*all appropriate measures … to preserve and protect the rights of persons*" who have been the object of smuggling, "*in particular the right to life and the right not to be subjected to torture or other cruel, inhuman, or degrading treatment, or punishment.*" In addition, according to Article 16(3), States should "*afford appropriate assistance to migrants whose lives and safety are endangered*" by reason of being smuggled. In applying the provisions of Article 16, States are required in its paragraph 4 to take into account the special needs of women and children.

[144] Article 19 states that "*nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non- refoulment as contained therein*."

A. Past practice and current challenges

37. A brief examination of past practices provides some guidance as to the type of arrangements, which may be required to face current challenges.

- The crisis of the Vietnamese boat people prompted specialised response mechanisms to support rescue efforts and the subsequent search for durable solutions. The most important of these were the Disembarkation Resettlement Offers Scheme (DISERO) and the Rescue-at-Sea Resettlement Offers Scheme (RASRO).[145] Both schemes provide an indication of the level of State co-operation required to secure effective response mechanisms
- The constituent elements of both schemes included:

    - agreement of the coastal States to allow disembarkation
    - agreement of the coastal States to provide temporary refuge
    - open-ended guarantees from contributing third States that those rescued would be resettled elsewhere.

38. Eventually however, both DISERO and RASRO were terminated as the guarantee that any Vietnamese rescued at sea would be resettled within 90 days did not square with the 1989 Comprehensive Plan of Action guidelines. These required that all new arrivals undergo screening to determine their status. Countries in the region became increasingly unwilling to disembark rescued boat people, fearing that resettlement guarantees would not be forthcoming.

39. Any consideration of mechanisms akin to DISERO and RASRO in the current context will need to take account of the fact that the vast majority of those rescued were considered *prima facie* refugees, in direct flight from their place of origin. Today's situation is characterised by complex movements and mixed flows where the refugee status of those involved must be carefully determined.[146] The composite nature of today's movements, coupled with more restrictive asylum practices generally, compounds the difficulty of agreeing on policies and standards for the processing of asylum applications of persons rescued at sea.

B. Elements of an international framework

40. Against this background, it is suggested here to explore an international framework, the goals of which would generally be the following:

- Support for the international search and rescue regime;
- Easing the burden on States of disembarkation;

[145] Article 19 states that "*nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol* relating to the Status of Refugees and the principle of non- refoulment as contained therein."

[146] Most of the migratory flows which have given rise to the current debate on rescue-at-sea are characterised as mixed. This should not, however, be taken to exclude the possibility of prima face recognition in the event of a massive outflow by sea directly from a country of origin, similar to that of the Vietnamese in the 1980s. In such a scenario individual refugee status determination would be impractical and response mechanisms would need to be tailored accordingly.

- An equitable responsibility sharing approach to the determination of refugee status and international protection needs of those rescued;[147]
- An equitable responsibility sharing approach to the realisation of durable solutions to meet international protection needs;[148]
- Agreed re-admission and strengthened assistance, financial and otherwise, to first countries of asylum;
- Agreement by countries of origin to accept the return of their nationals determined, after access to fair and efficient asylum procedures, not to be in need of international protection.

41. In order to ensure the effectiveness of an international framework the roles and responsibilities of numerous actors would have to be clarified. The principal actors involved would include:

- The asylum-seekers and refugees;
- Countries of origin;
- Countries of first asylum;
- Countries of transit;
- Countries of embarkation;
- Countries of disembarkation;
- Flag States;
- Coastal States;
- Resettlement countries;
- The donor community;
- International organisations, notably UNHCR, IMO and IOM.

42. From UNHCR's perspective the main concerns at stake which involve issues of refugee law, include:

- The right to seek and enjoy asylum;
- *Non-refoulment;*
- Access to fair and efficient asylum procedures;
- Conditions of treatment;
- Appropriate balance between State responsibilities and that of international organisations;
- Safe return to first countries of asylum;
- Durable solutions for those recognised as refugees;
- Orderly and humane return of persons determined not to be in need of international protection.

43. A workable framework will also need to take due account of the broader context,

[147] This could, for instance, include stand-by arrangements to assist states in processing asylum applications, when the number of rescued asylum-seekers overwhelms the capacity of the individual asylum system at the point of disembarkation. This could mean the dispatch of additional asylum officers from third countries, transfer arrangements for the processing of cases and capacity-building measures to strengthen protection and assistance. Potential distribution mechanisms in the immediately affected region, based on pre-arranged quotas and criteria, could play a positive role in facilitating such arrangements.

[148] Specific resettlement pools for rescue-at-sea situations could, for instance, be created. This would require the activation of emergency mechanisms to deal with especially pressing cases.

including the following factors:

- The impact on smuggling and irregular movement;
- Interception practices;
- The adverse impact of exporting condoned practices;
- Appropriate responsibility sharing vs. individual State responsibility;
- The impact on resettlement policy;
- The challenge of dealing with cases found not to be in need of international protection.

44. In addition, the importance of preventative measures should not be overlooked. Many concrete steps can be taken to discourage people from risking dangerous sea voyages. Public information campaigns, actions to prevent the departure of un-seaworthy vessels, and stringent criminal law enforcement measures directed against smugglers are features of such measures.

45. Finally, certain information needs need to be met. These include: i) measures to fill existing information gaps on the scale and scope of the problem; ii) measures to compile and analyse the existing legislative norms in a more detailed fashion, including recommendations for amendments where these prove necessary; iii) an open and transparent exchange of information on current practices in order to identify good state practice, and; iv) the development of a comprehensive information strategy designed to inform public opinion on problems related to rescueat- sea, especially on the rights and obligations of those involved.

**IV. Concluding observations**

46. It is hoped that this Background Note helps to stimulate a discussion on how to address complex rescue-at-sea situations involving asylum-seekers and refugees.

**Office of the United Nations High Commissioner for Refugees (UNHCR)**
**18 March 2002**[149]

[149] Final version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees,* held in Lisbon, Portugal on 25-26 March, 2002.

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# Conclusion on Protection Safeguards in Interception Measures

*The Executive Committee*,

*Noting* the discussions which took place on interception measures at the Standing Committee[1] as well as in the context of the Global Consultations on International Protection;[2]

*Concerned* about the many complex features of the evolving environment in which refugee protection has to be provided, including the persistence of armed conflict, the complexity of current forms of persecution, ongoing security challenges, mixed population flows, the high costs that may be connected with hosting asylum-seekers and refugees and of maintaining individual asylum systems, the growth in trafficking and smuggling of persons, the problems of safeguarding asylum systems against abuse and of excluding those not entitled to refugee protection, as well as the lack of resolution of long-standing refugee situations;

*Recognizing* that States have a legitimate interest in controlling irregular migration, as well as ensuring the safety and security of air and maritime transportation, and a right to do so through various measures;

*Recalling* the emerging legal framework[3] for combating criminal and organized smuggling and trafficking of persons, in particular the Protocol Against the Smuggling of Migrants by Land, Sea and Air, which, *inter alia*, contemplates the interception of vessels enjoying freedom of navigation in accordance with international law, on the basis of consultations between the flag State and the intercepting State in accordance with international maritime law, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea;

*Noting* the saving clauses contained in each of the Protocols[4] and the reference to the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the principle of non-refoulement;

*Recalling* also the duty of States and shipmasters to ensure the safety of life at sea and to come to the aid of those in distress or in danger of being lost at sea, as contained in numerous instruments of the codified system of international maritime law[5]; *recalling also* Conclusions of the Executive Committee of relevance to the particular needs of asylum-seekers and refugees in distress at sea[6] and *affirming* that when vessels respond to persons in distress at sea, they are not engaged in interception;

*Recognizing also* that States have international obligations regarding the security of civilian air transportation and that persons whose identities are unknown represent a potential threat to the security of air transportation as contained in numerous instruments of the codified system on international aviation law;[7]

*Understanding* that for the purposes of this conclusion, and without prejudice to international law, particularly international human rights law and refugee law, with a view to providing protection safeguards to intercepted persons, interception is one of the measures employed by States to:

i. prevent embarkation of persons on an international journey;
ii. prevent further onward international travel by persons who have commenced their journey; or
iii. assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;

where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner;

(a) *Recommends* that interception measures be guided by the following considerations in order to ensure the adequate treatment of asylum-seekers and refugees amongst those intercepted;

i. The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons;
ii. All intercepted persons should be treated, at all times, in a humane manner respectful of their human rights. State authorities and agents acting on behalf of the intercepting State should take, consistent with their obligations under international law, all appropriate steps in the implementation of interception measures to preserve and protect the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment of persons intercepted;
iii. Interception measures should take into account the fundamental difference, under international law, between those who seek and are in need of international protection, and those who can resort to the protection of their country of nationality or of another country;
iv. Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions;
v. The special needs of women and children and those who are otherwise vulnerable should be considered as a matter of priority;
vi. Intercepted asylum-seekers and refugees should not become liable to criminal prosecution under the *Protocol Against the Smuggling of Migrants by Land, Sea or Air* for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met;

vii. Intercepted persons who do not seek or who are determined not to be in need of international protection should be returned swiftly to their respective countries of origin or other country of nationality or habitual residence and States are encouraged to cooperate in facilitating this process;[8]

viii. All persons, including officials of a State, and employees of a commercial entity, implementing interception measures should receive specialized training, including available means to direct intercepted persons expressing international protection needs to the appropriate authorities in the State where the interception has taken place, or, where appropriate, to UNHCR;

(b) *Encourages* States to generate and share more detailed information on interception, including numbers, nationalities, gender and numbers of minors intercepted, as well as information on State practice, having due consideration for security and data protection concerns subject to the domestic laws and international obligations of those States;

(c) *Encourages* States to further study interception measures, including their impact on other States, with a view to ensuring that these do not interfere with obligations under international law.

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[1] EC/50/SC/CRP17, 9 June 2000

[2] EC/GC/O1/13, 31 May 2001, Regional Workshops in Ottawa, Canada and in Macau.

[3] The United Nations Convention Against Transnational Organized Crime, 2000 and its Supplementary Protocols Against the Smuggling of Migrants by Land, Sea and Air; and to Suppress and Punish Trafficking in Persons, Especially Women and Children.

[4] Article 19 of the Smuggling Protocol and Article 14 of the Trafficking Protocol.

[5] Including *inter alia* the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, 1974, as amended and the International Convention on Maritime Search and Rescue, 1979, as amended.

[6] In particular No. 15(XXX), No. 20(XXXI), No. 23(XXXII), No. 26 (XXXIII), No. 31 (XXXIV), No. 34 (XXXV) and No. 38 (XXXVI);

[7] Including, *inter alia*, the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of

Unlawful Acts against the Safety of Civil Aviation and the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

[8] See Conclusion on the return of persons found not to be in need of international protection. (A/AC.96/987, para. 21)

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# INTERCEPTION OF ASYLUM-SEEKERS AND REFUGEES THE INTERNATIONAL FRAMEWORK AND RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH

## I. INTRODUCTION

1. Irregular migration has become a major challenge for many States in different parts of the world. The increase in the number of arrivals without the required documentation has raised concerns about the ability of States to control borders and access to their territory. In recent years, Governments have renewed efforts to prevent irregular migration and to combat the smuggling and trafficking of persons, in particular when undertaken by organized criminal groups[1].

2. Many of those who are being smuggled or trafficked are migrants in search of a better life, hoping to find employment opportunities and economic prosperity abroad. Others are asylum-seekers and refugees who flee from persecution, armed conflict, and other threats to their life and freedom. Both groups are exploited by criminal traffickers or smugglers who seek to make illicit profit from offering their services to the vulnerable and the disadvantaged.

3. In order to combat human smuggling and trafficking, States have adopted, *inter alia*, the practice of "intercepting" persons travelling without the required documentation – whether in the country of departure, in the transit country, within territorial waters or on the high seas, or just prior to the arrival in the country of destination. In some instances, interception has affected the ability of asylum-seekers and refugees to benefit from international protection.

4. Based on a working definition outlined below, this paper describes the current State practice on interception. It sets out the international legal and policy framework in which interception takes places, including its impact on asylum-seekers and refugees, and puts forward a number of recommendations for a comprehensive, protection-oriented approach.

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[1] UNHCR supports the distinction made by the Vienna Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (created by the General Assembly in its resolution 53/111 of 9 December 1998) between smuggled migrants and trafficked persons. As currently defined in the two draft Protocols supplementing the main Draft Convention, trafficking concerns the recruitment and transportation of persons for a criminal purpose, such as prostitution or forced labour, and usually involves some level of coercion or deception. Smuggling, on the other hand, involves bringing a migrant illegally into another country, but normally without continued exploitation of the smuggled person after arrival.

 

## II. INTERCEPTION AND OTHER MEASURES AGAINST IRREGULAR MIGRATION

5. The paragraphs that follow describe various types of interception as practised by States, the reasons for these measures and their impact on asylum-seekers and refugees. They are introduced by a brief summary of current discussions at international level that relate to irregular migration.

### A. International Cooperation against smuggling and trafficking of persons

6. Interception has been discussed within the context of a number of processes and consultations, in particular at the regional level, with a focus inter alia on combating irregular migration. These include the Asia-Pacific Consultation (APC), the South Asian Association for Regional Cooperation (SAARC), the Inter-Governmental Consultations (IGC), the Budapest Process in Europe, and the Regional Conference on Migration ("Puebla Process") in the Americas.

7. Initiated in 1991, the Budapest process created a structured framework between the European Union and Central and Eastern European countries for the prevention of irregular migration and related control issues. This process resulted in the adoption of recommendations *inter alia* relating to pre-entry and entry controls, return and readmission, information exchange, technical and financial assistance and measures to combat organized crime with regard to trafficking and smuggling of persons. In Latin America, within the framework of the Regional Conference on Migration, Member States have been discussing programmes for the return of undocumented migrants from outside the region to countries of origin with the assistance of the International Migration for Migration (IOM), in particular those intercepted on boats in international waters.

8. Other examples of a comprehensive approach are provided by the country-specific action plans of the European Union's High Level Working Group on Asylum and Migration (HLWG). These plans address the phenomenon of composite flows and comprise a number of elements relating to the root causes of migratory and refugee movements. They also contain control measures to combat irregular migration, such as increasing the number and effectiveness of airline liaison officers and immigration officials posted abroad.

9. The issue of combating smuggling and trafficking of persons has also featured prominently on the agenda of the European Union and of several international organizations, including the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), the International Organization for Migration (IOM), the Inter-Parliamentary Union, and several United Nations agencies, such as the International Labour Organization (ILO)

## B. Interception and State Practice

### *(i) Defining interception*

10. An internationally accepted definition of interception does not exist. Its meaning has to be derived from an examination of past and current State practice. For the purpose of this paper, interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.

### *(ii) Description of interception practices*

11. Interception of undocumented or improperly documented persons[2] has taken place for many years, in a variety of forms. Although interception frequently occurs in the context of large-scale smuggling or trafficking of persons, it is also applied to individuals who travel on their own, without the assistance of criminal smugglers and traffickers.

12. The practice can occur in the form of physical interception or – as it is sometimes called – interdiction of vessels suspected of carrying irregular migrants or asylum-seekers, either within territorial waters or on the high seas. Some countries try to intercept boats used for the purpose of smuggling migrants or asylum-seekers as far away as possible from their territorial waters. Following the interception, passengers are disembarked either on dependent territories of the intercepting country, or on the territory of a third country which approves their landing. In most instances, the aim after interception is return without delay of all irregular passengers to their country of origin.

13. Aside from the physical interdiction of vessels, many countries also put in place a number of administrative measures with the aim of intercepting undocumented migrants. At key locations abroad, such as the main transit hubs for global migratory movements, States have deployed extraterritorially their own immigration control officers in order to advise and assist the local authorities in identifying fraudulent documents. In addition, airline liaison officers, including from private companies, have been posted at major international airports both in countries of departure and in transit countries, to prevent the embarkation of improperly documented persons. A number of transit countries have received financial and other assistance from prospective destination countries in order to enable them to detect, detain and remove persons suspected of having the intention to enter the country of destination in an irregular manner.

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[2] In this paper, the term "undocumented" or "improperly documented" persons refers to those who are not in possession of the required documentation for travel to and entry into the country of intended destination.

### *(iii) Reasons for interception*

14. Such interception practices have been adopted by States for a variety of reasons. Given their concern over a global increase in irregular migration and the number of spontaneous arrivals, interception is mostly practiced in order to disrupt major smuggling and trafficking routes. More specifically, in the case of smuggled asylum-seekers, States have expressed their apprehension as to undocumented arrivals who submit applications for asylum or refugee status on grounds which do not relate to any criteria justifying the granting of protection. These States consider that the smuggling of such persons will lead, or indeed is already leading, to the misuse of established status determination procedures, and risks decreasing their ability to offer asylum and protection on the same terms as in the past.

15. Many of the undocumented asylum-seekers are found to be irregular movers, that is refugees who had already found protection in another country and for whom protection continues to be available[3]. The perception is spreading, especially among traditional resettlement countries, that such refugees are seeking to circumvent established resettlement channels by using the services of criminal smugglers.

16. Finally, States have pointed out that smuggling often endangers the lives of migrants, in particular those travelling in unseaworthy boats. Their interception contributes to the rescue of persons in distress at sea and can help to save lives.

## C. Impact on asylum-seekers and refugees

17. States have a legitimate interest in controlling irregular migration. Unfortunately, existing control tools, such as visa requirements and the imposition of carrier sanctions, as well as interception measures, often do not differentiate between genuine asylum-seekers and economic migrants. National authorities, including immigration and airline officials posted abroad, are frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection.

18. Immigration control measures, although aimed principally at combating irregular migration, can seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum. As pointed out by UNHCR in the past, the exclusive resort to measures to combat abuse, without balancing them by adequate means to identify genuine cases, may result in the *refoulement* of refugees[4].

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[3] See Conclusion No. 58 (XL) of 1989 (A/AC.96/737, para. 25) concerning the problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection.

[4] See Note on International Protection of 3 July 1998 (A/AC.96/898), para. 16.

19. Recent bilateral arrangements for intercepting and arresting asylum-seekers in a transit country, including women and children, have given rise to particular protection concerns. In the absence of an effective protection regime in the transit country, intercepted asylum-seekers are at risk of possible *refoulement* or prolonged detention. The refusal of the first country of asylum to readmit irregular movers may also put refugees "in orbit", without any country ultimately assuming responsibility for examining their claim. Current efforts to increase cooperation between States for the purposes of intercepting and returning irregular migrants also fail to provide adequate safeguards for the protection of asylum-seekers and refugees. In UNHCR's view, it is therefore crucial to ensure that interception measures are implemented with due regard to the international legal framework and States' international obligations.

## III. THE INTERNATIONAL LEGAL FRAMEWORK

20. International law provides important parameters for States undertaking interception as a means to combat irregular migration. Reference to these parameters is to be found within a complex framework of existing and emerging international legal principles deriving from international maritime law, criminal law, the law of State responsibility, human rights law and, in particular, international refugee law.

### A. International refugee law

#### *(i) Interception and non-refoulement*

21. The fundamental principle of non-refoulement reflects the commitment of the international community to ensure that those in need of international protection can exercise their right to seek and enjoy in other countries asylum from persecution, as proclaimed in Article 14 (1) of the Universal Declaration of Human Rights. It applies whenever a State or one of its agents contemplates the return of persons "in any manner whatsoever" to territories where they may be subjected to persecution, irrespective of whether or not they have been formally recognized as refugees[5]. The overriding importance of the observance of *non-refoulement* – both at the border and within the territory of a State – has been repeatedly reaffirmed by the Executive Committee which has also recognized that the principle is progressively acquiring the character of a peremptory rule of international law[6].

22. The direct removal of a refugee or an asylum-seeker to a country where he or she fears persecution is not the only manifestation of *refoulement*. The removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution constitutes indirect *refoulement*, for which several countries may bear joint responsibility.

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[5] Conclusion No. 6 (XXVIII) of 1977 (A/AC.96/549, para. 53(4)).

[6] Conclusion No. 25 (XXXIII) of 1982 (A/AC.96/614, para. 70(1)).

23. The principle of *non-refoulement* does not imply any geographical limitation. In UNHCR's understanding, the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and human rights law.

### *(ii) Interception and illegal entry*

24. The indiscriminate application by States of interception measures to asylum-seekers derives from the assumption that genuine refugees should depart from their country of origin or from countries of first asylum in an orderly manner. However, some countries of origin impose strict exit control measures, which makes it difficult for refugees to leave their countries legally.

25. The fact that asylum-seekers and refugees may not be able to respect immigration procedures and to enter another country by legal means has been taken into account by the drafters of the 1951 Convention relating to the Status of Refugees. Article 31 (1) of the 1951 Convention prohibits the penalization of refugees for illegal entry or presence, provided they come directly from countries where their life was threatened and show "good cause" for violating applicable entry laws.

### *(iii) Interception and irregular movement*

26. Many intercepted asylum-seekers and refugees have moved from a country other than that of their origin. The phenomenon of refugees who move in an irregular manner from countries in which they had already found protection, in order to seek asylum or resettlement elsewhere, is a growing concern. The return of such refugees to countries of first asylum can be envisaged whenever the refugees will be protected there against *refoulement*; will be permitted to remain there and treated in accordance with recognized basic human standards until a durable solution has been found[7].

27. However, in the absence of specific agreements to allow refugees who moved in an irregular manner to re-enter the country in which they had already found protection, efforts to return irregular movers have not always been successful. In addition, refugees who initially found protection in the country of first asylum, sometimes feel compelled to depart spontaneously, for instance due to a deterioration of protection standards in the country of first asylum. This may require concerted international efforts to address such problems, and to assist States in building their capacity to establish effective protection mechanisms, not least in an effort to promote international solidarity.

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[7] Conclusion No. 58 (XL) of 1989 (A/AC.96/737, para. 25).

## B. The emerging legal framework for combating criminal and organized smuggling and trafficking of persons

28. In its resolution 53/111 of 9 December 1998, the General Assembly decided to establish an intergovernmental Ad Hoc Committee for the purpose of elaborating a comprehensive international convention against organized crime, including the drafting of international instruments addressing the trafficking in persons, especially women and children, and the smuggling in and transport of migrants.

29. UNHCR, along with other international organizations, has actively participated in the discussions of the Ad Hoc Committee in Vienna[8]. The Office shares the concerns raised by many States that the criminal and organized smuggling of migrants, on a large scale, may lead to the misuse or abuse of established national procedures for both regular immigrants and asylum-seekers.

30. The current draft Protocol against the Smuggling of Migrants by Land, Air and Sea[9], prepared by the Ad Hoc Committee, includes a draft provision which would authorize States Parties to intercept vessels on the high seas, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea[10].

31. It is encouraging that efforts in this context are directed to elaborating international instruments which not only serve the purpose of punishing criminal smugglers and traffickers, but which also provide proper protection to smuggled and trafficked persons, in particular asylum-seeking women and children. It is important that the current draft Protocols maintain explicit references to the 1951 Convention and the 1967 Protocol and, as regards the draft Protocol against Smuggling of Migrants, to the principle of *non-refoulement*. UNHCR also appreciates that delegations in Vienna repeatedly stated that these instruments do not aim at punishing or criminalizing persons who are being smuggled or trafficked.

32. The safeguards contained in the current draft Protocols should be maintained and, where appropriate, further strengthened, through appropriate references to international refugee law and human rights law. In UNHCR's view, the elaboration of these two Protocols represents a unique opportunity to design an international framework which could provide a solid legal basis for reconciling measures to combat the smuggling and trafficking of persons, including through interception, with existing obligations under international law towards asylum-seekers and refugees.

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[8] Note by the United Nations High Commissioner for Human Rights, International Organization for Migration, United Nations High Commissioner for Refugees, and the United Nations Children's Fund on the Protocol concerning migrant smuggling and trafficking in persons (A/AC.254/27) of 8 February 2000, and Corrigendum (A/AC.354/27/Corr.1) of 22 February 2000.

[9] A/AC.254/4/Add.1.Rev.5.

[10] See draft Article 7 bis.

## IV. RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH

33. In the absence of a comprehensive approach, the application of stringent measures alone for intercepting undocumented migrants is unlikely to be successful, and may well adversely affect refugees and asylum-seekers. The adoption of interception policies in certain regions, in isolation from other measures, risks diverting the smuggling and trafficking routes to other regions, thereby increasing the burden on other States.

34. Together with States and other international and national actors, UNHCR is prepared to contribute to the ongoing discussion on the problem of organized smuggling as it affects asylum-seekers and refugees. Further progress will require a protection-oriented approach which addresses the problem through a variety of measures. The following elements are intended as basis for a discussion within the Executive Committee on a comprehensive approach, with a view to the possible adoption of a conclusion on such an approach[11]:

(a) Interception and other enforcement measures should take into account the fundamental difference, under international law, between refugees and asylum-seekers who are entitled to international protection, and other migrants who can resort to the protection of their country of origin;

(b) Intercepted persons who present a claim for refugee status should enjoy the required protection, in particular from *refoulement*, until their status has been determined. For those found to be refugees, intercepting States, in cooperation with concerned international agencies and NGOs, should undertake all efforts to identify a durable solution, including, where appropriate, through the use of resettlement;

(c) Alternative channels for entering asylum countries in a legal and orderly manner should be kept open, in particular for the purpose of family reunion, in order to reduce the risk that asylum-seekers and refugees will resort to using criminal smugglers. By adopting appropriate national legislation, States should enforce measures to punish organized criminal smugglers and to protect smuggled migrants, in particular women and children;

(d) States should, furthermore, examine the outcome of interception measures on asylum-seekers and refugees, and consider practical safeguards to ensure that these measures do not interfere with obligations under international law, for instance, through establishing an appropriate mechanism in transit countries to identify those in need of protection, and by training immigration officers and airline officials in international refugee law;

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[11] The desirability of a comprehensive approach by the international community to the problems of refugees has been already acknowledged in Conclusion No. 80 (XLVII) of 1996 (A/AC.96/878, para. 22).

(e) In order to alleviate the burden of States that are disproportionally affected by large numbers of spontaneous and undocumented asylum-seekers and refugees, other States should give favourable consideration to assisting the concerned governments in providing international protection to such refugees, based on the principle of international solidarity and within a burden-sharing framework;

(f) In regions in which only a few countries have become party to the 1951 Convention and the 1967 Protocol, States Parties should actively promote a broader accession to the 1951 Convention and the 1967 Protocol throughout that region, including the establishment of fair and effective procedures for the determination of refugee status, in particular in transit countries, and the adoption of implementing legislation;

(g) In cases where refugees and asylum-seekers have moved in an irregular manner from a country in which they had already found protection[12], enhanced efforts should be undertaken for their readmission including, where appropriate, through the assistance of concerned international agencies. In this context, States and UNHCR should jointly analyze possible ways of strengthening the delivery of protection in countries of first asylum. There could also be more concerted efforts to raise awareness among refugees of the dangers linked to smuggling and irregular movements;

(h) In order to discourage the irregular arrival of persons with abusive claims, rejected cases which are clearly not deserving of international protection under applicable instruments should be returned as soon as possible to countries of origin, which should facilitate and accept the return of their own nationals. States should further explore proposals to enhance the use and effectiveness of voluntary return programmes, for instance with the assistance of IOM.

## V. CONCLUSION

35. Interception, whether implemented physically or administratively, represents one mechanism available to States to combat the criminal and organized smuggling and trafficking of migrants across international borders. UNHCR invites governments to examine possibilities to ensure, through the adoption of appropriate procedures and safeguards, that the application of interception measures will not obstruct the ability of asylum-seekers and refugees to benefit from international protection. Further analysis of the complex causes of irregular migration may be necessary, including their relationship with poverty and social development. Only a comprehensive approach, respecting principles of international refugee and human rights law, is likely to succeed in both combating irregular migration and in preserving the institution of asylum.

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[12] Conclusion No. 58 (XL) (A/AC.96/737, para. 25).

# Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*

## Introduction

1. In this advisory opinion, the Office of the United Nations High Commissioner for Refugees ("UNHCR") addresses the question of the extraterritorial application of the principle of *non-refoulement* under the 1951 Convention relating to the Status of Refugees[1] and its 1967 Protocol.[2]

2. Part I of the opinion provides an overview of States' *non-refoulement* obligations with regard to refugees and asylum-seekers under international refugee and human rights law. Part II focuses more specifically on the extraterritorial application of these obligations and sets out UNHCR's position with regard to the territorial scope of States' *non-refoulement* obligations under the 1951 Convention and its 1967 Protocol.

3. UNHCR has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of seeking permanent solutions to the problem of refugees by assisting governments and private organizations.[3] As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[4] UNHCR's supervisory responsibility under its Statute is mirrored in Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

4. The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. It provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations and also conducts such determinations under its own mandate. UNHCR's interpretation of the provisions of the 1951

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* This Opinion was prepared in response to a request for UNHCR's position on the extraterritorial application of the *non-refoulement* obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The Office's views as set out in the Advisory Opinion are offered in a broad perspective, given the relevance of the legal questions involved to a variety of situations outside a State's national territory.

1 The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereinafter "1951 Convention"].

2 The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967 [hereinafter "1967 Protocol"].

3 See: *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, para. 1 (1950).

4 *Id.*, para. 8(a).

Convention and 1967 Protocol is considered an authoritative view which should be taken into account when deciding on questions of refugee law.

## I. *NON-REFOULEMENT* OBLIGATIONS UNDER INTERNATIONAL LAW

### A. The Principle of *Non-Refoulement* Under International Refugee Law

#### 1. *Non-Refoulement* Obligations Under International Refugee Treaties

*(i) The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*

5. The principle of *non-refoulement* constitutes the cornerstone of international refugee protection. It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party to the 1967 Protocol.[5] Article 33(1) of the 1951 Convention provides:

> "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."

6. The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the "inclusion" criteria)[6] and does not come within the scope of one of its exclusion provisions.[7] Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.[8] It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to

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[5] Article I(1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

[6] Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it".

[7] Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A(2) of the 1951 Convention, but who are not eligible for protection under the Convention because

- they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because
- they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because
- they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

[8] See: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, para. 28.

those who have not had their status formally declared.[9] The principle of *non-refoulement* is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.

7. The prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border in the circumstances described below. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (*refoulement*) "in any manner whatsoever".[10] It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.[11]

8. The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.[12] It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.[13] As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.[14]

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[9] This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) "*Non-refoulement*" (1977), para. (c) (reaffirming "the fundamental importance of the principle of *non-refoulement* … of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."). The UNHCR Executive Committee is an intergovernmental group currently consisting of 70 Member States of the United Nations (including the United States) and the Holy See that advises the UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding on States, they are relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight. UNHCR Executive Committee Conclusions are available at http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174 (last visited on 26 October 2006).

[10] The meaning of the terms "expel or return ("*refouler*")" in Article 33(1) is also discussed *infra* at Part II.A.

[11] See: UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, para. 4. See also P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, Cambridge (1995), at p. 341.

[12] See: P. Weis, *supra* footnote 11, at p. 342.

[13] This could include, for example, removal to a safe third country or some other solution such as temporary protection or refuge under certain circumstances. *See* E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of *non-refoulement: Opinion*", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), para. 76.

[14] The 1951 Convention and the 1967 Protocol define those to whom international protection is to be conferred and establish key principles such as non-penalisation of entry (Article 31) and *non-refoulement* (Article 33). However, they do not set out procedures for the determination of refugee status as such. Yet it is generally recognised that fair and efficient procedures are an essential element

9. The *non-refoulement* obligation under Article 33 of the 1951 Convention is binding on all organs of a State party to the 1951 Convention and/or the 1967 Protocol[15] as well as any other person or entity acting on its behalf.[16] As discussed in more detail in Part II below, the obligation under Article 33(1) of the 1951 Convention not to send a refugee or asylum-seeker to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction.

10. Exceptions to the principle of *non-refoulement* under the 1951 Convention are permitted only in the circumstances expressly provided for in Article 33(2), which stipulates that:

> "The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The application of this provision requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention.[17]

11. The provisions of Article 33(2) of the 1951 Convention do not affect the host State's *non-refoulement* obligations under international human rights law, which permit no exceptions. Thus, the host State would be barred from removing a refugee if this

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in the full and inclusive application of the 1951 Convention outside the context of mass influx situations. *See* UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, paras. 4–5. See also Executive Committee, Conclusion No. 81 (XLVIII) "*General*" (1997), para. (h); Conclusion No. 82 (XLVIII), "*Safeguarding Asylum*" (1997), para. (d)(iii); Conclusion No. 85 (XLIX), "*International Protection*" (1998), para. (q); Conclusion No. 99 (LV), "*General Conclusion on International Protection*" (2004), para. (l).

15 See *supra* footnote 5.

16 Under applicable rules of international law, this applies to the acts, or omissions, of all organs, sub-divisions and persons exercising governmental authority in legislative, judicial or executive functions, and acting in that capacity in the particular instance, as well as to the conduct of organs placed at the disposal of a State by another State, even if they exceed their authority or contravene instructions. Pursuant to Articles 4–8 of the Articles of State Responsibility, the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct (*Articles on State Responsibility*, Articles 4–8). The Articles of State Responsibility were adopted by the International Law Commission without a vote and with consensus on virtually all points. The Articles and their commentaries were subsequently referred to the General Assembly with the recommendation that the General Assembly initially take note of and annex the text of the articles in a resolution, reserving to a later session the question whether the articles should be embodied in a convention on State responsibility. *See* J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary.* Cambridge University Press, UK: 2002. The General Assembly annexed the Articles on State Responsibility to its resolution 56/83 of 12 December 2001 on Responsibility of States for Internationally Wrongful Acts.

17 For a detailed discussion of the criteria which must be met for Article 33(2) of the 1951 Convention to apply, *see* E. Lauterpacht and D. Bethlehem, *supra* footnote 13, paras. 145–192. On the "danger to the security" exception, *see also* "*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*" (hereinafter: "UNHCR, *Suresh Factum*"), in 14:1 International Journal of Refugee Law (2002).

would result in exposing him or her, for example, to a substantial risk of torture.[18] Similar considerations apply with regard to the prohibition of *refoulement* to other forms of irreparable harm.[19]

12. Within the framework of the 1951 Convention/1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection. The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of UNHCR in numerous Conclusions since 1977.[20] Similarly, the General Assembly has called upon States "to respect the fundamental principle of *non-refoulement*, which is not subject to derogation."[21]

*(ii) Other International Instruments*

13. States' *non-refoulement* obligations with respect to refugees are also found in regional treaties, notably the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa[22] and the 1969 American Convention on Human Rights.[23]

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[18] See: UNHCR, *Suresh Factum*, *supra* footnote 17, paras. 18–50; E. Lauterpacht and D. Bethlehem, *supra* footnote 13, para. 159(ii), 166 and 179.

[19] See the discussion of *non-refoulement* obligations under international human rights law *infra* at Part IB.

[20] See, for example, Executive Committee, Conclusion No. 6 (XXVIII), *supra* footnote 9, para. (c) (reaffirming "the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States." ); Conclusion No. 17 (XXXI) *"Problems of extradition affecting refugees"* (1980), at. para (b) (reaffirming "the fundamental character of the generally recognized principle of *non-refoulement."); Conclusion No. 25 (XXXIII) "General"* (1982), para. (b) (reaffirming "the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law."); Conclusion No. 65 (XLII) "*General"* (1981), para. (c) (emphasizing "the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection…"); Conclusion No. 68 (XLIII) "*General"* (1982), para. (f) (reaffirming "the primary importance of the principles of *non-refoulement* and asylum as basic to refugee protection); No. 79 (XLVIII) "*General*" (1996), para. (j) (reaffirming "the fundamental importance of the principle of *non-refoulement*); No. 81 (XLVIII), *supra* footnote 14, para. (i) (recognizing "the fundamental importance of the principle of *non-refoulement*"); No. 103 (LVI) "*Provision of International Protection Including Through Complementary Forms of Protection*" (2005), at (m) (calling upon States "to respect the fundamental principle of *non-refoulement*").

[21] See, for example, A/RES/51/75, 12 February 1997, para. 3; A/RES/52/132, 12 December 1997, at preambular para. 12.

[22] OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, 1001 U.N.T.S. 45, *entered into force* 20 June 1974 [hereinafter, "1969 OAU Convention"]. Article II(3) reads: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras. 1 and 2 *[concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order]*."

[23] 1969 American Convention on Human Rights "Pact of San José, Costa Rica", 1144 U.N.T.S. 123, *entered into force* 18 July 1978 [hereinafter, "ACHR"]. Article 22(8) reads: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that

*Non-refoulement* provisions modelled on Article 33(1) of the 1951 Convention have also been incorporated into extradition treaties[24] as well as a number of anti-terrorism conventions both at the universal and regional level.[25] Moreover, the principle of *non-refoulement* has been re-affirmed in the 1984 Cartagena Declaration on Refugees[26] and other, important non-binding international texts, including, in particular, the Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967.[27]

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country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

[24] In the context of extradition, these provisions are usually referred to as "discrimination clauses". *See*, for example, Article 3(2) of the 1957 European Convention on Extradition, ETS 024, 359 U.N.T.S. 273 *entered into force* 18 April 1960 ("[Extradition shall not be granted] if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."); Article 4(5) of the 1981 Inter-American Convention on Extradition, 20 I.L.M. 723 (1981), *entered into force* 28 March 1992 ("Extradition shall not be granted … when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons.")

[25] See, for example, Article 9(1) of the 1979 International Convention against the Taking of Hostages, 1316 U.N.T.S. 205, *entered into force* 3 June 1983 ("A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing: (a) that the request for extradition for an offence set forth in article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or (b) that the person's position may be prejudiced: (i) for any of the reasons mentioned in subpara. (a) of this para. …"). *See also* Article 12 of the 1997 International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998), *entered into force* 23 May 2001 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons."), and the almost identical provisions in Article 15 of the 1999 International Convention for the Suppression of the Financing of Terrorism, 39 I.L.M. 270 (2000), *entered into force* 10 April 2002; Article 5 of the 1977 European Convention on the Suppression of Terrorism, ETS 090, 1137 U.N.T.S. 93, *entered into force* 4 August 1978; Article 14 of the 2002 Inter-American Convention against Terrorism, 42 I.L.M. 19 (2003), *entered into force* 7 October 2003.

[26] Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85) [hereinafter, "Cartagena Declaration"]. The Conclusion set out in section III(5) reads: "To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees…" While not legally binding, the provisions of the Cartagena Declaration have been incorporated into the legislation of numerous States in Latin America.

[27] A/RES/2312 (XXII), 14 December 1967, at Article 3 ( "No person referred to in Article 1, para. 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."). *See also* Resolution (67) 14 on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967, para. 2 (recommending that Governments should "…ensure […] that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution.").

## 2. *Non-Refoulement* of Refugees Under Customary International Law

14. Article 38(1)(b) of the Statute of the International Court of Justice lists "international custom, as evidence of a general practice accepted as law", as one of the sources of law which it applies when deciding disputes in accordance with international law.[28] For a rule to become part of customary international law, two elements are required: consistent State practice and *opinio juris*, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.[29]

15. UNHCR is of the view that the prohibition of *refoulement* of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by *non-refoulement* obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law.[30] As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol.[31] In this regard, UNHCR notes, *inter alia*, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations.[32] Moreover, exercising its supervisory function,[33] UNHCR has closely followed the practice of Governments in relation to the application of the principle of *non-refoulement*, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of *non-refoulement* as binding, as demonstrated, *inter alia*, in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended *refoulement*, thus implicitly confirming their acceptance of the principle.[34]

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[28] Article 38(1) of the Statute of the International Court of Justice, 59 Stat. 1031, 1060 (1945).

[29] See: International Court of Justice, *North Sea Continental Shelf, Judgment*, 1969 ICJ Reports, page 3, para. 74. See also International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ Reports, page 392, para. 77.

[30] See: UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (available at: http://www.unhcr.org/home/RSDLEGAL/437b6db64.html, last accessed on 30 October 2006); UNHCR, *Note on the Principle of Non-Refoulement (EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures)*, 1 November 1997 (available at: http://www.unhcr.org/home/RSDLEGAL/438c6d972.html, last accessed on 30 October 2006). *See also* New Zealand Court of Appeal, *Zaoui v. Attorney General*, 30 September 2004, (No 2) [2005] 1 NZLR 690, para. 34 ("The prohibition on refoulement, contained in art 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all States, which arise when States follow certain practices generally and consistently out of a sense of legal obligation.") and para. 136 ("The Refugee Convention is designed to protect refugees from persecution and the non-refoulement obligation is central to this function. It is non-derogable in terms of art 42.1 and, as discussed above at para [34] has become part of customary international law."). *See also* E. Lauterpacht and D. Bethlehem, *supra* footnote 13, paras. 193–219; G. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, Oxford University Press (1996), at pp. 167–171.

[31] The prohibition of *refoulement* of refugees under customary international law also applies, with regard to non-European refugees, in States which are party to the 1951 Convention, but which maintain the geographical limitation provided for Article 1B(1) of the Convention.

[32] This is the case, for example, in Bangladesh, India, Pakistan and Thailand.

[33] Under Paragraph 8 of the Statute of UNHCR, Article 35 of the 1951 Convention and Article II of the 1967 Protocol (see also *supra* footnote 3).

[34] As noted by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, 1986 ICJ Reports, page 14, para. 186, "[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in

16. In a Declaration which was adopted at the Ministerial Meeting of States Parties of 12–13 December 2001 and subsequently endorsed by the General Assembly, the States party to the 1951 Convention and/or 1967 Protocol acknowledged "…the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law."[35] At the regional level, the customary international law character of the principle of *non-refoulement* has also been re-affirmed in a Declaration adopted by Latin American States participating at a gathering to celebrate the twentieth anniversary of the 1984 Cartagena Declaration.[36]

## B. *Non-Refoulement* Obligations Under International Human Rights Law

### 1. International Human Rights Treaties

17. *Non-refoulement* obligations complementing the obligations under the 1951 Convention, which preceded the major human rights treaties, have also been established under international human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious

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general, be consistent which such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

[35] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001, HCR/MMSP/2001/09, 16 January 2002 (available at: http://www.unhcr.org/home/RSDLEGAL/3d60f5557.pdf, last accessed on 30 October 2006) at preambular para. 4. Earlier, the Executive Committee of UNHCR observed that "the principle of *non-refoulement* … was progressively acquiring the character of a *peremptory rule* of international law." *See* Executive Committee Conclusion No. 25 (XXXIII), *supra* footnote 20, para. (b). Pursuant to Article 53 of the 1969 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* 27 January 1980 [hereinafter: "1969 Vienna Convention"], peremptory norms of general international law, or *jus cogens*, are norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Article 64 of the 1969 Vienna Convention provides that peremptory norms of international law prevail over treaty provisions.

[36] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 16 November 2004 (available at: http://www.unhcr.org/home/RSDLEGAL/424bf6914.pdf, last accessed on 30 October 2006), at preliminary para. 7 ("*Recognizing* the *jus cogens* nature of the principle of *non-refoulement*, including non-rejection at the border, the cornerstone of international refugee law, which is contained in the 1951 Convention relating to the Status of Refugees and its Protocol of 1967, and also set out in Article 22 (8) of the American Convention on Human Rights and Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, …"). *See also* Section III(5) of the 1984 Cartagena Declaration on Refugees, *supra* footnote 26 ("…[The] principle [of *non-refoulement*] is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.").

human rights violations, notably arbitrary deprivation of life[37], or torture or other cruel, inhuman or degrading treatment or punishment.[38]

18. An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[39] which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

19. Obligations under the 1966 Covenant on Civil and Political Rights,[40] as interpreted by the Human Rights Committee, also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[41] The prohibition of *refoulement* to a risk of serious human rights violations, particularly torture and other forms of ill-treatment, is also firmly established under regional human rights treaties.[42]

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[37] The right to life is guaranteed under Article 6 of the ICCPR and, for example, Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 005, 213 U.N.T.S. 222, *entered into force* 3 September 1953 [hereinafter: "ECHR"]; Article 4 ACHR; Article 4 of the African (Banjul) Charter on Human and People's Rights, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986 [hereinafter: "Banjul Charter"].

[38] The right to be free from torture is guaranteed under Article 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture, 25 I.L.M. 519 (1992), *entered into force* 28 February 1987. Article 16 of the Convention Against Torture prohibits other cruel, inhuman or degrading treatment or punishment. A prohibition of torture and other cruel, inhuman or degrading treatment or punishment is guaranteed under Article 7 of the ICCPR and provisions in regional human rights treaties, such as, for example, Article 3 of the ECHR; Article 5(2) of the ACHR; or Article 5 of the Banjul Charter.

[39] The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *entered into force* 26 June 1987 [hereinafter: "Convention Against Torture"].

[40] 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 23 March 1976 [hereinafter: "ICCPR"].

[41] With regard to the scope of the obligations under Article 7 of the ICCPR, *see* Human Rights Committee in its *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment),* 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement")*; and *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant,* U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. Similarly, in its *General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6, 1 September 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[…] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment and right not to be arbitrarily deprived of liberty] of the Convention." (para. 27).

[42] See, for example, the jurisprudence of the European Court of Human Rights, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's decisions in *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989 and subsequent cases, including *Cruz Varas v.* Sweden, Application No. 15567/89, 20 March 1991;

20. The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all persons who may be within a State's territory or subject to its jurisdiction, including asylum seekers and refugees,[43] and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed.[44] It is non-derogable and applies in all circumstances,[45] including in the context of measures to combat terrorism[46] and during times of armed conflict.[47]

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*Vilvarajah et al. v. United Kingdom*, Application No. 13163/87 et al., 30 October 1991; *Chahal v. United Kingdom*, Application No. 22414/93, 15 November 1996; *Ahmed v. Austria*, Application No. 25964/94, 17 December 1996; *TI v. United Kingdom*, Application No. 43844/98 (Admissibility), 7 March 2000. In the Americas, see, for example, Article 22(8) of the 1969 ACHR ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.") or Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture ("Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.").

43 For States Party to the ICCPR, this has been made explicit by the Human Rights Committee in its *General Comment No. 31*, *supra* footnote 41, para. 10 ("… [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. …"). *See also infra* at Part II.B.

44 See: Human Rights Committee, *General Comment No. 31*, *supra* footnote 41, para. 12. *See also supra* footnote 41.

45 See, for example, Human Rights Committee, *General Comment No. 29 on States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; Human Rights Committee, *Concluding Observations/Comments* on Canada, U.N. Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 15; Committee Against Torture, *Gorki Ernesto Tapia Paez v. Sweden*, U.N. Doc. CAT/C/18/D/39/1996, 28 April 1997, para. 14.5. The absolute nature of the prohibition of *refoulement* to a risk of torture and other forms of ill-treatment under Article 3 of the ECHR has been affirmed by the European Court of Human Rights, for example, in *Chahal v. United Kingdom*, *supra* footnote 42**.**

46 See, for example, Committee Against Torture, *Agiza v. Sweden*, U.N. Doc. CAT/C/34/D/233/2003, 20 May 2005; Human Rights Committee, *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005, 10 November 2006; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System*, 28 February 2000, para. 154. *See also* United Nations Commission on Human Rights, Resolution 2005/80 of 21 April 2005 on Protection of human rights and fundamental freedoms while countering terrorism; Security Council resolutions 1456 (2003) of 20 January 2003, 1535 (2004) of 26 March 2004, 1624 (2004) of 14 September 2005, the Declaration on Measures to Eliminate International Terrorism (annex to General Assembly resolution 49/60 of 9 December 1994), the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (annex to General Assembly resolution 51/210 of 17 December 1996), the 2005 World Summit Outcome (General Assembly resolution 60/1 of 16 September 2005) and the Plan of Action annexed to the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly on 8 September 2006 (A/RES/60/288)**.**

47 International human rights law does not cease to apply in case of armed conflict, except where a State has derogated from its obligations in accordance with the relevant provisions of the applicable international human rights treaty (for example, Article 4 ICCPR). In determining what constitutes a violation of human rights, regard must be had to international humanitarian law, which operates as *lex specialis* to international human rights in law during a time of armed conflict. This has been confirmed, *inter alia*, by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 25; and the judgement of 19 December 2005 in *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, paras. 215–219. *See also*, for example, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10; Human Rights Committee, *General Comment No. 31*, *supra* footnote 41, para. 11; *see*

### 2. Human Rights-Based *Non-Refoulement* Obligations Under Customary International Law

21. The prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens.*[48] It includes, as a fundamental and inherent component, the prohibition of *refoulement* to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments. The prohibition of arbitrary deprivation of life, which also includes an inherent obligation not to send any person to a country where there is a real risk that he or she may be exposed to such treatment, also forms part of customary international law.[49] The prohibition of *refoulement* to a risk of cruel, inhuman or degrading treatment or punishment, as codified in universal as well as regional human rights treaties is in the process of becoming customary international law, at the very least at regional level.[50]

22. Under the above-mentioned obligations, States have a duty to establish, prior to implementing any removal measure, that the person whom it intends to remove from their territory or jurisdiction would not be exposed to a danger of serious human rights violations such as those mentioned above. If such a risk exists, the State is precluded from forcibly removing the individual concerned.

## II. EXTRATERRITORIAL APPLICABILITY OF THE PRINCIPLE OF *NON-REFOULEMENT* UNDER THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL

23. The Sections of this Advisory Opinion which follow examine the territorial scope of Article 33(1) of the 1951 Convention in light of the criteria provided for under international law for the interpretation of treaties. In accordance with the relevant rules,

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*also* Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006 para. 14.

48 See, for example, Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency***,** U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11 ("The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, para. 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). "); *see also* the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Delalic and Others*, Trial Chamber, Judgement of 16 November 1998, para. 454; *Prosecutor v. Furundzija*, Trial Chamber, Judgement of 10 December 1998, paras. 134–164; *Prosecutor v. Kunarac and Others*, Trial Chamber, Judgement of 22 February 2001, para. 466. *See also* the judgement of the House of Lords in *Pinochet Ugarte, re.* [1999] 2 All ER 97, paras. 108–109. *See also*, for example, *Filartiga v. Pena Irala*, 630 F.2d 876 (2d. Cir. 1980).

49 See Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8 ("… [P]rovisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in … torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives …").

50 See, for example, the jurisprudence of the European Court of Human Rights referred to *supra* footnote 42; *see also* Article 19(2) of the European Charter of Fundamental Rights, [2000] OJ C364; and preambular para. 13 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, adopted by the Council of the European Union.

as stated in the 1969 Vienna Convention on the Law of Treaties,[51] the meaning of a provision in an international treaty must be established by examining the ordinary meaning of the terms employed, in light of their context and the object and purpose of the treaty.[52] Subsequent practice of States in applying the treaty as well as relevant rules of international law must also be taken into consideration in interpreting a treaty.[53]

24. For the reasons set out below, UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.[54]

## A. Scope *Ratione Loci* of Article 33(1) of the 1951 Convention: Ordinary Meaning, Context, Object and Purpose of the 1951 Convention

25. As noted above, the focus of the present inquiry is the territorial scope of the *non-refoulement* provision under Article 33(1) of the 1951 Convention. In keeping with the primary rule of treaty interpretation stated in Article 31(1) of the 1969 Vienna Convention, it is necessary, first, to examine the ordinary meaning of the terms of Article 33(1) of the 1951 Convention, taking into account their context as well as the object and purpose of the treaty of which it forms part.

26. The obligation set out in Article 33(1) of the 1951 Convention is subject to a geographic restriction only with regard to the country where a refugee may not be sent to, not the place where he or she is sent from. The extraterritorial applicability of the *non-refoulement* obligation under Article 33(1) is clear from the text of the provision itself, which states a simple prohibition: "No Contracting State shall expel or return *("refouler")* a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened…".

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[51] *Supra* footnote 35 [hereinafter, "1969 Vienna Convention"]. The 1969 Vienna Convention is generally regarded as expressing rules which constitute customary international law.

[52] Article 31(1) of the 1969 Vienna Convention provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[53] Article 31(3) of the 1969 Vienna Convention provides that, in interpreting a treaty: "… there shall be taken into account, together with the context, … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between parties."

[54] In a decision which addressed the applicability *inter alia* of Article 33(1) of the 1951 Convention to the return to Haiti of persons intercepted on the high seas by U.S. coast guard vessels, the United States Supreme Court determined that Article 33(1) of the 1951 Convention is applicable only to persons within the territory of the United States (*Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et. al.,* 509 U.S. 155 (1993)). For the reasons set out in this advisory opinion, UNHCR is of the view that the majority opinion of the Supreme Court in *Sale* does not accurately reflect the scope of Article 33(1) of the 1951 Convention. *See also* Inter-American Commission on Human Rights in *The Haitian Centre for Human Rights et al. v. United States*, *supra* footnote 42, para. 157 ("… The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.").

27. The ordinary meaning of "return" includes "to send back" or "to bring, send, or put back to a former or proper place".[55] The English translations of "*refouler*" "include words like 'repulse', 'repel', 'drive back'."[56] It is difficult to conceive that these words are limited to refugees who have already entered the territory of a Contracting State. The ordinary meaning of the terms "return" and "*refouler*" does not support an interpretation which would restrict its scope to conduct within the territory of the State concerned, nor is there any indication that these terms were understood by the drafters of the 1951 Convention to be limited in this way.[57]

28. A contextual analysis of Article 33 of the 1951 Convention further supports the view that the scope *ratione loci* of the *non-refoulement* provision in Article 33(1) is not limited to a State's territory. The view has been advanced that Article 33(2) of the 1951 Convention, which permits exceptions to the principle of *non-refoulement* only with regard to a refugee who constitutes a danger to the security or the community of the country in which he is, implies that the scope of Article 33(1) is also limited to persons within the territory of the host country.[58] However, in UNHCR's opinion this view is contradicted by the clear wording of Article 33(1) and 33(2), respectively, which address different concerns,[59] as well as the fact that the territorial scope of a number of other provisions of the 1951 Convention is made explicit.[60] Thus, where the drafters of the 1951 Convention intended a particular clause of the 1951 Convention to apply only to

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55 See: *Merriam-Webster Online Dictionary*, 10th edition, available at: http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=return (last accessed on 15 October 2006).

56 This was also noted by the majority of the United States Supreme Court in *Sale*, *supra* footnote 54 (at 181) which, however, went on to state that "'return' means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination" (at 182), and that "… because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions." (at 183). As noted by Blackmun J in his dissenting opinion in *Sale*, *supra* footnote 54, "[t]he majority's puzzling progression ('*refouler*' means repel or drive back; therefore 'return' means only exclude at a border; therefore the treaty does not apply) hardly justifies a departure from the path of ordinary meaning. The text of Article 33(1) is clear, and whether the operative term is 'return' or '*refouler*', it prohibits the Government's actions." (at 192–193).

57 In support of its finding that Article 33(1) does not apply outside a State's territory, the majority of the United States Supreme Court in *Sale*, *supra* footnote 54, relied on statements by a number of delegates involved in the drafting of the 1951 Convention. However, these statements were expressions of concern related to a possible obligation to grant asylum to large numbers of arrivals in mass influx situations. In UNHCR's view, these portions of the negotiating history do not warrant the conclusion that the drafters of the 1951 Convention reached consensus about an implicit restriction of the territorial scope of the principle of *non-refoulement* as provided for in Article 33(1). *See also* UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, *supra* footnote 30.

58 See: *Sale*, *supra* footnote 54, at 179–180.

59 See also the dissenting opinion of Blackmun J in *Sale*, *supra* footnote 54, at 194 ("Far from constituting 'an absurd anomaly […], the fact that a state is permitted to 'expel or return' a small class of refugees found within its territory but may not seize and return refugees who remain outside its frontiers expresses precisely the objectives and concerns of the Convention. Non return is the rule; the sole exception (neither applicable nor invoked here) is that a nation endangered by a refugee's very presence may 'expel or return' him to an unsafe country if it chooses. The tautological observation that only a refugee already in a country can pose a danger to the country 'in which he is' proves nothing.")

60 For example, Articles 2, 4 and 27 require simple presence of a refugee in the host country, while Articles 18, 26 and 32 require that he or she be "lawfully on the territory" of a Contracting State, and Articles 15, 17(1), 19, 21, 23, 24 and 28 apply to refugees who are "lawfully staying" in the country of refuge.

those within the territory of a State Party, they chose language which leaves no doubt as to their intention.

29. Furthermore, any interpretation which construes the scope of Article 33(1) of the 1951 Convention as not extending to measures whereby a State, acting outside its territory, returns or otherwise transfers refugees to a country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian object and purpose of the 1951 Convention and its 1967 Protocol. In this context, it is worth recalling the first two paragraphs of the Preamble to the 1951 Convention, which read:

"Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,[61]

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms."

30. A comprehensive review of the *travaux préparatoires*[62] confirms the overriding humanitarian object and purpose of the Convention and provides significant evidence that the *non-refoulement* provision in Article 33(1) was intended to prohibit any acts or omissions by a Contracting State which have the effect of returning a refugee to territories where he or she is likely to face persecution or danger to life or freedom. For example, when the 1951 Convention was in the course of preparation, the Secretary-General stated in a Memorandum dated 3 January 1950 to the *Ad Hoc* Committee on Statelessness and Related Problems that "turning a refugee back to the frontier of the country where his life or liberty is threatened… would be tantamount to delivering him into the hands of his persecutors."[63] During the discussions of the Committee, the representative of the United States vigorously argued that:

> "[w]hether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not

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[61] One of the fundamental rights enshrined in the Universal Declaration of Human Rights, General Assembly resolution 217A (III), U.N. Doc. A/810 at 71 (1948), is the right of everyone "to seek and enjoy in other countries asylum from persecution" under Article 14.

[62] Pursuant to Article 32 of the 1969 Vienna Convention, *supra* footnote 35, recourse to the preparatory work of the treaty is a supplementary means of treaty interpretation is permitted only where the meaning of the treaty language is ambiguous or obscure; or where interpretation pursuant to the general rules set out in Article 31 of the 1969 Vienna Convention leads to a result which is manifestly absurd or unreasonable. It is a well-established principle that when the meaning of the treaty is clear from its text when viewed in light of its context, object and purpose, supplementary sources are unnecessary and inapplicable, and recourse to such sources is discouraged. *See*, for example, International Court of Justice, *Interpretation of the Treaty of Lausanne*, P.C.I.J., Ser. B, No. 12 (1925), at 22; The *Lotus Case*, P.C.I.J., Ser. A, No. 10 (1927), at 16; *Admission to the United Nations Case*, 1950 ICJ Reports 8. Thus, while UNHCR is of the view that recourse to the drafting history of Article 33(1) of the 1951 Convention is not necessary given the unambiguous wording of this provision, the *travaux préparatoires* are nevertheless of interest in clarifying the background, content and scope of Article 33(1).

[63] *Ad Hoc* Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons – Memorandum by the Secretary General, U.N. Document E/AC.32/2, 3 January 1950, Comments on Article 24 of the preliminary draft, para. 3.

> the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened."[64]

31. The same representative of the United States proposed that the words "undertakes not to expel or return (*refouler*)" should replace the words "not turn back" in order to settle any doubts that *non-refoulement* applied to refugees whether or not they had been regularly admitted to residence,[65] an amendment that ultimately formed the basis for the "expel or return" final wording of Article 33 of the 1951 Convention. It is also worth noting that at one point the Chairman of the *Ad Hoc* Committee suspended the discussion, observing that it had indicated agreement on the principle that refugees fleeing from persecution on account of their race, religion, nationality or political opinion should not be pushed back into the arms of their persecutors.[66]

## B. Extraterritorial Applicability of Article 33(1) of the 1951 Convention: Subsequent State Practice and Relevant Rules of International Law

32. Limiting the territorial scope of Article 33(1) of the 1951 Convention to conduct of a State within its national territory would also be at variance with subsequent State practice and relevant rules of international law applicable between the States party to the treaty in question. In accordance with Article 31(3) of the 1969 Vienna Convention,[67] these elements also need to be taken into account in interpreting a provision of an international treaty.

33. Subsequent State practice is expressed, *inter alia*, through numerous Executive Committee Conclusions which attest to the overriding importance of the principle of *non-refoulement* irrespective of whether the refugee is in the national territory of the State concerned.[68] Subsequent State practice which is relevant to the interpretation of the *non-refoulement* obligation under the 1951 Convention and 1967 Protocol is also evidenced by other international refugee and human rights instruments drawn up since 1951, none of which places territorial restrictions on States' *non-refoulement* obligations.[69]

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64 Statement of Mr. Henkin of the United States, U.N. Doc. E/AC.32/SR.20, Feb 1, 1950, paras. 54–55.

65 U.N. Doc. E/AC.32/SR.20, para. 56.

66 Statement of the Chairman, Mr. Chance of Canada, U.N. Doc. E/AC.32.SR.21, 2 February 1950, at page 7. The Chairman then invited the representatives of Belgium and the United States to confer with him to attempt the preparation of a suitable draft for later consideration.

67 *Supra* footnote 53.

68 See, for example, Executive Committee, Conclusion No. 6 (XXVIII), *supra* footnote 9, at para (c) (reaffirming "the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State …"); Conclusion No. 15 (XXX) "*Refugees without an Asylum Country*" (1979) paras. (b) and (c) (stating that "[a]ction whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the principle of *non-refoulement*" and noting that "[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."); Conclusion No. 22 (XXXII) "*Protection of Asylum-Seekers in Situations of Large-Scale Influx*" (1981), at II.A.2. ("In all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed."); Conclusion No. 53 (XXXIX) *"Stowaway Asylum-Seekers"* (1988), para. (1) (providing *inter alia* that "[l]ike other asylum seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.").

69 These include, in particular, the 1969 OAU Convention (*supra* footnote 22); the 1969 ACHR (*supra* footnote 23); and the Convention Against Torture (*supra* footnote 39). See also the expressions of the principle of *non-refoulement* in non-binding texts such as, for example, the 1984 Cartagena

34. In keeping with the above-mentioned rules of treaty interpretation, it is also necessary to have regard to developments in related areas of international law when interpreting the territorial scope of Article 33(1) of the 1951 Convention. International refugee law and international human rights law are complementary and mutually reinforcing legal regimes.[70] It follows that Article 33(1), which embodies the humanitarian essence of the 1951 Convention and safeguards fundamental rights of refugees, must be interpreted in a manner which is consistent with developments in international human rights law. An analysis of the scope *ratione loci* of States' *non-refoulement* obligations under international human rights law is particularly pertinent to the question of the extraterritorial applicability of the prohibition on returning a refugee to a danger of persecution under international refugee instruments.

35. As discussed in more detail below, States are bound by their obligations not to return any person over whom they exercise jurisdiction to a risk of irreparable harm. In determining whether a State's human rights obligations with respect to a particular person are engaged, the decisive criterion is not whether that person is on the State's national territory, or within a territory which is *de jure* under the sovereign control of the State, but rather whether or not he or she is subject to that State's effective authority and control.

36. In its General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the [ICCPR], the Human Rights Committee has stated that "States are required by Article 2(1) [of the ICCPR] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[71] The General Comment reaffirms consistent jurisprudence of the Human Rights Committee to the effect that States can "be held accountable for violations of rights under the ICCPR which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it"[72] and that in certain

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Declaration (*supra* footnote 26); the 1967 Declaration of Territorial Asylum adopted by the General Assembly (*supra* footnote 27); and Resolution (67) 14 of the Committee of Ministers of the Council of Europe (*supra* footnote 27).

70 The complementarity between *non-refoulement* obligations under international refugee and human rights law has been highlighted, for example, in the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 16 November 2004 (available at: http://www.unhcr.org/home/RSDLEGAL/424bf6914.pdf, last accessed on 30 October 2006). This Declaration was adopted by Latin American States participating at a gathering to celebrate the twentieth anniversary of the 1984 Cartagena Declaration. *See also* Executive Committee, Conclusion No. 79 (XLVII), *supra* footnote 20; No. 81(XLVII) "*General*" (1997); Conclusion No. 82 (XLVIII) "*Safeguarding Asylum*" (1997), which specifically refer to the prohibition of return to torture, as set forth in the Convention Against Torture, and Executive Committee Conclusion No. 95 (LIV) "*General Conclusion on International Protection*" (2003), para. (l) (noting the "complementary nature of international refugee and human rights law as well as the possible role of the United Nations human rights mechanisms in this area …").

71 General Comment No. 31, *supra* footnote 41, para. 10.

72 See the decisions of the Human Rights Committee in *Lopez Burgos v. Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3; and *Celiberti de Casariego v. Uruguay*, U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3. In both decisions, the Human Rights Committee has also held that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." *See also* the decision of the

circumstances, "persons may fall under the subject-matter of a State Party [to the ICCPR] even when outside that State's territory."[73]

37. The International Court of Justice has confirmed that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.[74] The Court observed that, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions."[75]

38. Similarly, the Committee against Torture has affirmed that the *non-refoulement* obligation contained in Article 3 of the Convention Against Torture applies in any territory under a State party's jurisdiction.[76] With regard to those provisions of the Convention Against Torture which "are expressed as applicable to 'territory under [the State party's] jurisdiction'", the Committee Against Torture reiterated "its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised" and made it clear that these provisions "apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world."[77]

39. The extraterritorial applicability of human rights treaties is also firmly established at the regional level. The European Court of Human Rights has examined the concept of "jurisdiction" in a number of decisions and consistently held that the decisive criterion is not whether a person is within the territory of the State concerned, but whether or not, in respect of the conduct alleged, he or she is under the effective control

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Human Rights Committee in *Pereira Montero v. Uruguay*, U.N. Doc. CCPR/C/18/D/106/1981, 31 March 1983, para. 5.

[73] See, for example, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/79/Add.50, 3 October 1995, para. 284. In 2006, the Human Rights Committee also reaffirmed the applicability of the provisions of the ICCPR with reference to conduct of the United States at Guantánamo Bay. *See* Concluding Observations of the Human Rights Committee, United States of America, *supra* footnote 47, para. 10. See also Concluding Observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10 and U.N. Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11.

[74] See the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, para. 111. See also the recent judgement of the International Court of Justice in *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda*), (2005) ICJ Gen. List No. 116, 19 December 2005, para. 216.

[75] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* footnote 74, para. 109.

[76] See, for example, Committee Against Torture, Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, *supra* footnote 47. Having requested the State Party's views on the extraterritorial applicability of Article 3 of the Convention against Torture in the context of Guantánamo Bay, the Committee expressed its concern ("…that the State party considers that the non-refoulement obligation, under article 3 of the Convention, does not extend to a person detained outside its territory. … The State party should apply the *non-refoulement* guarantee to all detainees in its custody, …, in order to comply with its obligations under article 3 of the Convention. …") (para. 20).

[77] *Id*., para. 15. This applies, *inter alia*, to Article 16 of the Convention Against Torture, which prohibits acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 of the Convention.

of, or is affected by those acting on behalf of, the State in question. Thus, in a decision in which it examined the circumstances in which the obligations under the European Convention apply extraterritorially, the European Court of Human Rights held that while, "from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial",[78] it may extend extraterritorially if a State, "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government."[79] A situation in which a person is brought under the "effective control" of the authorities of a State if they are exercising their authority outside the State's territory may also give rise to the extraterritorial application of Convention obligations.[80]

40. Also relevant in the present context is the judgement of the European Court of Human Rights in *Issa and Ors v. Turkey*, which confirmed that

> "a State may also be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State […]. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory […]."81

41. The Inter-American Commission on Human Rights held in its decision in *Coard et al. v. the United States* that "while the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with, but required by the norms which pertain."[82]

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78 *Bankovic et al. v. Belgium and 16 other contracting States (Admissibility)*, Application No. 52207/99, 12 December 2001, para. 59.

79 *Id.*, para. 71. See also *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgement of 23 February 1995, Series A, No. 310, para. 62 ("In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. […] [t]he responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.").

80 *Öcalan v. Turkey (Preliminary Objections)*, Application No. 46221/99, Judgement of 12 March 2003, para. 93 (the former PKK leader had been arrested by Kenyan authorities and handed over to Turkish officials operating in Kenya). *See also Ilascu and Others v. Russia and Moldova*, Application No. 48787/99, Judgement of 8 July 2004, paras. 382-394 (finding that the complainants came within the "jurisdiction" of the Russian Federation, and that the responsibility of the Russian Federation for acts which occurred on the territory of Moldova was engaged by the conduct of its own soldiers there, as well as that of the Transdniestran authorities, on the basis of the support provided by Russia to the latter) on the basis of the actions of its own soldiers as well as their support to the Transdniestran authorities).

81 *Issa and Ors v. Turkey*, Application No. 3821/96, Judgement of 16 November 2004, para. 71, with references, *inter alia*, to decisions of the Human Rights Committee and the Inter-American Commission of Human Rights.

82 *Coard et al. v. the United States*, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37.

42. In UNHCR's view, the reasoning adopted by courts and human rights treaty bodies in their authoritative interpretation of the relevant human rights provisions is relevant also to the prohibition of *refoulement* under international refugee law, given the similar nature of the obligations and the object and purpose of the treaties which form their legal basis.[83]

43. Thus, an interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party to the 1951 Convention and/or its 1967 Protocol would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. It is UNHCR's position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with *non-refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.

UNHCR, Geneva
26 January 2007

[83] As noted by the International Law Commission in its Report of the fifty-eighth session (1 May-9 June and 3 July-11 August 2006), U.N. Doc. A/61/10, at pp. 414–415, "Article 31(3)(c) [of the 1969 Vienna Convention, *supra* footnote 36] also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term."

**UNHCR POSITION:**
**VISA REQUIREMENTS AND CARRIER SANCTIONS**

Carrier sanctions involving the penalization of transporters bringing in aliens without proper travel documentation and/or entry permits have been the practice in many countries worldwide for a number of years. The majority of European countries now have provisions dealing with carrier liability.

In 1987, five European countries introduced this concept into their legislations: Belgium, Denmark, Italy, Germany and the United Kingdom.

The imposition of fines on airline companies also exists at an international level. In 1988, Annex 9 to the Chicago Convention on Civil Aviation was amended to provide that States should not fine operators in the event that passengers are found inadmissible unless there is evidence to suggest that the carrier was negligent in taking precautions to see that the passenger has complied with the documentary requirements for entry into the receiving State. The wording of the amendment suggests that the burden of proof should fall on the State. In fact, most legislations are drafted in such a way that the burden falls on the shoulders of the carriers.

In 1990, the Schengen Supplementary Agreement also provided for carrier sanctions without, however, any proviso relating to negligence. Since then more countries have introduced carrier liability provisions, with some allowing exemption where there has been no carrier negligence, such as Sweden and France.

Furthermore, in France, if the asylum claim is not manifestly unfounded or, as in the Netherlands if the applicant is recognized as a refugee or if the carrier has reasonable grounds to believe that such a person may be a refugee, then the carrier is also exempted from liability. The UK also allows for some flexibility in the application of the carrier legislation although this flexibility is rather limited in that it is only exercised where the applicant is subsequently recognized as a refugee. Other legislations such as the Italian and the Finnish however, involve strict liability for carriers even where there has been no negligence and where the alien is a refugee. More recently, carrier sanctions have been increased, as in the United Kingdom where fines have been doubled.

The issue of carrier sanctions as a measure to counter illegal migration must be seen in connection with and in the context of increased visa requirements placed on individuals originating from certain countries which are generally recognized as being refugee producing. Most Western European States have now introduced visas for all countries which generate substantive numbers of claimants (the former Yugoslavia, Romania, the Republic of Bosnia and Herzegovina, Bulgaria, Iraq, Vietnam and Sri Lanka). The emphasis which has recently been placed by States Parties to the Dublin Convention on entry authorization will also cause those States to increase visa requirements and carrier sanctions.

**UNHCR Position**

States have a legitimate interest in controlling irregular migration and a right to do so through various measures, including visa requirements, airport screening and sanctions imposed on airlines and other group carriers for transporting irregular migrants. When however, these measures interfere with the ability of persons at risk of persecution to gain access to safety and obtain asylum in other countries, then States act inconsistently with their international obligations towards refugees.

UNHCR believes that States' concerns about unfounded claims are better addressed by careful harmonization of standards of application, treatment and implementation such as accelerated procedures rather than through the use of carrier sanctions.

If States have recourse to carrier sanctions they should be implemented in a manner which is not inconsistent with international human rights and refugee protection principles, notably Article 14 of the Universal Declaration according to which each person has the right to seek asylum and in a way which is in keeping to the intention of Articles 31 and 33 of the 1951 Convention.

States should not sanction against carriers which have knowingly brought into the State a person who does not possess a valid entry document but who has a plausible claim for refugee status or otherwise needs international protection. Thus, States should not apply sanctions unless the carrier has shown negligence in checking documents, if the asylum claim is subsequently not considered as manifestly unfounded or the asylum-seeker is recognized as a refugee or granted stay on other humanitarian grounds.

The combination of carrier sanctions and visa requirements renders even more likely potential inconsistencies with international obligations. With regard to the imposition of visa requirements on persons originating from certain countries, it would be desirable for States not to impose these where considerable human rights violations occur (Bosnia and Herzegovina, for example). This requirement is even more important now in view of the Resolution agreed upon by the Immigration Ministers which classifies as manifestly unfounded claims lodged by applicants who have used false documents or destroyed such documents.

UNHCR, September 1995

## 2.2 Summary Conclusions: the principle of *non-refoulement*

*Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9–10 July 2001*


The first day of the Cambridge expert roundtable addressed the question of the scope and content of the principle of *non-refoulement*. The discussion was based on a joint legal opinion by Sir Elihu Lauterpacht and Daniel Bethlehem of the Lauterpacht Research Centre for International Law, which was largely endorsed.[1]

The discussion focused on those aspects of the legal opinion which were considered deserving of particular comment or in need of clarification. The paragraphs below, while not representing the individual views of each participant, reflect broadly the consensus emerging from the discussion. The general appreciation of the meeting was:

1. *Non-refoulement* is a principle of customary international law.
2. Refugee law is a dynamic body of law, informed by the broad object and purpose of the 1951 Refugee Convention and its 1967 Protocol, as well as by developments in related areas of international law, such as human rights law and international humanitarian law.
3. Article 33 applies to refugees irrespective of their formal recognition and to asylum seekers. In the case of asylum seekers, this applies up to the point that their status is finally determined in a fair procedure.
4. The principle of *non-refoulement* embodied in Article 33 encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of

1 **Editorial note**: As for the 10 July 2001 roundtable meeting on supervisory responsibility, participants comprised thirty-five experts from some fifteen countries, drawn from governments, non-governmental organizations (NGOs), academia, the judiciary, and legal profession. They were provided with written contributions by Eamonn Cahill, barrister, Dublin, Ireland, and by Friedrich Löper, Ministry of the Interior, Federal Republic of Germany. The morning session was chaired by Sir Elihu Lauterpacht, Lauterpacht Research Centre for International Law, and the afternoon session by Dame Rosalyn Higgins, Judge of the International Court of Justice.

persecution, including interception, rejection at the frontier, or indirect *refoulement*.

5. The principle of *non-refoulement* applies in situations of mass influx. The particular issues arising in situations of mass influx need to be addressed through creative measures.
6. The attribution to the State of conduct amounting to *refoulement* is determined by the principles of the law on State responsibility. The international legal responsibility to act in conformity with international obligations wherever they may arise is the overriding consideration.
7. There is a trend against exceptions to basic human rights principles. This was acknowledged as important for the purposes of the interpretation of Article 33(2). Exceptions must be interpreted very restrictively, subject to due process safeguards, and as a measure of last resort. In cases of torture, no exceptions are permitted to the prohibition against *refoulement*.

IMO

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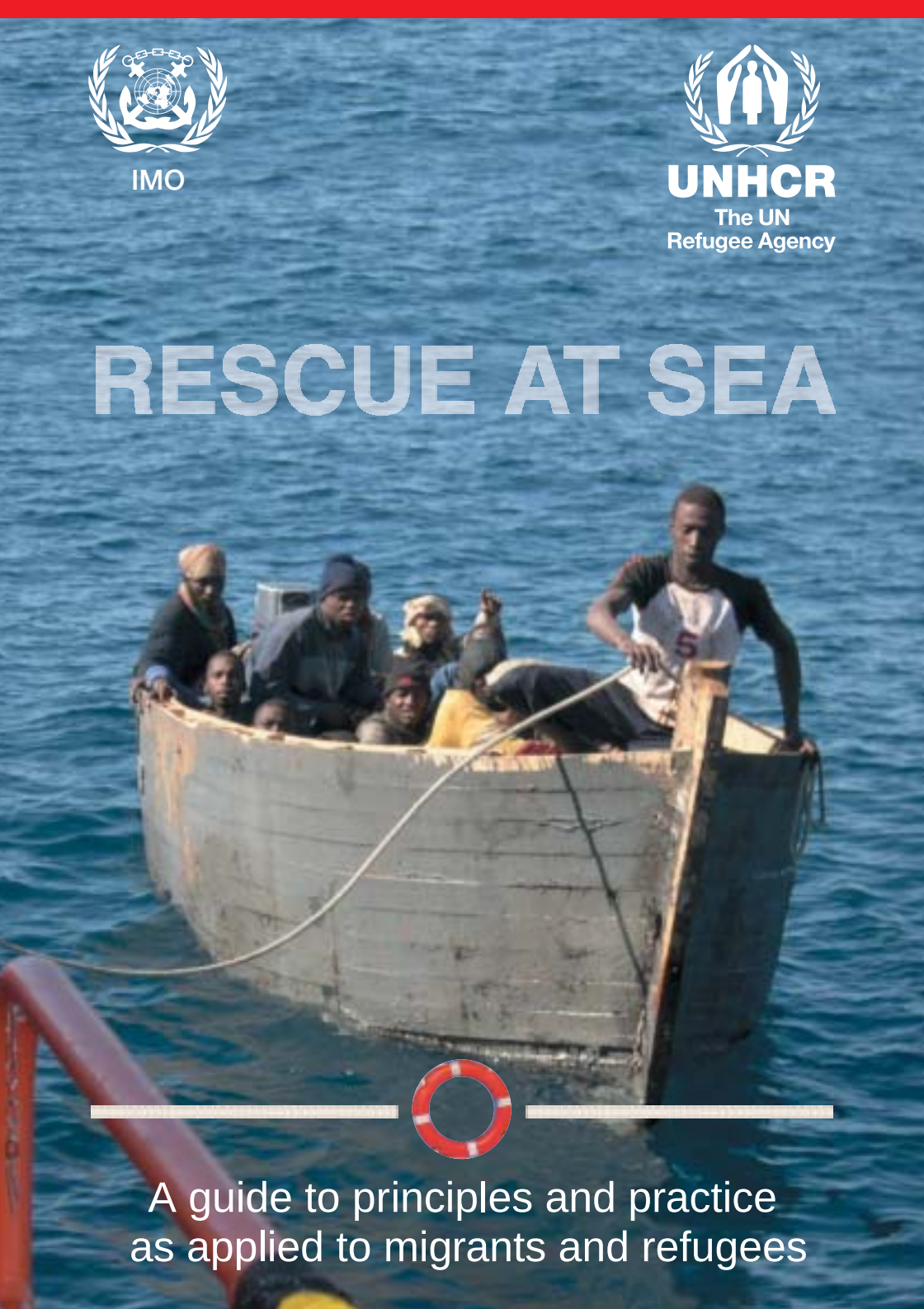
Refugee Agency

# RESCUE AT SEA



A guide to principles and practice
as applied to migrants and refugees

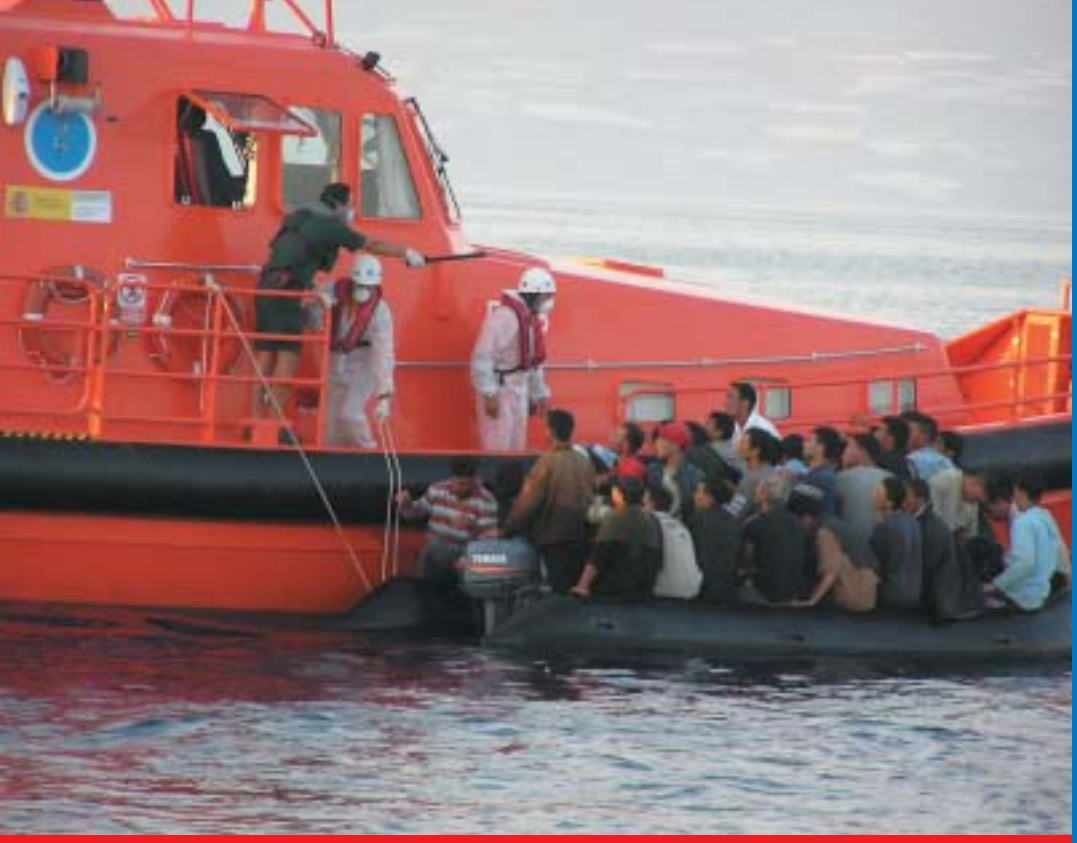
# Introduction

Sea-borne migrants and refugees are not a new phenomenon. Throughout the ages, people around the world have risked their lives aboard un-seaworthy ships and other craft, whether in search of work, better living conditions and educational opportunities, or international protection against persecution or other threats to their life, liberty or security, often placing their fate in the hands of unscrupulous, criminal smugglers. The term "boat people" has entered common parlance, designating all those who travel by sea in such a perilous way.

Search and Rescue (SAR) services throughout the world depend on ships – for the most part merchant vessels - to assist persons in distress at sea. Nowadays, distress signals can be rapidly transmitted by satellite and terrestrial communication techniques both to search and rescue authorities ashore, and to ships in the immediate vicinity. The rescue operation can be swift and co-ordinated.

Yet, even when the rescue has been accomplished, problems can arise in securing the agreement of States to the disembarkation of migrants and refugees, especially if proper documentation is lacking. Recognizing this problem, member States of the International Maritime Organization (IMO) have adopted amendments to two of the relevant international maritime conventions[1]. These aim to ensure that the obligation of the ship master to render assistance is complemented by a corresponding obligation of States to co-operate in rescue situations, thereby relieving the master of the responsibility to care for survivors, and allowing individuals who are rescued at sea in such circumstances to be delivered promptly to a place of safety.

[1] 1974 International Convention for the Safety of Life at Sea; and 1979 International Convention on Maritime Search and Rescue. Amendments were adopted in May 2004. They entered into force on 1 July 2006.



This leaflet has been prepared jointly by the International Maritime Organization (IMO) and the Office of the United Nations High Commissioner for Refugees (UNHCR). It is intended for masters, ship owners, government authorities, insurance companies, and other interested parties involved in rescue at sea situations. It provides guidance on relevant legal provisions, and on practical procedures to ensure the prompt disembarkation of survivors of rescue operations, and measures to meet their specific needs, particularly in the case of refugees and asylum-seekers.

# The Legal Framework

This section contains relevant obligations and definitions as defined under international law.

## International maritime law

### Obligations of the shipmaster

The shipmaster has an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found. This is a longstanding maritime tradition as well as an obligation enshrined in international law. Compliance with this obligation is essential to preserve the integrity of maritime search and rescue services. It is based on, *inter alia*, two essential texts:

**– 1982 United Nations Convention on the Law of the Sea** (UNCLOS Convention) provides that

> *" Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:*
> *(a) to render assistance to any person found at sea in danger of being lost;*
> *(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him."* (Art. 98 (1))

**– 1974 International Convention for the Safety of Life at Sea** (SOLAS Convention) obliges the

> *"master of a ship at sea which is in a position to be able to provide assistance, on receiving information*[2] *from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so...."* (Chapter V, Regulation 33(1)).

[2] The word *"signal"* was replaced by *"information"* as part of the May 2004 amendments.

## Obligations of Governments and Rescue Co-ordination Centres

Several maritime conventions define the obligations of State Parties to ensure arrangements for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts:

**– 1982 United Nations Convention on the Law of the Sea** (UNCLOS Convention) imposes an obligation on every coastal State Party to

> *"…promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose".* (Art. 98 (2))

**– 1974 International Convention for the Safety of Life at Sea** (SOLAS Convention) requires State Parties

> *"… to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary …"* (Chapter V, Regulation 7)

**– 1979 International Convention on Maritime Search and Rescue** (SAR Convention) obliges State Parties to

> *"… ensure that assistance be provided to any person in distress at sea … regardless of the nationality or status of such a person or the circumstances in which that person is found"* (Chapter 2.1.10) and to *" […] provide for their initial medical or other needs, and deliver them to a place of safety."* (Chapter 1.3.2)

**– Amendments to the SOLAS[3] and SAR Conventions[4]** aim at maintaining the integrity of the SAR services, by ensuring that people in distress at sea are assisted while minimizing the inconvenience for the assisting ship. They require the Contracting States/Parties to

- co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage; and
- arrange disembarkation as soon as reasonably practicable.

They also oblige masters who have embarked persons in distress at sea, to treat them with humanity, within the capabilities of the ship.

**Guidelines on the Treatment of Persons Rescued at Sea**[5] were developed in order to provide guidance to governments and to shipmasters in implementing these amendments. They contain the following provisions:

- The government responsible for the SAR region in which survivors were recovered is responsible for providing a place of safety or ensuring that such a place of safety is provided. (para. 2.5).
- A place of safety is a location where rescue operations are considered to terminate, and where:
  - the survivors' safety or life is no longer threatened;
  - basic human needs (such as food, shelter and medical needs) can be met; and
  - transportation arrangements can be made for the survivors' next or final destination. (para. 6.12)

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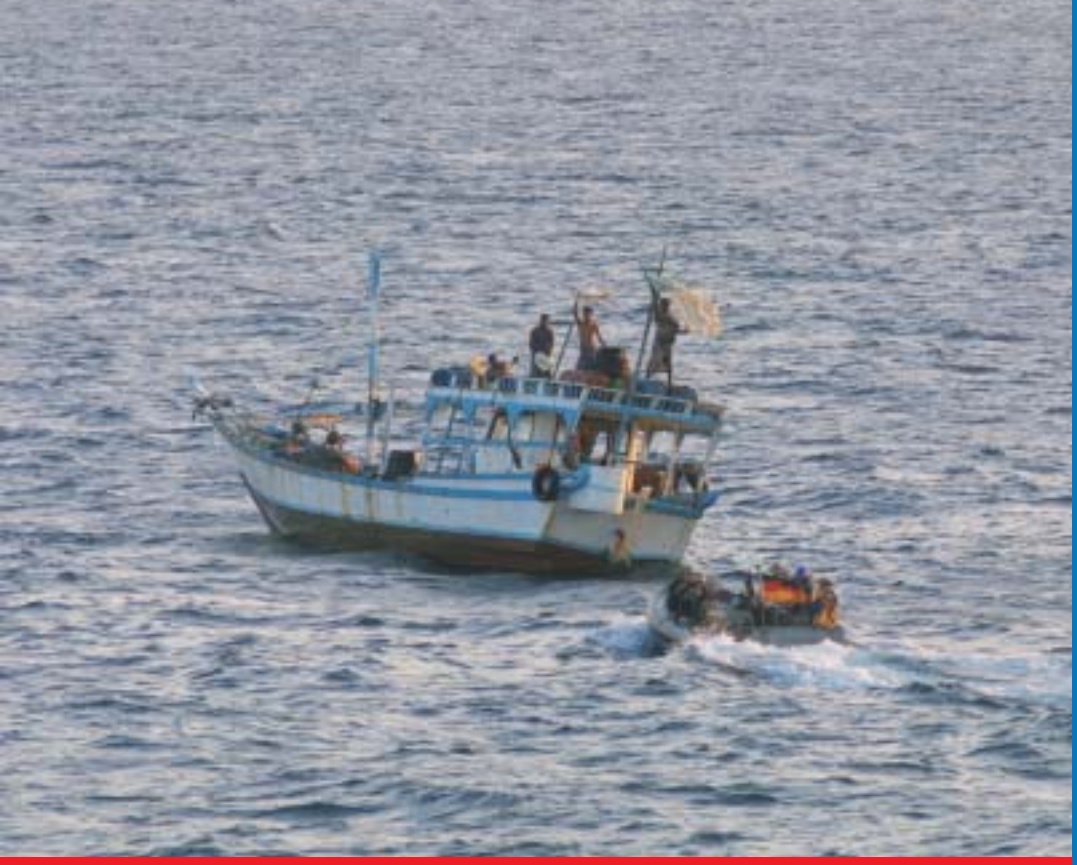
3 Amending SOLAS Regulation 33.

4 Amending SAR Chapter 3.1.9.

5 Resolution MSC.167(78) (adopted in May 2004 by the Maritime Safety Committee together with the SAR and SOLAS amendments).



- While an assisting ship may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made. (para. 6.13)
- Disembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedom would be threatened should be avoided. (para. 6.17)
- Any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation. (para. 6.20)

## International Refugee Law

If people rescued at sea make known a claim for asylum, key principles as defined in international refugee law need to be upheld. While the ship master is not responsible to determine the status of the people on board, he needs to be aware of these principles.

**The 1951 Convention relating to the Status of Refugees,** defines a refugee as a person who

> *"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his [or her] nationality*[6]*, and is unable to or, owing to such fear, is unwilling to avail himself [or herself ] of the protection of that country".* (Article 1A(2))

and prohibits that refugees or asylum-seekers

> be expelled or returned in any way *"to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."* (Article 33 (1))[7]

This refers principally to the country from which the individual has fled but also includes any other territory where he [or she] faces such a threat.

**An asylum-seeker** is an individual who is seeking international protection and whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.

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6 Or for stateless persons, the country of former habitual residence.

7 An obligation not to return a person where there are substantial grounds for believing that there is a real risk of irreparable harm derives from international human rights law (for example Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights). The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly prohibits return where there are substantial grounds for believing that a person would be in danger of being subjected to torture.

# Procedures

The following checklists are intended to define action that needs to be taken by the various parties involved in rescue at sea.

## Action by the shipmaster

Inform the Rescue Co-ordination Centre (RCC) responsible for the region as to:

- ✓ **the assisting ship:**
  - its name, flag and port of registry;
  - name and address of the owner and the owner's agent at the next port;
  - position of the vessel, its next intended port of call, its continuing safety and current endurance with additional persons on board;
- ✓ **the survivors:**
  - name, age (if possible), gender;
  - apparent health, medical condition and special medical needs;
- ✓ **actions completed** or intended to be taken by the master;
- ✓ **master's preferred arrangement** for disembarking the survivors;
- ✓ **any help** needed by the assisting ship;
- ✓ **any special factors** (e.g. prevailing weather, time sensitive cargo, etc.).

### If people rescued at sea claim asylum

- ✓ alert the closest RCC;
- ✓ contact UNHCR;
- ✓ do not ask for disembarkation in the country of origin or from which the individual has fled;
- ✓ do not share personal information regarding the asylum-seekers with the authorities of that country, or with others who might convey this information to those authorities.

## Action by Governments and Rescue Co-ordination Centres (RCCs)

The RCCs have an important role to play to ensure co-operation and co-ordination arrangements under the Amendments to the SOLAS and SAR Conventions. They need to maintain effective plans of operation and co-ordinating arrangements (interagency or international plans and agreements if appropriate) in order to respond to all types of search and rescue situations, notably:

- ✓ a recovery operation;
- ✓ disembarkation of survivors from a ship;
- ✓ delivery of survivors to a place of safety;
- ✓ arrangements with other entities (such as customs, border control and immigration authorities, ship owner or flag State), while survivors are still aboard the assisting ship with regard to nationalities, status or circumstances of the survivors; including temporary provisions for hosting survivors while such issues are being resolved; and
- ✓ measures to relieve the ship as soon as practicable, avoiding undue delay, financial burden or other difficulties incurred by assisting persons at sea.

# International Organizations and Useful Contact Information

- The **International Maritime Organization (IMO)** provides machinery for cooperation among governments on technical regulations and practices affecting shipping engaged in international trade, and facilitates the adoption of the highest practicable standards in matters such as maritime safety.
  www.imo.org
  (details of RCCs available by clicking on Circulars and GMDSS)
  Tel.: +44 207 735 7611

- The **Office of the United Nations High Commissioner for Refugees (UNHCR)** provides international protection and assistance to refugees, stateless persons and others of concerns. UNHCR can be contacted under the following telephone number +4122 739 8111.
  www.UNHCR.org

- The **Office of the High Commissioner for Human Rights (OHCHR)** promotes universal ratification and implementation of human rights treaties and ensures the practical implementation of universally recognized human rights norms.
  www.ohchr.org

- The **International Organization for Migration (IOM)** is committed to the principle that humane and orderly migration benefits migrants and society and acts with its partners in the international community to assist in managing migration, advance understanding of migration issues and uphold the human dignity and well-being of migrants.
  www.iom.int

- The **United Nations Office on Drugs and Crime (UNODC)** deals with questions of transnational organized crime and combats criminal trafficking and smuggling.
  www.unodc.org

- The **Office of Legal Affairs (OLA) /Division for Ocean Affairs and the Law of the Sea** promotes the wider acceptance of UNCLOS and assists States in the uniform and consistent application and effective implementation of its provisions.
  www.un.org/depts/los

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# 10-Point Plan Expert Roundtable No. 1: Controlling Borders while Ensuring Protection 20 – 21 November 2008, Geneva

# Summary Report

## Introduction

The Expert Roundtable No.1 'Controlling Borders while Ensuring Protection' was convened by UNHCR in cooperation with the Graduate Institute of International and Development Studies, on 20 and 21 November 2008 in Geneva with funding provided by the European Commission. It was the first in a series of four thematic meetings on UNHCR's '10-Point Plan of Action on Refugee Protection and Mixed Migration' ('10-Point Plan'). Around 40 experts from governments, international governmental and nongovernmental organizations, the academia and UNHCR explored practical ways as to how to operationalize refugee and human rights protection in the context of border and entry management. A particular emphasis was given to the challenges for the entry system related to the phenomenon of 'mixed migratory movements'.[1]

## 1. Clarification of terminology

Participants first discussed terminology and the concept of 'protection-sensitive entry systems':

Experts welcomed that the 10-Point Plan employed the term 'entry management' which is broader than the commonly used term 'border control'. Several European experts mentioned that the entry management has undergone important changes in their countries and moved away from the actual, physical border towards 'virtual' borders. States have set in place measures outside their own territory, on the high seas and on the territory of third states. These included cooperation agreements with third states, out-posting of immigration officials, extraterritorial interception operations and the factual delegation of certain control functions to private actors through the employment of carrier sanctions.

Participants underlined that it was essential to include activities beyond immediate measures at the border of a State's territory into an entry management strategy. The term 'entry system' should encompass all measures taken by a State to control entry into and stay on its territory, irrespective of whether they take place within the territory, at the border or outside the State's territory. Such measures could range from legislative clarifications through the direct refusal of entry by authorised personnel.

Experts explicitly emphasized that the entry system should be respective of refugee protection requirements, especially the principle of *non-refoulement*. They also emphasized that the notion 'protection-sensitive**'** should not be restricted to ensuring adherence to international refugee law only. The notion called for the respect of people's human rights and the dignified and respectful treatment of all persons within

[1] The annotated agenda and list of participants are annexed.

mixed movements, regardless of their status. Mixed movements often included refugees and migrants in extremely vulnerable situations with different humanitarian and protection needs. Safeguards were necessary to ensure that specific needs such as those of refugees, asylum seekers, women and other victims of human trafficking and unaccompanied minors are identified and addressed.

## 2. Core Functions and Objectives of a Protection-Sensitive Entry System

*Conflicting objectives?*

Participants emphasized that the entry system had to meet several, at times conflicting objectives, including migration management, crime prevention and respect of protection obligations. Strong expectation to meet control requirements could cause practical dilemmas for border guards, compromising their ability to be sensitive to claims for refugee protection. This was especially the case where border officials are required to meet performance indicators for effective border control or are otherwise submitted to considerable pressure to prevent entry.

But experts also underlined that conflicts between control and protection objectives should and could be solved. The success of increasingly tight border controls was questioned and several participants mentioned that such measures in their countries had not stopped people from arriving, sometimes by ever more dangerous routes. Tighter border control without corresponding protection safeguards would risk threatening the possibilities of refugees and other people in need of international protection to access safety.

Another important objective of the entry system was crime prevention. The development of anti-smuggling and anti-trafficking legislation including criminal penalties, immigration sanctions and travel bans has provided governments with additional possibilities for interventions. Additionally, cooperation and exchange of information among countries along migration routes have yielded positive results in combating these crimes.

A protection-sensitive entry system should, however, also include adequate safeguards to ensure that such measures do not also penalize the victims of such crimes. Some experts mentioned that specific training programmes have produced positive results, including an increased sensitization of border guards and the capability to identify victims of trafficking and distinguish them from traffickers.

A legal presentation on the ’non-penalization of entry of refugees’ referred to the fact that the 1951 Convention relating to the Status of Refugees (1951 Convention) specifically addresses the fact that refugees fleeing persecution often do not have the possibility to obtain the documentation necessary for an authorized entry. Art 31(1) of the 1951 Convention exempts refugees from penalization for irregular entry, if they are coming directly from a territory where they faced persecution and have presented themselves without delay to the authorities.

Experts agreed that further research would be useful on the legal aspects of the entry management, including a comparative analysis of Art. 31 (1) of the 1951 Convention,

the question of State responsibility for extraterritorial actions and for the involvement of private actors in the entry system.

*Timing and location of protection measures*

Participants noted that a protection-sensitive entry system should include measures at the pre-departure stage. It would, as one participant pointed out, 'help to provide protection without the need to make a potentially dangerous journey'. As a measure of prevention, it was seen useful to inform people who may consider leaving on their options, their rights and obligations and to raise awareness on the risks of human trafficking and smuggling.

Several participants expressed concerns on whether it can be assessed whether refugees have access to international protection elsewhere when they are intercepted long before reaching the territory of their desired asylum country. It was seen crucial that protection begins before physical entry into the territory of the intended destination country. The human rights of all people on the move should be protected at every stage of the entry process. This, however, requires solution of a number of practical and legal questions.

A specifically problematic area identified by participants was interception on the high seas where support services are regularly not available to those intercepted. Border officials have to decide quickly on interception measures and are often not in a position to resort to the advice and assistance of asylum experts.

A legal presentation on the extraterritorial application of the *non-refoulement* principle underlined that States' *non-refoulement* obligations under international human rights and refugee law are not restricted to their territory. They apply extraterritorially wherever the State exercises its jurisdiction. Supervisory bodies to international human rights and refugee treaties, especially the European Court of Human Rights (ECHR), have taken a cautious approach with regard to the establishment of jurisdiction, and require effective control over a territory or person. There is, however, a growing tendency in the international human rights discourse to hold States responsible for violations of human rights which they have caused.

Providing access to services at the initial reception stage and before the final status of the applicant is established was emphasized as another fundamental requirement of a protection-sensitive entry system. Such services ensure that persons with specific needs are identified and addressed in a timely manner.

## 3. Actors in Protection-Sensitive Entry Systems

Traditional actors in entry management include different State entities from border guards to officials in ministries of interior, immigration or security, justice etc. Increasingly, private actors also have become involved in entry management tasks. Two categories of actors were specifically discussed: carriers such as transport and shipping companies which are tasked with certain control functions and civil society representatives, sometimes in cooperation with international organisations, supporting governments in providing assistance and protection services to newly arrived persons.

*Carriers*

Several participants voiced concerns about the increased involvement of private carriers in entry control procedures. Their roles were often not adequately defined and safeguards are lacking that would help carriers to identify asylum seekers and to take differentiated approaches. It was also discussed whether and to what degree States remain responsible for actions carried out by carriers and for ensuring that all border control measures comply with international human rights and refugee protection standards.

A legal presentation on "State Obligations and Private Actors in the Entry System" highlighted the following points: Private involvement in migration control has been increasing in recent years, expanding the obligations of carriers, using private contractors to assist border control and process visa applications and the hiring of private security firms assist border management in third countries. For the asylum seeker these new forms of private-public partnerships raise a number of protection challenges. So far case law has been limited and little is generally known about the conduct and consequences of privatised migration control. Principles of customary international law nonetheless provide strong arguments that States retain basic protection obligation and responsibilities even when delegating immigration functions to private actors.

*Civil society representatives*

Participants concurred that the increasing involvement of non-governmental organisations and other civil society representatives was a positive development, which could ensure better safeguards and provide additional services. It was therefore important that they be given access to people seeking entry, including in transit zones. At the same time it was mentioned that the involvement of several actors could also create confusion. It was therefore necessary to stress the importance of coordination and clear definition of roles and responsibilities. In some countries, specific legislation or agreements has helped to clearly establish the roles of non-governmental organisations.

## 4. Establishing and Improving Protection-Sensitive Entry Systems

Participants exchanged practices and suggestions on the implementation of a protection-sensitive entry management. These included the following:

*Cooperation*

Throughout the roundtable, participants underlined the importance of effective cooperation, amongst organisations, with and between different branches of government institutions and law enforcement bodies, on national, sub-regional, regional and even global basis. Cooperation required clarity about mandate, roles and responsibilities of all actors involved in border management and coordination. Participants reported about the positive experiences with cooperation agreements formalized through a Memorandum of Understanding (MoU) or a Tripartite

Agreement. Participants pointed out the potential of international organisations playing a facilitator role between governmental bodies and civil society organisations in reaching such agreements.

Cooperation between States was relevant not only in law enforcement areas such as combating international crime, but could also facilitate the return of non-refugees. Co-operation among transit and destination countries was important to establish a system of burden sharing and for agreeing on the responsibility for the examination of asylum applications. Participants expressed concerns that inter-state cooperation in the area of border management often focused on control only and more attention should be given to include refugee protection and human rights concerns into cooperation and readmission agreements. In this respect it was recommended to conduct further research on existing readmission agreements. Some experts also suggested that cooperation should also be include, where necessary, capacity building measures.

Information sharing was identified as an important tool benefiting all relevant actors in the coordination, identification and effective protection of people crossing borders. Information sharing is or should be taking place between governments, humanitarian organizations, including UNHCR, and migrants, on national, regional or international level.

Actors involved in border management should regularly meet and discuss issues of common interest and identify problem areas. Humanitarian agencies and NGOs could better coordinate their functions and exchange cross-border information.

Some participants mentioned good experiences with cross-border cooperation between NGOs. They mentioned examples where NGOs informed their partners in other countries about the arrival of asylum-seekers who are returned under 'safe third country' arrangements to third States for the examination of their asylum requests.

Participants underlined that the exchange of best practices and twining arrangements could be beneficial for a more protection-sensitive border management as well as help to overcome certain resource constraints and asked that this issue is given the appropriate attention in the future. Furthermore, collection of data, which should not just encompass numbers but also profiles of people on the move, was also seen as an area requiring further action.

Tools for information exchange could include cross border meetings, handbooks, manuals and the internet. Information networks have the benefit of reaching out to a larger audience and provide access to information that is normally only available to a limited group.

*Specific good practice examples*:

The MoU between the Hungarian Border Guards, UNHCR and the Hungarian Helsinki Committee, establishing a monitoring framework with specific responsibilities allotted to each of the three parties. The MoU has improved access to the territory, asylum procedures and brought practices in line with international law. A public report on the project agreed upon by all three parties has been presented to

the public. Similar MoUs have also been concluded in other Central European Countries (Slovakia, Slovenia and Romania). [2]

The partnership between UNHCR London and the British Refugee Council aims to initiate a dialogue on protection-sensitive entry systems with the UK Government. The following five main objectives have been agreed upon: 1) to organize senior level discussions between civil society, UNHCR and the UK Government; 2) to design an independent monitoring model for the UK's outposted immigration control, 3) to develop a strategy for UK parliamentary lobbying 4) to agree on refugee law and human rights training for outposted UK immigration officials; 5) to develop a refugee protection toolkit for outposted immigration officials.

Examples of inter-state cooperation mentioned include: 1) the Migration and Development for South Africa initiative (MADFSA), a mechanism for dialogue between Governments in the Southern Africa region and providing university training courses on general migration and refugee protection and 2) the Cross Border Cooperation Process in Central and Eastern Europe, supported by the EU, UNHCR and the Swedish Migration Board and promotes networking on migration issues through intergovernmental and NGO meetings.

One example of a successful information network provided during the Roundtable is the Population Movement Tracking System in Somalia that monitors the movement of displaced people in Somalia. It has been particularly useful to humanitarian agencies, the national authorities and the media to identify refugees and migrants on the move and requiring humanitarian assistance and/or protection. Through an information network, relevant actors are alerted about these movements, allowing them to ensure adequate responses.

*Protection tools*

A protection-sensitive entry management should ensure that asylum seekers are given effective access to a procedure in which their protection needs can be examined. This includes access to information, interpretation, and legal advice. People with specific needs may require further services.

It was acknowledged that the identification of asylum seekers and other persons with special needs was not an easy task for border officials and required a proactive approach. Several participants highlighted the particular importance of communication between persons seeking entry and border or migration officials. The availability of information about rights and procedures, legal advice and interpretation services could facilitate such communication.

Several participants emphasized that border guards and others actors who fulfil similar functions should be given guidance on how to identify and refer asylum seekers and other people who may have specific needs to mechanisms where these needs can be assessed and addressed. Such guidelines should differentiate between different entry situations such as ports, airports, land borders, in-country applications and encounters taking place extraterritorially. For the identification of asylum seekers

[2] A copy of the MoU and an information note are included in the documentation of the roundtable.

it was stressed that entry officials should be able to create confidence and establish a meaningful communication with persons seeking entry.

Participants also mentioned that it was important to provide border guards with tools to facilitate this task. While some tools in this regard existed already participants recommended that additional ones be developed.

*Specific good practice examples*:

Participants referred to the following examples: Lists of countries or groups with specific protection needs, questionnaires regarding specific protection risks (as used in the Netherlands and Canada); toolkits and practical guidelines for migration and border officials on how to identify asylum seekers and follow protection obligations in their everyday activities; structures which provide border guards with the possibility to contact asylum experts and discuss problematic cases.

*Training*

Training was considered as an effective means to ensure (a protection-sensitive) implementation of the entry system and equip all actors in the entry system with the knowledge and skills to apply it in their daily work. Training should be all-inclusive, involving also private actors and bodies which, though not directly in contact with people seeking entry, nevertheless influence the design and implementation of the system, such as judges and policy makers.

Training should be provided to all new staff. Regular follow-up training events could ensure that entry officials are aware of changes in policies and/or the composition and profiles of migratory movements. Participants expressed some concerns regarding uncoordinated training provided by different actors and recommended joint or, at least harmonized training.

Participants suggested that training strategies and materials should further be made available in order to build upon the experience and know-how of others. This was also seen as a way to overcome resource limitations for the development of training modules.

*Specific good practice examples*:

"Protection with Broader Migration Flows" training in Angola: The use of case studies and videos and the work in teams of trainers from different organisations and institutions have been identified as being helpful in a country that has only recently been exposed to mixed migration issues.

FRONTEX's capacity building programmes: FRONTEX provides comprehensive and specified training to all EU border officers, including on joint returns, safe third countries, and false documents. The training is based on a common core curriculum, with a strong human rights component. The curriculum also requests all European border guards to follow the relevant national legislation on asylum claims.

Another example given was the training package for immigration officers in Canada. This training has to be undertaken by all immigration officials and includes special sections for tasks at land borders.

*Monitoring*

Many participants underlined that monitoring and quality-control mechanisms were essential instruments for the establishment and continuous improvement of a protection-sensitive entry system. Some experts reported about the monitoring mechanisms they have been setting up in their countries and suggested the following steps: (i) assessment of the current situation (existing legislative framework, key stakeholders, roles and responsibilities, operational context, compliance with international standards) and identification of strengths and gaps; (ii) organization of a workshop/meeting with stakeholders to clarify roles, develop strategies to overcome current gaps; (iii) regular monitoring of day-to-day activities and analysis of new developments; (iv) establishment of problem solving structures; (v) evaluate and list lessons learned and share findings of different activities with stakeholders, with the aim of further improving the system. Participants frequently referred to the important role UNHCR has played in establishing trust between governmental and civil society partners, and in facilitating and implementing the monitoring mechanisms.

*Specific good practice examples*:

The activities under the Hungarian MoU aim at monitoring the entry of persons in need of protection to the territory of, and access to the asylum procedures as well as their protection against *non-refoulement*. Lawyers from the Hungarian Helsinki Committee visit border sections with full access to foreigners, border police staff and detention facilities, as well as statistics and (anonymous) case files. Reports are being made from individual visits and issues taken up in regular tripartite working groups The work under the MoU has helped to increase mutual understanding and transparency, developed confidence, enhanced access to asylum, identified training needs as well as needs for changes in existing laws, particularly on non-penalization of entry, *non-refoulement*, and the cooperation between border police and immigration/asylum authorities.

Canada has regular quality control assessments of all stages and levels of border and immigration operations. The findings form the basis for adjustments and improvements of the existing system.

In the United Kingdom, an independent inspectorate has been tasked with monitoring the UK Border Agency in its implementation of national legislation in issues related to immigration and asylum.

*State responsibility for extraterritorial activities and private actors*

Several participants deplored the lack of information about extraterritorial border control activities, especially when undertaken by carriers or other private actors and their impact on the possibility of refugees to access countries in which they would be granted effective protection. It was recommended that this be further examined and

possibilities explored on how States' extraterritorial border control could be brought in line with international human rights and refugee protection standards.

One suggestion made in this respect was that outposting of immigration and border control officers could be accompanied by the parallel deployment of asylum experts. It was also recommended that outposted border officials or airline staff refer intercepted asylum seekers to their embassy for further examination. Embassies should and could make more use of humanitarian visa to allow onward travel in specific protection cases. While UNHCR's mandate generally does not allow for interventions in the country of origin, UNHCR may assist in assessing whether onward travel from countries of transit is necessary for protection reasons.

**Conclusion and follow-up**

Experts appreciated that the roundtable has provided them with the opportunity to exchange views on the basic features of a protection-sensitive entry system and on experiences and practices developed in different regions. Many experts mentioned that they will inform relevant actors in their governments about the results of the roundtable and share the background material with them.

Participants said that they would welcome continued exchange of information within the group and suggested to create a platform for exchange. The group felt that given the variety of regional and national particularity, it had not been possible to discuss all issues exhaustively. Participants agreed that it would be useful to continue these discussions on regional, sub-regional and national level. They welcomed the roundtable organized by the British Refugee Council and UNHCR London in December as a good practice to follow.

UNHCR
December 2008

Annex 1:

# List of Participants

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Annex 2:

# 10-Point Plan Expert Roundtable No. 1: Controlling Borders while Ensuring Protection 20 – 21 November 2008, Geneva

## Agenda

**Thursday, 20 November**

8:30 – 9:00 **Registration**

9:00 – 9:15 **Welcome**

9:15 – 9:30 **Opening Address by the Assistant High Commissioner (Protection), Ms. Erika Feller**

9:30 – 10:30 **Introductory Session: Establishing a working definition of "protection-sensitive entry systems"**

The opening session will provide an opportunity to develop an understanding of the concept 'protection-sensitive entry system' in UNHCR's 10-Point Plan, which is the central theme of the Roundtable discussion. It will lay the foundation for the following sessions in which different elements of the concept will be examined in greater detail. Participants will first discuss the terms 'protection-sensitive' and 'entry system' and then elaborate a working definition of the concept.

The following questions, inter alia, will be discussed: What is the meaning of the qualification 'protection-sensitive'? Who should be protected (all people seeking entry or only specific groups such as refugees, asylum-seekers, children, victims of trafficking, persons with medical needs) and against which threats (return, persecution, human rights violations)? Which elements encompass the term 'entry system? Why does the 10-Point Plan employ the notion of 'entry systems' and not the commonly used term 'border control' or 'border management'? Are there any new methods of controlling entry into states' territories? What are these methods and how do they relate to the discussions?

10:30 – 11:00 **Coffee Break**

11:00 – 12:30 **Working Session I: Reconciling (state) security and (refugee) protection**

This session aims to further elaborate the objectives of a protection-sensitive entry system and at setting them into relation to each other. States have the right to control their borders, to decide whether or not to allow a non-national to enter their territory and to know who is residing in their territory, at all times. Border control is an important mechanism to combat international crime and to avert security threats. At the same time, individuals wishing to enter a state's territory may need assistance to meet their own basic needs and support to access their rights, as these individuals,

who have been forced to flee persecution and human rights violations, may not be able to return to their country and require protection.

Many States have mechanisms in place that ensure that protection concerns are taken into consideration in their entry systems. Protection obligations enshrined in international, regional or national law underline the importance that States have given to the protection of individual human rights.

i. What are the core functions of a protection-sensitive entry system?

Based on the working definition of a "protection-sensitive entry system" agreed upon in the opening session, participants will examine in more detail the different objectives of a protection-sensitive entry system, including those related to 'control' and 'protection'.

ii. Is there a conflict of interest between border control and international protection objectives?

Participants will look more closely at objectives that can place contradicting demands on entry officials. They will discuss how these contradictions can be solved. The following questions will be discussed: Does access of asylum seekers to the territory, without the necessary documentation, undermine efforts to prevent irregular entry? How can potential security risks related to individual asylum seekers be dealt with? Can entry officials realistically be expected to address humanitarian needs? Would border officials be better able to reconcile different objectives with additional training, guidance and expertise?

iii. Are there specific protection safeguards required to combat international crimes such as smuggling and trafficking?

International migration, particularly irregular migration, often involves human smuggling and trafficking in persons. Combating these serious crimes raises specific problems for security and law enforcement activities and is challenging from a protection perspective, especially if smugglers and traffickers are among a mixed group of people requesting entry at a state's border. The following questions will be discussed: How can traffickers and smugglers be identified and separated from those who are victims of their crimes? How should they be punished? Which safeguards are necessary to ensure that measures against smugglers and traffickers do not negatively impact asylum seekers? Are entry officials responsible for the identification of victims of trafficking? Are these officials responsible for addressing the specific needs of victims of trafficking or victims of human rights abuses?

12:30 – 13:30 **Lunch**

13:30 – 15:00 **Working Session II: Protection-sensitive entry systems: A common task**

This session will further elaborate on the roles and responsibilities of different actors involved in entry management. The session will explore the contributions that these

actors can make to a protection-sensitive entry system and identify areas that may require the involvement of additional stakeholders.

i. Who are the main actors of a protection-sensitive entry system and where are they located?

Primary responsibility for the management of entry systems lies with the State and its authorities. Apart from border and coast guards, these actors may also include other governmental departments, including asylum authorities. Entry officials may be placed at different locations, including outside of their own territory. States have also delegated a variety of tasks relating to entry management to private actors, such as airline companies or the shipping industry. Depending on the national system, the management of the entry system may also include international agencies, such as IOM and UNHCR, or civil society representatives.

The following questions will, inter alia, be discussed: Which state bodies are involved in entry management? Where are they located (in the country, at the border, at sea, or in the territory of third States)? Are governmental bodies of third States involved in the management of the entry system and to what extent? Where have border control tasks been (partially) outsourced to private actors? Have the responsible actors changed over time and why? What role have international agencies and civil society representatives played? How do participants view these developments? Are there regional differences?

ii. What are the respective roles and responsibilities of the main actors of a protection-sensitive entry system?

After having exchanged information on the variety of actors who are involved in the management of entry systems, participants will discuss their experiences with regard to the role and responsibilities of these actors. The following questions, inter alia, will be discussed: Is there a division of labour between the different actors involved in the entry system?; How has this division been developed and does it work? Do responsibilities vary in different regions and to what extent?

iii. Are there any protection tasks that do not fall within the mandate of a specific actor?

Having looked at issues and stakeholders, are there any fields of work that are not adequately covered and why? What possible solutions can be envisaged?

iv. Other challenges

This session will provide an opportunity for participants to discuss challenges to the establishment and management of a protection-sensitive entry system. The following are some suggested questions for discussion: Is co-operation amongst different actors functioning well? How are conflicting interests resolved? Are there time constraints or can people stay at a state border until their protection needs are examined? Do increased numbers of people requesting entry raise particular challenges? Do difficult geographical settings, such as remote areas, sea borders or the high seas, bring particular operational challenges? How can resource limitations be addressed?

15:00 – 15:30 **Coffee Break**

15:30 – 17:00 **Special Session: Identifying the legal problems implicated in protection-sensitive entry systems**

The roundtable focuses on the operational challenges of a protection-sensitive entry system and possibilities to overcome these challenges. There are, however, a variety of important legal questions in connection with the management of entry systems. This session provides participants with the opportunity to familiarize themselves with some of these legal questions. Legal experts will make short presentations on each of the following topics, particularly as they apply in the context of border control and protection. The presentations will be followed by a discussion involving all participants.

i. Non-penalization of entry of asylum-seekers
*Vincent Chetail, Graduate Institute Geneva*

The imposition of entry requirements on non-nationals (eg. documentation, visas) is a long-established mechanism for controlling access to national territory and responds to a range of objectives, including security concerns. It is important, though, that the entry regime contains systematic safeguards to ensure that such mechanisms do not become an insurmountable obstacle to the individual's right to seek asylum. This presentation will elaborate on the circumstances under which international refugee law exempts refugees from penalties for illegal entry.

ii. Extra-territorial application of the *non-refoulement* principle
*Anja Klug, Senior Legal Officer, UNHCR*

States are increasingly employing a range of measures against irregular travellers situated outside of their territory, including at high sea and in the territory of third States (e.g. maritime interdiction, out-posted immigration officers). The presentation will examine whether the relevant provisions of international human rights and refugee law, and at a minimum, the prohibition of *non-refoulement,* are binding on States when acting extraterritorially.

iii. State obligations and private actors in the entry system
*Thomas Gammeltoft-Hansen, Legal Expert, Danish Refugee Council*

Many States impose sanctions on carriers for the transportation of non-nationals, who do not possess proper travel documentation, to their territory. As a result, carriers can be obliged to prevent the transportation of irregular travellers on their vessels, regardless of any potential protection needs that these individuals might have. This presentation will discuss whether and to what extent a State can be held liable for any breaches of international law by such private entities (carriers).

18:00 – 19:00 **Reception**

**Friday, 21 November**

9:00 – 10:30 **Working Session III: Establishing and improving protection-sensitive entry systems**

This session will explore practical ways to establish and maintain a protection-sensitive entry system by taking into account different operational realities, including limitations in resources. Different roundtable participants will present projects regarding this topic. Participants will be invited to draw general conclusions from these examples and discuss how these ideas might be replicated in their respective country/region.

i. Presentation of good practice examples:

- Controlling borders and ensuring protection in Angola
  *Katharina Schnöring, Chief of Mission, IOM Angola*

- A Memorandum of Understanding with the Hungarian Border Guards on monitoring and training in Hungary
  *Marta Pardavi, Executive Director, Hungarian Helsinki Committee*

- Establishing a dialogue with UK government officials on protection-sensitive entry systems
  *Sile Reynolds, Consultant, UNHCR London*

ii. Discussion

The subsequent discussion will focus on the following three questions:

- What are the main steps to establish a protection-sensitive entry system?

Participants are invited to refer to the presented examples and their own relevant experiences, to brainstorm ideas on how a control-focused border system can be developed into a protection-sensitive border system.

- What resources and tools are needed?

Addressing protection concerns within the entry system will require resources and expertise. Based on the result of previous discussions and good practice examples, participants are invited to list resources and tools which might facilitate the establishment of a protection-sensitive entry system.

- How can training, monitoring and other support best contribute to the improvement of a protection-sensitive system?

This session will specifically focus on training and monitoring in the context of entry systems. The following questions are intended to guide the discussion: What contributions can training, monitoring, and capacity-building activities make in establishing protection-sensitive entry systems? Where can these activities be best placed in the overall system? What actors can deliver or support the above activities?

10:30 – 11:00 **Coffee Break**

11:00 – 12:30 **Working Session IV: Controlling Borders and Mixed Migration: An international phenomenon requiring international cooperation**

International migration is a global phenomenon and by definition, involves a variety of countries that are situated along migration routes. Addressing the challenges to international migration, including those related to entry systems, is best discussed in the context of international cooperation. This session will discuss in which areas cooperation would be most important and on what level (eg. bilateral, regional, global) co-operation can yield the best results.

i. What is the relevance of information sharing and information networks?

Information sharing is key to any form of cooperation. How can this tool be employed to strengthen the protection component of an entry system? What examples of information networks can be discussed to inspire similar initiatives in the migration context?

ii. What local, regional or global approaches have been useful?

Participants can discuss the following questions: Are there examples of sub-regional or regional initiatives and what are the practical results that they have achieved? What type of facilitator role can international organisations play?

iii. How can ideas and best practices be better exchanged and discussed?

Participants may wish to reflect on the form of exchange and discussion which they think would be most useful. Can this be through cross-border meetings, regional conferences, the establishment of data bases and use of internet, handbooks or manuals? Where do experts see the most urgent need for action?

iv. Are there other good practices of state co-operation?

Participants can discuss further examples of co-operation relating to capacity building, financial support, and joint border surveillance.

12:30 – 13:30 **Lunch**

13:30 – 14:30 **Conclusions, Recommendations and Closure**

Parliamentary **Assembly**
**Assemblée** parlementaire


# Recommendation 1645 (2004)1

**Access to assistance and protection for asylum-seekers at European seaports and coastal areas**

1. The Parliamentary Assembly is deeply concerned about the increasing number of people who put their life and safety at risk by attempting to enter the territory of Council of Europe member states on board unsafe and overcrowded boats or hiding on board ships, secreted in containers, trailer carriers or other facilities, travelling in conditions of extreme hardship which sometimes result in their death.

2. The Assembly recalls its Recommendation 1467 (2000) on clandestine immigration and the fight against traffickers, in which it voiced its shock at the death of fifty-eight Chinese clandestine passengers who were found in a container in the port of Dover, and affirms its dismay at the death of eight Turkish nationals of Kurdish origin, including three children, found in a container in the port of Wexford (Ireland) in 2001. To these dramatic deaths innumerable other persons should be added who have lost their lives drowning in the Strait of Gibraltar, the Adriatic, the Aegean and off the shores of Sicily, while fleeing from hardship, extreme poverty, discrimination and persecution.

3. The Assembly reaffirms its recommendations designed to improve the protection and treatment afforded to asylum-seekers, in particular its Recommendation 1163 (1991) on the arrival of asylum-seekers at European airports; Recommendation 1236 (1994) on the right of asylum; Recommendation 1309 (1996) on the training of officials receiving asylum-seekers at border points; Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe; Recommendation 1374 (1998) on the situation of refugee women in Europe; and Recommendation 1440 (2000) on the restrictions on asylum in the member states of the Council of Europe and the European Union.

4. Despite statistics gathered by the International Maritime Organisation (IMO), it is not possible to know how many people manage to gain clandestine entry into Council of Europe member states by travelling on board ships or unsafe craft, as shipping companies do not systematically report stowaway and rescue incidents. However, the increasing number of those who are apprehended while trying to do so, as well as the number of unfortunate victims, show that this is not a negligible phenomenon.

5. Aware that this manner of entry can be used by genuine asylum-seekers as well as other migrants, the Assembly reiterates that those in need of international protection should neither be punished nor deprived of the right to lodge an asylum application in compliance with the 1951 Geneva Convention on the Status of Refugees on account of their clandestine manner of entry or attempted entry.

6. The Assembly is concerned that effective access to the asylum procedure for those who arrive at European seaports or coastal areas may be hindered by legal and practical hurdles, including lack of independent legal advice, limited availability of professional interpreters and inadequate information on how to lodge an asylum application. In addition, in the case of clandestine passengers, there is a concern that their effective access to the asylum procedure may be impeded by an unclear and non-harmonised legal framework applying to them as well as by the concurrent responsibilities of several actors.

7. The Assembly regrets that often, especially in cases of large-scale arrivals in coastal areas, the only interviews taking place before the adoption of an expulsion order have the exclusive purpose of determining the identity and the nationality of the person concerned, with the result that a number of potential refugees may be returned in breach of the principle of *non-refoulement* risking their lives and safety. On the contrary, effective access to the asylum procedure should imply that every person seeking entry into a Council of Europe member state should have the possibility of expressing the reasons why he or she is trying to do so in full, in an individual interview with the relevant authorities of the country.

8. Similarly, the Assembly fears that the effective exercise of the right of appeal against the refusal to receive an asylum application, or against expulsion, may be nullified by expeditious or accelerated procedures that do not allow sufficient time to lodge an appeal, by inadequate information, lack of independent and free legal advice and representation and by the limited availability of professional interpreters.

9. The Assembly also notes with regret that, despite the large numbers of asylum-seekers and migrants arriving on European shores every year, permanent reception facilities in the areas concerned are still the exception, and that their material and humanitarian conditions are often below acceptable standards.

10. The Assembly therefore recommends that the Committee of Ministers:

i. instruct the relevant committees to review the law and practice of Council of Europe member states regarding access to the asylum procedure for people arriving at European coastal areas, especially in cases of group or mixed arrivals, and on this basis, to make appropriate recommendations to member states;

ii. instruct the relevant committees to review the law and practice of Council of Europe member states applicable to clandestine passengers who wish to lodge an asylum application, with a view to drafting a code of good practice and, on this basis, make appropriate recommendations to member states;

iii. call on member states to:

*a*. ensure that those who wish to apply for asylum at seaports and coastal areas are granted unimpeded access to the asylum procedure, including through interpretation in their language or, if this is not possible, in a language they understand, and to free and independent legal advice;

*b*. ensure that every person seeking entry at seaports or coastal areas be given the possibility of explaining in full the reasons why he or she is trying to do so, in an individual interview with the relevant authorities;

*c*. set up a system to ensure the permanent availability of independent and professional legal advice and representation in the field of asylum and migration at seaports and coastal areas, and monitor its quality;

*d*. take full responsibility for immigration control at seaports, including through the investment in methods of prevention and detection and, where necessary, the reinforcement of police and immigration staff, working in partnership with private actors involved in seaport activities;

*e*. improve international co-operation between police, judicial and immigration authorities through the exchange of intelligence and information with a view to dismantling networks of smugglers operating at European and international level;

*f*. introduce harmonised criminal legislation to punish the smuggling of migrants and the trafficking of human beings;

*g*. ensure that vulnerable persons, such as unaccompanied minors and separated children, the elderly, the sick and pregnant women who arrive at seaports or coastal areas, even if they do not apply for asylum, be given appropriate assistance and accommodation pending their being sent back or being granted legal status; in addition, unaccompanied minors and separated

children should be provided with effective legal guardianship as soon as their presence comes to the attention of the authorities of a member state;

*h*. establish appropriate and permanent reception structures in coastal areas and near seaports, to provide accommodation for the new arrivals, whether they apply for asylum or not;

*i.* accept responsibility for processing asylum applications of clandestine passengers when the first port of call on the planned route of the ship is on their national territory;

*j.* in the context of their responsibilities for immigration control, conduct sea patrolling operations in such a way as to fully comply with the 1951 Geneva Convention on the Status of Refugees and the 1950 European Convention on Human Rights, by avoiding sending people back to countries where they would be at risk of persecution or human rights violations;

iv. ask the Council of Europe Development Bank to give positive consideration to funding requests from member states to build such reception structures;

v. invite the United Nations High Commission for Refugees (UNHCR) to:

*a*. continue its work on the issue of clandestine passengers who are in need of international protection;

*b*. continue co-operation with the international community and, in particular, with the IMO and the European Union in the search for effective solutions for clandestine passengers, including consideration of the viability of a single legal instrument on the treatment of clandestine passengers seeking asylum, rules on the determination of the state responsible for processing their asylum applications, their treatment on board ship and the maximum duration of custody on board ship.

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1. *Assembly debate* on 29 January 2004 (6th Sitting) (see Doc.10011, report of the Committee on Migration, Refugees and Population, rapporteur: Mr Danieli). *Text adopted by the Assembly* on 29 January 2004 (6th Sitting).

ECRE

EUROPEAN
COUNCIL
ON REFUGEES
AND EXILES

# *Defending Refugees' Access to Protection in Europe*

**DECEMBER 2007**

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# Executive Summary

Recent times have seen significant year on year decreases in the number of persons seeking asylum on the territories of European Union countries. This year the number of refugees worldwide rose for the first time in many years while the number of asylum applications in the European Union (EU) reached a 20 year low. There are probably a number of factors influencing these trends. For example, more persons may be choosing to remain irregularly rather than enter an asylum procedure, for reasons including lack of confidence in the asylum systems, a fear of being detained or transferred under the Dublin II Regulation, being under the control of traffickers. However it is also beyond doubt that the constant tightening of EU border controls is having a major impact in preventing refugees from seeking asylum in Europe.

With barely any legal migration routes into the EU from third countries, migrants are forced into resorting to irregular means of travel. This often means people placing themselves in the hands of unscrupulous smugglers or traffickers and / or taking life-threatening risks to complete the journey to Europe. Most are suffering horrific violence and human rights abuses along the way and many are dying. It has been estimated that 3,000 persons died between January and July 2006 trying to cross the Mediterranean. Others have said the figure is closer to 25,000. [1] No-one knows the real death toll: journeys can cover vast distances, persons may undertake several attempts – some do not survive desert crossings, while others drown at Europe's door. Every death is one too many, irrespective of a person's reason for trying to enter Europe.

Persons fleeing persecution have no more means to legally travel to the EU than any other category of person, despite the right to seek asylum established under the Universal Declaration of Human Rights. Refugees are therefore also forced into irregular channels thus creating so-called 'mixed flows'. We know that refugees and others in search of international protection are among the migrants. For example since 2002, 48% of asylum applicants in Malta, most of whom arrive by sea in an irregular manner, were eventually recognised as in need of international protection.[2] Meanwhile, to prevent irregular immigration, states are implementing an increasing array of border control measures that lack the necessary mechanisms to identify potential asylum seekers and allow their access to the territory and subsequently to an asylum procedure. This is leading to the violation of the principle of *non-refoulement* as enshrined in the 1951 Refugee Convention at Europe's borders.

**While recognising that states have a right to control their borders, the European Council on Refugees and Exiles (ECRE) urgently calls on EU countries to review and adapt all border management policies and operations in order to ensure the full respect of the principle of *non-refoulement* at its external borders.**

The **EU's external borders** are generally understood to be the land and sea borders and airports of EU Member States that are part of the Schengen area. While the responsibility for controlling borders lies squarely with the Member States, since the creation of the Schengen zone their capacity for surveillance and control of the EU's external borders has been more systematically supported and developed at the EU level. The EU is making substantial investments in this field, not least through the creation in 2005 of the European Agency for

[1] Pro-Human Rights Association of Andalusia, cited in CEAR, *Report on certain border externalisation practices pursued by the Spanish government that violate the rights of both now and in the future of immigrants who may seek to reach Spain via the southern border*, May 2007.
[2] Jesuit Refugee Service, *2007 Nansen Award winner addresses government representatives on refugee protection and mixed migration*, 2 October 2007.

the Management of Operational Cooperation at the External Borders (FRONTEX) and a new External Borders Fund of 1.82 billion Euros for 2008-2013.

**FRONTEX** has planned and coordinated a number of operations on the EU's land, air and sea borders. It has stated that its activities to date have led to a considerable decrease in the number of irregular entries into the EU, presenting it as a success and a factor that contributes to saving human lives. For ECRE, these statements fail to portray the entire picture: the number of irregular entrants into the EU space may have decreased overall, but at what price? Does FRONTEX know how many of these people may have been seeking international protection? Were any able to access an asylum procedure, and where? What has happened to them now?

While Member States are signatories to international conventions, have full command during FRONTEX operations and thus have the primary **responsibility towards refugees**, the critical role of FRONTEX – a EU agency - in determining how operations are carried out means it cannot be devoid of all responsibilities for ensuring operations are respectful of human rights. The key question therefore is not *if* it has responsibilities, but *in what respect* and *to what extent*? However, there is a lack of clarity and transparency regarding the exact scope of FRONTEX's coordinating role and the way in which its operations are conducted. Clarification is fundamental in order to cast light on the allocation of responsibilities and obligations towards refugees, between the agency on the one hand and Member States on the other.

ECRE questions **the role of FRONTEX beyond the EU's external borders**, in terms of whether it can legally be involved in these kinds of operations but also whether it can do so with guarantees that its actions remain in full compliance with relevant European Community (EC) law, namely the Schengen Borders Code, the Asylum Procedures Directive and its own founding Regulation. This implies, amongst other things, that FRONTEX should not be involved in operations beyond the EU's external borders. Any FRONTEX cooperation with third countries should be contingent on a demonstrable compliance by such countries with international refugee and human rights standards.

FRONTEX should also vigorously pursue ways to establish a **structured cooperation with asylum experts** such as the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations (NGOs) with a protection mandate, in order to facilitate operations that take account of protection issues. The urgent formulation of measures to address the lack of **independent monitoring** of Member States and FRONTEX's border operations is also necessary to safeguard the right to seek asylum. The establishment of an independent monitoring body should be explored, with the involvement of NGOs and UNHCR. Member States and FRONTEX should also ensure that the **training** of border guards and Rapid Borders Intervention Teams (RABITs) includes asylum and human rights law.

ECRE believes that the **EU External Borders Fund** should be used to help incorporate protection-sensitive measures into border management and should therefore support a range of activities that would explicitly aim to ensure that protection aspects of border management are better monitored and that measures to address gaps are developed and implemented over the next few years.

In terms of activities at the EU's external border or within its territory it is important to recall that both FRONTEX and Member States must respect the **Schengen Borders Code**, wherever they perform controls. They should, therefore, be ready to receive all asylum

requests presented to them in the course of the enforcement measures, ensure admission to their territory for the purposes of the asylum procedure, provide reasons for a refusal of entry and ensure that the right to appeal any such decision is available.

As with the activities of FRONTEX, EU governments are not limiting their border management activities to their territories but have in fact developed a range of **externalised migration controls** beyond their borders, sometimes in cooperation with the authorities of other EU states and also those of third countries and private actors, which are aimed at making it as difficult as possible for non-EU citizens to reach Europe. They can prevent the departure of people in need of protection from countries of origin or transit, in contravention of the right to free movement under the Universal Declaration of Human Rights that includes the right to leave one's own country.

The shifting of border controls further and further away from the EU's physical borders makes it extremely difficult to monitor what happens at the crucial moment when refugees and people in need of international protection come into contact with the authorities of the would-be asylum country for the first time, and allows people to be pushed back without anybody in Europe ever knowing about them. Nevertheless ECRE re-affirms the fact that **Member States' obligations under international and European refugee and human rights law do not stop at national borders**: they can be engaged by actions states carry out outside their national and EU borders, directly or through agents. All EU Member States are bound by the principle of *non-refoulement*, as enshrined in the 1951 Refugee Convention. They must therefore ensure that whenever exercising extraterritorial migration controls, those individuals affected who are seeking international protection, are granted access to a fair and efficient asylum procedure. Whenever they exercise **jurisdiction** (defined as effective control over an individual or over another state's territory) this will require allowing asylum seekers access to their territory. EU Member States are equally bound by the relevant provisions in the European Convention on Human Rights and other human rights instruments wherever they exercise migration controls amounting to an exercise of jurisdiction.

Specific **pre-frontier measures** imposed at land borders include requiring visas, imposing sanctions on transport carriers, the posting of Immigration/Airport Liaison Officers (ILOs/ALOs), biometrics and the use of information databases in the migration field. Although **visas** are probably one of the oldest forms of pre-frontier controls it has still not been proven that there is a direct link between the imposition of visas and a slowing down of irregular immigration. Nevertheless, the EU has in place a common list of 128 countries whose nationals are subject to a visa obligation for entry into its territory, including war-torn and refugee-producing countries and entities, such as Afghanistan, Iraq, Somalia, Sudan and the Palestinian Territories. ECRE urges the EU to consider suspending visa restrictions for a determined period of time (that can be reviewed) for nationals and residents whose country is experiencing a recognised significant upheaval or humanitarian crisis. Visa restrictions should also be lifted where there are no facilities for issuing visas within a country of origin and therefore no means to travel legally.

Not being able to acquire a visa does not in itself prevent a person from arriving at an international airport or seaport. States therefore have other complementary mechanisms in place. **Carrier sanctions** are the most important of these, imposing fines on private transport companies that carry persons who do not hold the necessary visas and/or travel documents to enter the EU. ECRE has long called for such measures to be abolished, as such sanctions have overwhelmingly adverse consequences on asylum seekers. Some states provide for exemptions e.g. in cases where a person is subsequently recognised as a refugee (sometimes also when the third country national is granted a subsidiary form of protection). EU legislation on carriers' liability should be revised so as to ensure that sanctions cannot be

enforced by any Member State if a third country national is admitted to the asylum procedure. ECRE emphasises that even when non-state agents have been engaged states are responsible under international law.

In recent years EU Member States have also had increasing recourse to the practice of **posting immigration staff abroad** in other Member States and above all in countries of origin or transit from where they wish to maintain better control on migration movements towards their territory. ILOs and / or ALOs are employed by 25 of the 27 EU Member States. At the level of the EU, a network of EU Member States' Immigration Liaison Officers has been set up, to prevent and combat irregular immigration, facilitate the return of irregular immigrants and better manage legal migration. It is very difficult to fully understand their functions and powers, as many of the relevant reports on their work are not publicly available. It can be assumed however that their advice is likely to be determinant for carriers seeking to avoid the imposition of fines. **ILOs/ALOs** should strictly comply with their states' obligations in the field of refugee and human rights and play a positive role in facilitating the entry into the EU of people who wish to seek asylum. The EU ILO Regulation should be revised, in order to provide a clearer framework for their activities and establish a code of conduct for incorporating protection concerns in their work.

**Interception at sea** consists of a great variety of measures, including activities to prevent the departure of boats or ships on dry land or in the proximity of the coast; diversion; and visiting/boarding of vessels. Whether these forms of interception are lawful according to international human rights and refugee law depends on the law applicable to the stretch of sea where interception takes place, or on the consent of the third country for interception on its territory or territorial waters. The enforcement of interception often overlaps with the obligation to render assistance to persons and ships in distress at sea wherever they are encountered in the course of navigation. Difficulties can arise because of the unsafe character of the boats and vessels used by migrants, which easily turns a surveillance activity into **rescue**. At the same time the obligation to rescue can be used as a pretext to undertake interception. In the course of rescue and interception operations, priority should be given to ensuring the safety of the people on board. This will imply their transfer to a safe place, which cannot be a ship but must be disembarkation to dry land. Undertaking an effective rescue will also require ensuring the availability of medical and psychosocial care for persons rescued who need it, such as separated children, traumatised persons and victims of violence in transit.

In cases of interception consisting of **diversion to a third country** and involving a EU state, the latter should ensure the safety of the people who are intercepted or rescued. Any asylum seekers should be brought to EU territory without delay. In cases of **interception involving an EU state in third country waters** full compliance the 1951 Refugee Convention and international law should be ensured, including access to asylum procedures, prohibition of inhuman and degrading treatment in all circumstances, and the right to an effective remedy. EU Member States should include a number of guarantees within any bilateral agreement concluded with the third country involved, such as that refugees will not face a risk of chain-*refoulement*; those who wish to apply for asylum will be given access to an asylum procedure and to UNHCR. EU states should offer to process asylum seekers if an unprecedented burden is placed on the third country's asylum system and where third countries do not agree to such guarantees or cannot provide them, EU states involved should allow anyone wishing to seek asylum to enter their territory without delay.

The issue of how southern European countries can be helped to better receive such arrivals is crucial, not least because it is key in the facilitation of people's **disembarkation**. A further key problem is that while international law sets out what state is responsible for rescuing

persons in distress at sea, it does not set out which state is then required to allow the disembarkation of any persons rescued. To date EU states have not shown the necessary political determination to develop ways to share the responsibility for hosting refugees more fairly with their EU partners. At the moment solutions are found on an *ad hoc* basis, but there is a clear need for guidelines to be agreed at the EU level that clarify the EU state responsible for receiving persons rescued at sea.

The EU must find a way to **share** not only the burden of patrolling Europe's external borders, but also the duty to save human lives and **the responsibility for refugee protection**. This will require political agreement at the EU level, which should include a mechanism to allow the relocation of refugees – after the determination procedure is concluded – under agreed criteria, among which family union and consent should be priorities. This mechanism should not in any way be set against quotas for resettlement of refugees from outside the EU.

Even where refugees manage to bypass the numerous hurdles they face on their way to the EU, they may still face difficulties in being admitted to EU territory at the physical borders. One such obstacle are **readmission agreements**. These should be implemented in full compliance with the principle of *non-refoulement*, meaning governments should ensure that the persons crossing the border irregularly are given the possibility to express their protection needs, in order to avoid being returned – directly or indirectly – to countries where they would be at risk of persecution. They should also have access to a legal remedy to challenge the decision to return them in line with the Schengen Borders Code. Prior to being returned, their identity and nationality should be determined and recorded.

The practice of **re-accompanying to the border irregular migrants** apprehended in the proximity of the border or of refusing to register their presence must be stopped at once. EU Member States should introduce sanctions against officers responsible for this kind of behaviour. In addition, there should be no special procedures at borders. Refugees at the border should be given unimpeded access to independent legal advice, interpretation and UNHCR/NGO assistance.

**Border monitoring** activities should be maintained and expanded in all countries with external EU borders in a sustainable manner. UNHCR and NGOs should be key partners to governments in border monitoring and training activities. EU funding, including the EU Borders Fund, should support such partnerships.

ECRE believes that new ways should be envisaged to allow the legal entry into the EU of people in need of protection. One way could be through setting up specific procedures allowing people in need of protection to present an asylum request to the authorities of Member States posted abroad. **Protected Entry Procedures** (PEPs) are arrangements allowing an individual to approach the authorities of a potential host country outside its territory with a view to claiming recognition of refugee status or another form of international protection; and be granted an entry permit in case of a positive response to that claim, be it preliminary or final. PEPs could be set up at first at national level, to be replaced by a EU PEP procedure alongside the development of a Common European Asylum System.

If the EU does not address the serious and indiscriminate barriers to refugees' access to protection in Europe here highlighted, the number of refugees able to seek asylum in Europe will continue to dramatically decrease. This will render the notion of a Common European Asylum System meaningless. It will also increase the responsibility borne by developing countries, that already host the majority of the world's refugees, rather than promote a global refugee protection system in which Europe takes its fair share of the responsibility.

# 1

# The Management of External Borders

## 1.1. The External Borders of the EU: What Are They?

The EU's Schengen Borders Code[3] defines external borders as *'the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders'*;[4] similarly, the FRONTEX founding Regulation[5] explains that for its purposes *'references to the external borders of the Member States shall mean the land and sea borders of the Member States and their airports and seaports, to which the provisions of Community law on the crossing of external borders apply'*.[6] It should be noted that FRONTEX refers to the borders of the Schengen area, which is due to expand on 1 January 2008 to include the eight Central and Eastern European countries that joined the EU in 2004.[7] Existing Schengen members only accept new members after detailed evaluation of law, policy and practice of applicant countries regarding border controls, police and judicial cooperation.[8]

What we have witnessed in recent times however is that there has been a process of extending controls from the external borders outwards towards the high seas and onto the territory of third countries. At the EU southern maritime border, for example, EU Member States have expanded their surveillance and interception activities to international waters, to the territorial waters of neighbouring third countries, and sometimes even to these countries' territories. Such measures are usually based on bilateral agreements between European countries and the third country involved, the contents of which are generally not public.

The challenge facing people trying to seek protection in Europe cannot be completely understood unless one properly considers the implications of these developments. The projection of the EU's border controls away from the EU's physical borders does not have any clear legal basis and seriously obstructs the creation of a consistent understanding of what the EU external borders are. Safeguarding the coherence and the certainty of law requires the definition of borders to be interpreted in the same way throughout the EU, both for the purposes of preventing the arrival of potential irregular entrants and of allowing the entry of potential refugees and people in need of protection.

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[3] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006, p. 1.
[4] *Ibid*, Article 2.2.
[5] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349 of 25.11.2004, p. 1.
[6] *Ibid*, Article 1.4.
[7] Council Decision 2007/801/EC of 6 December 2007 on the full application of the provisions of the Schengen acquis in the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic. OJ L 323/34, 8.12.2007, p. 34.
[8] See Valsamis Mitselegas, 'Border Security in the EU: Towards Centralised Controls and Maximum Surveillance' in *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy, Essays in European law,* Helen Toner, Elspeth Guild and Anneliesr Baldaccini, (eds), UK, Hart Publishing, 2007, p.362.

Border management has been a clear priority of EU policies and funding for many years now. This is demonstrated through funds to third countries such as TACIS, AENEAS and CARDS. This focus looks set to continue and increase in the coming years, both in terms of support to third countries and to EU states. As part of the EU general programme 'Solidarity and Management of Migration Flows', the External Borders Fund was set up for the period 2007-2013.[9] This instrument establishes a financial solidarity mechanism to support those states that face a lasting and heavy financial burden arising from the implementation of common standards on control and surveillance of external borders and visa policy. The financial allocation for the Fund is 1.82 billion euros.[10]

The Fund aims to enhance:[11]

- the efficiency of control and surveillance activities;
- the uniform application of the Schengen Borders Code;
- the management of the activities conducted by consular or other services of the Member States in third countries, and the cooperation between Member States in this regard;
- information gathering, data collection and their exchange;
- cooperation amongst the various national authorities operating at border crossing points; and
- the training and qualifications of border guards.

The Fund includes support for national measures and cooperation between Member States in the area of visa policy and other pre-frontier activities, such as those aimed at reinforcing the operational capacity of the EU network of immigration liaison officers (ILOs) and at assisting carriers in fulfilling their obligations under EC law.

ECRE believes that the Borders Fund should also be used as a tool to help Member States in incorporating protection-sensitive measures into the management of the EU's external borders. Therefore, it should support activities explicitly aimed at ensuring better monitoring of the protection aspects of border management, as well as the development and implementation of measures to address protection gaps. These should include the training of staff involved in border control activities on the refugee and human rights implications of preventing access to the territory, awareness raising among carriers on these matters, and the development of mechanisms for the independent monitoring of border controls by relevant international organisations and non-governmental organisations (NGOs).

## 1.2. The European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)[12]

The responsibility for controlling borders lies with the Member States. However, since the Laeken European Council[13] in 2001 the EU has increased its role in the management of the EU's external borders. In this vein it has tried to undertake three main tasks:[14]

[9] Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007, OJ L 144, 6.6.2007, p. 22. The other funds established under the Programme are the Integration Fund, the Return Fund and the European Refugee Fund.
[10] *Ibid*, Article 13.
[11] *Ibid*, Article 3.
[12] See also ECRE/Refugee Council, *Submission to the House of Lords Inquiry on Frontex*, 24 Sept 2007.
[13] Conclusion 42 of the European Council of Laeken of 14/15 December 2001 reads: *'Better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements*

- implementing a single corpus of legislation concerning border checks, uniform for all the external borders;
- ensuring operational coordination amongst Member States; and
- setting up mechanisms to assist EU countries in coping with immigration pressures at the various borders.

It did this through projects on border controls and *ad hoc* centres such as the coordination centre for land borders in Berlin, Germany, or the centres for maritime borders in Piraeus, Greece and Madrid, Spain. In 2005, however these were taken over by FRONTEX: a Community agency set up to improve the integrated management of the external borders of the Member States[15] and to facilitate and render more effective the application of existing and future community measures in this area. It aims to do so by:

- coordinating operational cooperation between Member States in external borders management;
- assisting Member States in training national border guards, including the establishment of common training standards;
- carrying out risk analyses;
- following up on the development of research relevant for the carrying out of control and surveillance at the external borders;
- assisting Member States in circumstances requiring increased technical and operational assistance; and
- providing Member States with the necessary support in organising joint return operations.

The FRONTEX founding Regulation states very clearly, however, that FRONTEX does not implement operations and that *'responsibility for the control and surveillance of external borders lies with the Member States'*.[16]

FRONTEX's priorities for 2007 included:[17]

- strengthening surveillance of the southern maritime borders of the EU;
- establishing procedures for emergency situations;
- enhancing cooperation with third countries, especially in the Mediterranean area, Western Africa, Central Asia and the Far East; and
- reinforcing links with the European Immigration Liaison Officers networks.

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*for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created (...).'*

[14] These were identified by the Commission in its Communication of 7 May 2002, *Towards integrated management of the external borders of the Member States of the European Union* (COM(2002) 233 final), and endorsed by the Council in its *Plan for the management of the external borders of the Member States of the European Union* , of 14 June 2002.

[15] Schengen associated members also participate in the Agency. As a result of their special position as regards the Schengen *acquis*, the United Kingdom, Ireland and Denmark did not take place in the adoption of the FRONTEX founding Regulation, although Denmark applies it as part of the Schengen *acquis*. The United Kingdom and Ireland can participate in FRONTEX operational actions, with modalities which are decided on a case-by-case basis. In this case, they can also be represented in the Management Board. Nevertheless, the United Kingdom has challenged its exclusion from the FRONTEX regulation before the European Court of Justice (Case C-77/05).

[16] Council Regulation No 2007/2004, Article 1.2

[17] FRONTEX*, Work Programme 2006*, October 2005, pp. 4-5.

While we can glean a superficial understanding of activities undertaken in 2005 and 2006 from its founding Regulation, agreed Working Arrangements and the 2006 Annual Report, there is no access to more detailed documents on its activities and operations, such as training manuals or relevant risk analyses after operations have taken place. While FRONTEX officials do meet with and / or report to the Council, the European Commission and the European Parliament, these will often be closed meetings. This points to a serious problem of transparency and democratic accountability for an agency being hailed as successful and receiving huge annual increases in public funding.[18] Furthermore it creates obvious (and for some possibly opportune) problems in terms of monitoring compliance with human rights and refugee law.

Based on the information publicly available, an initial assessment of FRONTEX's activities since its creation raises numerous reasons for concern as regards their impact on refugees' ability to seek asylum in EU territory. Moreover, there is no evidence that FRONTEX takes potential protection issues into consideration in e.g. its planning and coordination of joint operations.

In reporting on Joint Operation Amazon, conducted at airports in Spain, Portugal, France, the United Kingdom, Italy, the Netherlands and Germany, FRONTEX has provided information that 3166 third country nationals were refused entry.[19] Joint Operation Poseidon looked at irregular immigration via the south-eastern land and sea borders between May and July 2007. Altogether it led to the diversion back to the Turkish coast of 248 migrants and the apprehension of over 1,500 migrants mostly Albanians, Afghans, Iraqis, Pakistanis, Palestinians and Somali.[20] However, no information has been disclosed on the numbers of asylum seekers and on the fate of the persons apprehended, while other reports have revealed very serious violations of human rights in the areas covered by Poseidon.[21]

The FRONTEX approach towards Iraqis demonstrates what appears to be a conscious blurring of 'illegal immigration' and the arrival of persons in search of international protection. Approximately 18.4% of asylum applications in Europe from January-September 2007 have been lodged by Iraqis[22] and e.g. 90% of Iraqis in Sweden and 74% of Iraqis in Austria have been recognised as in need of international protection.[23] Many of those not recognised are also being granted some form of right to stay (e.g. in Finland) in acknowledgement of the fact that they cannot be returned at this time. While FRONTEX clearly acknowledges that many Iraqis come to Europe to claim asylum its main concern is that 80%-90% of those who do so in Sweden are not intercepted before reaching Swedish territory. It describes illegal immigration of Iraqi nationals as posing a potential threat to Member States.[24] It has undertaken a tailored risk analysis on the 'illegal migration' from and via Iraq towards the EU that only looked at "*threats of human trafficking, forgery of travel*

[18] In the course of 2006, its overall budget was increased from 12.4 to 19.2M euros. For 2007 its budget is 35M euros. In October 2007 the European Parliament's Budget Committee voted in favour of a 30M euro increase in its budget for 2008 which would lead to a possible 68M euro allocation.
[19] FRONTEX, *Annual Report 2006*, 2007, p. 11.
[20] See the 16 September 2007 FRONTEX statement on accomplished operations at: http://www.frontex.europa.eu/examples_of_accomplished_operati/art8.html.
[21] Pro Asyl, *The Truth Might Be Bitter, but It Must Be Told: The Situation of Refugees in the Aegean and the Practices of the Greek Cost Guard*, October 2007.
[22] UNHCR, *Asylum Levels and Trends in Industrialized Countries Second Quarter 2007-Statistical Overview of Asylum Applications Lodged in 31 European and 5 Non-European Countries*, September 2007.
[23] Markus Sperl, 'Fortress Europe and the Iraqi 'Intruders': Iraqi Asylum-Seekers and the EU, 2003-2007', *UNHCR New Issues in Refugee Research*, Research Paper No 144, October 2007.
[24] FRONTEX, *Public Bulletin,* September 2007, Reference Number: 9566/14.09.2007, p. 15

*documents and possible abuse of asylum seeking procedure"* [25] [emphasis added] and intends to launch an operational response to this situation.[26]

It is clear therefore that for FRONTEX, preventing as many people as possible from entering the EU is the principal indicator of success;[27] for ECRE, in contrast, it is a serious reason to believe that the principle of *non-refoulement* is being violated. Does FRONTEX know how many of these people had protection concerns? Were any able to access an asylum procedure, and where? What has happened to them now? FRONTEX presents figures on how many migrants affected by its operations have been diverted, returned to a country of transit or even of origin; why then does it not also present figures on how many of the migrants involved in its operations have claimed asylum and entered an asylum procedure? Regular reports which included such information and demonstrated how its activities respect fundamental rights would seem to be crucial.

ECRE does not wish to overstate the role of FRONTEX: Member States are signatories to international conventions, maintain full command during operations and therefore have the primary responsibility towards refugees. However, the critical role of FRONTEX – a EU agency - in determining how operations are carried out also means it cannot be devoid of all responsibilities for ensuring that these are respectful of human rights, including those of refugees. The key question therefore is not *if* it has responsibilities, but in what respect and to what extent? ECRE is concerned about the lack of clarity and transparency regarding the exact scope of FRONTEX's coordinating role and the way in which its operations are conducted. Clarification is fundamental in order to cast light on the allocation of responsibilities and obligations towards refugees, between the agency on the one hand and Member States on the other. This clarification would also help assess whether there are appropriate mechanisms in place for holding FRONTEX accountable – politically and legally – for breaches of EC, maritime, human rights and refugee law that might occur during the operations it coordinates. For example, no information to date indicates how people's right to be given a reason for refusal of entry and to have access to an appeal (as provided for in the Schengen Borders Code) is put into effect in the context of a FRONTEX operation. How could this be further examined and redressed?

In trying to assess whether FRONTEX is willing and able to properly support EU Member States in respecting their human rights obligations in their border management activities, it is important to look at who FRONTEX is. Its staff is composed mostly of border and police personnel, reflecting the situation in EU Member States where there is usually a separation between officials tasked with enforcing migration controls and those dealing with protection issues. One way of mitigating a lack of adequate attention to human rights and asylum concerns in FRONTEX's work would be the inclusion of staff from a more varied background, including personnel with protection expertise.

FRONTEX can negotiate and conclude so-called Working Arrangements with a range of actors. The agency is developing agreements of this kind with several international bodies, such as IOM, Interpol and Europol. It has also undertaken operational cooperation with third countries, including the exchange of information, the provision of training, the participation in joint measures, and the secondment of border guards to Member State units responsible for border controls. To date, FRONTEX has entered into agreements with the border guard authorities of the following non-EU countries: Switzerland, Ukraine and the Russian Federation. These agreements specify the aims of sharing expertise and best practice and

[25] *Ibid*, p.4
[26] *Ibid*, p.15
[27] FRONTEX, *Annual Report 2006*, 2007, pp. 8 and 13.

undertaking training activities. It is also thought they could also be the basis for other activities in the future such as the sharing of intelligence for risk analyses and actual involvement of a third country in FRONTEX joint operations.[28] The negotiations to conclude Working Arrangements with Morocco, Mauritania, Senegal and Libya were launched in 2006 and are also underway with Croatia. Informal contacts have been made with a number of other countries.[29] It should be noted that some of these countries have dubious records in relation to human rights and/or their treatment of migrants and refugees. Moreover, Libya[30] is not party to the 1951 Refugee Convention.[31] It is known that problematic practices in Libya include preventing people from leaving their countries of origin, arbitrarily detaining people, some for long periods of time,[32] in bad conditions and ill-treating them, and returning people to their country of origin without establishing whether it is safe, which in some cases has led to *refoulement*.[33] Unfortunately a FRONTEX-led EU technical mission on illegal immigration to Libya (May-June 2007) did not examine protection issues, but instead focused on assessing the needs of Libyan authorities in terms of improving control at their borders.[34] In addition, there is absolutely no formal basis upon which the EU can cooperate on migratory matters with Libya, while it is not a full partner of the Barcelona process[35] or part of the European Neighbourhood Policy.[36]

FRONTEX is supporting border control operations in international waters and the waters of non-EU countries. Joint Operation HERA 2007 focused on migration from West Africa to the Canary Islands in two stages between April and August and included joint sea patrols together with Mauritania and Senegal. It led to the interception of 3,164 'illegal immigrants', 1,202 persons being diverted back to Africa and 833 being intercepted "*out of the Operational Area"*. HERA III specifically is reported to have decreased irregular migration by sea from West Africa to the Canary Islands by 60 per cent in the first three months of 2007.[37] Under operations such as HERA II and III, FRONTEX performed its coordinating role in international waters and in the territorial waters of Senegal and Mauritania.

ECRE questions the role of FRONTEX beyond the EU's external borders, in terms of whether it can legally be involved in this kind of operations but also whether it can do so with guarantees that its actions remain in full compliance with EC law. Under international law individual states can exercise some powers in international waters with a view to preventing the infringement of their immigration laws and they can also do so on the territory or the territorial waters of a third country with the latter's consent. As an EU agency, however, the legal basis for FRONTEX activities derives from its founding Regulation, which provides a

[28] See answer of Mr Nielsen (European Commission) to Question 77 in (unrevised) *House of Lords Minutes of Evidence taken before the Select Committee on the EU (Sub-Committee F), Frontex Inquiry*, 16 October 2007, Mr J Faull and Mr H Nielsen: http://www.publications.parliament.uk/pa/ld/lduncorr/euf161007_ev2.pdf (accessed on 10 December 2007).
[29] Cape Verde, The Gambia, Guinea Bissau, Guinea Conakry and Nigeria. A first contact has also been established with Turkey. FRONTEX, *Annual Report 2006*, 2007, pp. 18-19.
[30] See Human Rights Watch, *Libya's Human Rights Record in Spotlight,* 17 January 2003.
[31] Convention Relating to the Status of Refugees of 28 July 1951.
[32] European Commission, *Technical Mission to Libya on illegal immigration 27Nov-6 Dec 2004*, Report 4 April 2005
[33] Sara Hamood, *African Transit Migration through Libya to Europe: The Human Cost*, Cairo, The American University in Cairo, 2006.
[34] See FRONTEX, *Public Bulletin,* September 2007, pp. 16-7 and *FRONTEX-Led EU Illegal Immigration Technical Mission to Libya 28 May-5 June* 2007,
[35] Sara Hamood, *African Transit Migration through Libya to Europe: The Human Cost*, Cairo, The American University in Cairo, 2006. p. 72
[36] *Analysis of the external dimension of the European Union's asylum and immigration policies– summary and recommendation for the European Parliament*, 8 June 2006, Ref: DGExPo/B/PolDep/ETUDE/2006 11, DT\619330EN.doc.
[37] EU Observer, '*EU Border Agency Cuts African Migrant Numbers'*, 13 April 2007.

definition of external borders similar to that of the Schengen Borders Code and foresees a role for FRONTEX in '*facilitat[ing] the operational cooperation between Member States and third countries*'[38] through the aforementioned Working Arrangements. However, neither the Regulation nor any of the Working Arrangements authorise the agency to coordinate actual operations in a third country's territorial waters. It is also difficult to see how any bilateral agreements between an individual EU Member state and a third country – many of which cannot be scrutinised for compliance with EC and international law – can be said to be applicable to FRONTEX.

FRONTEX should vigorously pursue ways to establish a structured cooperation with asylum experts such as United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations with a protection mandate, in order to facilitate operations that take account of protection issues. The development of a working arrangement with UNHCR and the posting of a UNHCR liaison officer within FRONTEX headquarters[39] are welcomed as positive first steps, but much more needs to be done. FRONTEX officials, as well as national border guards involved in its operations, should be trained in relevant human rights and refugee law. UNHCR and NGOs have the expertise needed to do this. Above all, the mandate of the agency should be clarified to integrally incorporate protection concerns in border management.[40]

While UNHCR and NGOs are playing an increasingly important role in undertaking independent monitoring at some EU external borders (see section 5.5 for further information),[41] at present there is no independent monitoring of FRONTEX operations.[42] The urgent formulation of measures to fill this gap is necessary to safeguard the right to seek asylum. For EU states to be fully equipped to ensure that the management of their external borders respects international refugee and human rights law, it is likely that monitoring by an independent body will need to be established.[43] The involvement of NGOs and international organisations with relevant expertise should be considered according to a jointly defined framework.

In addition to the concerns related to international protection, it is unclear whether there are mechanisms in place to deal with the wider humanitarian needs, particularly medical requirements, of persons rescued, intercepted or diverted during FRONTEX operations. We would like to see a commitment by FRONTEX, alongside Member States' efforts, to help ensure adequate reception facilities are available to meet the needs of all migrants wherever they are taken. These could be based on the current reception model in place on the Italian island of Lampedusa, for example.

The development of new EU border control instruments, which reinforce the role of FRONTEX, also makes it increasingly imperative to redress the agency's shortcomings

[38] Regulation No 2007/2004, Article 14.
[39] At the time of writing, this post was only secured until June 2007.
[40] The European Commission also called for this in its Communication on *Reinforcing the management of the European Union's Southern Maritime Borders*, COM(2006) 733 final, 30.11.2006.
[41] See *Tripartite Memorandum of Understanding on Modalities of Mutual Co-operation and Coordination to support the access of asylum seekers to the territory of, and the asylum procedures of the Republic of Hungary*, 2006, signed by the Hungarian government, UNHCR and the Hungarian Helsinki Committee.
[42] An inquiry into FRONTEX by the UK's House of Lords Select Committee on the European Union, Sub-Committee F (Home Affairs) is currently underway. An evaluation of FRONTEX by the European Commission is due in 2008 but its methodology and thus level of independent input remains unclear.
[43] As explored by the Commission in its *Green Paper on the future Common European Asylum System* (COM(2007) 301 final, 6.6.2007), the proposed European Asylum Support Office could act as such a body , depending on whether and how it is established and its level of independence.

without delay. FRONTEX is involved in the creation of a permanent Coastal Patrol Network,[44] to be managed together with the Member States of the region and allowing for the possibility of inviting neighbouring third countries to participate. Moreover, FRONTEX will be able to decide on the deployment of the Rapid Borders Intervention Teams (RABITs),[45] upon request by a Member State.

The RABITs are designed to intervene in cases where a Member State faces a major influx of irregular migration, and would be composed on a case-by-case basis from a permanent pool of national expert border guards. The requesting Member State would be in command of a rapid intervention team deployed on its territory but importantly guest officers would be empowered to implement the Schengen Borders Code in the Member State where they have been posted.[46] The surveillance functions of the RABITs also raise protection concerns. Border guards would be entitled to use technical means to monitor external borders, to participate in patrols in the external border area of the host Member State, and to prevent people from irregularly crossing the external border of the host Member State. The RABITs Regulation mentions the respect of fundamental rights and principles recognised in the European Convention on Human Rights (ECHR) and in the Charter of Fundamental Rights of the EU, but does not make any reference to states' obligations under the 1951 Refugee Convention. However, Article 2 establishes that it should apply without prejudice of the rights of refugees and persons in need of international protection, in particular concerning *non-refoulement*.

What is needed to complement the work of such RABITs is the implementation as soon as possible of the Commission's proposed 'Asylum Expert Teams'[47] in which UNHCR and NGOs could provide the expertise sought. While such teams are not formed and operational it is imperative that UNHCR be involved in the work of the RABITs, bringing in the missing asylum expertise by providing training and advice and monitoring the RABITS' activities.

## *Section 1 Recommendations*

1. The definition of the EU's external borders should be interpreted in the same way throughout the EU, both for the purposes of preventing the arrival of potential irregular entrants and for the purposes of allowing the entry of potential refugees and people in need of protection.

2. In the allocation of the EU External Borders Fund, activities with the following objectives should be prioritised:

- improving the training and qualifications of border guards and immigration liaison officers on the implications of refugee and human rights law of preventing access to the territory;
- raising awareness among carriers on protection issues; and

[44] The *MEDSEA* feasibility study, presented by FRONTEX on 14 July 2006, pointed to the need for a permanent Coastal Patrol Network for the southern maritime external borders. The Commission has endorsed the proposal in the *Green Paper on a future Maritime Policy* (COM(2006) 257 final, 7.6.2006).

[45] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 8 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism, OJ L 199, 31.7.2007, p. 30.

[46] *Ibid*, Article 10.

[47] European Commission, *Communication on Reinforcing the Management of the European Union's Southern Maritime Borders* COM(2006) 733 final, 30.11.2006. See also the *Green Paper on the future Common European Asylum System,* COM(2007) 301 final, 6.6.2007.

- enhancing the independent monitoring of borders and pre-frontier controls by relevant international organisations and NGOs.

3. Neither FRONTEX nor EU Member States should leave migrants they encounter in life-threatening circumstances whilst in transit. A portion of the External Borders Fund should also be allocated to support humanitarian responses to migrants in danger, injured, or traumatised in transit, including post-arrival reception services.

4. In its activities, FRONTEX should comply with relevant EC law, including the Schengen Borders Code, the Asylum Procedures Directive and its own founding Regulation. This implies, amongst other things, that FRONTEX should not be involved in operations taking place outside the EU external borders. Any FRONTEX cooperation with third countries should be contingent on a demonstrable compliance by such countries with international refugee and human rights law.

5. The legal framework and mechanisms to hold FRONTEX accountable for possible breaches of EC asylum and human rights law should be clarified.

6. FRONTEX should ensure that protection and human rights safeguards are incorporated into its work. To this end, its mandate should be revised, in order to spell out very clearly that protection and human rights concerns are an integral part of the management of the EU external borders. Every operational plan must include practical measures to ensure that individuals potentially in need of protection are identified and admitted to an asylum procedure. In addition, FRONTEX should establish regular cooperation, if necessary through the conclusion of Working Arrangements, with international and non-governmental organisations with a mandate in the areas of asylum and/or human rights. It should also aim to employ staff from a more diversified background, including specialists in asylum and human rights issues.

7. The urgent formulation of measures to address the lack of independent monitoring of Member States and FRONTEX's border operations is necessary to safeguard the right to seek asylum. This should include the establishment of an independent monitoring body. Monitoring of FRONTEX should also be informed by national border monitoring activities in which NGOs and UNHCR participate, for example through tripartite arrangements. The EU should develop or support pilot projects with this purpose. The EU should also ensure the envisaged 'Asylum Expert Teams' are formed and play a role in the monitoring and identification of asylum seekers at borders.

8. Democratic oversight of FRONTEX activities should be strengthened through supervision by an independent body and by consulting the European Parliament over the agency's work programme as well as on the conclusion of Working Arrangements with third countries and international organisations, not just on its budget as at present.

9. FRONTEX should ensure maximum transparency of its activities and operational rules by making more information publicly available on its work, such as its feasibility studies and risk analyses. It should produce regular reports that demonstrate how its activities respect fundamental rights. These should include information on how many individuals have been given access to an asylum procedure in the course of its activities, in the EU or outside, as well as on the fate of those whose entry has been prevented (repatriation, detention, etc).

10. Member States and FRONTEX should ensure that the training of border guards and RABITs includes asylum and human rights law and complete information on their implications for border control and admission to the territory. UNHCR and NGOs are well placed to be involved in such training.

11. In order to complement the work of RABITs the Commission's proposed 'Asylum Expert Teams' should urgently be formed and implemented, in a manner allowing for UNHCR and NGOs to contribute to their operation with their protection expertise. While such teams are not formed and operational it is imperative that UNHCR be involved in the work of the RABITs, bringing in the expertise which FRONTEX lacks through the provision of training, advice and monitoring.

# 2

## *Extraterritorial Application of International Law: Establishing the Link between Control and Responsibility*

It is sometimes claimed that states are only responsible for observing international refugee and human rights within their territory; that everything beyond the magic line of the external borders is somehow a "legal black hole". The problem is further compounded, it is argued, in the case of the EU: not quite a state, it is not liable under international law. However convenient these statements may be to policy-makers keen to rid themselves of legal obligations by moving migration control outside the territory, a careful examination of both EU and international law shows that neither claim is correct.

Europe has a long-standing commitment in the field of asylum and human rights. In over fifty years of application of the 1951 Refugee Convention and of the ECHR, it has built up a solid system to ensure that all those who come under the jurisdiction of European States can enjoy fundamental rights and liberties, are protected against their violations, and can hold States accountable before the courts in that respect. Through the process of European integration, the EU has explicitly endorsed the values of the ECHR; in fact, human rights and humanitarian principles are considered the foundation of the Union,[48] and their respect is a condition for new membership.[49] Over the years, the EU has also progressively increased its activities to safeguard human rights, which has led to the adoption of the EU Charter of Fundamental Rights[50] and the establishment of the Fundamental Rights Agency.[51]

It is therefore not consistent with this approach for the EU to act as if human rights and humanitarian principles stopped at its physical borders. ECRE's line of argument echoes the 1999 Tampere Conclusions:

> *'1. From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. (...) 3. This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union'.*[52]

[48] Treaty of the European Union, Article 6.
[49] *Ibid*, Article 49.
[50] *Charter of Fundamental Rights of the European Union*, 2000/C 364/01, 18.12.2000. Although it was solemnly proclaimed in the Nice European Council of December 2000, it is not legally binding.
[51] The EU Agency for Fundamental Rights was established through the Council Regulation (EC) No 168/2007 of 15 February 2007.
[52] *Council Presidency Conclusions*, 15/16 October 1999. Emphasis added.

Secondly, it is a general tenet of human rights law that wherever there is power, there should be control of this power. As such, there is a logical and unquestionable link between the exercise of extraterritorial immigration control, and the obligation to assume full responsibility for it. This responsibility is not only moral and political – EU Member States cannot abdicate their principles, values and commitments by doing outside their borders what would not be permissible on their territories – but also legal. While in some instances, extraterritorial actions may be beyond the reach of national law and monitoring mechanisms, awareness of and compliance with the fact that this does not leave states unconstrained and unchecked under international law is particularly crucial. Member States' obligations under international and European refugee and human rights law do not stop at national borders; they can be engaged by actions States carry out outside their national and EU external borders, directly or through agents.

## 2.1. International Refugee Law

The principle of *non-refoulement* is the essential and non-derogable component of the system on international protection, enshrined in Article 33(1) of the 1951 Refugee Convention,[53] and is one of the legal obligations falling upon EU Member States in the enforcement of extraterritorial immigration control. It says that *'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.*

According to the position of UNHCR,[54] scholars,[55] and extensive state practice, the obligation of *non-refoulement* does not arise only when a refugee is within or at the borders of a State but also when a refugee is under the effective or *de facto* jurisdiction of a State, outside its territory.[56] The arguments in support of this position include, but are not limited to:

- an interpretation of Article 33(1) of the 1951 Refugee Convention based on its ordinary meaning indicates that the only geographic restriction regards the country where a refugee cannot be sent *to*, not the place where a refugee is sent *from*;[57]

[53] In addition, the prohibition of refoulement is binding under customary international law even upon states which have not signed the 1951 Refugee Convention

[54] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007.

[55] James C. Hathaway, *The Rights of Refugees in International Law*, Cambridge, Cambridge Univerity Press, 2005, pp. 335-341, and Guy Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law*, 3rd Edition, Oxford, Oxford University Press, 2007, pp. 244-53.

[56] The US Supreme Court was of a different opinion in 1993: in the case of *Sale v. Haitian Centres Council,* concerning the US practice of interception in international waters, the Court concluded that *"because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions*" (113 United States Supreme Court 2549 (1993). However, the reasoning of the *Sale* decision has generally been rejected by both courts and scholars as being erroneously decided on several accounts. See Dissenting opinion by Justice Blackmum in *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155, p. 3; UNHCR , 'Brief Amicus Curiae: The Haitian Interdiction Case 1993', *International Journal of Refugee Law,* Vol. 6, No 1, pp. 85-102; *R. (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport.* 20 May 2003, Court of Appeal, QB 811 EWCA Civ 666: and James C. Hathaway, *The Rights of Refugees in International Law*, pp. 335-341.

[57] As was noted by the by the American representative, Louis Henkin, during the drafting Ad Hoc Committee: "Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he has been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether the refugee was in a regular position, he must not be turned back to a country where his life and freedom could be threatened." Doc. E/AC.32/SR.20, par. 54.

- other provisions of the 1951 Refugee Convention have an explicit territorial scope of application. Consequently, if the drafters had wanted Article 33(1) to have the same scope, they could have chosen a different wording;[58]
- interpreting Article 33(1) so as to allow States acting outside their territory to return refugees to a risk of persecution would create a situation whereby the most fundamental protection afforded under the 1951 Refugee Convention would turn not on protection needs, but on the ability of the refugees to clandestinely enter the territory. Not only is it illogical that the refugee who enters irregularly should enjoy more protection than the refugee who readily presents himself/herself to the authorities, but such an interpretation would also run contrary to the very purpose of the *non-refoulement* principle.[59]

Instead, in line with general international law, the geographical scope of the prohibition of *non-refoulement* can be determined to apply wherever a state exercises jurisdiction.[60] This includes international waters as well as the territorial waters and the territory of another state, provided that the actions which are performed by the state authorities reach the necessary threshold to constitute an effective exercise of control, *de facto* or *de jure*, in the given situation. While the test of effective control has to be satisfied in each individual case, it is reasonable to assume that as a rule any action resulting in the return or push back of refugees to a territory where they face a risk of persecution will meet this threshold.

EU Member States must ensure that individuals seeking international protection, wherever they are encountered, are given access to a fair and efficient asylum procedure. "C*ompliance with the non-refoulement is only ensured if its prerequisites, the refugee status in the meaning of Art. 1 A (2) Refugee Convention is examined appropriately."*[61] In practice, this will usually entail the acting state allowing asylum seekers access to its territory and asylum procedure. In situations involving third country territory where the EU Member State does not exercise effective control and it has assured that the *non-refoulement* principle and other protection standards are guaranteed in a third state, access to a procedure in that third state may be possible.[62]

## 2.2. International and Regional Human Rights Law

Member States have responsibilities and can be held accountable under a number of human rights instruments for what happens outside their borders. Despite having different geographic scopes, a number of human rights instruments reaffirm this notion of jurisdictional applicability. Together, they may help elucidate when and where states are responsible for carrying out migration controls outside their borders.

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[58] See James C. Hathaway, *The Rights of Refugees in International Law*, Cambridge, Cambridge Univerity Press, 2005, p. 160-ff and Guy Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law*, 3rd Edition, Oxford, Oxford University Press, 2007, p. 246.

[59] UNHCR '*Brief Amicus Curiae*', p. 42.

[60] Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', in Erika Feller et al.*Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003, p. 110; James C. Hathaway, *The Rights of Refugees in International Law*, Cambridge, Cambridge Univerity Press, 2005, p. 160-ff.

[61] Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy Asylum"', *International Journal of Refugee Law*, Vol. 15, 2005, p. 193.

[62] See Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy Asylum"', *International Journal of Refugee Law*, Vol. 15, 2005, pp. 192-211.

**UN Human Rights Instruments**

Several of the human rights instruments concluded under the aegis of the United Nations, including the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture (CAT) and the International Convention on the Elimination of all Forms of Racial Discrimination relate to jurisdiction rather than territory. As is evident from the case-law, this also entails instances where states exercise jurisdiction extra-territorially.

Both the Court of Justice and the Human Rights Committee have confirmed the extraterritorial applicability of the ICCPR in a number of texts.[63] In fact, the interpretation given to the notion of jurisdiction under the ICCPR is more liberal than the interpretation of this concept so far given by the European Court of Human Rights (ECtHR). For instance, the Human Rights Committee has taken the position that States can be held accountable for breaches of the ICCPR which are committed on the territory of another State, whether with the acquiescence of the authorities of that state *or in opposition to it*.[64]

These instruments have been ratified by all Member States and many of the countries in which European States apply extraterritorial migration controls, e.g. Mauritania, Morocco, Senegal and Libya. As such, both EU Member States and third States may be held accountable under their provisions when undertaking interception measures.

**The European Convention on Human Rights (ECHR)**

There is no doubt that the obligations stemming from the ECHR are not limited to the territory of a state: the wording of the ECHR,[65] as well as the established jurisprudence of the ECtHR has recognised that states are accountable for the effects of any act carried out within their jurisdiction, even if such effects take place outside their territory. It has been clarified that the ECHR's scope of application includes:

- the territory of a state party, including its borders and transit zones;[66] and
- wherever, outside its territory, a state party exercises jurisdiction.[67]

In the latter case, jurisdiction can consist of either:

- effective control over an individual;[68] or
- effective control over another state's territory.[69]

While the jurisprudence of the ECtHR has emphasised that jurisdiction is '*primarily territorial*' and '*applies in an essentially regional context and notably in the legal space of Contracting States'*,[70] a consistent jurisprudence confirms that the extraterritorial actions of

[63] For instance: International Court of Justice, *Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paragraph 111.
[64] Human Rights Committee, *Lopez Burgos V. Uruguay*, 29 July 1981.
[65] *'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'* (Article 1 – Obligation to respect human rights).
[66] *See Amuur v. France*, 25 June 1996. The state parties are all the member states of the Council of Europe (47 European countries), including all the EU Member States.
[67] See *Loizidou v. Turkey*, 18 December 1996
[68] Grand Chamber, *Ocalan v. Turkey*, judgment of 12 March 2003.
[69] Grand Chamber, *Ilascu and others v Moldova and Russia*, judgment of 8 July 2004.
[70] Bankovic and Others v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxemburg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the UK (Appl. No. 5207/99). Judgement of 12 December 2001. European Court of Human Rights, paragraph 71. See also Guy Goodwin-Gill

state parties can engage the ECHR even when performed outside the territory of Council of Europe member states.[71]

Nevertheless, even though the principle of the application of the ECHR to extraterritorial actions of European States has been established, the question remains in each case whether the exercise of migration control can reach the necessary threshold to be considered effective control over an individual or over a territory.

Only one case of extraterritorial exercise of migration control has so far been examined by the ECtHR: a case of interception at sea, conducted by a State party (Italy) in international waters and in the territorial waters of another State party (Albania).[72] During the operation, a collision between an Italian military ship and an unseaworthy vessel caused the deaths of 58 migrants. While the ECtHR held this case inadmissible on the grounds of non-exhaustion of domestic remedies, it did recognise that Italy was exercising jurisdiction and that if the case had progressed to a consideration of its merits there would have been an argument under ECHR Article 2 (the right to life).

ECRE is aware of the wide range of migration control measures being implemented in the context of externalisation, and that it is not possible to affirm that all of them, in all circumstances, constitute breaches of the ECHR. However, these measures will certainly engage the ECHR when they reach the threshold of constituting effective control either over an individual or a place. While the jurisprudence set out above is specific to the ECtHR, the principles to determine jurisdiction set out may be considered as a benchmark to evaluate the existence of an exercise of effective control under other international instruments, including the 1951 Refugee Convention. Thus, in carrying out extraterritorial migration control, consideration must be given to two issues:

Firstly, what is the nature and the extent of the powers that are exercised by the authorities of the Member States? Naturally, there may be a difference between cases where EU States exercise full immigration powers and instances where they merely take on an advisory capacity. The presumption of an exercise of jurisdiction will be very high in cases where Member States act directly to prevent the onwards movement of refugees towards the EU. However, Member States may also incur responsibility by merely aiding another state or private party in carrying out a wrongful act under international law. In instances where such actions may lead to a violation of fundamental principles of international law, such as the prohibition of *non-refoulement* or return to torture, the presumption of liability is further compounded.

Secondly, there is the question of overlaps with the jurisdiction of another state in cases where control is carried out on the territory or in the territorial waters of non-EU states. While the primary protection responsibility may rest with the country on whose sovereign territory the action is carried out, the jurisprudence of the ECtHR set out above is clear that European states are, under certain circumstances, liable even when acting inside another state's territorial jurisdiction. Thus, while interception at sea taking place in international waters carries an immediate presumption of jurisdiction of the acting state, migration control carried

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and Jane Mc Adam, *The Refugee in International Law*, 3rd Edition, Oxford, Oxford University Press, 2007, pp. 246-7.

[71] See, for instance, *Ocalan v. Turkey*, applying to Turkish activities in Kenya, and *Issa v. Turkey* of 6 November 2004 applying to Turkish activities in Iraq. This jurisprudence seems to indicate that the territorial limitation mentioned in *Banković* was an explanation of the original historical design of the Convention rather than an interpretation of its scope of application. See Guy Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law*, 3rd Edition, Oxford, Oxford University Press, 2007, p. 246.

[72] *Xhavara and fifteen v. Italy and Albania*, admissibility decision of 11 January 2001 (in French only).

out on the territory of a third country may raise issues of joint responsibility. This does not mean that the intercepting states will, in all instances, have to grant refugees access to their territories, but it does mean that the acting state must ensure that refugees do not face *refoulement* or so-called 'chain *refoulement*'[73] through any third state to which the refugee is submitted.

## 2.3. European Community Law

### The Schengen Borders Code

EU Member States' activities in the field of border control and surveillance must comply with the Schengen Borders Code (the Code).[74] The Code recasts the existing *acquis* on border checks carried out on people and is intended to consolidate and enhance the legislative component of the integrated border management policy by setting out the rules on the crossing of external borders and on the reintroduction of checks at internal borders.

The Schengen Borders Code does not specify the territorial scope of the application of its provisions. However, no relevant exceptions are foreseen to its operation, which therefore applies wherever border control and surveillance by its Contracting Parties take place. Thus, the territorial scope can be implicitly inferred from the material scope of application of the Code, which includes:

- border control, defined as *'the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing the border, regardless of any other consideration, consisting of border checks and border surveillance'*;[75] and
- border surveillance, the main purposes of which are *'to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally*'.[76]

As far as the states' positive obligations are concerned, the Code re-states that:

- the case of refugees and people in need of international protection represents an exception to the requirements which are normally demanded of third country nationals for crossing the external borders;[77]
- entry may only be refused by a substantiated decision stating the reasons for refusal;[78]
- persons refused entry have the right to appeal against this decision;[79] and
- when performing their duties, border guards must fully respect human dignity.[80]

[73] 'Chain refoulement' can occur whenever refugees can be continually transferred between countries and eventually sent back to their country of origin without having accessed an asylum procedure at any point. ECRE, *Broken Promises – Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection: Tampere 1999-Brussels 2004*, June 2004, p. 11.
[74] Regulation (EC) No 562/2006.
[75] *Ibid*., Article 9.
[76] *Ibid*. Article 12.
[77] *Ibid*., Article 13.1
[78] *Ibid*., Article 13.2.
[79] *Ibid*., Article 13.3.
[80] *Ibid*., Article 6.1

**The Asylum Procedures Directive**[81]

The Asylum Procedures Directive has a clear scope of application: it applies to all asylum claims made in the territory of EU Member States, including at the border or in transit zones.[82] The recent study by the European Commission on the international law instruments in relation to illegal immigration by sea re-affirmed the applicability of the Asylum Procedures Directive – amongst other instruments – to Member States' territorial waters.[83]

In terms of relevant obligations, the Directive sets out:

- the obligation on Member States to guarantee access to the asylum procedure;[84]
- the right of asylum seekers to remain in the territory of a Member State, at its border or in its transit zone pending the examination of the claim;[85]
- the obligation on Member States to ensure the right to an effective remedy, including against a decision of inadmissibility of the claim and in the context of border procedures;[86] and
- the obligation on Member States to allow UNHCR access to asylum applicants.[87]

## *Section 2 Recommendations*

12. EU Member States are bound by the principle of *non-refoulement*, as enshrined in the 1951 Refugee Convention. They should therefore ensure that whenever exercising extraterritorial migration controls those individuals affected who are seeking international protection are granted access to a fair and efficient asylum procedure. Whenever they exercise jurisdiction this will require allowing asylum seekers access to their territory.

13. EU Member States are equally bound by the relevant provisions in the European Convention on Human Rights and other human rights instruments wherever they exercise migration control amounting to an exercise of jurisdiction.

14. In undertaking border controls and surveillance, EU Member States must respect the Schengen Borders Code wherever they perform such activities. They should, therefore, be ready to receive all asylum requests presented to them in the course of the enforcement of such measures, ensure admission to their territory for the purposes of acces to the asylum procedure, provide reasons for a refusal of entry, and ensure that the right to appeal any such decision is available.

15. EU Member States must ensure full compliance with the EC Asylum Procedures Directive on their territories and in their territorial waters.

[81] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p. 1.
[82] *Ibid*., Article 3.
[83] European Commission, *Study on the international law instruments in relation to illegal immigration by sea*, SEC(2007) 691, 15.05.07, p. 16.
[84] Directive 2005/85/EC, Article 6
[85] *Ibid*., Article 7. This obligation, however, has exceptions.
[86] *Ibid*., Article 39.
[87] *Ibid*., Article 21.

# 3

# *Pre-Frontier Controls*

A number of measures implemented by Member States have the effect of preventing the departure of people in need of protection from countries of origin or transit. This contravenes the right to free movement under the Universal Declaration of Human Rights which includes the right to leave one's own country.[88] Amongst them are traditional barriers such as visas and carriers' liability, and new and developing ones, such as the posting of Immigration/Airport Liaison Officers (ILOs/ALOs), biometrics and the use of information databases in the migration field. A common characteristic of these measures as envisaged by the EU is that they respond to a two-fold objective: security and the control of irregular immigration.

They raise cross-cutting issues such as:

- the compliance in good faith with the obligations stemming from international refugee law;
- the extraterritorial responsibility of Member States for the actions of their agents abroad and their positive obligations under national, EC, and international refugee and human rights law;
- the responsibility of EU Member States for the powers they delegate to private actors;
- how these measures can be implemented so as to ensure that protection needs are adequately taken into consideration.

## 3.1. Visas

Visas are probably one of the oldest forms of pre-frontier controls. The traditional rationale for the imposition of visas is regulating migration flows in both directions: to prevent the arrival of some and to allow the legal entry of others. As part of that, before and after the Second World War it was not unusual to issue protection visas for refugees.

Since the introduction of the Schengen framework,[89] the EU's approach to visa policy has changed: the number of countries whose nationals are subject to visa requirements has increased, as has the number of types of visas. Furthermore preventing refugees from reaching Europe has clearly been one of the objectives of EU visa policy. That the EU and its members make an increasingly strategic use of this instrument in the development of their relations with third countries is evidenced by the practice of offering to liberalise visa requirements for non-EU country's nationals as an incentive to obtain those countries' consent to the conclusion of readmission agreements (e.g. the Russian Federation, Ukraine and the countries of the Western Balkans).[90] While states can of course waive visa

[88] Universal Declaration of Human Rights, Art. 13(2).
[89] Enshrined in the Schengen Agreement of 14 June 1985 and in its Implementing Convention (hereafter, Schengen Convention), in force since June 1995 (OJ EC 22.9.2000, p. 19).
[90] Council Decisions 2007/340/ EC and 2007/341/EC, both of 19 April 2007, on the conclusion of the Agreements between the EC and the Russian Federation on the issuance of short-stay visas and on readmission (OJ L 129, 15.5.2007, pp. 25 and 38 respectively); in the case of Ukraine, visa and readmission agreements were signed in June 2007, but their ratification is still pending. This kind of agreements were also concluded on 18 September 2007 between the Community and Bosnia and Herzegovina, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia

requirements for refugees,[91] they are not explicitly encouraged to do so, as they are for certain other groups in the EU Visa Regulation.[92]

The EU has in place a common list of countries whose nationals are subject to a visa obligation for entry into its territory, as opposed to a 'white list' of countries whose nationals are not subjected to this requirement.[93] As of May 2007, the EU common visa list comprised 128 countries,[94] including war-torn and refugee-producing countries and entities, such as Afghanistan, Iraq, Somalia, Sudan and the Palestinian Territories. The EU Regulation setting out the common visa list and the white list does not include any obligation for periodic revision.[95]

Despite their being a traditional instrument for migration regulation, the effects of visa requirements on irregular migration are not completely clear. The European Commission has stated it is not sure *"whether or not there is a direct link between the imposition of visa requirements and a slowing down of illegal immigration. On the contrary it seems difficult to prove a link between the lifting of visas requirements and a subsequent increase of illegal immigration"*.[96] On the other hand we do know that the imposition of visa requirements on nationals of refugee-producing countries puts refugees in the situation of having to resort to irregular forms of migration to enter the EU and seek protection.

The deliberate targeting of countries from which asylum seekers are likely to originate is underlined by the additional introduction of Airport Transit Visas (ATVs), which are used to prevent asylum applications at airports from individuals in transit towards further destinations, and are often introduced in response to an increase in asylum applications by people travelling a given route. An EU list of third countries whose nationals must be in possession of such visas has been in place since 1996.[97] It includes Afghanistan, the Democratic Republic of the Congo, Ethiopia, Eritrea, Ghana, Iran, Iraq, Nigeria, Somalia and Sri Lanka. In addition, EU member States may require ATVs from nationals of countries not included in this list.

The obstacles presented to asylum seekers through the visa regime are equally evident in the criteria set out for granting or refusing visas. The EU's Common Consular Instruction (CCI)[98] is intended to facilitate cooperation among EU and Schengen consulates but also guides the practical granting of visas by setting out different risk categories. Among the risk groups designated are "*unemployed persons, those with no regular income, etc*"[99], whose arrival is

[91] See Schengen Convention Article 5. 2.

[92] Article 4 of the Council Regulation (EC) No 539/2001, of 15 March 2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (replacing Council Regulation (EC) No. 574/1999 of 12 March 1999, which placed 101 countries in the visa-list), OJ L 81, 21.3.2001, p. 1

[93] *Ibid*. These provisions do not apply to Ireland nor to the United Kingdom, who are free to decide their own visa lists pursuant to the protocol on their position annexed to the Treaty on European Union and to the Treaty establishing the European Community.

[94] In addition, nationals from three entities which are not recognised as States by all EU members are subjected to visa obligations (East Timor, Palestinian Territories and Taiwan).

[95] However, limited changes were introduced in 2003 (to add Ecuador to the common visa-list), 2005 (to respect reciprocity) and 2006 (with Bolivia being included in the visa-list and a number of Caribbean countries being excluded).

[96] European Commission, *Communication on the study on the link between legal and illegal immigration*, COM (2004) 412 final, 4.6.2004.

[97] Joint Action 96/197/JHA of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements, OJ L 63, 13.3.1996, p. 8.

[98] Council Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts, OJ C 326, 22.12.2005, p. 1.

[99] *Ibid*, Section V.

further deterred by the cost of a Schengen visa (now Euros 60). Additionally, consular officers may require more documentation for 'high risk' persons – something which asylum seekers will often have particular difficulties in obtaining.

In 2006 the European Commission proposed amending the CCI on visas in relation to the introduction of biometrics[100] in order to create a legal basis for national authorities to collect biometric identifiers from visa applicants and to establish a legal framework for the organisation of Member States' consular offices with a view to implementing the Visa Information System. The proposal regulates the notion of *outsourcing*, a new form of consular representation. According to the European Commission, although the power to grant a visa must remain with Member States, the giving of appointments, the collection of biometric data and the reception of visa applications can be carried out by an external service provider if required by the local conditions and the number of visa applications. However, in a recent legislative report, the European Parliament's LIBE Committee has signalled its concern that this practice might put into question the public character of the process of visa issuing.[101] ECRE calls for the application of the strictest safeguards whenever such delegation of tasks to private actors is permitted.

Another European Commission proposal to establish a Community Code on Visas[102] in part aims to enhance transparency in the issuing of visas by introducing the obligation on states to notify and motivate negative decisions and make a clear distinction between refusal and the inadmissibility of decisions. This measure however, will not in itself provide for any remedies regarding appealing any refusal to grant a visa, which would only be available if provided for by the Member State's national law.

## 3.2. Carrier Sanctions

Not being able to acquire a visa does not in itself prevent a person from arriving at an international airport or seaport. States therefore have other complementary mechanisms in place, which make a visa a prerequisite for *starting* a journey. Carrier sanctions are the most important of these, imposing fines on private transport companies that carry persons who do not hold the necessary visas and/or travel documents to enter the territory of the EU.

Carrier sanctions had been in place in some countries since the mid-1980s, when common EU rules were introduced with the Schengen framework.[103] The Schengen Convention explicitly stated that the imposition of penalties should be in line with obligations under the 1951 Refugee Convention, but countries interpreted it differently. For example France, Italy and The Netherlands waived the fines if a person was admitted to their asylum procedure, while Denmark, Germany and the United Kingdom (UK) fined carriers regardless of protection concerns.

In 2001 the EU brought in legislation on carriers' liability, as a supplement to the relevant provisions of the Schengen Convention,[104] specifically removing the obligation to fine in

[100] COM(2006)269 final, 31.5.2006.. Procedural reference 2006/0088(COD).
[101] European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications,* A6-0459/2007, 29.11.2007. Procedural reference: 2006/0088(COD).
[102] Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final, 19.7.2006. Procedural reference: 2006/0142/(COD).
[103] See the Article 26 of the Schengen Convention.
[104] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. OJ L 187, 10.7.2001, p. 45.

cases where the person seeks international protection. EU legislation on carriers also includes a 2004 Council Directive on the obligations of carriers to communicate passenger data in advance to the competent authorities.[105] The regime applies to all kinds of professional carriers, from airline companies to lorry drivers, and imposes on them:

- penalties of at least 3000 euros for each third country national transported;
- the obligation to return third country nationals in transit;
- the responsibility to find means of onwards transportation where they have been unable to carry out the return of the third country nationals and for bearing all related costs, including accommodation.

Despite the 2001 Directive's affirmation that its application is without prejudice to obligations resulting from the 1951 Refugee Convention,[106] ECRE regrets that it does not foresee special safeguards to:

- ensure protection from *refoulement* of persons for whom carriers are unable to effect return and for whom carriers are therefore obliged to arrange onwards transportation;
- ensure that asylum seekers who have been refused permission to travel on a carrier, are forced to return or taken to a country where they might face treatment contrary to the 1951 Refugee Convention or the ECHR, are given the possibility to appeal;
- *require* Member States to exempt carriers from liability if the third country national is admitted to an asylum procedure or is subsequently granted refugee status.

At present, all EU countries have introduced provisions in their legislation to conform to the EU regime of carriers' liability. However, given the discretion left to Member States by the Directive, there are substantial differences amongst them, with some States providing for exemptions only for those who are subsequently recognised as refugees and others providing for exemptions also when the third country national is granted a subsidiary form of protection. Often the relevant legislation is not applied consistently.

The adverse consequences of carrier sanctions on asylum seekers have been pointed to by many observers, most recently by a study carried out for the European Parliament.[107]Yet the use of carrier sanctions continues across the EU. Moreover transport companies will continue to comply with the rules as long as it is more economically beneficial to avoid a fine by not allowing a passenger to travel rather than let a potential asylum seeker travel and risk making the wrong decision and incur a fine as well as the costs of repatriation. The European Commission has agreed that an assessment on the effects of carriers' liability is needed and announced the preparation of a study on this issue.[108] In addition, the "Forum on Carrier Liability"[109] - set up in 2001 and composed, amongst others, of representatives from EU governments, the transport industry and humanitarian organisations - was due to explore ways to develop cooperation between immigration authorities and carriers and present a report on best practices in the course of 2007 and also consider how stakeholders have given practical

[105] Council Directive 2004/82/EC of 29 April 2004 on the obligations of carriers to communicate passenger data, OJ L 261, 6.8.2004, p. 24.
[106] Council Directive 2001/51/EC, Recital 3.
[107] *Analysis of the external dimension of the European Union's asylum and immigration policies– summary and recommendation for the European Parliament*, 8 June 2006, Ref: DGExPo/B/PolDep/ETUDE/2006 11, DT\619330EN.doc
[108] European Commission, *Communication on policy priorities in the fight against illegal immigration of third-country nationals*, COM (2006) 402, 19.7.2006, p. 11.
[109] European Commission, *Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents*, COM (2003) 323 final, 3.6.2003.

effect to the safeguard clause in the Directive. These developments are positive in the way they indicate awareness that these measures might restrict access to protection. However, ECRE objects in the strongest terms to the very existence of carriers' liability, which strips many refugees of the possibility to reach a country of asylum.

Also problematic is the way carrier sanctions confer on private actors responsibilities which by nature pertain to public authorities. They privatise functions in the field of migration control to non-state agents that cannot be held accountable for ensuring the rights of refugees under international law. In this way EU countries seek to avoid the international and constitutional restrictions that would normally apply to state agents carrying out similar functions. ECRE emphasises that even when non-state agents have been engaged states are responsible under international law.[110]

## 3.3. Immigration Liaison Officers (ILOs)/Airport Liaison Officers (ALOs)

In recent years EU Member States have had increasing recourse to the practice of posting immigration staff abroad, in other Member States but above all in countries of origin or transit from where they wish to maintain better control on migration movements towards their borders. This practice can consist of posting either:

- immigration officers at diplomatic missions abroad, including in EU Member States (ILOs)[111]; or
- immigration officers at international airports or seaports abroad, including in EU Member States, with the task of assisting carriers and the relevant authorities to check that travellers are in possession of the necessary documentation (ALOs).

The recourse to ILOs and ALOs is very widespread, as it concerns 25 EU Member States. The UK (which has a network responsible for 128 countries), the Netherlands (posted in 13 countries, covering 56 countries) and France are amongst the EU countries which most avail themselves of ILOs and ALOs. Some of the most popular locations for the posting of ILOs by EU Member States include Eastern Europe (Russia, Ukraine), the Balkans (Serbia, Bosnia and Herzegovina), Turkey, China, Pakistan and Kenya. Among new EU Members, Romania has ILOs/ALOs posted in 26 countries, most of which are EU members.[112] In some cases, EU Member States have undertaken joint initiatives, such as the British and Italian ILO network in south-eastern Europe (in operation since 2001, mainly intended to provide training to local officials and gather intelligence on trafficking and smuggling) and the Belgian-led eastern Balkans ILO network (since December 2002).

[110] The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) of the International Law Commission establishes that States cannot abnegate their obligations by delegating some functions to private actors. If they do delegate some functions, States are still to be held responsible under international law.

[111] Article 1 of the Council Regulation (EC) No. 377/2004, of 19 February 2004, on the creation of an immigration liaison officers network (OJ L 64, 2.3.2004, p. 1), defines an ILO as *"a representative of one of the Member States, posted abroad by the immigration service or other competent authorities in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating illegal immigration, the return of illegal immigrants and the management of legal migration"*.

[112] The figures in this paragraph are data from 2005 as taken from the Draft Common Manual for Immigration Liaison Officers (ILOs) posted abroad by the Member States of the European Union, 25 April 2006, Ref.: 8418/06.

**The case of Regina v. UK Immigration Officer at Prague Airport**

*In February 2001, the governments of the United Kingdom and the Czech Republic (then not yet an EU Member) agreed that British immigration officers would be posted at Prague Airport to screen passengers directed to the UK and grant pre-entry clearance with the power to give or refuse leave to enter the UK to passengers before they boarded aircraft bound for the UK. This agreement followed an increase in the number of asylum applications made in the UK by Czech nationals, the vast majority of whom were Roma.*

*The agreement was first implemented on 18 July 2001 in an intermittent manner, usually for a few days or weeks at a time, without advance warning. British immigration officers refused leave to enter to those who stated that they were intending to claim asylum in the UK and those of whom they thought intended to do so.*

*In the three weeks before the operation began there were over 200 asylum claims made by Czech nationals at entry points in the UK. Only 20 such claims were made in the three weeks after it began, during which period 110 intending travellers were denied authorisation to enter at Prague Airport. Among those refused leave at this time were six Czech citizens, of Roma ethnicity, who appealed against the refusal of pre-entry clearance. The House of Lords found that the UK practice was in breach of UK domestic law, as it was inherently discriminatory on ethnic grounds, as well as of the UK's international obligations.* [113]

At the level of the EU, a network of EU Member States' ILOs has been set up, to ensure better cooperation and exchange of information among Member States with a view to preventing and combating irregular immigration, facilitating the return of irregular immigrants and better management of legal immigration.[114]

The Code of Conduct for Immigration Liaison Officers of the International Air Transport Association states that whenever ILOs receive requests for asylum they should refer the applicants to the office of UNHCR, the appropriate diplomatic mission(s) or a pertinent local NGO.[115] Nevertheless, the founding Regulation of the EU network does not include any specific mention of Member States' international obligations concerning refugees and people in need of protection. In addition, the lack of transparency around the activities of ILOs/ALOs is so great that it is difficult to have a full appreciation of their functions and powers.

Every holder of the EU Presidency is required to submit an activity report to the Council and the European Commission,[116] providing detailed information on the activities of the ILO network and the situation in the third country as regards irregular immigration, but this document is classified.[117]

[113] In *R (European Roma Human Rights Centre and Others) v .Immigration Liaison Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening) 2005} 2 AC 1.*

[114] Council Regulation (EC) No 377/2004, Article 1.1

[115] IATA, *A Code of Conduct for Immigration Liaison Officers*, October 2002, paragraph 2.3.

[116] *Ibid*. Article 6

[117] According to Commission Decision 2005/687/EC, the report should be treated as a "RESTREINT UE" document and the relevant provisions of the Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations apply.

From the limited information publicly available, and from information collected by ECRE,[118] it seems that the main focus of ILOs is indeed on irregular immigration.[119] Typical activities they perform include: the verification of documents on behalf of the national authorities; provision of advice on relevant legislation to the authorities of the host country and to carriers; provision of training to the same actors on the identification of falsified documents; gathering of information on irregular immigration trends and routes; easing the exchange of investigative information between the authorities of the two countries; and facilitating returns.

A Draft Common Manual for ILOs posted abroad by the Member States of the EU has also been prepared.[120] It comprises information useful for ILOs to carry out their tasks, including examples of best practice. Amongst them, the only recommendation referring to asylum and protection needs in the entire manual is that ILOs should *'share contacts with international organisations (e.g. NGOs) active in the field of illegal migration, borders, asylum and trafficking in human beings'*.[121] The legislation on asylum is indicated for each country in the chapter on relevant legislation.[122]

The role of ILOs promises to be increasingly important in the coming years: closer cooperation is foreseen between the EU immigration liaison network and FRONTEX, and regional networks of ILOs have been set up along the main four migration routes from Africa to Europe, with Spain, France, Italy and the United Kingdom being identified as leading Member States for each of them.[123] These countries are tasked with drafting a calendar of activities with the final objective of developing an operational action plan for each route. The European Commission has proposed that the regional ILO networks be reinforced, with the aim of having at least one Liaison Officer in each key African country of origin and transit. In addition, terms of reference are to be developed for an EU ILO, who would be able to act on behalf of several Member States.

ECRE is concerned about the increasing reliance on ILOs/ALOs: the combination of visa requirements, carriers' liability and the activities of ILOs seriously affect the chances of refugees to flee and find protection from persecution when not in possession of the necessary travel documents. Even if it were ascertained that their role was merely advisory, their advice is likely to be determinant for the carriers.

As agents of their States operating abroad, ILOs/ALOs should strictly comply with their States' obligations in the field of asylum and human rights. To do so, they should inform carriers that refugees and people in need of protection are exempted from the admission requirements normally requested of a third country national, including in terms of documentation. They should also advise carriers on the possibility of sanctions being lifted in cases involving asylum seekers or people who are subsequently recognised as refugees or granted another protection status. There is a need for a revision of the EU ILOs/ALOs Regulation, in order to provide a clearer framework for their activities and establish a code of conduct for incorporating protection concerns in their work.

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[118] ECRE gathered information through a questionnaire directly sent to ILOs/ALOs from a number of EU Member States for the preparation of this paper in June 2007.

[119] Council of Europe, *Cross-border cooperation in the combating of organised crime, Best practice survey No.5,* January 2003 (see the chapter on France, which gives a practical example of the job of a French Liaison Officer posted in Rome, pp. 13-14). Information has also been obtained through ECRE questionnaire on ILOs.

[120] Draft Common Manual ILOs, Ref.: 8418/06

[121] *Ibid*., p. 8.

[122] *Ibid*. pp.,104-ff.

[123] European Commission, *The Global Approach to Migration one year on: Towards a Comprehensive European migration policy*, COM(2006) 735 final, 30.11.2006

## 3.4. Biometrics and Information Databases

Since the Laeken European Council, the EU and its Member States have placed increasing emphasis on the use of personal information databases in the area of Justice and Home Affairs (JHA), as well as on the use of biometric technology. In the current security-dominated climate, these mechanisms are seen as a way to collect, exchange and analyse personal data for security purposes.

The Visa Information System (VIS), which should soon become operational,[124] would contain data, including biometric identifiers, on visa applicants as well as data on the visa application, for instance details of sponsors. This initiative is linked to the proposal to establish a Community Code on Visas,[125] with which the Commission aims to adapt the CCI to biometric technology and introduce the legal obligation for Member States to collect fingerprints of every individual applying for a visa. In the words of the JHA Council, VIS should *"contribute towards improving the administration of the common visa policy and towards internal security and combating terrorism"*.[126]

ECRE is concerned that the use of biometrics might represent an additional barrier to entry for refugees, as it will most probably prevent people who are already in the system from obtaining a visa. Reasons why people may be in a database include having previously applied for asylum in the EU or having been returned from an EU country. People's circumstances can change, however, and they may justifiably want to enter Europe. The impact of biometrics will be to push more refugees and people in need of international protection into resorting to irregular forms of migration.

As regards databases, at the moment there are a number of EU information systems, containing different information and serving different purposes, including EURODAC in the field of asylum;[127] the Schengen Information System (SIS) in the fields of migration, police and judicial cooperation;[128] and the Europol Information System, a police database, in the field of criminal law.[129] Further proposals in this area include inter-operability among databases; sharing information between law enforcement authorities in Member States on the basis of the principle of availability; broadening the scope of the data; and granting access to the authorities of third countries[130] or including information coming from private actors.[131]

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[124] The VIS was established by the Council Decision 2004/512/EC of 8 June 2004 (OJ L 213, 15.6.2004, p. 5). However, for its further development it requires of the adoption of a number of legislative measures such as the Draft Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, which is has gone through the co-decision procedure and is now waiting to be signed (procedural reference 2004/0287(COD)).

[125] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas*, COM(2006) 403 final, 19.7.2006. Procedural reference: 2006/0142/(COD).

[126] 2561st Council meeting, JHA, 19 February 2004, Doc 5831/04 (Presse 37).

[127] It contains the fingerprints of those who apply for asylum in the EU.

[128] It stores information on third country nationals who should be denied entry into the Schengen territory; people wanted for extradition to a Schengen State, missing persons as well as on those wanted as witnesses or for the purposes of prosecution or the enforcement of criminal sentences, etc.

[129] It contains information on persons who have been convicted for one of the offences falling within Europol's mandate; persons who are suspected of having committed or having taken part in such an offence as well as on people for whom there are serious grounds to believe that they will commit it.

[130] This would be possible under the Draft VIS Regulation, although the EP has manifested its opposition.

[131] This would be possible under a proposal reforming Europol and its information system: European Commission, *Proposal for a Council Decision establishing the European Police Office (EUROPOL),* COM (2006) 817 final, 20.12.2006.

ECRE regrets that the issue of databases is presented as purely technical as opposed to political, which limits the potential for a meaningful public debate on their use. There are serious concerns regarding these systems including the lack of monitoring and reports of frequent mistakes.[132] The latest proposals in this area are of particular concern: in particular, the inter-operability of databases would allow access by law enforcement authorities to immigration databases, in spite of the undoubtedly different purposes of managing migration and fighting crime. The very broad definition of availability[133] of data poses the threat of the violation of the right to privacy and makes the exchange of information almost automatic.[134] There should be guarantees that sensitive information on asylum seekers and people in need of protection is not shared with third countries, as this could be detrimental to their safety. At the same time, data collected by private actors should not be considered as a reliable source of information for dealing with immigration or asylum cases. As a matter of principle, confidentiality should underpin all information gathered in relation to applications for refugee status. Finally as with biometrics there are no provisions to deal with situations where people who have been entered into the database later return to the EU in need of international protection.

## 3.5. Anti-Smuggling and Anti-Trafficking Measures

The way in which EU Member States implement their obligations in the fight against trafficking in human beings and smuggling of migrants may also have an impact on refugees' access to territory and protection.

The relevant international framework[135] includes:

- the Protocol against the Smuggling of Migrants by Land, Air and Sea,[136] supplementing the UN Convention against Transnational Organized Crime;

- the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime; and

- the Council of Europe Convention on Action against Trafficking in Human Beings.[137]

While both Protocols state that the rights, obligations and responsibilities of States and individuals under the 1951 Refugee Convention and 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* shall not be affected, they do not provide any guidance for dealing with refugees who are smuggled or victims of trafficking in cases where

[132] See, for instance EURODAC Supervision Coordination Group, *Report of the first coordinated inspection*, 17 July 2007.
[133] Member States must ensure that information will be provided to equivalent authorities of other Member States and Europol, see Art. 6 of Proposal for a Council framework Decision on the exchange of information under the principle of availability, COM (2005) 490 final, 12 October 2005.
[134] Valsamis Mitselegas, 'Databases in the Area of freedom, Security and Justice: Lessons for Centralisation of Records and their Maximum Exchange' in *Towards a European Criminal Record*, Constantin Stefanou and Helen Xanthaki (eds.), forthcoming.
[135] At the EU level, there is also the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence (OJ L 328, 5.12.2002, p. 17).
[136] Amongst EU Member States, the Protocol against smuggling has not been ratified yet by Austria, Czech Republic, Greece, Ireland and Luxembourg.
[137] ETS No.197, 16 May 2005 (not in force yet). Although focusing on aspects relating to the protection of victims of trafficking, this Convention also calls for the reinforcement of border measures aimed at preventing the commission of this crime and the introduction of sanctions.

they are intercepted before reaching a country in which they may reasonably be able to claim asylum. Similarly, EU Member States' legal frameworks generally lack provisions on the right to apply for asylum expressly for the victims of trafficking, although several countries have granted some status to persons who had suffered or feared forced prostitution or sexual exploitation.[138] By contrast, both Protocols contain provisions aimed at facilitating the return respectively of smuggled migrants and victims of trafficking.

## *Section 3 Recommendations*

16. All EU Member States must ensure that their enforcement of pre-frontier controls does not prevent people from leaving their own country in line with the Universal Declaration on Human Rights, and does not obstruct the departure of people in need of protection from countries where they might be at risk of persecution, as this would amount to a violation of the spirit and purpose of the 1951 Refugee Convention.

17. The EU and its Member States should revert to the original rationale of visa policy as an instrument to regulate legal migration, as opposed to an instrument to prevent and discourage immigration. In this context, they should also reinstate mechanisms to grant visas on protection grounds.

18. The EU should suspend visa restrictions for a determined period of time (that can be reviewed) for nationals and residents whose country is experiencing a recognised significant upheaval or humanitarian crisis. Visa restrictions should also be lifted where there are no facilities for issuing visas within a country of origin, therefore no means to travel legally. Nationals of such countries should be exempted from transit visa obligations.

19. The legislation on carriers' liability should be revised so as to ensure that sanctions are not enforced if a third-country national is admitted to the asylum procedure.

20. The EU should conduct an evaluation of the impact of carriers' liability on access and consider which special safeguards could be introduced to avoid carriers placing obstacles to refugees' legitimate search for protection.

21. The Forum on Carriers' Liability should develop a code of good practice for carriers at the EU borders, including special safeguards for people who might be in need of protection, so as to give meaning to Article 26.2 of the Schengen Convention.

22. EU Member States should not, in principle, delegate their functions and powers in the field of migration and asylum to private actors. If they do so, they should at least ensure strict monitoring and surveillance of their activities, to avoid an adverse impact on access to protection for refugees. EU Member States remain fully accountable for breaches of their legal obligations in the field of asylum that are caused by the activities of private actors to which they have delegated immigration/asylum functions.

[138] UNHCR, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, May 2004, pp. 47-57; *Combating Human Trafficking: Overview of UNHCR Anti-Trafficking Activities in Europe*, 2005.

23. Immigration Liaison Officers and Airline Liaison Officers should inform carriers that refugees and people in need of protection are exempted from the admission requirements normally requested to a third country national, including in terms of documentation. They should also advise carriers on the possibility of sanctions being lifted in cases involving asylum seekers or people who are subsequently recognised as refugees or granted another protection status.

24. The founding Regulation of the EU ILOs network should be revised, to include a clear indication of their functions and powers. The Regulation should clarify the obligation for ILOs to strictly comply with all the provisions of the Schengen Borders Code, including those referring to people with protection needs and to the existence of a right of appeal, as well as to relevant refugee and human rights law, and should require that ILOs/ALOs receive training on these subjects.

25. ILOs/ALOs should play a positive role in facilitating the entry into the EU of people who wish to seek asylum. In this context, ILOs/ALOs should be given the power to waive carriers' sanctions or – where existing - facilitate the issuance of protection visas or access to a Protected Entry Procedure (PEP). A telephone advice line with UNHCR and/or the competent national authorities could be introduced to assist ILOs/ALOs in playing this role. Similarly ILOs/ALOs could be provided with a standard questionnaire to improve the identification of asylum seekers, which could be drafted with the involvement of asylum experts such as UNHCR and relevant NGOs.

26. ILOs / ALOs should receive training on how to deal with persons possibly in need of international protection. UNHCR, NGOs and other relevant asylum experts should be involved in the design and delivery of such training.

27. A code of conduct for ILOs/ALOs should be elaborated at the EU level, to ensure that protection concerns are adequately incorporated into their work across Europe. These should set out what the responsibilities of ILOs and ALOs are when confronted with persons possibly in need of international protection.

28. Greater transparency and a comprehensive monitoring system of all European ILO networks should be developed. The European Commission should publish a summary of the EU ILOs/ALOs network activity report, coordinate the collection of evaluations of those activities, and ensure these are publicly available.

29. The Draft Common Manual for ILOs should be revised to include examples of good practices in relation to people with protection needs as well as the contact details of relevant NGOs .

30. In relation to the growing number of databases and efforts to increase their inter-operability, there should be guarantees that sensitive information on asylum seekers and people in need of protection is not shared with third countries as this could be detrimental to their safety.

31. All anti-smuggling and anti-trafficking instruments should be applied with full respect of states' obligations towards refugees and people in need of protection, including those who are smuggled or victims of trafficking.

# 4

# *Interception at Sea*

## 4.1. Interception and Rescue at Sea: The Need for Distinctions

The journey across the waters of the Mediterranean and East Atlantic is often the last and most perilous part of refugees' search for protection, during which travel conditions can be life threatening. In addition to arriving as stowaways, hiding individually or in small groups in registered ships and ferries, people travel on unsafe small boats (such as *pateras* or *cayucos*) to avoid detection, or on ships transporting a large number of migrants.

And yet, after surviving persecution in their country of origin and the challenges of travelling in countries of transit, refugees have to overcome four layers of border control and surveillance by EU Member States, sometimes under the aegis of FRONTEX: in the territory of an African country; in the territorial waters of a third country; in international waters; and in the territorial waters of a Member State.

Interdiction is defined as *'any measure used by States to prevent embarkation of persons on an international journey or further onward international travel by persons who have commenced their journey, or assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international and maritime law'*.[139] In practice, it consists of a great variety of measures, including activities to prevent the departure of boats or ships, implemented on dry land or in the proximity of the coast; diversion; and visiting/boarding of a vessel.

Whether these forms of interception are lawful according to international human rights and refugee law depends on the law applicable to the stretch of sea where interception takes place,[140] or on the consent of the third country for interception on its territory or territorial waters. The complexity of this issue has led the European Commission, following demands from European Councils in 2004 and 2005, to undertake a study on the international law instruments in relation to illegal immigration by sea.[141]

In broad terms, interception is permissible under international law in international waters provided that the vessel does not fly any flag or with the consent of the flag state. In addition, *certain* interception measures are allowed – or are even compulsory – against vessels flying the flag of another state, without its consent, where there are reasons to believe that these vessels are involved in specific and serious criminal activities, e.g. drug or human trafficking. In the portion of international waters coinciding with a state's contiguous zone,[142] the coastal state can enforce interception in order to prevent breaches of its immigration laws and regulations. These powers should be exercised proportionally to the need to prevent or punish the infringements. In their territorial waters, states can intercept vessels that do not fly any flag, and vessels flying the flag of another state without its consent, in order to prevent infringements of its immigration laws and regulations.

[139] UNHCR Executive Committee, *Conclusion on protection safeguards in interception measures*, No. 97 (LIV) 2003.
[140] As defined by the Montego Bay Convention.
[141] SEC (2007)691, 15.5.2007.
[142] Up to an additional 24 nautical miles beyond the territorial sea, according to the 1982 UN Convention on the Law of the Sea.

In addition, the Protocol on Smuggling sets out the right of the state parties, if there are reasonable grounds to suspect that a vessel flying the flag of another state is involved in smuggling, to request authorisation from the flag State to board the vessel, search it, and/or take appropriate measures towards the vessel, the persons and the cargo. When the vessel does not fly any flag, the State can request authorisation to board and search it. ECRE regrets that, also at sea, the legal framework to combat trafficking in human beings and smuggling of migrants is used as a pretext to divert and return irregular migrants, without any identification of potential asylum seekers or refugees in the context of mixed migration flows.

In the context of the EU southern border, interception is conducted by EU Member States, sometimes supported by FRONTEX, sometimes in cooperation with African countries. The EU States most concerned with irregular migration by sea have developed in recent years bilateral forms of cooperation with non-EU countries of origin and transit, including cooperation agreements, sometimes including provisions of readmission (for instance between Spain and Morocco), sometimes allowing joint surveillance and interception operations on the territory of the third country or its territorial waters (for instance, between Spain and Mauritania); and agreements on police co-operation (for instance between Italy and Libya).

To varying degrees, these agreements – which are presented by governments as technical, and therefore not needing any involvement of national parliaments in the procedure leading to their conclusion – are invoked as the legal basis for EU Member States to conduct control and surveillance operations in the territorial waters or the territory of such third countries.

A further complication is that in the context of the EU southern border, the enforcement of interception often overlaps with the obligation to render assistance to persons and ships in distress at sea wherever they are encountered in the course of navigation.[143] Unlike some African countries from where migrants set sail for Europe, all EU Member states have the additional obligation to coordinate search and rescue operations of vessels in distress within a determined area along their coasts – the so-called search and rescue (SAR) region.[144] Even amongst EU Members, however, there are large disparities in the size of SAR regions.

Difficulties can arise because of the unsafe character of the boats and vessels used by migrants, which easily turns a surveillance activity into rescue. At the same time the obligation to rescue can be used as a pretext to undertake interception.

## 4.2 Interception at Sea

Apart from cases of rescue at sea, EU Member States have avoided coming into contact with the people on board intercepted vessels. Diversion aimed at preventing access to the territorial waters of an EU Member State is also a common form of interception. The diversion of a vessel, "*actually using any level of force to constrain a migrant vessel to alter a course or return to its port of departure has at best only a very tenuous legal basis*."[145] In any case it will engage the responsibility of Member States under refugee and human rights law if the control exercised over those on board amounts to jurisdiction. Push backs, towing back or

[143] This is an obligation under international customary law, which is also codified in the Montego Bay Convention, the International Convention for the Safety of Life at Sea (SOLAS) of 1974 and in the Search and Rescue Convention (SAR Convention) of 1979.

[144] However, not all European countries have ratified the amendments to the SAR and SOLAS Conventions (Finland Malta, Norway). For clarity, the SAR region does not necessarily coincide with the territorial sea or the contiguous zone.

[145] Malta High Commission in London UK, *Written Evidence to the House of Lords Select Committee on the EU, Sub-Committee F (Home Affairs) Frontex Inquiry*, 2007

transfers to a coastal state (including non-EU states) will usually meet this threshold. In particular, ECRE recalls that:

- in the territorial waters of EU Member States, EC law as well as refugee and human rights law is fully operational;
- in international waters, obligations under refugee and human rights instruments are engaged in so far as Member States exercise effective control over individuals or a portion of sea or territory. The diversion of a vessel can therefore amount to an exercise of jurisdiction depending on the circumstances of the case;
- in the territorial waters or the territory of a third country, joint responsibility arises as regards breaches of customary law, and breaches of conventional law to which both States are parties.

***The Case of the Marine I***

*On 31 January 2007, the Marine I, a cargo ship transporting 369 people and trying to reach Spain, sent out a distress signal. Spain immediately replied by sending a rescue ship which, due to the difficult sea conditions, managed to conclude the rescue operation only on 4 February.*
*During a tug-of-war between Spain and Mauritania concerning the issue of disembarkation, all the migrants were left on the Marine I, which was stationed in international waters opposite the Mauritanian coast, tugged by the Spanish rescue ship.*
*On 11 February the two governments reached an agreement, whose terms have not been made public. However, from various official statements, it is clear that Mauritania accepted the disembarkation for the time necessary to repatriate. The responsibility and costs of accommodating the migrants, ensuring their surveillance and repatriation were to be borne by Spain. On the same day, Spanish officials conducted identification and screening of the passengers of the Marine I onboard the ship.*
*On 12 February, the group was disembarked in Mauritania. They were placed in a hangar under in the custody of Spanish police (Guardia Civil) and, in the following days, also of the Mauritanian police. Reportedly, they were forbidden from leaving the hangar and reception conditions were not satisfactory.*
*On the basis of their identification and screening, 70 migrants were deported to different countries, in nine cases despite the fact that a favourable assessment on their asylum applications had been issued by UNHCR. The others remained in the hangar in Mauritania, always under the exclusive custody of the Spanish authorities. Reportedly, they were subjected to heavy pressures to accept IOM-assisted voluntary repatriation. Most of them accepted and were repatriated with a Spanish flight on 27-28 March 2007.*
*A group of 23 people who refused voluntary repatriation was placed for a week in a separate small room with no window and often denied permission to use the lavatories. They were not offered the possibility of applying for asylum in Spain or furnished with legal assistance of any kind. The Spanish Commission for Refugees (CEAR) brought a case before the courts against the unresolved situation of these migrants based on the breach of their fundamental rights. In May, CEAR and Amnesty International Spain presented a demand to the Spanish Ombudsman in order to obtain his commitment to present a 'Habeas Corpus' procedure in the Spanish courts. Finally, on 19th July 2007, 10 of the group of 23 migrants were settled in Europe (6 in Spain and 4 in Portugal)*

## 4.3. Safeguards to Ensure the Compliance of Interception/Rescue Operations with Protection Obligations

In ECRE's view, the case of the Marine 1 where Spain took the asylum seekers to their territory and processed their claims, shows how, as a result of a rescue operation, the responsibility of a EU Member State can be engaged also in the territory of a third country. In view of the suffering and maltreatment experienced by migrants trying to enter Europe by sea, both in southern European countries and African countries from where they set sail, ECRE urges EU Member States to respect the following guidelines:

In cases of **interception in international waters consisting of diversion to a third country and involving a EU state,** the latter should ensure the safety of the people who are intercepted or rescued, and reception facilities that can meet any medical and psychosocial needs. Any asylum seekers should be brought to EU territory.

In cases of **interception involving an EU state in the territorial waters of a third country** and where the EU country does not exercise jurisdiction, the EU country and the third country may be jointly responsible for the rights of those persons intercepted. In this case full compliance with the 1951 Refugee Convention and international law should be ensured, including access to asylum procedures, prohibition of inhuman and degrading treatment in all circumstances, and the right to an effective remedy. In order to achieve this EU Member States should, prior to the enforcement of interception activities beyond their territories, include the following guarantees within any bilateral agreements concluded with the third countries involved:

- the third country will allow disembarkation;
- refugees will not face a risk of chain-*refoulement*;
- appropriate medical treatment will be provided to those in need of it;
- adequate reception conditions will be ensured, also providing for the psychological and medical needs of the people concerned;
- appropriate measures will be taken for the identification of those rescued or intercepted, taking into account that amongst them there might be people who fear persecution in their countries of origin;
- UNHCR will be promptly informed and given unimpeded access to those intercepted or rescued, wherever they are accommodated, without delay;
- those who wish to apply for asylum will be given access to an asylum procedure;
- the EU state will facilitate monitoring of the quality of the asylum procedure and reception conditions by UNHCR and NGOs;
- the EU state will process all asylum seekers if there is evidence of human rights abuses, such as violence and forced expulsion of foreigners, and the denial of asylum seeker's rights such as no access to legal assistance;
- the EU state will offer to process the asylum seekers if an unprecedented burden is placed on the third country's asylum system;
- a satisfactory solution will be found for those who cannot be identified and cannot be returned.[146]

[146] ECRE also urges EU states to provide assistance in general capacity-building to third countries in regions of origin targeted at improving their ability to provide protection. See ECRE, *The Way Forward: Guarding Refugee Protection Standards in Regions of Origin*, December 2005.

EU states should ensure compliance with the above-mentioned guarantees. However if the third country will not or cannot give these guarantees, the Member State should allow disembarkation to its own territory in a timely manner, without endangering any passengers' lives.

In the cases where, for imperative reasons such as rough sea conditions and the need for medical care to those rescued or intercepted, **disembarkation takes place in a third country** not providing the above-mentioned guarantees, the Member State should take the responsibility for providing them. Those who wish to seek asylum should be taken to the territory of the Member State without delay.

## 4.4. Disembarkation and Responsibility Sharing between EU Countries

In recent times politicians and the media have focused on arrivals by sea and on developing measures to prevent those arrivals. The visibility of such migration flows is heightened by the fact that the arrival points are often small islands with a tourist industry, e.g Malta and the Canary Islands. The issue of how southern European countries can be helped to better receive such arrivals is crucial, not least because it is key in the facilitation of people's disembarkation. In order to place the numbers of sea arrivals in a proper perspective, however, it is important to note that by far the highest numbers of irregular entries to the EU come by land and air.

The important issue is not the total figures, but rather the fact that some EU Members States are faced with much greater numbers than others due to their geographical location. The governments affected believe this is eroding public confidence in their ability to control migration and the result is a decrease in their political will to fulfil their international obligations, including that of rescuing persons in danger at sea. The dramatic case of the 27 men left hanging onto a tuna net for three days in the Mediterranean,[147] just one of many crises in recent years, demonstrates the extent to which the lack of responsibility-sharing is putting lives at risk.

A key problem is that while international law sets out which state is responsible for rescuing persons in distress at sea, it does not set out which state is then required to allow the disembarkation of any persons rescued. A recent amendment to the International Convention for the Safety of Life at Sea (SOLAS) of 1974 has only clarified how the nearest safe port should be determined.[148] Of course, if states do not permit disembarkation for assistance and processing, the rescue cannot be effective. Processing asylum seekers on board boats is not a viable alternative: any processing should take place on dry land to minimise the trauma of rescued asylum seekers and prevent any possible procedural injustices.[149]

It is not possible to provide a comprehensive review of state practice in this field, due to lack of transparency. The information available, however, highlights the need for clear guidelines on how to address these cases, for which at the moment solutions are found on an *ad hoc* basis. The Maltese and Spanish and Italian governments have recently urged for the EU to propose solutions to these problems. Spain has suggested that a harmonised regulation of the rescue procedures in all Member States and sanctions for those who do not comply should be developed. They suggest that EU rules should require, *inter alia,* that all vessels flying an EU

[147] CIR, *Report Regarding Recent Search and Rescue in the Mediterranean*, July 2007.
[148] Chapter XI, section 2 of the SOLAS Convention, amended in 2002.
[149] Similar to those suffered by some of the Haitian refugees intercepted by the US in the 1990s. See Cecilia Baillet, 'The Tampa Case and its Impact on Burden-Sharing at Sea', *Human Rights Quarterly,* 2003, Vol. 25, p. 759. 9

flag rescue persons in distress whether or not they are in EU waters or their SAR areas; compensation mechanisms for vessels who suffer financial losses due to rescues; the establishment of sanctions against vessels that ignore distress calls as well as a common definition of 'port of safety'.[150]

Yet to date EU states have proved their willingness to cooperate only in terms of strengthening the effectiveness of border controls. ECRE has for some time been calling for EU countries to show the same political determination to develop ways to share the responsibility for hosting refugees more fairly with their EU partners.[151] This of course entails looking at a range of relevant instruments such as the Dublin II Regulation,[152] which unfairly burdens states on certain external borders, and envisaging financial burden-sharing mechanisms.[153]

Clearly some countries need additional help to improve their reception facilities in order to put an end to some of the inhumane conditions migrants and refugees are kept in.[154] NGOs have a lot of relevant expertise in the protection and reception of asylum seekers and migrants which could help address the challenges at Europe's borders and should be seen as key partners.

ECRE believes that a system of attaching a right of freedom of movement to international protection status would be a fair and efficient way to address some of the challenges.[155] In the short term, reaching some agreement on the relocation of refugees after status determination is one possible way forward. The principle of mutual consent should apply (whereby both the person and the destination state consent) and other factors such as family links should be considered. Such intra-EU transfers should under no circumstances count against Member States' resettlement quotas, as this would undermine solidarity with the non-EU countries from which refugees are resettled. What is clear, however, is that in the absence of solutions and sanctions, states with more exposed maritime borders will continue to have few incentives to fulfil their rescue and protection obligations.

## 4.5. Identification of Persons in Need of International Protection

The identification of persons arriving by sea who may be in need of protection is an obligation of EU Member States. During interception operations at sea, the identification of those who are in need of protection implies some obvious practical difficulties. Although the United States and Australia have envisaged mechanisms to carry out the screening of boat people before they are taken ashore, *ad hoc* and expeditious mechanisms cannot be considered an appropriate solution.

The European Commission has proposed the establishment of 'Asylum Expert Teams', to be deployed in emergency situations to enable a "*prompt initial assessment of individual cases at*

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[150] Council of the EU, *Information Note on Rescue at Sea – Information from the Spanish and Italian Delegations- Annex Statement by the Spanish Delegation*, Doc 14758/07, 23 November 2007.
[151] ECRE, *The Way Forward: Europe's Role in the Global Refugee Protection System-An Agenda for Change*, April 2006
[152] ECRE, *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe,* September 2006; *Report on the Application of the Dublin II Regulation in Europe*, March 2006.
[153] For further proposals on how this can be achieved, see ECRE paper on re-designing the Dublin System, forthcoming.
[154] See, for example, European Parliament, *Resolution on the situation with refugee camps in Malta*. P6_TA(2006)0136. Reports on the visits of delegations from the LIBE Committee to detention centres in France, Italy and Spain can also be found in http://www.no-fortress-europe.eu/showPage.jsp?ID=2506.
[155] *Ibid.*

*points of arrivals*" with respect to protection obligations of Member States.[156] These emergency situations, however, concern "*mass arrivals at their borders"*. The problem would remain for those who never manage to make it to these borders because they are diverted in international waters, far from the eyes of any independent witness.

UNHCR has suggested that in cases of interception at sea the identification of people who wish to apply for asylum through profiling might be a way forward.[157] However, this approach may unduly reduce the chances of entering the asylum procedure for certain individuals, who would then find it even harder to have their right to seek asylum recognised. ECRE is against the idea that those who are not selected through profiling should have their case automatically examined through an accelerated procedure.[158] Overall, ECRE is concerned that despite some of its practical advantages, profiling might be detrimental to a significant minority. In this regard, particular attention should be paid to the criteria chosen in a profiling procedure; nationality, for example, should not be used as a guiding principle due to its likely discriminatory impact.

## *Section 4 Recommendations*

32. ECRE recalls that the territorial waters of Member States are integrally subject to EC law, and that the Schengen Borders Code, the Asylum Procedures Directive and the Dublin II Regulation must be applied.

33. The frequent occurrence of cases of interception and rescue at the EU southern border requires an urgent clarification over the allocation of responsibilities towards refugees and people in need of protection, in particular as regards the identification of the state which is responsible for addressing the needs of persons seeking protection. ECRE suggests a number of safeguards, based on the principle that any country involved in interception or performing a rescue operation is responsible for ensuring that the requirements of international law are satisfied in relation to human rights and refugee protection. In general, this will imply allowing access to its territory and to the asylum procedure for those seeking asylum. In cases of interception on the territory of a non-EU country where no EU country exercises jurisdiction, it will imply ensuring that they are given access by another state to its territory and to an asylum procedure. In such cases the EU Member State involved in the interception should take serious steps to ensure that certain guarantees are met.

34. The European Commission should issue guidelines, possibly even an EU instrument, that clarify the EU state responsible for receiving persons rescued at sea and facilitate states' ability to adhere to their protection obligations and preserve the right to seek asylum while underlining the imperative to preserve life at sea. This should lead to a common understanding between EU Member States of what constitutes the 'nearest port of safety'. It should examine the provision of resources and the application of sanctions to ensure all relevant parties respect the duty to rescue lives at sea in an effective manner. Such guidelines should also include an analysis of the responsibilities of FRONTEX in the context of such operations.

[156] See European Commission, *Communication on Reinforcing the Management of the European Union's Southern Maritime Borders* COM(2006) 733 final and *Green Paper on the future Common European Asylum System,* COM(2007) 301 final.
[157] UNHCR, *Refugee protection and Mixed Migration: A 10 Point Plan of Action*, January 2007
[158] *Ibid*, Annex II

35. In the course of rescue and interception operations, priority should be given to ensuring the safety of the people on board. This will imply their transfer to a safe place, which must be disembarkation on dry land. Any processing of asylum seekers should take place on dry land after disembarkation and not on board boats to minimise the trauma of rescued asylum seekers and prevent any possible procedural injustices.

36. The EU must find a way to share not only the burden of patrolling Europe's external borders, but also the duty to save human lives and the responsibility for refugee protection. This will require political agreement at the EU level, which should include a mechanism to allow the relocation of refugees – after the refugee status determination procedure is concluded – under agreed criteria: consent should be required and family links should be taken into account. Such a mechanism should not in any way be set against quotas for resettlement of refugees to Europe from outside the EU.

37. Reception conditions in countries receiving arrivals by sea must urgently be improved. NGOs with relevant expertise in the protection and reception of asylum seekers and refugees should be brought in as key partners in this process. Sufficient EU funding should be targeted to this end.

38. A possible way of carrying the initial assessment of individual claims could be the use of 'Asylum Expert Teams' similar to those proposed by the European Commission for situations of mass influx. UNHCR should further study good practices as regards the identification of refugees arriving by sea, including profiling at borders, in order to fully examine whether such a mechanism should be implemented across Europe. However, nationality should be immediately excluded as a criterion used for profiling persons in or out of an asylum channel.

# 5

# *Physical Borders*

Even where refugees and people in need of protection manage to bypass the numerous hurdles they face on their way to the EU, they may still face difficulties in being admitted to EU territory at the physical border. Some of these obstacles are legal; others are practical; some of them are common to all types of borders. They include maltreatment / violence at hands of borders guards,[159] the refusal of entry and return under readmission agreements; others may be specific to some modes of attempted entry, such as the pseudo status of airport transit / waiting areas or the challenge of the disembarkation of stowaways. It must first of all be emphasised that any persons denied entry at the border have the right to be provided with a reason for the refusal and to be able to appeal this decision according to Article 13 of the Schengen Borders Code. People denied entry should also have their identity and nationality determined and recorded for monitoring purposes.

## 5.1. Readmission Agreements

Readmission agreements are very relevant instruments in the way that they can act as effective barriers at the second stage of access to the procedure as they may facilitate a return in an extremely short time span, often just hours. Sometimes people are sent to the third country from which they have arrived in the EU, relying on such readmission agreements or clauses or simply on the principle of safe third country/first asylum country. It is not unusual, in such cases, for people to be returned without their presence having been recorded, let alone their protection needs or even fear of persecution in the country to which they are being returned having been ascertained. There is evidence, for instance, that the operation of the readmission agreement between Greece and Turkey is an important obstacle to protection. Since the beginning of 2007, Turkey has increasingly accepted the return of Iraqi asylum seekers from Greece, who then face the risk of immediate deportation to Iraq.[160] Those who cross the EU borders irregularly should be given the opportunity to express their protection needs, if any.

ECRE also notes that bilateral readmission agreements between Member States and third countries are characterised by their lack of transparency and democratic oversight. In this situation, it is virtually impossible to know whether border officials have in fact complied with the bilateral agreement in the many Member States where such provisions are not public. Similarly, it is impossible for NGOs to contribute to influencing the text of those agreements, which are negotiated in total confidentiality.

## 5.2. Land Borders

The main reason why the presence of refugees or other people in need of protection at borders or immediately after crossing the border is not officially recognised is because they hardly ever cross at official border points. Even when they do present themselves or are apprehended by border guards or other law enforcement officials immediately after crossing the border,

[159] For information on maltreatment at Greek borders, see Pro Asyl, *The Truth Might Be Bitter, but It Must Be Told*, October 2007.
[160] *Ibid*. p. 26.

refugees may face several difficulties in having their presence officially recognised or in obtaining access to an asylum procedure.

Sometimes there is a border procedure in place which distinguishes the physical presence of an alien from his/her legal presence, and a decision as to the admission to the territory has to be taken for his/her presence to be officially recognised.

An obstacle very frequently observed by NGOs working on the ground is that, in some EU transit countries, the authorities who encounter migrants in the process of crossing the border irregularly do not comply with the relevant domestic legislation and either re-accompany the individuals concerned to the border or ignore their presence - and sometimes invite them to move on to other countries. ECRE is aware that this is a particular problem at the borders with Slovakia, where persons seeking asylum are often returned to Ukraine without any individual examination of their identity and status.[161] Similarly, at the Greek-Turkish border, refugees are apprehended after arrival and detained without official registration before being sent back to Turkey.[162] Spain also automatically returns to Morocco those immigrants trying to reach its territory through the bordering cities of Ceuta and Melilla.[163]

## 5.3. Air Borders

The fact that procedures at airports often bar access to the territory to refugees and other people in need of protection is a major problem, as the majority of asylum seekers arrive in Europe by air. The limited presence of independent monitoring at airports compounds the problem, despite the fact that in recent years NGO access to border areas in Europe, including airports, as well as to detention and reception facilities in the proximity of borders has increased.

A number of European States have introduced special airport procedures, with a view to processing asylum applications more rapidly and enforcing return in the same manner. ECRE is against the existence of special procedures which intrinsically lack the necessary guarantees and safeguards,[164] and notes that this sort of arrangement allows persons to be denied admissibility to a procedure at the border without having had access to a fair and effective determination of their status and protection needs.[165]

A frequent obstacle to access in the context of arrivals at airports is the pretence that airport transit zones are not an integral part of the territory of a State and that, therefore, domestic and international obligations towards refugees and people in need of protection are not engaged. In some cases, such as in France, this pretence is supported by domestic law provisions.

In light of the jurisprudence of the ECtHR, there are no doubts as to the unlawfulness of this special status for transit areas: in the case of *Amuur v. France*, the ECtHR clarified that the transit zone of an airport should be considered as an integral part of the territory of a State.[166] This principle was re-confirmed by the ECtHR in a case concerning the detention of an

[161] Human Rights Watch, *Ukraine: On the Margins – Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union*, November 2005.
[162] Pro Asyl, *The Truth Might Be Bitter, but It Must Be Told*, October 2007, p. 6.
[163] Amnesty International, *Spain and Morocco: Failure to Protect the Rights of the Migrants – Ceuta and Melilla One Year On*, 26 October 2006.
[164] ECRE, *Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status,* October 2006, p. 30.
[165] UNHCR Executive Committee, *Conclusion on safeguarding asylum*, No. 82 (XLVIII) 1997.
[166] *Amuur v. France*, 10 June 1996, 22 EHRR 533

asylum seeker in the transit zone of Warsaw airport, which established that claims of extraterritoriality were unfounded,[167] as well as in another recent case concerning France.[168]

In addition to the strength of the recent ECtHR jurisprudence, the absence of a suspensive right of appeal against a decision of non-admission to the territory in the context of an airport procedure is unlawful under the ECHR.[169]

In light of the unequivocal jurisprudence on the status of airport transit zones, ECRE objects to the fact that the European Commission has proposed to exclude transit zones from the application of the draft Directive on common standards and procedures for return,[170] thus depriving migrants in these areas of crucial safeguards such as the right to an effective remedy.[171]

## 5.4. Stowaways

The phenomenon of stowaway asylum seekers is less visible than the arrival of asylum seekers in small boats and involves a much reduced number of individuals. However, it deserves to be addressed because of the humanitarian and human rights concerns that it raises.

A stowaway can be defined as *'a person who is secreted on a ship or in a cargo which is subsequently loaded on the ship, without the consent of the ship-owner or the master or any other responsible person, and who is detected on board after the ship has departed from a port and is reported as a stowaway by the master to the appropriate authorities'*.[172] An international convention relating to stowaways was signed in Brussels in 1957 but has not entered into force and is unlikely to do so. In recent years, however, awareness of the issues affecting stowaways has increased and it is generally recognised that there is an urgent need for a structured framework applying to them.[173]

The refusal of their disembarkation can result in stowaways being kept on board a ship for months. Amongst the most pressing concerns applying to all stowaways are ensuring:

- the safety of stowaways and at the same time the operational safety of the ship;
- prompt identification; and
- prompt disembarkation.

In the absence of binding provisions to respond to the most pressing concerns, a number of non-binding instruments have been elaborated. The International Maritime Organization (IMO) has adopted *Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases* (1997), which identify as the ship-master's responsibilities:

- trying to establish the identity of the stowaways;

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[167] *Shamsa v. Poland*, 27 February 2004
[168] Chamber judgment in *Gebremedhin v. France*, 26 April 2007.
[169] Article 13 - Right to an effective remedy. In *Gebremedhin*. (*Ibid.*) the Court recognised the violation of Article 13 in conjunction with Article 3, and of the irreversible damage that might have been caused by the return of the applicant to his country of origin.
[170] COM(2005) 391 final, 1.9.2005.
[171] ECRE, *Comments on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final*), May 2006.
[172] 1965 Convention on Facilitation of International Maritime Traffic (FAL Convention), Annex Section 1A.
[173] This has led to the introduction of amendments to the FAL Convention with the effect of strengthening measures to prevent stowaways from boarding ships.

- preparing statements containing relevant information on the stowaways; and
- taking appropriate measures to guarantee security, general health, welfare and safety of the stowaways until disembarkation.

The 1997 Guidelines also say that the first scheduled port should allow the stowaway's disembarkation for "examination".

ECRE believes that the situation of stowaways should be tackled in a humanitarian spirit, with a view to ensuring prompt disembarkation and addressing any protection needs. This includes reducing to a minimum the time in which stowaways are kept on board a ship.

## 5.5 Border Monitoring

Independent monitoring mechanisms are crucial to helping address some of the problems highlighted. This can be undertaken in different ways. In Hungary this is done on the basis of a Tripartite Agreement with the government, UNHCR and the Hungarian Helsinki Committee which allows NGO representatives, on an indefinite basis, to access Budapest airport transit zone and short-term detention facilities along the border as well as unsupervised access to foreign nationals detained within them. There are many other examples of border monitoring activities involving NGOs in Europe that are leading to improved practices and greater awareness of asylum seekers' rights at the borders.[174] These include pilot projects in Bulgaria, Poland, Romania, Slovak Republic, Slovenia,[175] as well as Belarus, Moldova, the Russian Federation and Ukraine.[176] These projects are very importantly increasing trust and confidence between border authorities and civil society, and have shown how beneficial such partnerships can be to all parties.

NGOs can and in some countries do undertake other activities at borders - these include legal assistance, materia support and advice on how to access it, signposting and information provision, being present as an official contact point for receiving asylum applications.

## *Section 5 Recommendations*

39. Any persons denied entry at the border must be able to fulfil their right to receive a reason for the refusal and to appeal the decision, according to Article 13 of the Schengen Borders Code. People denied entry should also have their identity and nationality determined and recorded for monitoring purposes.

40. The EU and its Member States should make public their readmission agreements with third countries and ensure transparency and independent monitoring over their implementation. UNHCR and NGOs should play a role in this monitoring.

[174] One example is the ERF-funded project entitled *Monitoring access of asylum seekers to territory and procedure at European airports – exchange of experiences and best practices,* led by NGOs in Austria, the Czech Republic, Hungary, The Netherlands, Poland and Spain, December 2006 – December 2007.
[175] Monitoring of the Slovenia –Croatia and Slovenia-Italy border through a tripartite mechanism between the government, UNHCR and an NGO from 14.8.2006 to 14.2.2007.
[176] Part of ECRE's AENEAS-funded Project: *The protection of refugees, asylum seekers and forced migrants*, December 2005 – December 2008.

41. Readmission agreements should be implemented in full compliance with the principle of *non-refoulement*. In the implementation of readmission agreements, EU Member States should ensure that the persons crossing the border irregularly are given the possibility to express their protection needs, in order to avoid being returned – directly or indirectly – to countries where they would be at risk of persecution.

42. The practice of re-accompanying to the border irregular migrants apprehended in the proximity of the border or of refusing to register their presence must be stopped at once. EU Member States should introduce sanctions against officers who are responsible for this kind of behaviour.

43. There should be no special procedures at borders. Refugees and people in need of protection at the border should be given unimpeded access to independent legal advice, interpretation and UNHCR/NGO assistance.

44. The EU and its Member States should acknowledge that airport transit zones are an integral part of a state's territory and grant persons within them full access to all their rights under international, European and EC law. NGOs should have access to such areas in order to provide persons held within them the necessary material and legal assistance, and information.

45. For humanitarian reasons, EU Member States should seek to solve stowaway cases in the shortest possible time. Stowaways should be allowed disembarkation at the first scheduled port of call. Should a stowaway be an asylum seeker, the state of disembarkation should also be responsible for determining the asylum application.

46. Border monitoring activities should be maintained and expanded in all countries with external EU borders in a sustainable manner. UNHCR and NGOs should be key partners to governments in border monitoring and training activities. EU funding, including the EU Borders Fund, should support such partnerships.

# 6

# *Facilitating Refugees' Legal Access to Europe: Protected Entry Procedures*

Refugees should not be penalised for resorting to irregular entry[177] and yet they are: trying to reach the EU in mixed flows, together with people who do not have protection needs, they are punished by being prevented access to a safe haven. The introduction of legal ways to access Europe on protection grounds is a logical and necessary measure to ease the barriers raised to accessing Europe.

Protected Entry Procedures (PEPs) are arrangements allowing an individual to:

- approach the authorities of a potential host country outside its territory with a view to claiming recognition of refugee status or another form of international protection; and
- be granted an entry permit in case of a positive response to that claim, be it preliminary or final.[178]

Currently, a number of Member States – including Bulgaria, France, The Netherlands, Spain and the UK – operate a form of PEP on a formal basis. Other Member States authorise entry in exceptional cases and in an informal fashion (Belgium, Germany, Ireland, Italy, Luxembourg and Portugal). In Italy, a parliamentary proposal for an asylum bill includes PEPs. Denmark used to operate a PEP until June 2002; Austria recently discontinued this practice.

In general, diplomatic representations and embassies act as a liaison between their relevant authorities and the individual applying to enter their country on protection grounds. They receive asylum applications, but do not process them; they simply liaise with national authorities on admissibility. At the other end of the spectrum, some states send trained staff to selected diplomatic representations to conduct refugee determination abroad. According to a draft Italian proposal, the authorities normally competent for decisions on asylum claims would make a decision on the admissibility of the claim; in the case of a positive decision, the applicant would be allowed entry to an EU Member State through a protection visa with a view to having his/her claim decided on its merits.

[177] Refugee Convention, Article 31.

[178] Gregor Noll, Jessica Fagerlund, and Fabrice Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure*, 2002. The study was carried out by the Danish Centre for Human Rights on behalf of the European Commission.

**Italian PEP Proposal**

The Italian proposal establishes that the person concerned, an Italian NGO based in the country where the person is present or UNHCR can lodge the asylum application. The diplomatic authorities would make a preliminary assessment of whether the asylum applicant meets the conditions required by the Italian legislation to be granted asylum (either under the Italian Constitution, the 1951 Refugee Convention or the Italian legislation concerning subsidiary protection). Their opinion is not binding. Provided that the applicant has some connection with Italy, the application is transmitted to the authorities competent for deciding asylum claims in Italy. Amongst the elements to assess whether there is a connection are: the presence in Italy of a family member, previous stay in Italy, knowledge of the language, relevant studies or work. The competent authorities can either make a decision on the merits straight away or ask for the transfer of the applicant for additional examination. In both cases, the PEP applicant is transferred to Italy, in principle at his/her own expense. It is possible to present a judicial appeal against a negative decision, via the Italian diplomatic representation.

Owing to the limited recourse to these procedures and to the fact that they are accessed from abroad, it is not easy to evaluate their practical implementation. Certainly PEPs present a risk of arbitrariness, and are sometimes subjected to political influence. On the other hand, they are flexible and could be used in various situations, such as to allow the safe and legal entry of refugees and people in need of protection who have been returned by way of interception to a third country, or to people who have expressed their protection needs to an ILO/ALO.

In 2003, the European Commission financed a feasibility study on processing asylum applications outside the EU which examined PEPs and made clear proposals on how they could be developed at the EU level.[179] The following year the European Commission returned to the concept, but since then the EU has not followed up on the matter due to lack of political will on the part of Member States. Nevertheless, further impetus in this direction could come from the feasibility study on the joint processing of asylum applications outside the EU foreseen in the Hague programme.

ECRE believes that new ways should be envisaged to allow the legal entry of refugees and people in need of protection in Europe. Specific procedures should be set up to this end, allowing people in need of protection to present an asylum request to the authorities of Member States posted abroad. In order to maintain PEPs as a tool to access protection, success in such a procedure should not depend on any particular links with the country of destination. Being involved in a PEP should also not prevent a person from seeking asylum on EU territory in the future or be used to facilitate their expulsion for the transit country.

PEPs could be set up at first at national level, to be replaced by an EU PEP procedure with the development of a common European asylum system.

[179] *Ibid*.

## *Section 6 Recommendations*

47. Member States should establish legal procedures for the presentation of asylum requests to their authorities posted abroad, in order to ensure legal and safe access to Europe for refugees and people in need of protection. Success in such a procedure should not depend on any particular links with the country of destination.

These procedures should not undermine the situation of those with protection needs who arrive in Europe in an irregular manner and should not be considered as an alternative to resettlement. Making a PEP application should also not prevent a person from seeking asylum on EU territory in the future.

48. Any PEPs established should comply with some minimum requirements, such as:

- decisions on asylum claims should be subject to the usual procedural safeguards available on EU territory and should not be undertaken by untrained embassy/consulate staff or private agents.
- the consular/diplomatic authorities of the PEP country should not share information on a PEP applicant with his/her country of origin, in order to avoid any prejudice to him/her;
- the consular/diplomatic authorities of the PEP country should not share information on a PEP applicant with the country of transit, in order to avoid his/her return pending the procedure;
- the PEP applicant should have a legal remedy against a decision of refusal.

49. The EU should take further concrete steps towards setting up a EU PEP.

# Annex: List of Recommendations

**1.** The definition of the EU's external borders should be interpreted in the same way throughout the EU, both for the purposes of preventing the arrival of potential irregular entrants and for the purposes of allowing the entry of potential refugees and people in need of protection.

**2.** In the allocation of the EU External Borders Fund, activities with the following objectives should be prioritised:

- improving the training and qualifications of border guards and immigration liaison officers on the implications of refugee and human rights law of preventing access to the territory;
- raising awareness among carriers on protection issues; and
- enhancing the independent monitoring of borders and pre-frontier controls by relevant international organisations and NGOs.

**3.** Neither FRONTEX nor EU Member States should leave migrants they encounter in life-threatening circumstances whilst in transit. A portion of the External Borders Fund should also be allocated to support humanitarian responses to migrants in danger, injured, or traumatised in transit, including post-arrival reception services.

**4.** In its activities, FRONTEX should comply with relevant EC law, including the Schengen Borders Code, the Asylum Procedures Directive and its own founding Regulation. This implies, amongst other things, that FRONTEX should not be involved in operations taking place outside the EU external borders. Any FRONTEX cooperation with third countries should be contingent on a demonstrable compliance by such countries with international refugee and human rights law.

**5.** The legal framework and mechanisms to hold FRONTEX accountable for possible breaches of EC asylum and human rights law should be clarified.

**6.** FRONTEX should ensure that protection and human rights safeguards are incorporated into its work. To this end, its mandate should be revised, in order to spell out very clearly that protection and human rights concerns are an integral part of the management of the EU external borders. Every operational plan must include practical measures to ensure that individuals potentially in need of protection are identified and admitted to an asylum procedure. In addition, FRONTEX should establish regular cooperation, if necessary through the conclusion of Working Arrangements, with international and non-governmental organisations with a mandate in the areas of asylum and/or human rights. It should also aim to employ staff from a more diversified background, including specialists in asylum and human rights issues.

**7.** The urgent formulation of measures to address the lack of independent monitoring of Member States and FRONTEX's border operations is necessary to safeguard the right to seek asylum. This should include the establishment of an independent monitoring body. Monitoring of FRONTEX should also be informed by national border monitoring activities in which NGOs and UNHCR participate, for example through tripartite arrangements. The EU should develop or support pilot projects with this purpose. The EU should also ensure the envisaged 'Asylum Expert Teams' are formed and play a role in the monitoring and identification of asylum seekers at borders.

**8.** Democratic oversight of FRONTEX activities should be strengthened through supervision by an independent body and by consulting the European Parliament over the agency's work programme as well as on the conclusion of Working Arrangements with third countries and international organisations, not just on its budget as at present.

**9**. FRONTEX should ensure maximum transparency of its activities and operational rules by making more information publicly available on its work, such as its feasibility studies and risk analyses. It should produce regular reports that demonstrate how its activities respect fundamental rights. These should include information on how many individuals have been given access to an asylum procedure in the course of its activities, in the EU or outside, as well as on the fate of those whose entry has been prevented (repatriation, detention, etc).

**10**. Member States and FRONTEX should ensure that the training of border guards and RABITs includes asylum and human rights law and complete information on their implications for border control and admission to the territory. UNHCR and NGOs are well placed to be involved in such training.

**11**. In order to complement the work of RABITs the Commission's proposed 'Asylum Expert Teams' should urgently be formed and implemented, in a manner allowing for UNHCR and NGOs to contribute to their operation with their protection expertise. While such teams are not formed and operational it is imperative that UNHCR be involved in the work of the RABITs, bringing in the expertise which FRONTEX lacks through the provision of training, advice and monitoring.

**12.** EU Member States are bound by the principle of *non-refoulement*, as enshrined in the 1951 Refugee Convention. They should therefore ensure that whenever exercising extraterritorial migration controls those individuals affected who are seeking international protection are granted access to a fair and efficient asylum procedure. Whenever they exercise jurisdiction this will require allowing asylum seekers access to their territory.

**13.** EU Member States are equally bound by the relevant provisions in the European Convention on Human Rights and other human rights instruments wherever they exercise migration control amounting to an exercise of jurisdiction.

**14**. In undertaking border controls and surveillance, EU Member States must respect the Schengen Borders Code wherever they perform such activities. They should, therefore, be ready to receive all asylum requests presented to them in the course of the enforcement of such measures, ensure admission to their territory for the purposes of acces to the asylum procedure, provide reasons for a refusal of entry, and ensure that the right to appeal any such decision is available.

**15**. EU Member States must ensure full compliance with the EC Asylum Procedures Directive on their territories and in their territorial waters.

16. All EU Member States must ensure that their enforcement of pre-frontier controls does not prevent people from leaving their own country in line with the Universal Declaration on Human Rights, and does not obstruct the departure of people in need of protection from countries where they might be at risk of persecution, as this would amount to a violation of the spirit and purpose of the 1951 Refugee Convention.

**17.** The EU and its Member States should revert to the original rationale of visa policy as an instrument to regulate legal migration, as opposed to an instrument to prevent and discourage

immigration. In this context, they should also reinstate mechanisms to grant visas on protection grounds.

**18.** The EU should suspend visa restrictions for a determined period of time (that can be reviewed) for nationals and residents whose country is experiencing a recognised significant upheaval or humanitarian crisis. Visa restrictions should also be lifted where there are no facilities for issuing visas within a country of origin, therefore no means to travel legally. Nationals of such countries should be exempted from transit visa obligations.

**19.** The legislation on carriers' liability should be revised so as to ensure that sanctions are not enforced if a third-country national is admitted to the asylum procedure.

**20.** The EU should conduct an evaluation of the impact of carriers' liability on access and consider which special safeguards could be introduced to avoid carriers placing obstacles to refugees' legitimate search for protection.

**21.** The Forum on Carriers' Liability should develop a code of good practice for carriers at the EU borders, including special safeguards for people who might be in need of protection, so as to give meaning to Article 26.2 of the Schengen Convention.

**22.** EU Member States should not, in principle, delegate their functions and powers in the field of migration and asylum to private actors. If they do so, they should at least ensure strict monitoring and surveillance of their activities, to avoid an adverse impact on access to protection for refugees. EU Member States remain fully accountable for breaches of their legal obligations in the field of asylum that are caused by the activities of private actors to which they have delegated immigration/asylum functions.

**23.** Immigration Liaison Officers and Airline Liaison Officers should inform carriers that refugees and people in need of protection are exempted from the admission requirements normally requested to a third country national, including in terms of documentation. They should also advise carriers on the possibility of sanctions being lifted in cases involving asylum seekers or people who are subsequently recognised as refugees or granted another protection status.

**24.** The founding Regulation of the EU ILOs network should be revised, to include a clear indication of their functions and powers. The Regulation should clarify the obligation for ILOs to strictly comply with all the provisions of the Schengen Borders Code, including those referring to people with protection needs and to the existence of a right of appeal, as well as to relevant refugee and human rights law, and should require that ILOs/ALOs receive training on these subjects.

**25**. ILOs/ALOs should play a positive role in facilitating the entry into the EU of people who wish to seek asylum. In this context, ILOs/ALOs should be given the power to waive carriers' sanctions or – where existing - facilitate the issuance of protection visas or access to a Protected Entry Procedure (PEP). A telephone advice line with UNHCR and/or the competent national authorities could be introduced to assist ILOs/ALOs in playing this role. Similarly ILOs/ALOs could be provided with a standard questionnaire to improve the identification of asylum seekers, which could be drafted with the involvement of asylum experts such as UNHCR and relevant NGOs.

**26.** ILOs / ALOs should receive training on how to deal with persons possibly in need of international protection. UNHCR, NGOs and other relevant asylum experts should be involved in the design and delivery of such training.

**27.** A code of conduct for ILOs/ALOs should be elaborated at the EU level, to ensure that protection concerns are adequately incorporated into their work across Europe. These should set out what the responsibilities of ILOs and ALOs are when confronted with persons possibly in need of international protection.

**28.** Greater transparency and a comprehensive monitoring system of all European ILO networks should be developed. The European Commission should publish a summary of the EU ILOs/ALOs network activity report, coordinate the collection of evaluations of those activities, and ensure these are publicly available.

**29.** The Draft Common Manual for ILOs should be revised to include examples of good practices in relation to people with protection needs as well as the contact details of relevant NGOs .

**30.** In relation to the growing number of databases and efforts to increase their inter-operability, there should be guarantees that sensitive information on asylum seekers and people in need of protection is not shared with third countries as this could be detrimental to their safety.

**31.** All anti-smuggling and anti-trafficking instruments should be applied with full respect of states' obligations towards refugees and people in need of protection, including those who are smuggled or victims of trafficking.

**32.** ECRE recalls that the territorial waters of Member States are integrally subject to EC law, and that the Schengen Borders Code, the Asylum Procedures Directive and the Dublin II Regulation must be applied.

**33.** The frequent occurrence of cases of interception and rescue at the EU southern border requires an urgent clarification over the allocation of responsibilities towards refugees and people in need of protection, in particular as regards the identification of the state which is responsible for addressing the needs of persons seeking protection. ECRE suggests a number of safeguards, based on the principle that any country involved in interception or performing a rescue operation is responsible for ensuring that the requirements of international law are satisfied in relation to human rights and refugee protection. In general, this will imply allowing access to its territory and to the asylum procedure for those seeking asylum. In cases of interception on the territory of a non-EU country where no EU country exercises jurisdiction, it will imply ensuring that they are given access by another state to its territory and to an asylum procedure. In such cases the EU Member State involved in the interception should take serious steps to ensure that certain guarantees are met.

**34.** The European Commission should issue guidelines, possibly even an EU instrument, that clarify the EU state responsible for receiving persons rescued at sea and facilitate states' ability to adhere to their protection obligations and preserve the right to seek asylum while underlining the imperative to preserve life at sea. This should lead to a common understanding between EU Member States of what constitutes the 'nearest port of safety'. It should examine the provision of resources and the application of sanctions to ensure all relevant parties respect the duty to rescue lives at sea in an effective manner. Such guidelines

should also include an analysis of the responsibilities of FRONTEX in the context of such operations.

**35.** In the course of rescue and interception operations, priority should be given to ensuring the safety of the people on board. This will imply their transfer to a safe place, which must be disembarkation on dry land. Any processing of asylum seekers should take place on dry land after disembarkation and not on board boats to minimise the trauma of rescued asylum seekers and prevent any possible procedural injustices.

**36.** The EU must find a way to share not only the burden of patrolling Europe's external borders, but also the duty to save human lives and the responsibility for refugee protection. This will require political agreement at the EU level, which should include a mechanism to allow the relocation of refugees – after the refugee status determination procedure is concluded – under agreed criteria: consent should be required and family links should be taken into account. Such a mechanism should not in any way be set against quotas for resettlement of refugees to Europe from outside the EU.

**37.** Reception conditions in countries receiving arrivals by sea must urgently be improved. NGOs with relevant expertise in the protection and reception of asylum seekers and refugees should be brought in as key partners in this process. Sufficient EU funding should be targeted to this end.

**38.** A possible way of carrying the initial assessment of individual claims could be the use of 'Asylum Expert Teams' similar to those proposed by the European Commission for situations of mass influx. UNHCR should further study good practices as regards the identification of refugees arriving by sea, including profiling at borders, in order to fully examine whether such a mechanism should be implemented across Europe. However, nationality should be immediately excluded as a criterion used for profiling persons in or out of an asylum channel.

**39**. Any persons denied entry at the border must be able to fulfil their right to receive a reason for the refusal and to appeal the decision, according to Article 13 of the Schengen Borders Code. People denied entry should also have their identity and nationality determined and recorded for monitoring purposes.

**40.** The EU and its Member States should make public their readmission agreements with third countries and ensure transparency and independent monitoring over their implementation. UNHCR and NGOs should play a role in this monitoring.

**41.** Readmission agreements should be implemented in full compliance with the principle of *non-refoulement*. In the implementation of readmission agreements, EU Member States should ensure that the persons crossing the border irregularly are given the possibility to express their protection needs, in order to avoid being returned – directly or indirectly – to countries where they would be at risk of persecution.

**42.** The practice of re-accompanying to the border irregular migrants apprehended in the proximity of the border or of refusing to register their presence must be stopped at once. EU Member States should introduce sanctions against officers who are responsible for this kind of behaviour.

**43.** There should be no special procedures at borders. Refugees and people in need of protection at the border should be given unimpeded access to independent legal advice, interpretation and UNHCR/NGO assistance.

**44.** The EU and its Member States should acknowledge that airport transit zones are an integral part of a state's territory and grant persons within them full access to all their rights under international, European and EC law. NGOs should have access to such areas in order to provide persons held within them the necessary material and legal assistance, and information.

**45.** For humanitarian reasons, EU Member States should seek to solve stowaway cases in the shortest possible time. Stowaways should be allowed disembarkation at the first scheduled port of call. Should a stowaway be an asylum seeker, the state of disembarkation should also be responsible for determining the asylum application.

**46.** Border monitoring activities should be maintained and expanded in all countries with external EU borders in a sustainable manner. UNHCR and NGOs should be key partners to governments in border monitoring and training activities. EU funding, including the EU Borders Fund, should support such partnerships.

**47**. Member States should establish legal procedures for the presentation of asylum requests to their authorities posted abroad, in order to ensure legal and safe access to Europe for refugees and people in need of protection. Success in such a procedure should not depend on any particular links with the country of destination.

These procedures should not undermine the situation of those with protection needs who arrive in Europe in an irregular manner and should not be considered as an alternative to resettlement. Making a PEP application should also not prevent a person from seeking asylum on EU territory in the future.

**48**. Any PEPs established should comply with some minimum requirements, such as:

- decisions on asylum claims should be subject to the usual procedural safeguards available on EU territory and should not be undertaken by untrained embassy/consulate staff or private agents.
- the consular/diplomatic authorities of the PEP country should not share information on a PEP applicant with his/her country of origin, in order to avoid any prejudice to him/her;
- the consular/diplomatic authorities of the PEP country should not share information on a PEP applicant with the country of transit, in order to avoid his/her return pending the procedure;
- the PEP applicant should have a legal remedy against a decision of refusal.

**49.** The EU should take further concrete steps towards setting up a EU PEP.

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# WHAT PRICE DOES A REFUGEE PAY TO REACH EUROPE?


## INTRODUCTION

In recent years the European Union has focused its migration policy on preventing and combating irregular entries. While the EU's borders are increasingly tight and more secure, victims of persecution around the world are finding it ever harder to reach a safe haven.

Persons fleeing persecution often lack the means to legally travel to the EU. Despite the right to seek asylum established under the Universal Declaration of Human Rights, Europe is not providing refugees with an alternative to placing themselves in the hands of smugglers and traffickers in their attempt to reach protection. Those that do not die en route are often subject to acts of horrific violence, as well as human rights abuses. And even for those persons who manage to endure their journey and reach Europe's doors, there still remain a number of obstacles to overcome.

Above all, it has been shown that border control measures lack mechanisms to identify persons in need of asylum and thus prevent refugees from benefiting from protection measures.

In December 2007 ECRE published a major report showing that the arsenal of border controls deployed at the EU borders creates the risk of *refoulement* when refugees are excluded from entering the territory and gaining access to a fair and efficient asylum procedure. ECRE, through its member agencies across Europe, has now collected a number of refugee stories.

These stories demonstrate the devastating impact that restrictions to access have on people's lives. The testimonies below have been grouped into four recurring themes: dangerous journeys, human rights violations in transit countries, abuses suffered at the EU borders and denial of access to the asylum procedure.

These voices are strong evidence of the urgent need to reverse the direction of EU migration control policies in order to defend refugees' access to protection in Europe. All the stories have been anonymised to protect identities.

**EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)**

ECRE is a pan-European network of non-governmental organisations, concerned with the needs of all individuals seeking refuge and protection within Europe.

**"WORKING TOGETHER TO PROTECT AND RESPECT REFUGEES"**

ECRE
EUROPEAN COUNCIL ON REFUGEES AND EXILES

# EMBARKING ON A DANGEROUS JOURNEY

The lack of legal entry routes often forces people to place themselves in the hands of smugglers or traffickers to carry out their journey to Europe. ECRE believes that new ways should be envisaged to allow the legal entry of refugees into the EU. One such way could be through setting up specific procedures allowing people in need of protection to present an asylum request to the authorities of Member States posted abroad in embassies or consulates, such as the so-called Protected Entry Procedures (PEPs).

## [Tilak]

Tilak is of Indian nationality from Kashmir whose family has repeatedly suffered abuse from the military. His father acquired the services of Mr. KB, an smuggler, to arrange Tilak's escape: "*In order to pay for this, my father gave Mr. KB a piece of land and now I have to work for Mr. KB to pay the rest of the debt.*" He travelled alone from New Dehli to Africa, not knowing in which country he had landed. Upon his arrival, a man was waiting for him. He was taken along with others to a building and was told that they were in Conakry. "*I stayed there for eight months, doing nothing. We couldn't go out, we were imprisoned and they just gave us food.*" One day they were told that they were finally going to continue on with their journey. At the coast they boarded a small boat which after around 3 hours dropped them at a bigger boat. "*It was very hot down there, after 24 hours travelling we got some rice and some water. We were fed bread and water every 24 hours.*"

After being at sea for about a month, they were intercepted by the Spanish border guards and taken to Mauritania, where they were placed in a big pavilion. The Spanish officials advised them to return to their home countries. Those who agreed to go back had their travel expenses covered by the Spanish authorities. However, Tilak refused.

*"I didn't want to go to my country of origin because I feared for my safety."*

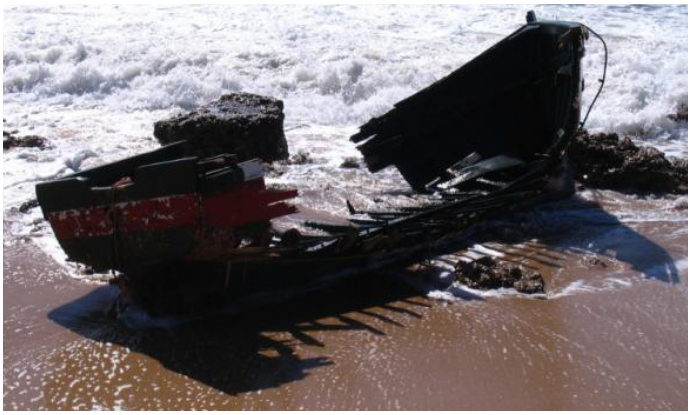

**Photo: Costa de la luz, Spain, March 2008 - Credit: British Refugee Council, Sile Reynolds**

Tilak remained in Mauritania for about seven months together with nine other people. Six of them were subsequently taken to Spain. The other four, including Tilak, were admitted in Portugal in July 2007. He claimed asylum there and was granted humanitarian protection.

*(Source: Portuguese Refugee Council)*

## [Alassane]

When war broke out in his country, the Ivory Coast, in September 2002, Alassane lived with his family in the North, a stronghold of the Muslim rebels fighting against the government. The conflict forced more than one million people to leave, among them Alassane. "*I fled my home in the Ivory Coast and walked to the border with Mali. On the path, there were bodies lying: they were corpses.*"

From Mali, he set off to cross the dessert in a lorry: "*The lorry was very small. We were 25 people in-*

*side. […] I had people next to and all over me.*" In addition to the heat, the harsh conditions and the duration of the trip, they were robbed during their journey. He arrived in Algeria, from where he managed to cross into Morocco. He managed to save up some money there and hired a smuggler to help him reach the Canary Islands by boat. However, he was caught in a raid carried out by the Moroccan police. "*They left us in the dessert. […] Some people died.*"

Around 1,000 migrants were apprehended, many of whom were sent back to their countries of origin. Alassane could not be returned due to the conflict in the Ivory Coast and therefore was left at the Algerian border, from where he headed to Casablanca, again by lorry. "*The lorry left us in the mountains to avoid the police and then picked us again. It took us a month to reach Agadir. We were extremely hungry and thirsty.*"

At the coast they boarded two boats. There was a strong swell and Alassane's boat turned around and went back. However, the other boat continued and subsequently capsized.

*"There were 48 onboard and only 4 people survived."*

Alassane claims that he saw a helicopter belonging to the Spanish authorities and that the Moroccan police was waiting for them at the coast. Despite the failure of this attempt, Alassane decided to try crossing into Spain one more time. "*This time I made it; I spent four days on the sea before I arrived in the Canary Islands.*" He told the Spanish authorities that he was seeking asylum. Two years later he was granted humanitarian protection status.

To reach Spain, Alassane spent three years travelling. In comparison, the same trip by plane takes only 10 hours. Over the course of those three years, he went hungry, was robbed and arrested, and saw 44 people dying in the sea. He still believes he was lucky, he did not die.

*(Source: CEAR)*

# [Zoja and her children]

On the 13th September 2007 the Polish border guards found the bodies of three Chechen girls – aged 6, 10 and 13 - who had died in the mountains at the Ukrainian border. The border guards had previously come across Zoja, their exhausted mother, who was clutching a fourth child - a 2-year-old son - and asked them for help. The bodies were found 1,100m up the mountains along the Polish-Ukrainian frontier, which is now the European Union's eastern border. Zoja went on to explain that they all had spent four days in the cold and the wet. Commenting on the case, a representative of the Polish Helsinki Committee, said that the family was probably crossing the border at this particular point in order to apply for asylum in Austria. Zoja subsequently applied for refugee status in Poland.

*(Source: ECRE East European team, news reports)*

# [Nadifa]

Nadifa fled her home in Somalia ten years ago due to the ongoing conflict. She wanted to go directly to the UK, where her children were already living. She did not want to take the risk of travelling irregularly across two continents and therefore applied for a visa. However, her application was repeatedly refused. Faced with no other option, Nadifa then set off to Sudan, from where she crossed the Sahara desert overnight into Libya: "*It was so difficult but that is the Sahara, is so big, you can't imagine what is the difficulties there, it's so dry…*

*" how many people died… during my journey not one died, but on the way, you saw, on the way the people died on the floor, there are bones…"*

From Libya she took a small boat to Italy with 15 other people, then travelled up through Europe to the Netherlands, where she was able to get a boat to the UK. She was returned to the Netherlands by the UK authorities but made another attempt to join her family, trapped in a lorry inside a small, overcrowded boat. Bad weather made the crossing impossible and the boat was stuck in the dock for five days: "*It was Sunday night, they told me tomorrow morning you get to UK 8 o'clock but… because it was windy we stayed there. Sunday there, Monday, Tuesday… inside the lorry, we don't have water, we don't have nothing inside and we feel scared that when you go out you can't come inside the lorry.*" She made it to the UK after five days. It took Nadifa two years and $2,000 to reach safety.

*(Source: British Refugee Council)*

# HUMAN RIGHTS' VIOLATIONS IN TRANSIT COUNTRIES

Governments in transit countries should be encouraged to sign up to and comply with international and regional treaties concerning the rights of those fleeing violence and persecution. The guarantee of non-refoulement is pivotal to refugee protection and must ensure that no asylum seeker is sent back at the border to a country in which he/she may be at risk of persecution. ECRE believes that Europe should play a more active role in improving refugee protection in regions of transit, without undermining the right to seek asylum in Europe.

## [Jalil]

On the morning of 7th January 2009, Jalil, an Iranian national who had arrived at Istanbul Ataturk Airport from Tehran was intercepted while allegedly attempting to board a plane to the UK with a forged passport. After being detained, he managed to call the UNHCR from a public phone at the "transit zone" detention facility, expressing a realistic fear of persecution if returned to Iran. Although he submitted a self-drafted asylum request to the airport police in writing, he was told that he would be sent back to Iran that same evening. Since neither UNHCR nor NGOs are allowed any kind of physical access to the detention facility, Jalil phoned a representative of the Helsinki Citizens' Assembly to talk about his reasons for fleeing . As they spoke, Jalil became extremely distressed and scared, frequently breaking into tears and begging for help:

*"If they send me back, that is the end of everything."*

The Helsinki Citizens' Assembly filled an urgent application before the European Court on Human Rights, requesting the adoption of an interim measure to stop the deportation. The Court granted this request, determining that it was unacceptable that an individual apprehended in the transit zone be denied access to the Turkish asylum procedure and that physical access of UNHCR and legal assistance providers should not be obstructed. The interim measure was issued around 8pm and swiftly communicated to the authorities.

Despite the Court's binding intervention, the government chose to go through with the deportation. Jalil was sent back to Tehran, probably on a plane that took off from Istanbul Ataturk Airport at 11pm that same day. He was detained upon arrival at Tehran airport.

*(Source: Helsinki Citizens' Assembly)*

# [Saeed]

Four years ago, Saeed and his brother, both Iranian nationals, arrived in Turkey with the intention of joining the rest of their family and claiming asylum. The journey was long and dangerous; it took them 15 hours to cross the border by horse and by foot, running or crawling past Iranian and Turkish watchtowers. Despite the risks involved, Saeed would not approach the Turkish border guards for help due to the fear of being shot: "*It was very dangerous because we knew that we should hide from any Turkish soldiers […] the soldiers would possibly have shot at us while crossing the border because we were doing so illegally…*

*"we knew that it was dangerous to go to claim asylum through the soldiers."*

Saeed had known of many cases of people intercepted while crossing the border. One person was beaten by Turkish guards and dragged along the ground behind a horse, until they thought he was dead. Saeed's cousin was intercepted by Iranian soldiers and imprisoned and deprived of food and water for two days. One of his friends was apprehended by the Turkish police, detained and taken to court, where he was told he would be expelled. Neither his family, friends, nor UNHCR were able to access him in detention and, without a translator to assist him, he was unable to claim asylum. He was eventually deported to Iran and his whereabouts remain unknown.

*(Source: British Refugee Council)*

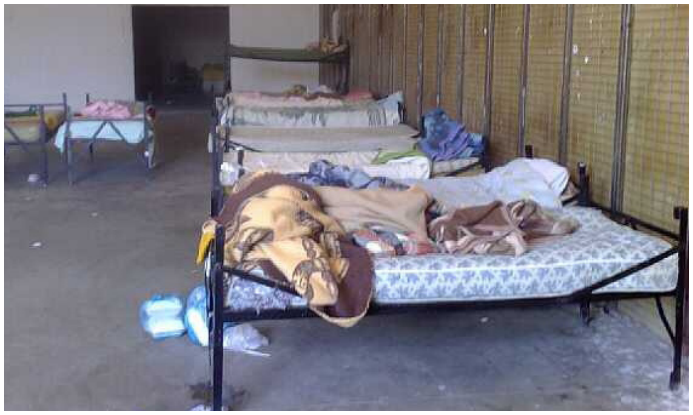

**Photo: Mitilini Camp, Lesbos, Greece, 2008 - Credit: ProAsyl, Karl Kopp**

# [Dawod]

Dawod and members of his family were related to the Communist Party of Afghanistan. Fearing harassment and persecution by the mujaheddin, Dawod left Afghanistan in April 2005 and moved to Peshawar (Pakistan) with his wife and children after being repeatedly threatened in his hometown. Nevertheless, he did not feel safe in Peshawar as a large number of mujaheddin also operated in the area. While still in Pakistan, he was attacked and went into hiding.

Fourteen months after arriving in Peshawar, Dawod decided to try to reach Europe and set off with the help of smugglers. His uncle promised to pay 350.000 toman (roughly 260 Euro) when Dawod would reach a safe haven. Together with others, Davod was smuggled into Turkey through Iran, enduring terrible conditions. They were all brought to Istanbul, where the smugglers locked them in a basement until they had payed the amount promised. For three and a half months, Davod was held in the basement and was beaten by the smugglers as neither him nor his uncle could pay the debt. He eventually managed to escape but was arrested. He told the Turkish police that he wanted to apply for asylum showing his scars from Afghanistan, but instead they detained him and beat him.

After approximately a fortnight, Davod and others were driven to a detention camp where they remained under surveillance. During the night the guards walked them towards a hill ordering them to continue walking straight ahead until they crossed over the Iranian border. They begged the guards not to shoot because they had been told that this would attract nomadic tribes of Kurds, who often assaulted deportees. However the Turkish guards did not listen and one hour later a group of armed Kurds attacked Dawod and the others. He managed to escape with seven other people and they surrendered to the police in the Iranian town of Makou. They were once again beaten by the police and eventually sent back to Afghanistan.

*(Source: Greek Council for Refugees)*

# ABUSES AT THE EU BORDERS

The EU should support independent monitoring of what is happening at the EU's external borders to ensure more transparency and compliance with human rights standards at border crossings. The establishment of border monitoring agreements allowing UNHCR and NGO partners to visit border areas and detention centers is highly desirable. Such agreements have recently been put in place in countries such as Hungary, Slovenia, Romania and the Slovak Republic.

## [Kasim]

Kasim is an Iraqi citizen, who fled from Baghdad to Turkey and then to Bulgaria in December 2006 together with other six persons. At the Bulgarian border the guards opened fire on them and wounded several of Kasim's fellow travellers. Even after they surrendered, the border guards threw them on to the ground and allowed their dogs to injure them.

They were all taken to a police base for interrogation and held there for two days without food. It was difficult to communicate with the police as they did not have an interpreter. They were once again kicked and beaten up with policemen's clubs. Kasim and the other detainees were subsequently moved to the city jail, where they were held in terrible conditions. For over a month the guards subjected them to psychological torture.

*"They humiliated us in various ways, for example by urinating on our doors."*

They were also told not to sleep in order to be ready for deportation. "*They told us that we were unwanted in Bulgaria, and that we had only come here to have sex with Bulgarian girls.*"

Kasim was made sign several documents in Bulgarian, which he thinks were about asylum, and was transferred to a reception centre for asylum seekers, where he stayed for several months.

*(Source: NOAS)*

## [Aadil]

Together with other 21 people, Aadil, a 29-year-old Palestinian, tried to reach Greece by sea in 2007.

When the Greek coast guards arrived, they were pulled on board. A 17-year old was first. "*Immediately, they beat him.*" The others got scared and jumped into the water. "

*"Then they pulled us out of the water and they began beating us and shooting… they beat me up and broke my rib. We had to lie flat on the floor and they stood on us".*

Aadil clarifies that all this took place on the coast guard's boat. "*As soon as we were on board they started pushing us around and hitting us.*"

*(Source: Pro Asyl)*

## [Mitra]

Mitra is an asylum seeker from Afghanistan. He was 16 years old when he tried to reach Greece in a small inflatable dinghy with other people. The Greek coast guard discovered them when they were about 300 meters away from the Island of Lesbos. The police threw them a rope and Mitra and the others were taken on board the coast

guard's vessel.

*"We were tired, fully exhausted, and only wanted to sleep. We lay down on the floor. The police shouted 'don't sleep, sit up!' They kicked us."*

The police brutally continued as they were taken "The police shouted at us: 'Malaka' and other swearwords which we couldn't understand. We pleaded with them: "*We are humans, please help us.*" The police threw the bread, water, and everything else that was left in their dinghy, into the water.

About two kilometres from the Turkish coast they threw the dinghy out. Then Mitra and the others were violently forced back into it. The police boat drove them back into international waters. They had made a small hole in the rubber dinghy and only gave them one oar. "*We paddled desperately to reach the coast, but we were so exhausted. We gave up just after an hour. We thought we were going to die. The water was very still. After a while we fell asleep.*" A big boat came and rescued them.

*(Source: Pro Asyl)*

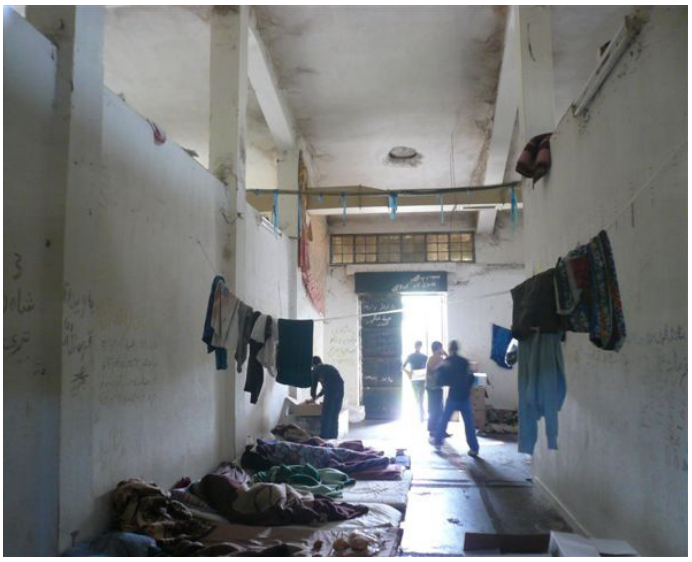

**Photo: Detention facility, Peplos, Greece, 2008 - Credit: ProAsyl, Karl Kopp**

## UPON ENTRY STILL NO RIGHTS

After enduring all the dangers of their journey in order to enter the EU territory, individuals still face enormous difficulties in accessing the asylum procedure. In some cases this can even lead to a violation of the principle of non-refoulement. The right to seek asylum must be fully respected and all asylum seekers must have access to a fair determination procedure. Asylum seekers should not be penalised for arriving without valid travel or identity documents.

## [Malik]

On 9 November 2007, Malik, an Iraqi citizen, arrived at Budapest International Airport through Syria. Return procedures were instigated against him for travelling with a false visa.. Malik was issued an English-language document about the measures being taken against him and received information about his rights and responsibilities in Hungarian. He was held in detention for two days and returned to Syria on the 11th November 2007. A ban of entry was also issued against Malik; this means that Malik is not able to lawfully seek asylum in Hungary anymore, whilst being of Iraqi citizenship he could presumably be in need of international protection.

The case of Malik is not exceptional. In 2007 several other Iraqi nationals were returned to Syria from the Budapest International Airport due to the lack of valid travel documents or valid visas after being held in detention for about two days. It could also be established that prior to their return to Syria, the Hungarian authorities did not interview these persons to see whether or not they were in need of international protection. The possession of a false travel document was considered sufficient grounds for enforcing return.

*(Source: Hungarian Helskinki Committee)*

## [Rahim]

In February 2008, Rahim from Pakistan, arrived at Schiphol airport in the Netherlands. He was arrested for travelling with false travel documents. He wanted to apply for asylum, but was told he would first be prosecuted for travelling with false documents.

On 5th February, Rahim was convicted and handed down a two-month probationary sentence, which allowed the Dutch authorities to declare him "unwanted" in the Netherlands. As a result, he was denied entry into the Netherlands and placed in detention. Rahim applied for asylum and his claim was dealt with through the 48 working hours accelerated procedure. The Dutch Immigration Service (IND) rejected the application because of Rahim's unwanted status as this 'status' means he cannot obtain a residence permit. Having had his claim refused by the IND, Rahim was required to leave the Netherlands immediately even if he appealed the decision, as appeals do not have suspensive effect.

Rahim appealed the decision , and requested the issuing of an interim measure allowing him to stay in the Netherlands pending his appeal. He also presented a request to annul his "unwanted" status. However, the appeal of his asylum application was dealt with initially, before his request to annul his 'unwanted' status was addressed. The fact that he had started the procedure to annul his 'unwanted' status was deemed irrelevant and his appeal was rejected. Rahmin was moved to the deportation centre without having anybody listen to his reasons for applying for asylum in the first place.

*(Source: Dutch Refugee Council)*

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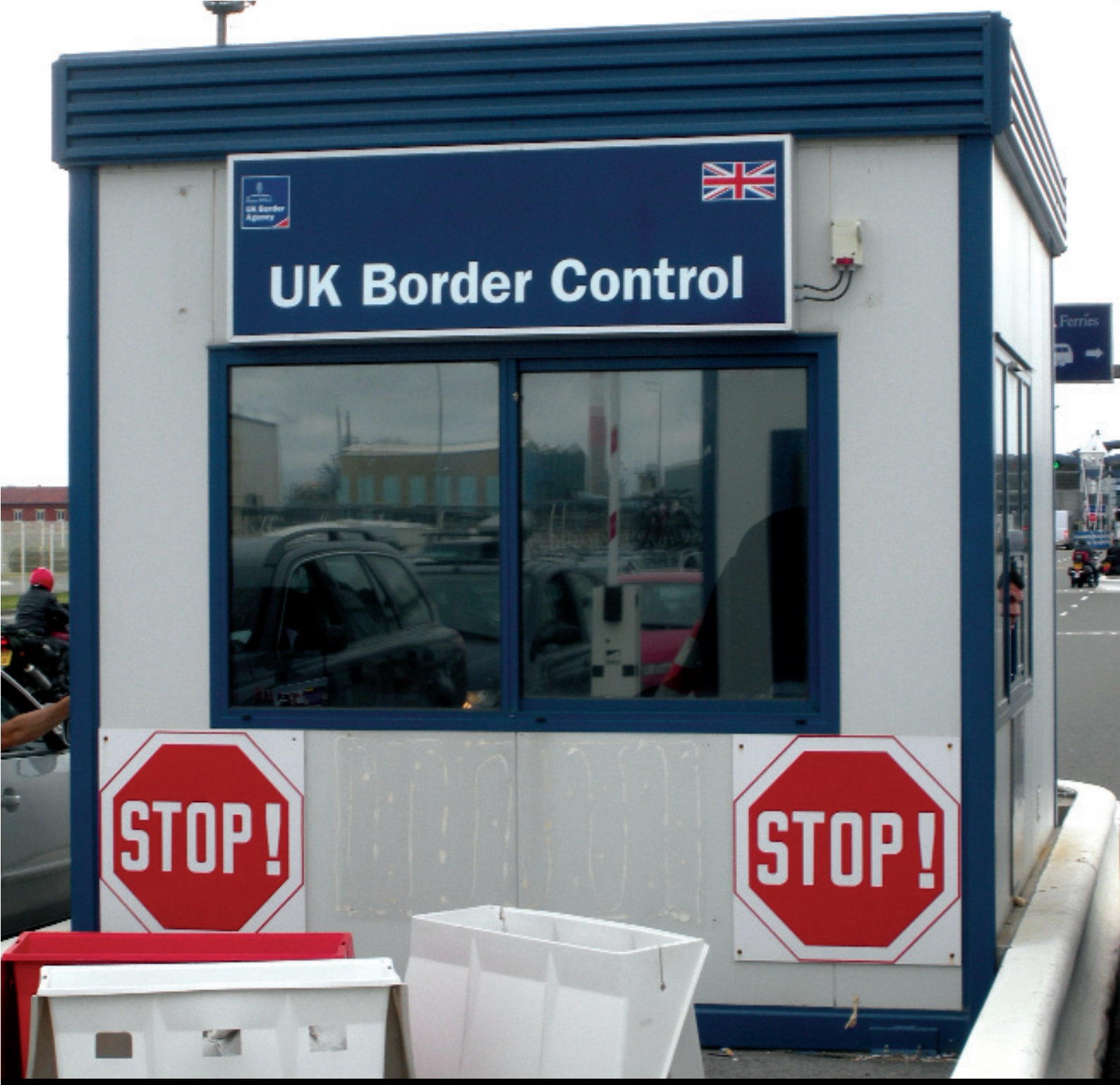


Refugee Council

# Remote Controls: how UK border controls are endangering the lives of refugees

Sile Reynolds

Helen Muggeridge

December 2008

REFUGEE COUNCIL

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# Contents

# Executive Summary

**This report presents the findings of a one-year Refugee Council project, which examined the impact of the UK's border controls on refugees' ability to escape persecution and find protection. The project was guided by an International Advisory Group of leading NGOs, lawyers, academics and UNHCR, and fieldwork was undertaken in Turkey to review the impact of border controls in a key transit country for refugees.**

## Policy context

The dramatic decrease in the number of refugees coming to the UK over the last 20 years is not matched by any decrease in conflict around the world. In fact, the global number of refugees and those displaced within their own country has increased. The Refugee Council is concerned that the plethora of UK border controls placed overseas and aimed at preventing irregular migration is preventing refugees fleeing from their own countries and getting to a place of safety.

The Refugee Council believes that the UK government needs to recognise that wherever it operates border controls, or influences the border controls of other States, refugees will be moving across those borders because they need to escape from persecution and human rights abuses. In order for the UK Government to comply with its legal and moral obligations, it must ensure that its border controls do not result in refugees being unable to escape their countries of origin or being sent back to persecution. Such practice, known as *refoulement*, is prohibited by the 1951 Convention relating to the Status of Refugees, to which the UK is a signatory.

## Key findings

- **The UK government's 'upstream' migration controls risk blocking refugees who are trying to escape their country of origin or transit.**

This report focuses on the UK Government's objective of moving migration control as far 'upstream' as possible in order to stop irregular migrants reaching the UK. Since there is no legal way to travel to the UK for the specific purpose of claiming asylum, refugees are forced to travel irregularly in 'mixed flows', and hence encounter the same border controls as other irregular migrants.

This study explores the various overseas UK border controls and their impact on refugees. The report demonstrates that a request for documentation is often the first obstacle faced by a refugee trying to escape. Refugee respondents explained that they were unable to obtain passports when their country was in a state of upheaval. To compound this difficulty, visas are required for many nationalities. Our research shows that the imposition of visas on nationals of countries such as Iraq, Somalia and Zimbabwe make escape from persecution extremely difficult.

- **Leading refugee law expert, Guy Goodwin-Gill has provided a legal analysis for this report, in which he questions whether anything remains of the right 'to seek' asylum in 2008, the 60th anniversary of the Universal Declaration of Human Rights.**

Today's 'rights-holders' are faced with obstacles put in place by States to curb irregular migration. However, States bear responsibilities for actions taken outside their territories. Most crucially, refugees should not directly, or indirectly, be sent back to a place of persecution or torture as a result of the actions of UK officials at home or abroad. A decade after the Human Rights Act, Goodwin-Gill concludes that it is unclear whether the UK's specific human rights obligations are integrated sufficiently, or at all, into its migration and asylum policy and practice.

- **The protection-blind use of technology in border control ignores the needs of refugees who are forced to travel irregularly.**

The UK's use of technology in the field of border control is also examined in this report. The Refugee Council finds it remarkable and disappointing that in implementing a sophisticated and expensive border control system, refugees' protection needs have been entirely ignored. Our refugee respondents expressed a particular fear that the use of biometrics to 'fix' individual identity leaves no room for legitimate explanations for the use of irregular travel by refugees, as provided for by Article 31 of the 1951 Refugee Convention.

- **Interception activities conducted by the UK's outposted immigration officials and private carriers contain no safeguards for persons who may need international protection, and could even lead to *refoulement*.**

The report considers the responsibilities of outposted immigration officials, whose work with airlines and government counterparts throughout the world aims to intercept irregular travellers on their way to the UK. Our research found that outposted UK immigration officials, as well as the government and private sector actors the Government relies on to implement UK immigration controls, are not tasked with nor trained in refugee protection. We found that immigration and airline officials have no knowledge of systematic procedures to follow in order to identify refugees and ensure that they are protected. The Refugee Council is particularly concerned as these officials enforce the UK's border controls in refugees' countries of origin and transit, thereby heightening the risk of direct and indirect refoulement. The risk particularly affects refugees in transit zones. We also found that there is no monitoring or publicly available information, as to who is stopped, whether they are refugees in need of protection, or what happens to them after they are intercepted.

- **Private carriers who are forced to operate migration controls are not trained in refugee protection and are not sufficiently accountable for actions which may lead to refoulement.**

Our research revealed that much of the UK's immigration control is in practice carried out by private carriers such as airlines and security companies contracted by airlines and other carriers. The threat of carrier sanctions on private companies, including a £2000 fine per improperly documented passenger brought to the UK, means that individuals suspected of intending to claim asylum in the UK are classified as a threat and therefore likely to be refused boarding. Identification of such risky passengers is based on little more than ad hoc profiling by carriers, and the use of 'gut feeling' to intercept individuals suspected of travelling irregularly or of intending to destroy their travel documents before arriving in the UK. Carriers showed little awareness of basic refugee protection principles, including the prohibition on refoulement. There is a lack of transparency surrounding private carriers' immigration control activities. This makes it difficult to guarantee that refugees' lives are not put at risk.

- **There must be a solution to the needs of refugees in order to prevent irregular and dangerous travel to safety in Europe.**

As a result of our findings, we identified an urgent need for safeguards to be incorporated into the UK's border activities in order to protect refugees. At the same time, the Refugee Council believes that the UK government should explore measures that could proactively facilitate safe passage for refugees.

## Secondary effects of border control

- **Stronger borders mean that refugees have to take greater risks to find safety.**

In Chapter Six of this report, we present our findings that strengthened border control displaces refugees into more dangerous routes and methods of travel. Refugee respondents described the life-risking routes they had to take in order to reach safety. The fear of dealing with smugglers, travelling through lawless zones and encountering border guards was particularly traumatic for vulnerable groups, such as women and children. Our research found that since refugees are compelled to leave their country, the UK Government's overseas marketing campaigns, aimed at persuading individuals to 'stay at home', lacks relevance for them. Instead, the lack of safe legal routes means that refugees have to take even greater risks to escape.

- **Refugees in countries that do not offer adequate protection are in a state of 'permanent transition' and struggle to survive.**

Chapter Seven of this report describes what life is like for refugees in a country of transit. Turkey is one, but not the only, example of a country where refugees can be described as being in permanent

transit. Our research fieldwork revealed that refugees in Turkey live on the very edges of society, finding it difficult to survive. We heard accounts of vulnerable refugees resorting to prostitution to survive, and lesbian and gay refugees living in unsafe communities. Overall, we were told by the majority of respondents that refugee integration was simply not an option in Turkey.

- **NGOs and UNHCR are denied access to border and transit areas where refugees are intercepted, sometimes resulting in refoulement.**

The Refugee Council found it of extreme concern that NGOs and UNHCR are routinely denied access to individuals who are intercepted at the Turkish border, within Turkey, and particularly in transit zones and in detention facilities. If NGOs or UNHCR hear of intercepted individuals at all, it is often 'too late' as the individuals may have already been sent back to their countries of origin. As a result, our respondents felt that the protection of refugees was not always guaranteed, and they pointed to well-publicised recent accounts of refugee refoulement.

- **Refugees who have to wait years in countries of transit will search for their own durable solution.**

In Turkey, our research revealed that refugees wait between two and ten years for a decision on their asylum claim, then have to wait again to be resettled to a country where they can rebuild their lives. As a result, some refugees seek a sustainable solution themselves by moving on, irregularly, to reach sanctuary within the EU. Whilst the UK seeks to implement its objective of decreasing arrivals to the UK by working in partnership with countries such as Turkey, we found that where refugees cannot enjoy protection, they will logically seek to move on to a safe place.

- **International responsibility-sharing for refugees is not best achieved by containing refugees at the borders of the EU.**

The Refugee Council believes that international responsibility-sharing does not mean containing refugees at the EU's borders. Rather, it requires increasing refugee protection standards and ensuring that refugees are able to reach a place of safety.

# Recommendations

**The Refugee Council would like to make the following recommendations which we believe are necessary to ensure protection safeguards in the context of the UK's extra-territorial border control.**

## General

Refugee protection should be included as an integral part of the UK's border strategy.

The UK government should consult with civil society and UNHCR on the implementation of protection safeguards in the context of extra-territorial immigration control.

## Visa Restrictions and e-Borders

Visa requirements should never be imposed with the aim of preventing asylum seekers from reaching a State's territory.

The UK and other EU States should examine their visa policies regularly, and in emergency situations should suspend visa requirements to enable people to flee an area of conflict or severe human rights abuse. In such emergency situations, the international community should suspend visa requirements simultaneously, in a spirit of burden sharing, for determined periods of time for nationals experiencing humanitarian crises.

Negotiations with countries on the lifting of visa restrictions, in exchange for increased efforts to control irregular migration to the UK and readmission agreements, must include protection safeguards. Individuals should not be transferred to countries from where they do not originate. Where, however, agreements are signed to return non-nationals, they should contain guarantees of full access to fair and efficient refugee status determination procedures, and protection against *refoulement*.

The UK should explore the facilitation of legal travel for those in need of protection, where encountered at Consulates in countries of origin or transit.

Where aspects of consular activities are outsourced to private contractors, such as processing visa applications, the UK should ensure individuals with protection needs are still able to access the Consulate.

When considering the treatment of individuals who travel without proper documentation, the UK should take into account the lack of choice of those fleeing persecution, including where there are no facilities for issuing passports within the country of origin, due to it being a country in upheaval or where certain profiles are illegitimately denied passports.

The UK's assessment of risk in the context of routes and nationalities should include the risks posed to the individual, not just the State. This could involve an analysis of situations that may include refugee flows, including where vulnerable groups could be travelling on dangerous routes.

The identification of risks to individuals should be shared with outposted immigration officials and private carriers.

Safeguards should be put in place to ensure that where a false identity is used for the purposes of fleeing persecution, the false identity is not electronically 'fixed' as this could lead to inappropriate refusal of an asylum claim and possible chain *refoulement*.

Policy and practice should reflect that the fact of being a failed asylum seeker does not mean that an

individual will never have a legitimate refugee claim in the future.

A risk assessment on the impact of e-Borders on refugee protection should be conducted by UKBA. This should include an examination of safeguards to ensure that data-sharing systems under no circumstances allow for information on individual asylum applicants to be shared with countries where an individual is at risk.

Regular updates on the e-Borders programme should be disseminated and stakeholders in the NGO sector should be invited to input into developments.

The advantages and risks of Protected Entry Procedures (PEPs) should be fully explored by an independent body.

## Outposted immigration officials

The UK should put systems in place to ensure that the actions of its outposted immigration officials do not result in direct or indirect *refoulement* of individuals with protection needs.

The UK should ensure agreements between the UK and third countries that allow UK immigration officials to function on their territory are transparent. These agreements must contain clauses on UK responsibility to respect the principle of *non-refoulement* and should include measures to ensure access to protection wherever its immigration officials conduct measures to control irregular migration.

The UK should encourage host countries to allow intercepted individuals to have access to UNHCR, independent legal advisers and NGOs, in particular in transit zones.

UKBA should ensure that regular independent monitoring is carried out to ensure extra-territorial border control is compliant with refugee protection, and in particular the prohibition on direct and indirect refoulement.

The UK should provide easily accessible advice and guidance on the responsibilities of outposted border officials in respect of refugee protection. This should include procedural guidelines on what to do when encountering a person in need of international protection.

Outposted UK immigration officials should receive training on international refugee and human rights legislation and procedures.

The UK should provide training to outposted immigration officials on the identification of vulnerable individuals and how to meet their needs.

UKBA must demonstrate that the activities of all outposted immigration officials are implemented in accordance with domestic equality obligations.

The role of the ILO and ALO should be clarified and a list of activities and powers made publically available.

Non-sensitive information with reference to general trends of persons stopped from coming to the UK should be shared publically.

Frameworks for working arrangements between ALOs/ILOs, private carriers and host authorities should include reference to the importance of ensuring the individual details of refugees are not shared with countries of origin or transit.

UK and EU operational manuals for ILOs and ALOs should include reference to refugee protection and practical instructions regarding action to be taken if a passenger expresses protection needs.

ILO/ALOs should be fully aware of local institutions and organisations that assist refugees and others in need of international protection and refer individuals on accordingly.

The UKBA, in conjunction with UNHCR and NGOs should explore giving ALOs the power to allow undocumented refugees safe passage to the UK in circumstances where they may be at risk. This could include a hotline facility to support ALOs to use this power when encountering an individual in need of protection.

ALOs should keep records of the details of intercepted persons, including whether they expressed protection needs.

The remit of the Independent Police Complaints Committee (IPCC) has recently been extended to cover matters of immigration enforcement. UKBA should ensure that the IPCC also has oversight of the activities undertaken in the context of juxtaposed controls, in particular if these are rolled out to refugee countries of origin and transit.

## Carrier Sanctions

Records should be kept and made public as to the number and characteristics (age, gender, nationality, vulnerability) of persons who are intercepted, including whether any expressed protection concerns.

Carriers should be encouraged by UKBA to seek guidance when they come across an individual who may have protection needs.

UKBA should consider how to support carriers who come across passenger who may have protection needs, including waiving fines.

UKBA training for carriers should cover their obligations under international refugee and human rights legislation.

Private carriers should be fully aware of procedures for the local system of referral to UNHCR, independent legal advisors and NGOs. Where private carriers contract out interception functions to private security firms, they must adhere to protection safeguards.

Where an individual is to be returned, a mandatory return interview should be conducted to afford individuals the opportunity to express protection concerns and to access independent legal advice.

UKBA should encourage host countries and carriers to allow time for access to UNHCR, NGOs and independent legal advisors.

## Displacement onto dangerous routes

All Interior Ministry and border control staff, in countries where the UK seeks to influence the operation of national border control operations, should receive training and awareness-raising on refugee issues and on identifying victims of trafficking.

Attention should be paid by outposted immigration officials and carriers to the needs of vulnerable groups, including vulnerability based on age, gender and sexuality.

## Refugees in permanent transition

The UK should use its influence to increase standards of refugee protection and respect for the principle of *non-refoulement* internationally.

Where the UK is involved in interception activities in the territory of a third country, it must ensure access to adequate asylum procedures and guarantees that refugees will not be refouled.

UNHCR and NGO access to individuals intercepted at air, land and sea border zones should be written into agreements the UK makes with countries in which it conducts extra-territorial immigration control. The presence of independent humanitarian organisations in detention facilities at the border and inland should also be considered.

# Foreword

**Oktay Durukan, Refugee Advocacy and Support Program, Helsinki Citizens' Assembly**

In 2007, asylum applications in the European Union reached a 20-year low. Unfortunately, this is not a reflection of the world becoming a more peaceful place. Whilst Fortress Europe as a critical concept appears out of fashion, over the last decade the vision of a heavily fortified, securitised European borderline to protect Europe from unwanted 'illegal migrants' has become a reality to an unprecedented degree. Although individuals escaping war and persecution are supposed to be the exception to the rule – the beneficiaries of legally sanctioned protection and compassion – refugees are often forced to resort to the same irregular channels to leave their countries of origin and travel towards safety. Despite this, Europe continues to devise and perfect a formidable arsenal of migration control tools and policies, which barely make exceptions for refugees, and fail to take stock of European governments' international legal obligations towards individuals in need of protection.

Gone are the days when governments were solely relying on visa requirements and simple document checks at arrival. Europe is taking 'the battle against illegal migration' further and further away from the actual European borders. Recent years have seen the EU-wide development of a range of externalised 'non-arrival' measures including sanctions on private carriers, posting of immigration liaison officers abroad and interception of boats in international waters and in ports of departure through cooperation agreements with governments in regions of transit. By 'externalising' and 'sub-contracting' migration control functions, European States effectively shift responsibility for refugees to third countries. Where they operate outside EU territories, governments attempt to avoid their human rights responsibilities and are subject to minimal scrutiny and accountability.

Those refugees fortunate enough to reach European territories face an array of post-arrival, 'non-admission' measures meant to deter and divert people from seeking asylum in Europe. The practices range from the automatic trigger of 'readmission agreements' for returning asylum seekers to so-called 'safe third countries', widespread use of detention for asylum claimants and restrictions on access to employment and family reunification, to more insidious diversion measures such as the creation of legally fictitious 'international zones' at airports and the frequent unlawful practice of 'pushing back' irregular migrants apprehended in proximity to borders, without registering their presence, let alone screening for protection needs.

With the launch of the European Agency for the Management of Operational Cooperation at the External Borders of the EU Member States, FRONTEX, the management of the EU's external borders seems more effective than ever. But does Europe's formidable migration control apparatus adequately and sufficiently differentiate between individuals who may be in need of international protection and other migrants? What is the price a refugee has to pay to access safety and protection in Europe? This is a matter of life and death. For refugees, staying home is not an option. In the absence of safe and legal ways to reach European territories, they are forced into dangerous and abusive situations, and are obliged to embrace the perils of life-threatening journeys and the unscrupulous services of smugglers and traffickers.

While too many individuals die in their attempt to reach safety in Europe, many others are indefinitely trapped in regions of origin and countries of transit, struggling to survive on the compassion of governments that lack the legal and administrative infrastructure and resources – and often the will – to extend them the protection they need and deserve. Turkey is indeed one such key country of transit, uniquely positioned as an EU accession country situated at the geographic and political margins of Europe.

Over the past five years, the Helsinki Citizens' Assembly (hCa) has been leading emerging efforts on the part of Turkey's NGO and human rights community to promote and secure the protection of refugees who make their way to Turkey. hCa's work in the area of refugee rights ranges from comprehensive legal assistance vis-à-vis the United Nations High Commissioner for Refugees (UNHCR) and the Turkish government, to monitoring and advocacy activities aiming to improve policies and practice affecting asylum seekers. Earlier this year hCa became the first Turkish NGO to join the European Council on Refugees and Exiles (ECRE) and immediately became involved in ECRE's advocacy focus on defending refugees' access to Europe. We consider the Refugee Council's Protection-Sensitive Borders Project as a very timely and necessary intervention.

Europe's failure to allow access to protection for refugees has consequences. At a minimum, Europe sets a 'bad example', particularly for States in Europe's immediate neighbourhood. The fear of becoming a 'dumping ground' for migrants and refugees motivates governments like Turkey to adopt similar indiscriminate migration control measures aimed at keeping the 'mixed flows' of migrants and refugees at bay, and removing those who did manage to arrive back to countries of transit and origin further to the east and south. At worst, Europe proactively sets transit countries like Turkey up as 'partners in crime', as gatekeepers of Fortress Europe expected to intercept and return irregular migrants and potential asylum seekers at whatever cost. On 23 April 2008 Turkish authorities forced a group of Syrian and Iranian nationals, including 5 UNHCR-recognized refugees, to cross the Tigris river separating Turkey from Iraq. Four persons, including a refugee, were swept away by the strong river current and drowned. Sadly this incident is hardly an isolated affair. It is a tragic reminder of what happens when people escaping persecution are denied access to safety at the EU's frontiers.

The reality is that the overwhelming majority of violations and instances of refoulement never come to the attention of either the UNHCR or refugee advocates like hCa. In the absence of any independent monitoring bodies and an effective judicial review mechanism, it is hardly possible to speak of any meaningful oversight of border activities. This out-of-sight-out-of-mind effect is arguably an outcome of a calculated secretiveness in the Ministry of Interior's (MOI) operations, and Turkish border authorities' hostile attitude towards attempts by independent actors to monitor their practice. hCa and a handful of other human rights NGOs struggle to overcome major capacity and resource issues as well as legal obstacles in their quest to establish a significant monitoring presence across the country.

I would like to thank colleagues at the Refugee Council for initiating this very important project, which we believe provides a great opportunity for boosting advocacy efforts in the UK and beyond to make Europe once again a safe haven for victims of persecution.

# Chapter One – Introduction

## Background to the Protection Sensitive Borders Project

For the last 20 years, the numbers of people claiming asylum in Europe has been declining. The Refugee Council has been increasingly concerned that this decline has not been accompanied by comparable falls in global conflicts and human rights abuses. In 2006, the Refugee Council became interested in examining whether the UK's border controls operating outside UK territory were denying refugees access to the UK. It decided to designate its voluntary income to fund a Research and Policy Officer for one year to work on its 'Protection Sensitive Borders Project', launched in August 2007.

This research has benefited from, and is part of, an increased recognition in human rights circles that indiscriminate border control may render the human right to seek asylum obsolete.[1] The Refugee Council's research was designed to address the gap in knowledge as to whether the UK's increased and extra-territorial border control could actually prevent an individual accessing asylum and, if so, what could be done to rectify this?

## Methodology

The methodology employed in this project was shaped by the nature of the subject matter: how refugees navigate obstacles placed in their path in order to access a place of safety is an elusive matter. This was reflected in the methodology employed in this project; for example the difficulty of interviewing a refugee who 'did not make it' to the UK combined with the sensitivity of researching irregular travel due to refugees' fears of backlash by smugglers and/or being subjected to punitive government measures. States are also reluctant to share plans which involve State security and border control. These factors meant our research took an experimental path.

## International Advisory Group

An International Advisory Group of leading academics, NGOs, lawyers and refugee community organisations was established at the outset of the project to steer the research and lend valuable expertise in what is a complex field. Irregular migration and refugees encompasses considerations that are humanitarian, legal, geographical and technical, and includes the dynamics of international relations and responsibility sharing. The Advisory Group met twice and provided regular input into the project via a virtual forum.

## Scoping Exercise

An extensive scoping exercise was conducted to establish lessons learned about the impact of extra-territorial border control on refugees from existing research, including academic and NGO publications. The exercise also looked wider to examine UK government policies, discussions in the UK Parliament, policy documents from the European Union and domestic and international media reports. With this understanding, it was then possible to identify gaps in publicly available knowledge as well as key stakeholders whom we wanted to interview to find out more. Stakeholders fell into four broad categories: refugees, government, NGOs/UNHCR and private carriers. Respondents were drawn from the UK and from our chosen fieldwork country of Turkey.

## Interview Schedules

Four questionnaires were designed to cover the four categories above in order to elicit information based on the expertise of the respondents.[2] For example, we asked refugees about their personal experiences of crossing borders, and we asked government officials about the purpose and implementation of border control.

The questionnaires were used as the basis for semi-structured interviews including open-ended questions to prompt the interviewee to give information related to their 'on the ground' experience. The advantage of this flexible approach was that a large amount of relevant data was gained, some of it sensitive. The nature of the subject matter – escaping persecution and being forced to travel irregularly and often dangerously across a border – meant that it was necessary to build trust with respondents by assuring them that the information they gave to us would remain confidential, and any quotes would be anonymised. We were unable to collect quantitative data since figures as to how many persons are intercepted, sent back or allowed passage are not publicly available.

## Field Research

A research trip to a country through which refugees transit to the UK gave us a broader picture of access to asylum as an international issue, as well as facilitating exploration into the border control with which we were most concerned – that which is 'exported' by the UK and is being implemented outside UK territory. The premise for our research was that in any mixed flow of people, there are likely to be some who need international protection. Our one base line was that the UK's border controls should not in any way prevent that protection being sought and received.[3]

In selecting a country for fieldwork, we considered the following criteria: the location of outposted UK immigration controls; a country's geographical position in relation to refugees who transit to the UK; likelihood of gaining information in a short period of time overseas; the presence of local refugee NGOs and UNHCR that could assist in making logistical arrangements during our research trip with our visit; and the security of the country. Turkey was selected as best fitting our criteria. Furthermore, as a country that borders both the EU and refugee countries of origin such as Iraq and Iran, Turkey is also a country of refugee origin itself as well as being a potential EU candidate country.

## Respondents: Refugees

When designing the interview schedules, we prioritised the need to learn more from refugees themselves. In the context of researching access to asylum, this did not prove an easy task. Refugees had reservations about disclosing information about risky journeys, often due to their sense of shame at being forced into taking irregular routes facilitated by smugglers or traffickers. In certain cases, the journey was a memory the refugee would rather forget, since the experience included extremely dangerous border crossings, risking life and being separated from family.

Interviewees were accessed through various contacts including NGOs, RCOs and the Refugee Council One Stop Service as a way of identifying respondents by using 'gatekeepers'. This entailed following up leads from Refugee Council colleagues and refugee community organisations as to which refugees were able and willing to share their experience of their journey from country of origin to the UK. We were fortunate that four refugees from refugee community organisations in London and three clients from the Refugee Council's office in Leeds agreed to be interviewed, as well as eight representatives from refugee community organisations in both London and Leeds. We attempted to reflect different nationalities as well as considerations of immigration status, age and gender in the sample of interviewees. The main criteria for interview participation was that the individual was able and willing to talk about access issues. Interviewees were guaranteed full anonymity and were compensated for their travel costs.

Interviews with refugees in Turkey were facilitated by the various NGOs we visited, as well as by UNHCR. We interviewed five refugees in Turkey. The reason for the low number was that Turkish NGOs and UNHCR were our 'gatekeepers' and themselves provided comprehensive information about refugees' journeys and experiences. They were unable to identify many refugee respondents for us to interview, as they believed most refugees in Turkey, a transit country, would not talk about their intentions to move on to another country of asylum. In addition, NGOs and UNHCR shared concerns that our interviewing refugees would lead their clients to expect an increased service. NGOs were further concerned that refugees may believe that participation in our study would have a positive or negative effect on a pending refugee claim. Despite

this, interviews with refugees in Turkey elicited qualitatively rich data, and the grassroots expertise drawn from NGO and UNHCR interviews significantly broadened our understanding of border crossing and the situation for refugees in Turkey.

## Government

We identified government officials as key stakeholders, given their evident policy making and implementation role in managing immigration and border control. UK government representatives co-operated with our research as well as being interested in our study. We were pleased that UK officials, based in the UK and Turkey, shared our view that access to asylum in the context of mixed flows of refugees and migrants is a complicated area. The Refugee Council sincerely hopes to harness this interest and build on these relations in the future. Unfortunately, Turkish government officials were unavailable for interview, although they signalled their interest in the project and the Refugee Council is seeking to work with them to ensure our recommendations are disseminated and acted upon wherever possible.

## NGOs and UNHCR

Our research would have not been possible without the support and expertise of NGOs, as well as the UNHCR in Turkey. Our interviews with them provided a 'big picture' view of the situation in Turkey for refugees, including systematic difficulties involved in getting to, and seeking asylum in, Turkey. On the UK side, we received input from NGOs, including the European Council on Refugees and Exiles, and the Immigration Law Practitioners Association as well as UNHCR's London office via their representation on our Advisory Board. In addition, we were invited to present the Project's initial findings at an academic conference where we benefitted from multi-disciplinary input.[4]

## Private Carriers

We interviewed private carriers, for example private airlines, operating in Turkey as they play a crucial role in immigration control. Since they are at risk of being fined £2000 for every improperly documented passenger they bring to the UK, they carry out stringent checks and often refuse transit or boarding. We were warmly received by the carriers (mostly private airlines) and received a detailed explanation of their role in immigration control and the impact of this on the airline staff, passengers and the airline companies.

## Summary

The methodology used in this Project has entailed gathering a wide range of perspectives – of refugees, NGOs, UNHCR, private carriers and Government officials – on the issue of access to asylum. As a result, the Refugee Council believes that the recommendations we have made in this report are both realistic and achievable.

1 Universal Declaration of Human Rights 1948, (Article 14 (1)), Paris: United Nations General Assembly. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2 see Annexe One on page 74

3 The Refugee Council recognises the rights of States to control their borders and does not advocate that all refugees who encounter UK border control be brought to the UK.

4 Modern Law Review seminar, Extraterritorial Immigration Control: Legal Challenges, Queen Mary Graduate School of Law, 13 June 2008.

# Chapter Two – Contextual Overview

**In the light of increased measures employed by States to prevent irregular migrants, including refugees, from even reaching the UK, Guy Goodwin-Gill asks in this report '*whether anything remains even of the right 'to seek' asylum*'. This section will provide an overview of interception, including the UK government's border management policies and activities which are aimed at decreasing the number of arrivals to the UK. Similar trends at EU level, where 'externalisation' policies aim to engage bordering States in the prevention of entry to the EU, will also be explored. We will examine the view of the United Nations High Commissioner for Refugees on the impact of border controls on the protection of refugees travelling in 'mixed flows'.**

## Background: The right to seek asylum

2008 marks the 60th anniversary of the Universal Declaration on Human Rights, Article 14 of which sets out the right to seek asylum:

*"Everyone has the right to seek and enjoy in other countries asylum from persecution."*

The Refugee Council believes that this fundamental human right is under threat and that the UK government and its EU counterparts should adopt all measures possible to avoid preventing refugees from fleeing persecution and finding protection.

There is no legal way to travel to the UK for the purpose of seeking asylum. Refugees therefore often have to use the same routes, employ the services of the same smugglers, obtain fraudulent travel documents from the same suppliers and, crucially, encounter the same border controls as non-refugees. The Refugee Council believes that these border controls which are designed to prevent all immigrants from travelling to the UK must be made more sensitive to the protection needs of refugees travelling within mixed flows. It is this belief which has given rise to this study.

The reason for the Refugee Council's concern is that border control involves stopping and/or diverting individuals back to their country of origin or transit. The consequences for refugees are extremely serious as, if intercepted, they could be at risk, directly or indirectly, of return to the very persecution and human rights violations from which they have fled. This process of returning an individual to a place where his/her life or freedom would be threatened for a reason outlined in the 1951 Refugee Convention[5], is known as *refoulement* and is prohibited by the 1951 Convention relating to the Status of Refugees to which the UK is a signatory.

The Refugee Council believes that States face a challenge of establishing ways of guaranteeing that those in need of international protection are not denied access to protection as a result of States' broader migration control programmes. For example, the UK operates much of its border control overseas and states that:

*"Tougher checks abroad help keep Britain safe by stopping risks to our country coming close."* (Home Office, 2008b: 6)

Over the past decade, the Refugee Council has called on the UK government to assess the impact of its immigration controls on those seeking asylum and on the international refugee protection regime, and to put appropriate safeguards in place. Furthermore, as a member of ECRE, we have this year played a leading role in a European wide advocacy focus on access to asylum.[6] The Refugee Council concurs with ECRE that there is little point in having a Common European Asylum System if there is no way for refugees to access it.

## Global numbers

The total number of international migrants was estimated at about 76 million persons in 1960 (IOM, 2005: 379). Forty-five years later, the estimated number had more than doubled to almost 191 million.[7] Within these global movements, asylum-seekers and refugees constitute only a very small proportion.[8] UNHCR estimates that global refugee numbers had actually been decreasing between

2000 and 2005 to reach a 25-year low of approximately 8.4 million at the end of 2005 (UNHCR, 2006c: 3). However, global refugee numbers have been increasing over the past two years, and the latest estimates from UNHCR show that by the end of 2007 there were 11.4 million refugees, the majority of whom had found asylum in developing countries, particularly in Africa and Asia (UNHCR, 2007b: 2).[9] Europe, on the other hand, while experiencing a significant increase in the number of international migrants, actually hosts only a relatively small proportion of the world's refugees.[10] At the end of 2007, this figure stood at 14 per cent (approximately 1,580,000 refugees). The UK now hosts less than 300,000 refugees, representing 2.6 per cent of the world's refugees (UNHCR, 2007b: 8).

## Increasing numbers, decreasing sympathy

In the 1990s, increasing numbers of asylum applications across Western Europe, accompanied by decreasing rates of acceptance for refugee status, resulted in heightened hostility and suspicion towards asylum seekers amongst sections of the media, politicians and the general public.[11] Terms such as 'bogus asylum seeker' and 'queue-jumper' became accepted media and governmental language used to describe a population that was increasingly being associated in public discourse with economic migration, abuse of the welfare state and terrorism.

In response to the perceived abuse of the asylum system by non-refugees and the domestic pressures of negative public opinion, States have employed a number of internal and external measures to ensure that asylum seekers are deterred from reaching the UK. The Refugee Council notes that the UK's harsh internal asylum policies such as detention, fast-tracking and reduced legal assistance for asylum applicants, combined with external measures to prevent individuals even entering the territory, have resulted in the dramatic fall in the numbers claiming asylum in the UK. Our concern is that these measures have negatively affected not only non-refugees but also refugees. This is supported by UNHCR in the following statement:

*"Unregulated migration can place serious strains on national asylum systems and provoke public hostility towards all foreign nationals, irrespective of their legal status. It can also prompt the imposition of restrictive border controls which fail to make the necessary distinction between prospective entrants on grounds of their need for protection, which lead to incidents of refoulement, thereby undermining the objective of effective refugee protection."* (UNHCR, 2007h: 5)

## What is interception?

In this study we focus on the external measures which aim to prevent entry to the UK's territory at the earliest possible stage. The Refugee Council has chosen this focus because there are very few studies of such external border control measures, particularly in the UK context, and little public scrutiny of their operation or impact.

Border controls have adapted to modern forms of 'irregular' travel. Hence the traditional understanding of border controls as something solely implemented at the State's territorial border, at train stations and at airports by the State's immigration officers, has become a thing of the past. States have found that a more effective method of preventing irregular travel to their territory is to target unwanted migrants at the earliest point in their journey. Commentators now refer to 'non-arrival measures'[12], 'interdiction' or more commonly, 'interception'. 'Interception', like the phenomenon it seeks to tackle, appears to have no universally agreed definition but UNHCR has outlined a provisional definition which proposes that interception includes:

*"all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination."* (UNHCR, 2000b: 2)

UNHCR's Executive Committee subsequently refined the definition to refer only to active measures to prevent access to the territory, including:

*'measures employed by States to:*

1. *prevent embarkation of persons on an international journey;*
2. *prevent further onward international travel by persons who have commenced their journey; or*
3. *assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;*

*where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter…'.* (UNHCR, 2003d)

For the purposes of this study, the Refugee Council considers interception in the broadest sense to include visa controls and the imposition of civil penalties on carriers, such as airlines, that bring in improperly documented migrants (carrier sanctions), and the more active measures such as interception and diversion by immigration officials posted in refugee regions of origin and transit.

## Extra-territorial responsibilities

The Refugee Council notes that European States have increasingly extended their border controls further away from the external borders of Europe outwards towards the high seas and onto the territory of third countries. In Guy Goodwin-Gill's legal analysis in *The Legal Dimensions* on page 23 of this report, he states:

*"Non refoulement is precisely the sort of obligation which is engaged by extra-territorial action, for it prohibits a particular result – return to persecution or torture – by whatever means, direct or indirect, and wherever the relevant action takes place."*

ECRE has challenged the notion of a 'legal black hole' and emphasised that States have to respect international and European refugee and human rights law when conducting their extra-territorial activities (ECRE, 2007). UNHCR has also stated its view that, in international law, no distinction is made for actions taken outside of State territory, nor for the actions of those contracted by the State, when it comes to deciding responsibility for respect for human rights (Brouwer and Kumin, 2004).

The Refugee Council would like to see increased transparency and public accountability in respect of out of sight border control in order to ensure that the UK's extra-territorial controls do not result, directly or indirectly, in *refoulement*.

## UK Government priorities

The broad aims set out in the UK's international priorities are to reduce arrivals, increase returns and promote the UK's migration policies abroad.

The UK Border Agency (UKBA) was launched on 3 April 2008 as a shadow agency of the Home Office, uniting border, immigration, customs and visa checks into one body. UKBA is now responsible for both border checks overseas (visas etc) as well as deciding on refugee claims made in the UK.

UKBA was established following a wide-ranging assessment of the UK's anti-terrorism efforts, which claimed that the first line of defence against terrorism is overseas.[13] Consequently, UKBA is presented as the latest measure to tackle international crime through border controls and migration management.

*"UKBA… has been formed to respond quickly to new threats to Britain's security, to stay one step ahead of lawbreakers and protect the country 24 hours a day. It is also backed up by world-leading technology that tracks the people setting out on journeys to UK ports and airports so that wanted criminals can be arrested before they cross the border."*[14]

The Agency includes more than 9,000 border control officers operating in the UK and across 135 countries worldwide. UKBA's strategy is to create a single border intelligence service to bring together overseas risk assessment units, airline liaison officers and customs and immigration intelligence officers based around the globe.[15]

In the 2007 strategy document 'Managing Global Migration' the government cited its intention to introduce a 'different doctrine of control' and referred to the creation of a new offshore border. The government aims to achieve its objective of managing migration flows by:

1. Acting as early as possible to prevent the arrival of irregular migrants.
2. Making use of the collection and analysis of data, intelligence and information to allow for a more targeted response to migration flows.
3 Cooperating with third countries through bilateral and multilateral agreements, the development of compatible systems and the common use of new technology (Home Office and Foreign and Commonwealth Office, 2007).

The ultimate goal of the government is to take border controls 'upstream' to the earliest possible point in the individual's journey to the UK. This would facilitate the identification of irregular movers and "*stop or control them before they reach the UK*" (Cabinet Office, 2007: 8). Early identification and intervention of irregular migrants is preferred by the government because it is perceived to be more effective and cheaper than identification on, and removal from, UK territory. Hence the government statement:

*"it is better to prevent illegal immigrants from travelling to the UK, than to remove them once they have arrived."* (ibid: 56)

This early interception will be conducted by the UK's own outposted immigration officials present in countries of origin and transit. UKBA further plans to 'build the capacity' of countries of transit and origin to manage migration through the provision of training and equipment, as well as sharing practices. It intends to set up a 'rapid response system' to deploy immigration specialists abroad to offer advice, support, and training to host country immigration officials. The impact on refugees of the UK's border control efforts aimed at decreasing irregular arrivals will be explored throughout this report.

The UK views itself to be at the forefront of the use of technology in border control and is in the process of identifying ten key partner countries with which to develop 'biometric relationships' to work on their migration agenda, including visa systems and data-sharing. A detailed examination of the use of the UK's use of technology in border control is included in Chapter Three of this report.

The inclusion of different government departments in immigration control is reflected in the cooperation between the Foreign and Commonwealth Office (FCO) and the Home Office on migration control. In early 2008, David Miliband, Secretary of State for Foreign and Commonwealth Affairs, outlined the FCO's strategic priorities, revealing the new focus on border controls. One of the essential services of the FCO is now to:

*"ensure, through a robust migration and visa policy, that UK borders are… closed to those who might cause harm or come here illegally"* [and to] *"promote with the EU and other partners effective international cooperation that supports the UK's border and migration objectives."*[16]

The Refugee Council is concerned at the lack of a human rights approach to border control, and in particular the absence of refugee protection in plans for stronger border controls.

## Europe's borders

There has been much media coverage of the attempts made by irregular migrants to get to the EU by boat, including their tragic death at sea. NGOs have highlighted human rights abuses occuring at border posts as well as the risk of indirect *refoulement* when EU States push migrants back to third countries such as Libya and Morocco.

Recommendations to identify and protect refugees in mixed flows are regularly being made at EU level. ECRE has published a comprehensive overview of the impact on refugees of the EU's approach to the prevention of irregular migration entitled 'Defending Refugees' Access to Protection In Europe', in which it:

*"urgently calls on EU countries to review and adapt all border management policies and operations in order to ensure the full respect of the principle of non-refoulement at its external borders."* (ECRE, 2007: 2)

The Refugee Council fully endorses ECRE's recommendations to improve refugees' access to protection in Europe. We would particularly highlight concerns around the impact on refugees' access to asylum of the EU agency responsible for operational co-ordination of the EU's external borders, known as FRONTEX. In evidence given to a House of Lords Inquiry into Frontex in 2007, the Refugee Council and ECRE called for protection considerations to be included in its land, air and sea operations.[17] We also highlighted the seriousness of including protection safeguards in agreements with third countries, some of which have records of human rights abuses and a lack of respect for the principle of *non-refoulement*. In addition, we called for an improvement in data collection and for the profiles (nationality, age, gender etc) of intercepted individuals to be made publically available.

## The future of European border control

The Refugee Council anticipates increased coordination at an EU level in relation to border control and the formulation of agreements with third countries. We hope that the European Commission's commitment to ensure access for those in need of protection as outlined in its 2008 Policy Plan on Asylum is fully realised.

*"Legitimate measures introduced to curb irregular migration and protect external borders should avoid preventing refugees' access to protection in the EU while ensuring a respect for fundamental rights of all migrants."* (European Commission, 2008: 3)

The EU's agenda for the 'external dimension', including stronger financial and technical support for third countries that host large numbers of asylum seekers, the establishment of an EU resettlement

scheme, the expansion of Regional Protection Programmes, and proposals for the examination of Protected Entry Procedures (PEPs) is not a focus of this report. However, the Refugee Council wishes to point out that it is supportive of the EU's efforts to enhance protection in third countries and is in particular supportive of an EU resettlement scheme. It is important that any attempt to manage refugee movements must be in addition to, and not a substitute for, safeguards that protect refugees arriving spontaneously.

## UNHCR's approach

The Refugee Council is pleased that UNHCR has given a high priority to the protection of refugees in the context of mixed migration movements (UNHCR, 2003f) and notes its concern that States tend to address asylum pressures through 'undifferentiated' interception practices (UNHCR, 2007c). UNHCR's approach to the issue as it evolves is explored below.

## EXCOM Conclusion on Protection Safeguards in Interception Measures

In 2003, UNHCR's Executive Committee published its Conclusion on Protection Safeguards in Interception Measures (UNHCR, 2003d). The Conclusion calls for the safe and humane treatment of intercepted persons with particular attention to the special needs of refugee women and children. It further calls for respect for the human rights of all intercepted persons, including the right to life and the right to seek and enjoy asylum in other countries. It recommends the training of all persons involved in implementing border controls, including both State and private actors, on the applicable standards of international law and required procedures. The need for durable solutions – integration, resettlement or return – for intercepted migrants was identified.

The Refugee Council notes that the Conclusion places responsibility for the protection needs of intercepted persons on "*the State within whose sovereign territory, or territorial waters, interception takes place*" and believes this must be viewed in the light of the prohibition on indirect and direct *refoulement* which applies to States acting outside of their own jurisdiction.

## UNHCR's Ten–Point Plan

In July 2006, UNHCR presented a Ten-Point Plan of Action on refugee protection and mixed migration. The Plan outlines a number of key areas in which comprehensive action is needed in order to address protection issues arising in situations of mixed migration. Meant as a practical tool, UNHCR has published a number of Ten-Point Plans relevant to the regional context – including Eastern and Southeastern Europe. For countries such as the UK that export their borders, the Refugee Council would welcome a toolkit addressed towards protection in the context of extra-territorial control.

## The High Commissioner's dialogue on mixed migration

In December 2007, the High Commissioner initiated a 'dialogue' on protection challenges within the context of mixed migratory flows and stated:

*"We must ensure that efforts to improve the situation of refugees in developing regions are not used as a pretext by the world's most prosperous countries to dump protection problems onto States with far fewer resources and much weaker capacity. Refugee protection in the South is necessary but it can never be an alternative to asylum in the North."* (UNHCR, 2007i)

UNHCR believes that international migration cannot be controlled through interception measures and migration management alone, but that a comprehensive solution must straddle policy areas, taking account of human rights, conflict resolution, reconstruction, environmental degradation and development. It has called on States to work together on a bilateral and regional level, to guarantee the human rights of migrants are protected and to offer viable alternatives to irregular movement, such as accessible, legal migratory channels.

## 'Protection space' within broader migration flows

More recently, UNHCR has abandoned the concept of the 'asylum-migration nexus' and chosen to replace it with the more straightforward notion of 'refugee protection and durable solutions in the context of international migration' (UNHCR, 2008b). Anxious that the nexus concept reinforced a misplaced focus on the South-to-North movement of people and neglected the role of the developing world as host to the overwhelming majority of the world's refugees, UNHCR has sought to broaden the agenda beyond the key concerns of industrialised States. UNHCR appears keen, however, for Western States to acknowledge links between their actions and the impact on neighbouring States.

This new rhetoric allows UNHCR to incorporate into its programme less traditional policy areas, in order to advocate for a more comprehensive and integrated approach. UNHCR now takes a more vocal stand on mixed flows that see refugees moving with other migrants, the mixed motivations of migrants, the onward movement of both recognised refugees and asylum seekers, the protection afforded to victims of trafficking, and the provision of legal migration opportunities to prevent irregular movement. According to Erika Feller, the Assistant High Commissioner for Protection, 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… Our involvement is designed to make some space in the broader management of this problem, some space for protection.*"[18]

## Human rights of non-refugees

Whilst this study focuses on refugees, the Refugee Council would reiterate that although a migrant may lack legal immigration status as a result of travelling irregularly, s/he is still protected by her or his fundamental rights as a human being. ECRE supports this position and demands that UNHCR guidelines on the humane treatment of all migrants, as defined in the 'Conclusions on Protection Safeguards in Interception Measures', be taken into account during interception activities (ECRE, 2004a). The Red Cross has echoed this concern about the inhumane and degrading treatment caused to migrants, including children, and urges "*all European and bordering States to respect the human dignity of all migrants who are coming to and staying in Europe for various reasons regardless of their ethnic origin, gender, religion, nationality or legal status and according to applicable International Law and to ensure them a fair and humane treatment*" (Red Cross EU Office, 2006: 2).

## International Organisation for Migration (IOM) programme and priorities

IOM is an intergovernmental organisation whose role is to facilitate humane and orderly migration, while also reducing irregular migration which, it believes, constitutes a significant threat to States' ability to implement their migration control programmes.

In many countries, IOM's activities focus on return and reintegration. IOM has been criticised by NGOs, such as Human Rights Watch, for its partnerships with States that lack legal frameworks and infrastructures for refugees and that have poor human rights records, including in relation to migrants. Where no effective asylum regime exists, IOM's critics assert that it is impossible to know if the 'stranded migrants' assisted by IOM do, in fact, have protection needs.

IOM conducts information campaigns in countries of origin and transit to promote repatriation, and to warn of the dangers of trafficking and irregular travel. IOM also collects information on irregular migration flows and carries out research into the demand for irregular migration.

Refugee Council believes that IOM shares with UNHCR a responsibility to ensure that humanitarian concerns are taken into account by States in the implementation of measures to control irregular migration. We share Human Rights Watch's concern that IOM's lack of a human rights based approach means that the migrants it encounters, including refugees, will not be afforded appropriate procedural safeguards.

## Forced returns as a non-arrival policy

The Refugee Council notes that the UK government's asylum policy is overwhelmingly focused on the return of those who have been refused asylum, and the introduction of measures to limit the State's responsibilities to those who cannot return but have not been granted status in the UK. The Refugee Council has criticised the forced return of refused asylum seekers to a number of countries that, even by conservative estimates are considered unsafe, such as Iraq and Zimbabwe. The government has deliberately embarked upon such returns in order to send a 'message' to deter future arrivals. The Refugee Council believes that forced return should not be used as a message to suggest to populations, that include individuals suffering persecution and human rights violations, that they should not leave the country where they are at risk in order to seek sanctuary in the UK.

## Neglect for international obligations and responsibility sharing

The Refugee Council believes that by preventing asylum seekers from reaching the UK, the Government is shifting responsibility for refugees onto other countries, often those that are least able to provide them with the protection they need. As immigration controls increase on some routes, they become impassable, and people seek new routes of entry resulting in a displacement effect. This effect has been recognised by the UK government[19], but it

continues to intercept in States, such as Kenya, which border refugee-producing countries and already host the majority of world's refugees (UNHCR, 2007b). By preventing refugees from leaving underdeveloped and poorly resourced countries, the UK increases the social and economic costs they are forced to bear (Refugee Council and Oxfam GB, 2005). Displacing refugees onto poor countries in the region undermines the notion of burden-sharing upon which the international refugee protection system was initially conceived.

## Summary

This chapter has outlined the context that refugees find themselves in when trying to obtain protection in Europe. The research that is presented in subsequent chapters of the report explores the experiences of refugees and those who work with refugees, as well as agencies tasked with enforcing extra-territorial controls, in order to assess whether our borders are protection-sensitive.

5 Article 1 A(2) of the 1951 convention relating to the Status of Refugees cites the reasons as: As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

6. www.ecre.org/access_to_europe [accessed 31 October 2008].

7 Figures sourced from online population database: United Nations, Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, 2006. Trends in Total Migrant Stock: the 2005 revision. [Online] Available at: http://esa.un.org/migration/index.asp?panel=1 [accessed 27 October 2008].

8 In 1960 refugees constituted only 2.9 per cent of international migrants, increasing to only 7.1 per cent by 2005. Source: Ibid, [accessed 27 October 2008].

9 At the end of 2007, the Middle East and North Africa region hosted a quarter of all refugees (approximately 2,700,000 refugees) (UNHCR, 2007b: 7).

10 In Europe, the number of international migrants has increased significantly, particularly in the 1990s. Between 1970 and 2000, their numbers rose from 19 million to 33 million, an increase of 14 million (IOM, 2005: 381). During the same period, refugee numbers in Europe rose by only 1.8 million (United Nations, 2006).

11 According to UNHCR statistics, annual asylum claims increased from 13,000 in the 1970s to almost 700,000 by 1992 (UNHCR, 1997 cited in Gibney, 2005: 5).

12 According to Gibney "non-arrival measures" aim directly to impede access to asylum (Gibney, 2005: 4).

13 Website of the Prime Minister's Office, 2007. Statement on security by Gordon Brown to parliament. [Online] 25 July. Available at: www.number10.gov.uk/Page12675 [accessed on 28 October 2008].

14 Home Office press release, 2008. Smugglers feel the force. [Online] 8 July. Available at: www.whitehallpages.net/modules.php?op=modload&name=News&file=article&sid=115394&mode=thread&order=0&thold=0 [accessed on 30 October 2008].

15 Home Office press release, 2008. Launch of Britain's new Unified Border Agency. [Online] 3 April. Available at: http://press.homeoffice.gov.uk/press-releases/launch-of-ukba [accessed on 30 October 2008].

16 Foreign and Commonwealth Office, 2008. Better World, Better Britain. [Leaflet].

17 For more information see Refugee Council and the European Council on Refugees and Exiles (ECRE), 2007. *Joint Response to Select Committee on the European Union Sub-Committee F (Home Affairs): Frontex Inquiry*. [Online] Available at: www.refugeecouncil.org.uk/policy/responses/2007/frontex.htm [accessed 17 November 2008].

18 UNHCR. 2007. Q&A: Why UNHCR cares about migration flows. [Online] Available at: www.unhcr.org/cgi-bin/texis/ vtx/asylum ?page=interview [accessed 28 October 2008].

19 In February 2003, following the closure of the Sangatte refugee centre and the introduction of UK immigration controls and detection technology in France, Home Secretary David Blunkett stated "*Of course we are alert to the potential for displacement*". Home Office press release, 2003. UK/French cooperation key to combating terrorism and illegal migration, 4 Feb.

# The legal dimensions

**Any analysis of the UK's extra-territorial border controls must be framed within an accurate legal context in order to underline the obligations and responsibilities incumbent on the State. In order to achieve this, we asked Guy Goodwin-Gill, international legal expert and valued member of our project advisory group, to conduct an assessment of the UK's obligations under international refugee and human rights law in relation to border control and access to protection. We hope that this analysis will form a key contribution to the debate on migration control and will serve as a useful tool to legal practitioners, campaigners and policy makers seeking clarity on a much-disputed area of law.**

## A legal analysis

**Guy S. Goodwin-Gill, Senior Research Fellow, All Souls College, Oxford, and Professor of International Refugee Law, Oxford University**

In this 60th anniversary year of the UN General Assembly's Universal Declaration of Human Rights (UDHR), the status of one article in particular demands attention. Article 14(1) declares that, "*Everyone has the right to seek and to enjoy in other countries asylum from persecution*". But despite much international human rights law-making over the last six decades, the right to asylum, considered as an individual entitlement rather than just the privilege of the State, remains very much where it was in 1948.

Back in 1948, many States saw no need for a right to asylum. The United Kingdom's own proposals for the UDHR contained nothing on asylum, and when France nevertheless proposed text which would have included the right to seek, *and to be granted*, asylum, the UK led the opposition. In its view, no foreigner could claim the right to enter a State, unless it were granted by treaty. To this day, though some regional developments are helping to fill the gap, there is still no general treaty provision on asylum as a human right.[20]

Yet human rights and refugee law have themselves developed, governing many aspects of the relationship between the State and individuals within that State's territory or within the jurisdiction, custody, or control of the State. Thus, treaty obligations or obligations which are binding as a matter of customary international law, significantly limit a State's options when it comes to curtailing or obstructing the movement of people in search of refuge.

The 1951 Convention and 1967 Protocol relating to the Status of Refugees, now ratified by some 147 States, provide positive endorsement of a refugee definition which, in the face of the challenges of ethnic and gender-based persecution, has proven itself flexible enough to encompass new groups of refugees. The Convention and Protocol also lay down the fundamental principles of refugee protection – freedom from penalties for illegal entry (Article 31); freedom from expulsion, save on the most serious grounds (Article 32); and, of course, freedom from *refoulement*, that is, return in any manner whatsoever to a territory in which the refugee would be at risk of persecution.

But there are gaps in the Convention protection regime – grey areas, and matters on which the Contracting States did not anticipate a need for regulation. For example, the Convention does not prescribe which of many possible transit States should assume responsibility for deciding a claim to refugee status and asylum, while many Convention benefits, being oriented to successful settlement in the country of refuge, have a strong, sometimes exclusive territorial focus. In this apparently unregulated area, States such as the United Kingdom, other EU Members, Australia, Canada and the USA, can often be found engaged in operations to curb irregular migratory movements, including (though generally without differentiating) those undertaken by people in search of refuge and protection.

Globalisation may not have brought conflict and the need for protection to an end, but it seems certainly to have enhanced the opportunities to travel further afield. The question is, whether anything remains

even of the right 'to seek' asylum. The measures now employed to obstruct asylum seekers, as outlined in this report, raise critical questions regarding the human rights obligations of States when acting outside their territory, and whether individuals in that uncertain no-man's land called transit, are still 'rights-holders' and capable, at least in principle, of claiming effective protection. This report illustrates the very great practical difficulties facing asylum seekers today.

In fact, however, developments in the international law of State responsibility, coupled with those in the human rights field, permeate the range of activities which States may engage in beyond their borders. 'Effective protection' is not a legal concept as such, but a standard of compliance constructed with the refugee, the asylum seeker, human rights and solutions very much in mind.[21] The background to the notion is the general obligation of the State to respect and ensure the human rights of everyone within its territory or within its power or effective control.

For the United Kingdom, this is well illustrated by the recent House of Lords judgment in *R (Al Skeini and others) v. Secretary of State for Defence* [2007] UKHL 26, where the Court held that those in the 'custody and control' of the British armed forces in Iraq were protected by the Human Rights Act and therefore by the European Convention. Similarly, in *R (on the application of 'B') v. Secretary of State for Foreign Affairs* [2004] EWCA Civ. 1344, [2005] QB 643 – Afghan minors seeking protection in the British Consulate in Melbourne – the court again recognised, if not on the facts in the instant case, that the Human Rights Act was capable of applying to the actions of officials, for example, where there was an immediate and severe threat to the physical safety of individuals seeking refuge in diplomatic premises.

As a matter of general international law, it is undisputed that the State is responsible for the conduct of its organs and agents wherever they occur. The International Law Commission's articles on the responsibility of States for internationally wrongful acts make this abundantly clear.[22] Even when it exceeds its authority or acts contrary to instructions, the organ or agent exercising elements of governmental authority acts for the State.[23]

In principle, international responsibility may be engaged wherever the conduct of its organs or agents (the military, the police, officials generally) is *attributable* to the United Kingdom, and that conduct breaches an obligation binding on the UK. To take the simplest example, the United Kingdom may no more torture foreign nationals abroad, than it may 'at home'. The 1984 United Nations Convention against Torture (CAT84) obliges a State party to take effective measures to prevent torture in any territory under its jurisdiction, but also obliges it to establish jurisdiction over all acts of torture where the alleged offender is one of its own nationals.

*Non-refoulement* is precisely the sort of obligation which is engaged by extra-territorial action, for it prohibits a particular result – return to persecution or risk of torture – by whatever means, direct or indirect, and wherever the relevant action takes place.[24] A State which intercepts a boat carrying refugees on the high seas and which returns them directly to their country of origin violates the principle. The fact of interception – the taking of control and custody – establishes the necessary juridical link between the State and the consequence. Equally, an intercepting State which disembarks refugees and asylum seekers in a country which it knows or reasonably expects will *refoule* them becomes party to that act. It aids or assists in the commission of the prohibited conduct.[25] It is responsible, as is the State which actually does the deed. Moreover, no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, to an international organisation or to a private agent such as a carrier.

Building on the refugee protection principle of non-refoulement, Article 3 of CAT84 expressly prohibits return to risk of torture in another State, just as the doctrine established by the European Court of Human Rights around Article 3 of the European Convention on Human Rights ('No one shall be subjected to torture or to inhuman or degrading treatment of punishment') has also underlined the *absolute* nature of protection against torture, including against return to torture. As the Grand Chamber of the European Court of Human Rights unanimously reiterated this year, in *Saadi v Italy* (Appl. 37201/06, 28 February 2008), there are no exceptions to this principle, and States must find alternative means to deal with so-called security risks, which are compatible with the protection of human rights.

States party to the European Convention have undertaken very distinct obligations – to protect the right to life, to prohibit and protect against torture,

to protect life and liberty, to provide a fair trial, and to ensure respect for private and family life, among others. European human rights doctrine recognises that, depending on the facts, these individual rights may have a limiting impact on the sovereign competence of States to determine who may enter and remain in their territory. In addition, the European Court of Human Rights has recognised that the European Convention can apply to States in relation to extra-territorial activities, though there are limitations, and that States cannot 'contract out' of their responsibilities, for example, by transferring governmental functions to an international organisation, or a private company. The primary responsibility thus remains with the State.

Other international obligations relevant to the policy and conduct of United Kingdom officials abroad can be found in treaties, such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD65), the 1966 International Covenant on Civil and Political Rights (ICCPR66), and the 1989 Convention on the Rights of the Child (CRC89). Article 7 ICCPR66 provides protection not only against torture, but also against cruel, inhuman or degrading treatment or punishment, while Article 3 CRC89 declares that in all actions affecting children, 'the best interests of the child shall be a primary consideration'. In ratifying ICERD65, the United Kingdom undertook to eliminate and not to engage in racial discrimination. Indeed, the Race Relations Acts, with their foundation in the UK's international obligations, were an important factor in the *Roma Rights* case.[26] Here, in a challenge to UK pre-screening at Prague Airport, the House of Lords found evidence of racial discrimination and racial profiling, contrary to British law and the UK's treaty obligations.

This case illustrates a number of legal issues relevant to the formulation of policy towards the movement of people in search of refuge. Even if the right to be granted asylum is still not formally recognized by States, nevertheless there are certain measures which States may not take in order to stop people from seeking asylum. Racial discrimination is prohibited, as are measures calculated or which have the effect of exposing the individual to the risk of torture, or cruel, inhuman or degrading treatment or punishment.

Clearly, however, the nature of airport liaison officer and similar operations in distant airports will not always allow issues and solutions to be properly identified, including rights and the need for protection. If the United Kingdom's human rights and refugee protection obligations are to be fulfilled effectively and in good faith, more serious attention must be paid to the general obligation of co-operation and support which States have undertaken in regard to countries admitting or receiving refugees. As the Turkish representative put it at the 1989 UNHCR Executive Committee meeting, the refugee problem, 'was such that it was no longer possible to disassociate international protection from international co-operation and assistance.'

Human rights and refugee protection obligations such as those illustrated above are not contingent, but neither are they self-executing. The United Kingdom has committed itself to protect, and the Human Rights Act is a clear legislative statement of intent. A decade or so later, however, it is by no means clear that specific human rights obligations and what they imply are integrated sufficiently, or at all, into policy and practice. In short, a human rights culture throughout government seems to be still some way off.

20 These developments include the EU's Qualification Directive, which links entitlement to a residence permit to recognition as a refugee, and the extension of protection under human rights instruments, such as the European Convention and the Inter-American Convention on Human Rights.

21 For more information on 'effective protection' see Chapter Seven on permanent transition.

22 The ILC articles are annexed to UNGA resolution 56/83, 'Responsibility of States for internationally wrongful acts', 12 December 2001.

23 See arts. 4-11 generally, and arts. 7, 9, in particular; above note.

24 Goodwin-Gill, G. S. & McAdam, J., The Refugee in International Law, Oxford: Oxford University Press, 3rd edn., 2007, 244-53.

25 Art. 16 of the ILC Articles on State Responsibility (above n. 26), 'Aid or assistance in the commission of an internationally wrongful act', provides: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.' See also, Goodwin-Gill & McAdam, The Refugee in International Law, above note, 252-3, 389-90.

26 R (European Roma Rights Centre) v Immigration Officer, Prague Airport (UNHCR Intervening) [2005] 2 AC 1, [2004] UKHL 55.

# **Chapter Three** – Visa restrictions and e-Borders

**Current UK border control policy is driven by a desire to move migration control as far 'upstream' as possible. The goal is to identify irregular movements and "*stop or control them before they reach the UK*" (Cabinet Office, 2007: 8). Overseas border control activities are a major element of the UK's migration management programme, and over recent years they have moved closer to refugees' regions of origin. This section will look at some of the main border control measures implemented by the UK in refugee countries of origin or transit, that have made it harder for refugees to leave the country in which they face persecution and seek protection in Europe.**

*"By requiring a refugee to obtain proper travel documentation before fleeing his or her country to seek asylum in another country, States in fact ignore the very problems which give rise to the need for refugee protection and, in effect, deny the possibility of asylum to some refugees."* (UNHCR, 2000a: 10)

*"They either come to Europe or die trying* [...] *they don't have another option."* (DF, RCO representative London)

*"I had no choice, I could not have used the Zimbabwean passport and come into the UK. I couldn't."* (KI, refugee, Leeds)

## Visa restrictions

The UK maintains a list of countries whose nationals are required to obtain a visa before travelling to the UK regardless of their reasons for wanting to enter the UK; these are known as 'visa nationals'. In addition, for certain purposes, such as a family reunion, obtaining entry clearance is mandatory for all non-nationals. This allows the Government to conduct checks whilst the traveller is still in his or her country of departure. At different points during the journey, through a combination of control measures including airline liaison officers, carrier sanctions and port police, this traveller can be checked by a variety of actors, positioned at key points, to decide if s/he is admissible to the UK and to prevent entry if necessary. In this way, visa restrictions form the frontline of immigration control and allow migration management to become detached from the physical border and to function efficiently at every stage along an individual's journey to the UK.

Visa restrictions allow States to screen out undesirable migrants, such as those seeking to conceal their identity for criminal purposes or those wishing to claim asylum in the UK, while facilitating the entry of others. In April 2008, the Border and Immigration Agency, UKvisas and Revenue and Customs were brought together to form the UK Border Agency. Hence, the UKBA now operates a visa service issuing visas at UK Embassies, High Commissions and Consulates abroad. Entry Clearance Officers (ECOs) based in visa offices overseas make decisions on visa or entry clearance applications.

## Visa regimes as way to control asylum numbers

The UK's visa restrictions do not apply uniformly to all foreign nationals but instead are informed by the State's political, economic and historic ties. UKBA asserts that country visa regimes are normally imposed where there is evidence of the systematic abuse of immigration controls by the nationals of a particular country (Home Office, 2002). A glance at the visa restrictions imposed over the past 20 years suggests that they have been used to stop potential asylum seekers reaching UK territory:

1. In 1987 the government imposed a visa restriction on Sri Lankan nationals following an increase in the arrival of Tamil asylum seekers;
2. In 1989 the government imposed a visa restriction on Turkish nationals in response to a rapid increase in the arrival of Kurds;
3. In 1992 nationals of the former Yugoslavia and in 1994 nationals of Sierra Leone and the Ivory Coast were required to obtain visas to travel to

the UK (Gibney, 2005; Sianni, 2003; Morrison and Crosland, 2001).

The introduction in 2003 of a visa requirement for citizens of Zimbabwe was in direct response to the large numbers of asylum seekers from the country. The measure was effective as the number of asylum seekers from Zimbabwe fell from 7,655 in 2002 to 3,295 in 2003 (Home Office, 2004: 3). The Government has cited this as an example of success in tackling 'abuse' of the asylum system, despite the fact that 2,240 Zimbabweans were recognised by the UK as Convention Refugees in the year before the visa requirement was introduced (ICAR, 2006: 1).

The Government does not hesitate in linking the imposition of Airport Transit Visas (ATVs) with a reduction in asylum numbers. In 2005 it claimed that:

*"we have substantially increased the nationalities that require visas just to pass through the UK. This has had a significant impact on unfounded asylum applications."* (Home Office, 2005: 25)

The Refugee Council believes that it is inappropriate for the Government to use visa restrictions as a mechanism to curb the arrival of refugees and asylum seekers. To use visas in this way undermines the right to seek asylum and threatens the international protection system.

## The visa waiver test

In 1991, the nationals of just 19 countries were required to obtain visas regardless of their reason for travelling to the UK; that number is now 108.[27] In July 2008, UKBA conducted a visa waiver test to review all non-European countries against a set of strict criteria to determine the level of risk they pose to the UK in terms of illegal migration, crime and security. Following the test, UKBA proposed new visa restrictions for 11 countries, which would extend the 'visa net' over 80 per cent of the world's population.[28] Two of the new visa countries, Malaysia and South Africa, are countries used by refugees, including one of our respondents, to enable their irregular movement to the UK for the purpose of claiming asylum. The Government now intends to work with these countries over the next six months to reduce the risk they pose.[29]

We can assume, from the criteria used to judge the risk posed, that a country on this visa list will have to, inter-alia, increase co-operation on the readmission of its nationals from the UK and show adequate efforts to address 'immigration abuse', including 'misuse' of the asylum system. This use of visa restrictions in the development of relations with third countries is not new. The EU and its individual Member States frequently promise to liberalise visa requirements for non-EU countries in exchange for readmission agreements.[30] Such agreements which facilitate the return of nationals of the receiving State and third country nationals, including failed asylum seekers that have passed through the receiving State, have serious implications for refugee protection. The Refugee Council believes that third country nationals should never be returned under such agreements and nationals should only be returned where their life and safety are not at risk.

## Access to visas

During World War II it was common practice to issue 'protective passports' or transit visas to Jewish refugees, which either protected their holders from harm pending emigration, or enabled them to flee occupied territories.[31] In theory, humanitarian visas are available from UK Consulates.[32] The UK's system is, however, extremely limited, in part because it requires the applicant to have already left their country of origin (without which they could not be a refugee). In practice, humanitarian visas are not widely used and it is now impossible for an individual to enter the UK legally for the purpose of claiming asylum.[33]

In some cases, refugees are not even able to leave their country of origin due to the passport or visa requirements of other States. The process of obtaining a visa requires an applicant to present a valid passport as well as supporting documentation such as, in the case of a visitors visa, bank statements, a letter from an employer and a letter from the sponsor in the UK. Most categories under the immigration rules require the applicant to show that they have an intention to return home at the end of their stay. By definition refugees cannot meet that criteria. Therefore even if they do have a travel document they are forced to lie about their intentions in order to get a visa to come to the UK. Many refugees face a fundamental problem in that they are unable to approach State authorities to obtain travel documents and visas for fear of the risk this would pose to their lives. Where the State apparatus has completely collapsed, as in the case of Somalia, there is no agency to issue passports. Our respondents described situations where they were denied passports due to targeted discrimination against a minority group, or corruption within State systems:

*"I couldn't [come with a passport] because in order to get passport you should pass military service for two years, you should serve military service and according to our religion we won't do this."* (SV)

*"When Saddam [was] president is no giving to anybody passport. Yeah, if somebody is rich man or he is in party, you know, is giving, or is in business. But anybody, no is given passport."* (AD, refugee, Leeds)

In some countries, such as Iran, women are unable to obtain travel documents without permission from a male relative, and some are thus forced to rely on forged documents to leave their country of origin. Those refugees who do have identification documents are often obliged to leave them behind when they flee to the neighbouring country because they are in a rush to leave, are afraid that they will lose them, or suspect that they may robbed along the route.

*"someone who has run from a civil war they don't have the time to carry all the documents they need to carry, some of them have been robbed on the road while they were coming there. Most them don't have any kind of documentation."* (DF, RCO representative, London)

Applicants will be refused a visa if they fail to meet the requirements of the immigration rules, including seeking entry for a purpose not covered by the rules, failure to produce a valid passport or national identity document, or the use of false documents. Unable to access the visa route legitimately and yet still seeking a safe passage to the UK, some refugees will be forced to submit a visa application under false pretences. Those who apply for a visa and reveal, or who are suspected of having, an intention to seek asylum, will almost certainly have their application refused. One of our respondents, an elderly Somali woman who has refugee status in the UK, attempted to gain entry to the UK by applying for a visit visa at the British Embassy in Ethiopia. She was repeatedly refused and eventually reached the UK after an extremely dangerous journey that lasted two years:

*"In Ethiopia they […] give negative... I don't know the reason, they give three times."* (SA, refugee, London)

## Visas as a deterrent

It is still unclear what impact visa requirements have on irregular migration, but there is no evidence to suggest that they deter refugees from travelling altogether. The European Commission has admitted that it is not clear:

*"whether or not there is a direct link between the imposition of visa requirements and a slowing down of illegal immigration. On the contrary it seems difficult to prove a link between the lifting of visa requirements and a subsequent increase of illegal immigration."* (European Commission 2004a: 13)

Imposing visas on nationals of refugee-producing countries may provide a short-term dip in asylum numbers in the UK, but those numbers are likely to recover as refugees find alternative, irregular forms of migration in order to enter the country to seek protection. Our research found that smugglers adapted quickly to the closing down of particular routes and found new ways to reach the UK. One of our respondents explained how quickly alternative routes were created when visa restrictions where imposed on Zimbabwean nationals:

*"When the visa restrictions where imposed I stopped visiting the [migrants'] hostel ... I thought there would be no new Zimbabweans arriving. Then after Christmas I heard rumours that there were Zimbabweans up there so towards the end of January I went back. I was amazed; there were a lot of new arrivals. They had all come through new directions. I was amazed of how fast new routes had been established by agents."* (SH, RCO representative, London)

As visa restrictions blocked the legal route to Europe, many of our respondents fled instead to neighbouring countries where they did not need a visa, including Kenya, Pakistan, Ethiopia, South Africa, Syria and Turkey. As this report has already illustrated, these countries not only host the majority of the world's refugees, but have been widely criticised for their treatment of migrants, particularly the lack of adequate procedures for providing international protection to refugees (Refugee Council, 2003a; 2003b; ICMPD, 2007; Helsinki Citizens' Assembly, 2007).

Upon finding themselves in a country that does not provide adequate protection, our research findings confirmed that many refugees are forced into irregular migration in order to find safety elsewhere. Some will continue on their route without documents and forge a dangerous, clandestine path through Europe, hidden under a lorry or concealed within cargo holds, dodging border controls along the way.

*"Most of them – I'm not saying everybody but I would say 92 per cent of them, they are with no documents."* (AA, RCO representative, Leeds)

Others find a way to acquire false documentation, either buying a false passport for a country that does not require a visa for the UK, or purchasing a valid visa using false supporting documentation. The market for forged documents within countries bordering refugee-producing States is burgeoning and, according to UKBA, there are more forged passports in circulation than ever before. It appears that some refugees can use money and connections to purchase the necessary documentation to enable them to travel to Europe and the UK in safety.

*"As Pakistan is totally corrupted you can buy everything and you can sell everything – and that's a freedom of corruption there. That's easy for those agents to make any false documents."* (AFM, RCO representative, London)

By denying them a legal and safe route to protection, the UK and other EU States are obliging refugees to participate in illegal activities in order to reach a country in which they can claim asylum. In so doing, these countries are feeding an international criminal industry that is based on the smuggling of individuals desperate to leave the country of persecution (see Chapter Six).

## The case of Zimbabweans and passports

Our research discovered that Zimbabwean refugees are reliant on Malawian and South African passports in order to flee the region and seek protection elsewhere. Corruption in the countries bordering Zimbabwe means that refugees are able to falsely acquire documents, although pressure from the UK to improve document issuance and verification is making this more difficult.[34] Increased border controls at South African airports have made it significantly harder for Zimbabweans to leave the country using a South African passport, as they are now questioned and required to provide supporting documentation to prove their nationality.

As the South African route becomes more difficult, Zimbabwean refugees are increasingly using passports from Botswana, Malawi and Zambia. If they succeed in making it to the UK with the passport of another State, then they must prove they are not a national of that State or risk being returned to that State by the UK Government, and eventually refouled to Zimbabwe. UKBA frequently relies on the fact that a Zimbabwean asylum seeker has arrived on a Malawian passport in order to dispute the nationality, and hence the credibility, of the applicant. Considered to be Malawian, their asylum claim is rejected and they are returned to Malawi. Our research revealed that, rather than being returned to the UK, these Zimbabwean refugees are admitted to Malawi, detained and charged by the Malawian authorities with the crime of acquiring false documents. They are then frequently *refouled* to Zimbabwe and little is known about their fate at the hands of the Zimbabwean authorities.

## Destruction of documents and lack of documents

A number of our respondents did manage to fraudulently acquire documents with the help of an agent who then took responsibility for the papers during the journey. Upon arrival in the UK, the agent then vanished, leaving the refugee without documentation.

UKBA does not distinguish between refugees and other 'high risk' travellers attempting to enter the UK irregularly for the purpose of committing a crime.

*"The system of overseas checks, including the existing visa regimes and the Airline Liaison Officer (ALO) network, allows border agencies to filter out high risk or inadequately documented individuals before they arrive in the UK."* (Cabinet Office, 2007: 21)

It has long been a criminal offence to seek to enter the UK in contravention of immigration laws but, in recent years, the Government has significantly increased the number of criminal offences under which individuals may be prosecuted for irregular entry. Under Article 31 of the 1951 Refugee Convention, refugees should not have any penalties imposed upon them as a result of entering or being present in the UK in contravention of immigration laws if there is a good reason why they are/were unable to comply with those laws; and provided they present themselves to the domestic authorities without delay. The Government introduced a defence for refugees in Section 31 of the Immigration and Asylum Act 1999 but the scope of this defence is much narrower than the protection afforded under the 1951 Refugee Convention. Under Section 2 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, it is a criminal offence "*if at a leave or asylum interview he does not have with him an immigration document*". A number of

prosecutions have been brought where a passenger had failed to produce a valid passport at interview or on arrival, including where smugglers had destroyed or confiscated the travel document (both false or valid) on which the passenger had travelled. Complying with the instructions or advice of a smuggler, as some of our respondents did, only constitutes a reasonable defence if it is unreasonable in all the circumstances to expect non-compliance. In October 2006, the Lord Chief Justice ruled[35] that a conviction under Section 2 would not apply if at no stage in the defendant's journey to the UK did s/he use a valid passport.[36] However, if a valid passport was used at some stage of the journey, and it is not presented when required, perhaps because it has been destroyed or given back to the smuggler, the offence may be committed. Furthermore, under Section 8(3)(a) of the 2004 Act, UKBA decision makers and judges are obliged to consider whether failure to produce a passport without reasonable explanation may damage the credibility of the asylum applicant.

In the Refugee Council's view, the failure to provide a valid passport must not impact on the asylum claim of the individual, and the prosecution of asylum seekers under Section 2 is entirely incompatible with Article 31 of the 1951 Refugee Convention. Our objection to this treatment of asylum seekers has been echoed by one of the most senior judges in England and Wales. Lord Justice Sedley wrote:

*"As is obvious, many people fleeing persecution have no option but to travel on false papers. An enactment which may have the effect of prescriptively requiring a judge to disbelieve an individual's otherwise credible story, and so possibly send them back to torture or death, is a serious invasion of judicial independence."* [37]

## Risk Assessment Units at Entry Clearance Posts

UKBA is committed to targeting inadequately documented travellers and is developing its enforcement programme overseas. Risk Assessment Units (RAUs) are based in high-volume, 'high-risk' posts, and work with the host country police to deter fraud and forgery by arresting those submitting forged documents for visas. It is not known how many of those arrested wished to make a claim for asylum in the UK, nor what has happened to them after their arrest. UKBA intends to expand this programme to other posts where fraud is common, bringing the total to approximately 25 RAUs worldwide.[38]

Our research shows that it is often impossible, or extremely dangerous, for refugees to acquire the necessary documentation from their own State authorities or from UK visa offices, that would enable them to travel to the UK legally and safely. As this report has already indicated, it is wrong to penalise refugees for their irregular arrival in the UK. UNHCR has recognised the inherent difficulty[39] in acquiring documents for the purpose of travelling legally to Europe and stresses that asylum seekers and refugees must not be liable to criminal prosecution or penalty for irregular entry or presence in the State. Whilst targeting the fraudulent use of documentation is a legitimate Government aim, the consequences for people fleeing persecution can be very serious. These measures risk trapping persecuted individuals within the country of origin, and exposing them to further human rights violations or inhumane or degrading treatment.

## Technology and access to asylum

Within Europe, the UK is leading the way in developing technology to make visa applications a more secure tool for the purpose of monitoring and controlling immigration. The movement towards an electronic system of border controls is largely motivated by concerns about security, and is heavily influenced by the conclusions of the US 9/11 Commission (National Commission On Terrorist Attacks Upon The United States 2004). The conclusions attributed the failure to pre-empt 9/11, in part, to inadequate border controls and the report suggested that up to 15 hijackers could have been intercepted at the border had more effective systems been in place. The Commission suggested that if the border control had been able to identify fraudulent documentation the attack might never have happened.

Establishing passenger identity, monitoring that identity through electronic surveillance and sharing intelligence between airlines and State authorities, have become the new tools of a border control system focused on identifying high risk passengers before they reach UK territory, while also facilitating legitimate travel. The Home Office has described a "*triple ring of border security*"[40] that starts on foreign territory, is reinforced at the border and then completed inside the country itself. Each of these checkpoints is an opportunity to expose fraudulent documents or track suspicious behaviour.

## Biometrics

The UK government first began collecting biometrics in 1993 to 'fix' the identity of asylum applicants in order to reduce 'abuse' of the system. The Nationality, Immigration and Asylum Act 2002[41] allows the UK to require people to provide biometric information when applying to enter or remain in the country. In February 2004, new provisions were introduced to extend the Government's fingerprinting powers.[42] In July 2003, the Home Office conducted a trial of compulsory fingerprinting of visa applicants in Sri Lanka.[43] The project cost £1million and during six months 14,000 sets of fingerprints were taken but only seven undocumented asylum applicants were identified and a further two people were prosecuted for destroying their passports after entering the UK.[44] Shortly afterwards, UKBA ran a number of pilot projects, including Project Semaphore,[45] to test biometric visa issuance as part of a new system of electronic border controls on a number of key routes in and out of the UK. The pilots allowed UKBA to check passenger details against border agency and police databases in the UK, in order to highlight any suspect individuals. The pilots were considered a success[46] and the Government felt confident that biometric data collection held the key to managing migration through the monitoring of individual identities.

*"biometrics… are now well established as the most secure way of fixing an individual to a unique identity."* (Home Office, 2006: 6)

## e-Borders

The e-Borders programme was set up in 2004 as the overseas element of the Home Office's risk-based system of identity management. The programme consists of a multi-agency unit, the e-Borders Operations Centre (eBOC), which brings together staff from UKBA, Revenue and Customs, Serious Organised Crime Agency (SOCA) and the police. It was established with the intention of creating a single pool of information provided by air, sea and rail carriers, on suspect identities and risky individuals, including those who had committed immigration offences, to be accessed quickly and easily by authorised officers for the purpose of denying entry to unwanted migrants.

The first threshold in the alert system is at the point of visa issuance. The global collection of biometric data from visa applicants was formally launched in 2006 and has now been rolled out across 135 countries covering around 75 per cent of the world's population. All UK visa applicants, apart from those benefiting from a limited number of exemptions,[47] are required to provide biometric data (ten-digit fingerscans and a digital photograph) as part of the application process. This data is then cross-matched against immigration databases in the UK to reveal if the applicant has already been fingerprinted, why and with which identity. A Memorandum of Understanding between UKvisas and the National Police Improvement Agency in August 2007 also enables visa staff to check fingerprint data against criminal and counter-terrorist records (Cabinet Office, 2007). Applicants are scored against risk profiles in order to identify a potential security risk, and compared against a 'watch list' of suspects and previous offenders. So far, more than 2 million sets of fingerprints have been recorded.[48]

While travel is underway, eBOC currently collects the biometric data from visa issuance points, along with electronic Advanced Passenger Information (API) data and Other Passenger Information (OPI) direct from carriers. This information is subjected to further electronic background checks so that UK immigration control staff posted overseas can advise carriers not to board a suspect individual, even at the last minute. A passenger's passport is swiped at the airport when entering the UK in order to capture the biometric data stored in the visa. The individual's record is retrieved from a database and the fingerprints are checked by the system against those of the visa holder. Not only are passengers electronically monitored as they enter the UK but, in the future, e-Borders will also record departure information so that future visa applications can be informed by past compliance with immigration requirements. The Government hopes that e-Borders will cover the majority of passenger movements by 2009 and 95 per cent by 2011 (Home Office, 2007a: 16).

According to UKBA, biometric data collection allows the Government to 'fix' an identity at the earliest opportunity so that it can be referred to at any future point. This emphasis on 'fixing' identity and then 'locking' it to the individual passenger is key to the e-Borders programme, as it supposedly undermines efforts to travel irregularly on false documents and makes it easier for the Home Office to identify and remove migrants who arrive without any identification document at all.

*"New fingerprint visas are fast becoming our first line of defence against illegal immigration. By establishing people's identities beyond any doubt before they enter the UK we can stamp out multiple*

*applications and identity fraud – ensuring entry only to those who are welcome."*[49]

## Effectiveness of e-Borders

Confidence in the e-Borders system stems from the Government's faith in technology and UKBA's belief that the electronic system is grounded in the faultless analysis of 'intelligence'. However, history has taught us that whenever Governments invest in new technology to control their borders, smugglers and traffickers soon find ways to circumvent them. Our conversations with airline carriers in Turkey suggest that the use of biometric identifiers is no exception. Their document handlers are increasingly confronted with top quality forged documents, including passports and visas, made using the latest technology developed by black market manufacturers. While demand continues there will always be a market for forged documents. As the technology develops the cost will simply increase. An even greater proportion of refugees will either be forced to pay large sums to unscrupulous agents or be obliged to find a cheaper, more dangerous route to safety.

It is difficult to judge whether the introduction of biometric controls has had a significant impact on the ability of refugees to acquire a visa. Visa applications for 2007 were approximately five to ten per cent lower than the same period the previous year. UKvisas stated that biometrics have had a short-term impact on demand in countries where they have been introduced, but that applications recovered to previous levels within a couple of months.[50] There is no way of knowing how many of those who were refused visas were refused because it was suspected that they would later claim asylum in the UK. This information is not collected by entry clearance officers.

## Risks involved in fixing identity and e-Borders: Disputed nationality

The requirement to provide a fingerprint may put some refugees lives at risk. For example, one of our respondents told us that a Somali refugee is unlikely to possess a valid Somali travel or identity document. He may have to use false documents to obtain a visa to enter the UK. If a Somali refugee has used false Ethiopian documents to obtain a visa, and then makes an asylum application in the UK using his real identity, it is possible that he will be identified by his fingerprint and presumed to be Ethiopian. Such a case might be dealt with under accelerated procedures and refused, with the possibility that he may be removed to Ethiopia. He may then be vulnerable to expulsion from Ethiopia and refoulement to Somalia. In the case of a refugee forced to lie about his identity in order to flee persecution, the fixing of an identity has a negative effect on credibility, which could lead to a refusal of asylum.

## Margin for error

Electronic border controls rely on biometrics to produce a fixed identify for each passenger, but the reliability of biometric identification has been challenged (GCIM 2005). Fingerprint matching is not straightforward, nor is it infallible and, like any biometric identification system, it contains a high chance of false non-matches (where valid individuals are refused border entry because the technology fails to recognise them), and false matches (where an individual is matched to another individual incorrectly).[51] Even with a multi-characteristic biometric system, using several biometric measures, this seriously undermines the reliability of biometric identification. The French Data Protection Authority CNIL investigated one of the EU-wide biometric databases that relies on fingerprint matching, the Schengen Information System, and found that almost 40 per cent of the alerts were unlawful or wrong.[52] For an asylum seeker the unreliability of biometric techniques could have significant impact. If a person is wrongly matched during the visa application process, s/he would have little chance of proving that the £6 million system is at fault.

## Data sharing

At the moment, biometric data is shared broadly amongst UK Government agencies. The Immigration, Asylum and Nationality Act 2006 (Duty to Share Information and Disclosure of Information for Security Purposes) Order 2008 creates a duty on UKBA and the police, to share travel-related data on international passengers, crew and services if it is likely to be of use for immigration, police or certain security purposes. UKvisas has recently indicated that it will consider sharing enrolment facilities with EU partners and, in the future, will explore plans to share biometric information with other countries.[53] UKBA is negotiating access to Europol[54], the second generation Schengen Information System (SIS II)[55] and the EU Visa Application System for further comparison of personal data. It intends to extend this relationship beyond Europe so that security, intelligence and law enforcement agencies in the US, Australia and Canada can contribute to immigration 'watch lists' and compare details of passengers with their own databases (Home Office, 2007a).

The inter-operability of databases will allow law enforcement authorities in the UK and beyond, to access immigration information for purposes other than migration control. The Refugee Council is concerned about the potential for sharing data in the future with countries of origin or transit which could pose a significant risk to asylum seekers and refugees, should their details be shared with third countries, particularly their country of origin. Even the European Commission, which has proposed a centralised database to store the biometrics of all EU travel document holders, has conceded that further research is necessary to "*examine the impact of the establishment of such a European Register on the fundamental rights of European citizens, and in particular their right to data protection.*" (European Commission, 2004c: 8)

Recent scandals relating to data security in the UK have highlighted the dangers of collecting and storing large amounts of sensitive personal information. Most of the criticism has focused on the difficulties involved in securing large data stores and the possibility of data being lost or stolen by criminal agents. A large database of biometric data could become a risk to privacy through the disclosure of personal information and the use of biometric data for other purposes.[56] Airline check-in procedures will involve verifying the validity of travel documents, and airlines may then hold the biometric data. Currently there is no clear information of how this data is stored or used by any of the many private actors involved. Templates containing the biometric data and personal details of asylum seekers and refugees are particularly vulnerable to abuse. If State agents in the country of origin obtained this information, refugees and their families would be in danger.

## Protected Entry Procedures

In 2002, NGOs called for the introduction of exemptions from visa requirements for individuals fleeing persecution and human rights abuses, and began exploring the possibility of Protected Entry Procedures (PEPs) (Sianni, 2003: 26). PEPs entail the suggestion that people at risk of persecution may approach consular authorities to apply for a visa. In determining eligibility for a visa, immigration officers should consider an individual's particular circumstances if it appears that they are at risk of persecution, whether they are in their country of origin or whether they are in a neighbouring country. In exceptional, emergency cases, where it appears that someone has an urgent need to flee persecution, visas should be granted to asylum seekers seeking entry clearance at consular authorities. Procedures must be flexible, since people at risk of persecution may not be able to fulfil all the usual visa requirements, for example possession of a valid passport, an intention to return to the country of origin, or sufficient money to cover the cost of their stay and return. Ultimately, visas should allow entry to the territory for the purpose of accessing that country's refugee determination procedure.

## Summary

The UK, by using visa restrictions and the e-Borders programme to strengthen the borders, is closing and locking the doors to those seeking protection in the UK. Our research confirms that "*the imposition of visa restrictions on all countries that generate refugees is the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal migration*" (Morrison and Crosland, 2001). As this report will show in Chapter Six (Displacement onto dangerous routes and methods), visa regimes are one of the primary reasons why asylum seekers and other migrants must resort to the services of smugglers, use false documents and expose themselves to extreme danger and the possibility of interception and *refoulement*. As the visa regime is harmonised across the EU, the Refugee Council shares concerns that the entire region will become inaccessible for the purpose of seeking asylum (Brouwer and Kumin, 2004). This situation will only become more severe with the introduction of new technology to support and develop the identity management element of the UK's border control programme.

## Recommendations

Visa requirements should never be imposed with the aim of preventing asylum seekers from reaching a State's territory.

The UK and other EU States should examine their visa policies regularly, and in emergency situations should suspend visa requirements to enable people to flee an area of conflict or severe human rights abuse. In such emergency situations, the international community should suspend visa requirements simultaneously, in a spirit of burden sharing, for determined periods of

time for nationals experiencing humanitarian crises.

Negotiations with countries on the lifting of visa restrictions, in exchange for increased efforts to control irregular migration to the UK and readmission agreements, must include protection safeguards. Individuals should not be transferred to countries from where they do not originate. Where, however, agreements are signed to return non-nationals, they should contain guarantees of full access to fair and efficient refugee status determination procedures, and protection against *refoulement*.

The UK should explore the facilitation of legal travel for those in need of protection, where encountered at Consulates in countries of origin or transit.

Where aspects of consular activities are outsourced to private contractors, such as processing visa applications, the UK should ensure individuals with protection needs are still able to access the Consulate.

When considering the treatment of individuals who travel without proper documentation, the UK should take into account the lack of choice of those fleeing persecution, including where there are no facilities for issuing passports within the country of origin, due to it being a country in upheaval or where certain profiles are illegitimately denied passports.

The UK's assessment of risk in the context of routes and nationalities should include the risks posed to the individual, not just the State. This could involve an analysis of situations that may include refugee flows, including where vulnerable groups could be travelling on dangerous routes.

The identification of risks to individuals should be shared with outposted immigration officials and private carriers.

Safeguards should be put in place to ensure that where a false identity is used for the purposes of fleeing persecution, the false identity is not electronically 'fixed' as this could lead to inappropriate refusal of an asylum claim and possible chain *refoulement*.

Policy and practice should reflect that the fact of being a failed asylum seeker does not mean that an individual will never have a legitimate refugee claim in the future.

A risk assessment on the impact of e-Borders on refugee protection should be conducted by UKBA. This should include an examination of safeguards to ensure that data-sharing systems under no circumstances allow for information on individual asylum applicants to be shared with countries where an individual is at risk.

Regular updates on the e-Borders programme should be disseminated and stakeholders in the NGO sector should be invited to input into developments.

The advantages and risks of Protected Entry Procedures (PEPs) should be fully explored by an independent body.

27 This includes 51 countries whose nationals need a visa to transit through the UK – DATV. For more information see Home Office. Visa and transit visa nationals. [Online] Available at: www.ukvisas.gov.uk/en/doineedvisa/visadatvnationals [accessed 21 August 2008].

28 The countries are Bolivia, Botswana, Brazil, Lesotho, Malaysia, Mauritius, Namibia, South Africa, Swaziland, Trinidad and Tobago and Venezuela.

29 Home Office press release, 2008. Results of Britain's first global visa review, [Online] 10 July. Available at: www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2008/resultsofBritainsfirstglobal [accessed 21 August 2008].

30 In 2006, the EU and Russia signed agreements on visa facilitation and readmission of illegal immigrants. This was followed, in January 2008, with the entry into force of agreements on visa facilitation and readmission with Albania, Bosnia and Herzegovina, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia. For more information see European Commission, Enlargement (News about "Visa"). [Online] (Updated 26 May 2008). Available at: http://ec.europa.eu/enlargement/press_corner/whatsnew/visa_en.htm [accessed 31 October 2008].

31 In 1944, the Swedish legation in Budapest issued documents to Hungarian Jews that bestowed upon the holder presumptive Swedish citizenship, hence shielding them from harm. It is estimated that this action saved the lives of approximately 50,000 people. For more information on the use of 'protective passports' and visas during World War II see Noll, 2002.

32 Although there is no provision in the UK Immigration Rules for someone to be granted a visa for the purposes of coming to the UK to claim asylum, the Embassy or Consulate could refer an entry clearance application to the UK Home Office, if the person was already outside of their country of origin,

could demonstrate a prima facie case for Convention status, had close ties with the UK and could provide evidence that the UK was the most appropriate country of refuge.

33 There are no official statistics recording UK practices regarding protected entry procedures. Although there is no information on the number of people who request asylum at UK representations, it is estimated that ten cases are referred to the Home Office from representations abroad, per year. Of these, very few receive positive decisions on entry clearance from the Home Office. For more information on UK use of protected entry procedures see Noll, 2002.

34 The UK has threatened to impose a visa restriction on South Africa if it does not tackle the problem of irregular migration through the country. For more information see Home Office press release, 2008. Results of Britain's first global visa review, [Online] 10 July. Available at: www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2008/resultsofBritainsfirstglobal [accessed 21 August 2008].

35 Soe Thet v Director of Public Prosecutions [2006] EWHC 2701 (Admin). [Online] Available at: www.bailii.org/ew/cases/EWHC/Admin/2006/2701.rtf [accessed 31 October 2008].

36 For more information see Refugee Council, 2006. Convictions for failure to produce documents under Section 2 of the Asylum and Immigration (Treatment of claimants) Act 2004 – asylum seekers may have right of appeal. October 2006. [Policy briefing] [Online] Available at: www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/briefings/section_2_october_2006.pdf. [accessed 21 August 2008].

37 Verkaik, R., 2008. Asylum seekers put at risk by law, warns top judge. The Independent, [Online] 2 July. Available at: www.independent.co.uk/news/uk/home-news/asylumseekers-put-at-risk-by-law-warns-top-judge-858323.html [accessed 31 October 2008].

38 For more information see Memorandum submitted by UKvisas to the Select Committee on Home Affairs, Fifth Report Session 2005-2006. Tackling Abuse of the Visa Issuing Operation. 27 February 2006. [Online] Available at: www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/775/775awe35.htm [accessed 21 August 2008].

39 "*Often it is impossible, or too dangerous, for a refugee to obtain the necessary travel documents from the authorities*". Source: Council of Europe and UNHCR, 2002. Proceedings: "Round Table Process" on carriers' liability – Second expert meeting on carriers' liability, Topic B: Respect of the humanitarian dimension. Brussels, Belgium 24 June 2002.

40 Home Office press release, 2007. Border security strengthened by fingerprint technology. 9 October.

41 Section 126 of the NIA 2002 empowers the Secretary of State to require 'specified information' about an applicant's 'external physical characteristics'.

42 The Statutory Instrument allowing for the collection of fingerprints from certain visa applicants and holders of 1951 Convention Travel Documents came into force in February 2004. See Home Office press release, 2004. Increased use of biometrics to tackle asylum abuse. 21 January.

43 This followed new legislation under Section 126 of NIAA 2002 which empowers the Secretary of State to require applicants for British visas or entry clearance to provide 'specified information' about their 'external physical characteristics'.

44 From Commons standing committee debate: www.parliament.the-stationery-office.co.uk/pa/cm200304/cmstand/deleg2/st040209/40209s01.htm and Home Office press release, 2004. Increased use of biometrics to tackle asylum abuse'. 21 January.

45 Home Office, How we tested e-Borders. [Online] Available at: www.ukba.homeoffice.gov.uk/managingborders/technology/eborders/testingeborders [accessed 28 March 2008].

46 Success has been measured in terms of the amount of data gathered and number of arrests: "'*Project Semaphore' has already captured data on 21 million passenger movements, and issued over 9,000 alerts to the border agencies.... To date over 800 arrests have been made*." (Home Office, 2007a: 16).

47 People who are exempt from immigration control are not required to provide their biometric data. In addition, there also exist certain categories of people that are subject to immigration control but are not required to provide their biometric data, including diplomatic couriers and diplomats visiting the UK on the official business of their government. For more information on exemptions see: www.ukvisas.gov.uk/en/ecg/chapter5

48 Home Office press release, 2008. Results of Britain's first global visa review. 10 July.

49 Home Office press release, 2007. Border security strengthened by fingerprint technology. 9 October.

50 UKvisas, 2007. Entry Clearance User Panel Meeting. 25 October 2007.

51 Open letter to ICAO: A second report on 'Towards an International Infrastructure for Surveillance of Movement. 30 March 2004. [Online] Available at: www.eff.org/files/filenode/rfid/icaoletter.pdf [accessed 8 August 2008].

52 For further details see Brouwer, E., (forthcoming) Digital Borders and Real Rights; Effective remedies for third-country nationals in the Schengen Information System (Immigration and Asylum Law and Policy in Europe).

53 UKvisas, 2007. Entry Clearance User Panel Meeting. 25 October 2007.

54 Europol is the European Law Enforcement Organisation which aims at improving the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime. For more information see Europol. Welcome to the European Police Office. [Online] Available at: www.europol.europa.eu/ [accessed 29 October 2008].

55 The Schengen Information System (SIS), is a secure governmental database system used by the participating countries of the Schengen Agreement Application Convention (SAAC) for the purpose of maintaining and distributing information related to border control and law enforcement. For more information see the House of Lords, 2007. European Union Committee, 9th Report of Session 2006-07, Schengen Information System II (SIS II). 2 March 2007. [Online] Available at: www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/49/49.pdf [accessed 29 October 2008].

56 The collection, storage and analysis of biometric data is currently managed by commercial actors forming a conglomerate called 'Trusted Borders', including the large defence contractor Raytheon. For more information see: Daon press release, 2007. Trusted Borders becomes preferred bidder for e-Borders contract: Daon to provide biometric software and services. [Online] December 2007. Available at: www.daon.com/news/2007/7_12_2007.html [accessed 28 March 2008].

# **Chapter Four** – Outposted immigration officials

**In a further attempt to take immigration control closer to the source of the 'problem', EU Member States, including the UK, have been posting representatives in foreign countries for the purpose of reducing irregular migration. These representatives take the form of Immigration Liaison Officers (ILOs), Airline Liaison Officers (ALOs), juxtaposed controls[57] and, more recently, Migration Delivery Officers (MDOs). This section will explore the role and responsibilities of the UK's representatives posted overseas and examine the impact on individuals seeking protection within the UK.**

*"In some countries, efforts to control illegal migration are failing to make a proper distinction between those who choose to move and those who are forced to flee because of persecution and violence. All too often, we see refugees turned away at the borders of countries where they had hoped to find safety and asylum."*
(Antonio Guterres, UN High Commissioner for Refugees, World Refugee Day, June 2008)

## Immigration and Airline Liaison Officers

In the European Council's definition, an Immigration Liaison Officer is *"representative of one of the Member States, posted abroad by the immigration service or other competent authorities in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating illegal immigration, the return of illegal immigrants and the management of legal migration"*.[58] Although informal contacts between outposted national immigration officials had been in place for some time, in 2004 the EU set up a network of Immigration Liaison Officers to coordinate immigration control and is currently developing a common manual in order to facilitate cooperation within the network (European Council, 2006).

The term 'Immigration Liaison Officer' (ILO) refers to immigration staff posted to Member States' diplomatic missions overseas, including within the EU and to countries of origin or transit for refugees. By 2006, the UK had ILOs in 14 locations covering 26 countries including the Ukraine and Turkey (European Council, 2006). The term also covers Member State immigration representatives posted to international airports abroad, more specifically known as Airline Liaison Officers (ALOs). The UK began posting ALOs abroad in 1983 and, as of August 2007, has 34 permanent representatives posted in 31 locations as well as five additional 'floater' and regional ALOs. Deputy ALOs provide support in 12 locations.[59] In total the UK's overseas immigration network covers at least 126 countries.[60]

UK Airline liaison Officers were introduced to "*address issues at nexus points for illegal movements*" (Cabinet Office, 2007: 39), and they work with airlines in key locations for irregular migration. The locations "*are selected primarily on the basis of the number of inadequately documented passengers who have recently arrived in the UK*" and include key countries of origin or transit for refugees, such as Kenya, South Africa, Pakistan, Malaysia and Egypt.[61]

## Role and responsibilities of liaison officers

According to the International Air Transport Association (IATA) Code of Conduct for Immigration Liaison Officers,[62] the purpose of a liaison officer is to '*reduce the number of improperly documented passengers travelling from or through*' the country in which they are posted. The code explains that typical activities include verifying documents on behalf of national authorities, providing advice on relevant legislation to host country authorities, and delivering training on identifying false documents. An examination of the Draft Common Manual suggests that their role extends beyond simply advising on appropriate documentation. ILOs are also charged with gathering information on irregular immigration trends and routes, including smuggling and trafficking, facilitating the exchange of

investigative information between national authorities and enabling returns. There is a lack of transparency regarding the role of immigration liaison officers within the migration control programme. There is also a lack of information on cooperation between ALOs from other Member States and with host country immigration officials, and reports on the activities of ALOs are confidential on the grounds of containing "*sensitive information*".[63]

The ALOs' more specific mandate is to reduce the number of inadequately documented arrivals (IDAs) in the UK. They do so by supporting carriers in discharging their responsibilites under Sections 40 and 41 of the Immigration and Asylum Act 1999 (as amended), which obliges carriers to identify and intercept improperly documented passengers or risk incurring a civil penalty (for more information on carrier sanctions see Chapter Five). As such, they offer advice to carriers on the acceptability of documents presented for travel and whether or not the airline is likely to be fined if they allow embarkation. Usually, carriers will alert the on-site ALO who, depending on their airport access rights, will appear in person to verify documents and advise. This can be difficult when, as in the case of Turkey, the ALO has not been granted access to the airport at all, and is instead based in another country, in this case Greece.[64] On occasion, the ALO may request an in-depth interview with the passenger to establish how s/he acquired the documents presented.

UK ALOs can also access the J-Vox mechanism, a large database which contains risk lists from UKBA, police and customs, particularly regarding anti-terrorism. If an ALO is aware of a passenger whose name appears on the database, they can release an alert to carriers and other ALOs. UK ALOs submit monthly activity reports with details on interceptions including nationality and type of forgery, but they do not record the identity or biometrics of the individuals they intercept. Regional managers conduct trends analyses on data relating to forgeries and interceptions, and this information is fed back down to ALOs, who may share it informally with host country authorities and airline staff.

## ALOs and refugees

Currently ALOs do not operate formal UK immigration controls and they have no legal powers in a foreign jurisdiction. They have no power to compel an airline to either accept or refuse a passenger, nor can they arrest or prosecute criminals. Their role is 'purely advisory' but it is reasonable to assume that carriers will follow this advice rather than risk a heavy fine. Our research found that advice to airlines to refuse embarkation was almost always followed. In light of this, it is of concern that liaison officers are not aware of any responsibility to ensure that individuals with protection needs are given access to an asylum procedure.

The European Council Regulation establishing the ILO network (which, as stated earlier, incorporates ILOs and ALOs) does not include any specific mention of Member States' international obligations towards refugees and asylum seekers. Very little emphasis is placed on training liaison officers or those they work with to identify or respond to the needs of refugees. Their own training is heavily focused on security and criminality in relation to border checks, and touches on humanitarian issues only peripherally.[65] They are given some awareness training on trafficking but are not taught the skills required to respond to the needs of victims of trafficking, particularly those wishing to seek asylum. In most situations, ALOs will refer any trafficking victims to the local immigration authorities. The training they provide to airline staff, authorities and host country immigration services covers UK passport and visa requirements, document verification and forgery awareness, and does not include any content on international refugee and human rights legislation and procedures. It is unclear whether this training includes profiling, although UKBA has stressed that it is not encouraged as the Agency prefers to focus on document validity rather than the intentions of the passenger.

Between 2001 and 2007, the UK ALO network prevented 180,000 people with inadequate documentation from boarding aircraft to the UK [Cabinet Office 2007]. It is not known how many of these people were in need of international protection nor what their fate has been as a consequence of being denied access to the UK. There is no indication that the responsibilities of any immigration liaison officers include a requirement to examine the intercepted person's reasons for migration or to address any need for international protection. ALOs can conduct what they call 'assists', situations in which they provide ad hoc authority to carry, for passengers who do not have the appropriate documents but for whom there are extenuating circumstances.[66] Unfortunately the discretion to allow boarding for improperly documented passengers does not stretch to

individuals seeking international protection. The IATA Code of Conduct for ILOs states that whenever ILOs receive requests for asylum they should refer the applicants to the office of UNHCR, the appropriate diplomatic missions or a pertinent local NGO.[67] In practice, an ALO will, in most situations, refer any irregular passengers directly to local officials who then take responsibility for handling any request for asylum. ALOs may provide a telephone number for UNHCR, but where UNHCR is not available no guidance is provided to ALOs on the appropriate action to be taken, and they have no power to intervene to ensure an asylum claim can be lodged.

Very little is known about how many of the 'inadequately documented passengers' intercepted by UK immigration officers overseas had the opportunity to indicate their need for asylum, what procedures were followed, how many were referred to UNHCR or local asylum authorities and how many were turned back and potentially refouled. Our research suggests that UK immigration liaison officers are indeed involved in the interception of refugees, and that they may be contributing to the refoulement of people in need of protection. For example, one of our Zimbabwean respondents described the experience of a friend who tried to flee South Africa at the same time as him, but was intercepted by UK immigration officials based in the airport.

*"they took him to the British embassy in Pretoria and when he was there, there were South Africans that were called in and only to find that... he is Zimbabwean, he is a true Zimbabwean and the document is […] not genuine. And so he served a couple of months [in prison] and then he was facing deportation and I don't know at the moment what happened to him… he was returned to Zimbabwe, that's what most of South African government does."* (KI, refugee, Leeds)

UKBA asserts that very few intercepted passengers are refugees[68] but it is difficult to verify this as ALOs keep no formal record of the number of intercepted passengers who wish to or do claim asylum. The lack of actual applications for asylum at the point of interception gives no indication of the protection needs of the intercepted migrants. Many do not articulate their wish for asylum because they are afraid of repercussions either within the country of transit or when they are returned to their country of origin. Others choose not to claim asylum because they have been guaranteed passage by their agent and will simply be able to use another route. As concluded by the Council of Europe and UNHCR Experts Roundtable:

*"It is impossible to be precise about the number of refugees who are denied escape due to stringent checks by transport companies. The number is considered to be on the rise, however, not least since transport companies have been assisted by Governmental liaison officers in verifying travel documents."*[69]

The ALO relationship with the host country authorities is just one of the factors preventing a greater role for ALOs in guaranteeing access to protection. The relationship is often fragile and ALOs are not inclined to disturb this by forcing the issue of access to asylum within the State, as they risk losing their vital airside access if they interfere in the treatment of passengers. ALOs are not concerned with the intentions of passengers and UKBA is reluctant to give them a greater role in ensuring access to protection, as it is felt this would negatively impact on their existing duties, particularly concerning their relationship with host country authorities.

### Pre-clearance controls – the Prague airport case

In May, 2001 the UK began to implement 'pre-entrance clearance immigration controls' in agreement with the Czech government at Ruzyne airport in Prague. The controls consisted of UK immigration officers conducting full checks on travellers, including interviews, before they boarded the carrier, in order to decide whether or not a passenger was eligible to enter the UK. As with all immigration officers posted overseas, there was no requirement for them to do anything if they recognised than an individual was in need of international protection from persecution. On the contrary, the operation sought specifically to halt the arrival of Czech Roma asylum seekers, who had been coming to the UK in increasing numbers by 2000. The Home Office claimed that the majority of these cases were unfounded despite recognising the persecution of Roma citizens within the Czech Republic.[70] As Czech citizens did not require a UK visa for travel to the UK, passengers were stopped prior to boarding on the alleged grounds that they were not genuinely seeking entry for the purpose stated on

their valid travel documentation. The measures proved very effective;[71] over 110 people were refused leave to enter the UK during the period of the controls. During a legal challenge against the operation, the Immigration Service justified their actions by arguing that the UK is not obliged under the 1951 Refugee Convention to consider applications outside the UK, nor to facilitate travel to the UK for the purpose of applying for asylum. Despite criticism from the UK's Independent Race Monitor, the government maintained that the pre-clearance operation was not discriminatory. Although the House of Lords upheld the Government's position that it is not obliged to consider asylum claims outside its territory in its judgement on the case, the Lords concluded that the practice was 'inherently and systematically discriminatory' against Roma.

Testimony before the High Court challenge by the European Roma Rights Centre revealed that most of those stopped were Roma.[72] Such targeting is likely to be repeated in future, since the Race Relations Amendment Act (2000) allows for discrimination in immigration, asylum and nationality functions on the grounds of nationality or ethnic or national origin where this is required by legislation or ministerial authorisation.

## UKBA plans for ALOs and ILOs

Evidence from UKBA suggests that the future of UK border controls will include a greater focus on 'pre-check-in activities' and targeting 'potential offenders' before they even start their journey. The extension of the existing network of airline and immigration officers is key to this goal. As early as 2005, the Home Office announced that it intended to invest £4million to extend the ALO network to a total of 42 officers supported by a 'fast response' team of 30 immigration officers, and to enhance IT systems and technology.[73] It also wants to involve immigration liaison officers in tackling criminal activities in their host country by improving links with local law enforcement.

There are plans to broaden the remit of ALOs and ILOs to cooperate more with other agencies such as FRONTEX to detect smugglers and ensure that they are prosecuted. The UK hopes to extend its cooperation with ALO networks in Europe and beyond to exchange information, develop common positions in dealing with commercial carriers and deliver joint training. Since 2001, British and Italian ILOs have worked together in Southeastern Europe to provide training to local officials and gather intelligence on trafficking and smuggling (ECRE 2007). UKBA also intends to explore the possibility of posting Sea Carrier Liaison Officers at major maritime ports around the world. Proposed legislative change included in the Government's draft Immigration and Citizenship Bill will extend the existing 'advisory' powers of liaison officers to allow them to cancel visas or refuse permission for carriers to bring foreign nationals to the UK.[74] These powers will be very similar to those enacted by pre-clearance officers at Prague airport in 2001 (see text box on page 37). The posting of officers at Prague airport allowed the UK government to carry out immigration checks on passengers seeking to come to the UK before they boarded the aircraft, with the result that many Roma asylum seekers were denied access to protection in the UK. UNHCR issued a statement arguing that the practice "*frustrate(d) the object and purpose of the 1951 Convention contrary to the international legal principle of good faith…(and) rendered the 1951 Convention nugatory (as) it prevents provisions such as Article 31 or 33 ever being engaged*".[75]

Measures to intercept irregular migrants in countries that do not fulfill their international legal and human rights obligations towards refugees and asylum seekers, will deny refugees the right to seek and enjoy asylum from persecution and expose them to the risk of *refoulement* (see chapter seven on permanent transition). As Guy Goodwin-Gill has already explained in this report, States which intercept refugees in a country that will, or is likely to, *refoule* them back to the country of origin, are equally responsible for the commission of a prohibited act. That responsibility is incurred wherever organs or agents, including ALOs and ILOs, conduct immigration controls functions on behalf of the State. Guy Goodwin-Gill outlines that the act of interception alone is sufficient to establish the jurisdiction of the UK and sustain responsibility for the subsequent *refoulement* of the refugee.

## Migration Delivery Officers

There are currently 20 Migration Delivery Officers (MDOs) posted to British Embassies in key locations overseas including Ethiopia, Kenya, the Democratic Republic of Congo (DRC), Sri Lanka, Pakistan and Turkey, as a joint FCO/UKBA initiative. The locations were chosen on the basis of internal intelligence, primarily concerning the flow of migrants, both

regular and irregular in both directions, and all appear to be key countries of origin and transit for irregular migrants.

There is still very little information available concerning the responsibilities of MDOs, as they have been tasked with investigating local migration issues and defining their role accordingly. However, our research suggests that UK MDOs seek to exert pressure on countries near to the external borders of the EU, in the hope of containing irregular migration within the region of origin. Evidence we have collected from MDOs based in Sudan, South Africa and Ethiopia suggests that their main purpose is to promote compliance with UK migration law and identify sustainable arrangements for the return of foreign nationals from the UK. They look at issues related to managed migration including trafficking, routes and methods used for irregular migration, organised immigration crime and country of origin information reports. Their work also includes analysis of the political and human rights situation within the host country, in cooperation with UNHCR. MDOs are responsible for negotiating with host country immigration authorities to influence their decision making with regard to migration policy and programmes, in order to promote the UK's migration management priorities. This will include Memoranda of Understanding on returns and visa requirements. MDOs also examine the availability and use of valid travel documents within their region, and review the UK's processes for accepting such documents.

As a potential EU accession country, Turkey is in negotiations with the European Commission regarding its capacity for reception and integration and its responsibility towards the global refugee population. Turkey's reluctance to lift the geographic limitation clause[76] and take over status determination for non-European refugees is a significant obstacle to accession. A number of EU Member States have taken this opportunity to influence the development of asylum processes in Turkey in anticipation of eventual accession. The UK is a very strong supporter of Turkey's accession to the EU and, through the UK Migration Fund, the government is active in developing migration management and asylum reception capacity within Turkey. The Migration Fund has enabled UNHCR to conduct training for the Turkish Ministry of Interior and military on refugee law, border monitoring and airport procedures including the return of third country nationals and safeguards against chain deportation. The UK also sponsors the International Organisation for Migration (IOM) to provide training for Turkish government officials on wider migration issues including asylum, border management and migration flows. Currently the UK is not directly involved in training border guards but this may be a feature of Turkey's new border management project.

The European Union is currently funding the UK and the Netherlands to conduct a 'twinning project' in cooperation with the Turkish authorities. The project involves the construction of seven large asylum reception centres around Turkey. The UK is involved in designing the management systems for use in the reception centres, as well as introducing operational models and new technologies. According to the UK government, the proposed reception centres will help Turkish authorities with contact management and will mean that refugees will find it easier to access services, social support, and legal advice. Critically, they will also experience accelerated procedures for status determination and return to their country of origin.

At the time of writing, it is unclear whether these reception centres will be open or will involve detention, who will have access, and which legal and procedural frameworks will apply. Many of our respondents voiced fears that these centres will act as removal facilities, particularly considering the emphasis on return within the UK's migration management programme and the detention and return model used within the UK and the Netherlands.

By promoting its migration management programme in transit countries, with no regard for the level of protection afforded within that country, the UK is shifting responsibility for refugee protection onto the EU's poorer neighbours. However, it is not sufficient for the UK to transfer command and control to a third country in order to avoid application of its human rights obligations (see 'A note on State Responsibility'). The UK remains fully responsible for any human rights violations that take place during or as a result of these activities. This could include violations that occur as a result of the provision of infrastructure or finance, formal or informal agreements and working arrangements, joint patrols and training, as well as support and advice to States recognised as having a low standard of human rights protection.

## Juxtaposed controls

The 1991 Sangatte Protocol established reciprocal arrangements between Britain and France under which each State was permitted to operate full

immigration controls on the territory of the other, otherwise known as juxtaposed controls. It initially only applied to persons travelling through the Channel Tunnel with motor vehicles and allowed for passengers to be arrested, detained and conducted to the territory of the state whose controls were being enforced.[77] It also provided that, where persons are refused entry or decide not to proceed to the other State, the State of departure must take them back.[78] In May 2000, following an increase in undocumented arrivals and asylum claims by those arriving by train, an 'Additional Protocol' gave permission for pre-boarding immigration controls at Eurostar stations in Britain and France. Article 4 of the Additional Protocol states that a request for asylum or other form of international protection should be examined by the State of departure where it is made either at immigration control or otherwise before the shutting of train doors.[79]

In 2001 juxtaposed controls were extended from the Channel Tunnel terminal at Coquelles to further locations in France and Belgium. In July 2002, the decision to close the Sangatte centre was accompanied by an announcement to establish British immigration controls at Calais and, later that year, French authorities began using British equipment at Calais to check for persons hidden in lorries. Section 141 of the Nationality Immigration and Asylum Act (NIAA) 2002 empowered the Secretary of State to "*make provisions for the purpose of giving effect to an international agreement which concerns immigration control at an EEA port*"[80] allowing for the development of frontier controls at sea ports. An agreement with France in 2003[81] provided for the creation of control zones in commercial ports from which there is sea travel between the two States. Within these control zones, officials of the State of destination are permitted to enforce their immigration laws, including by arrest, detention and bringing of persons to their own territory. However, the State of departure is responsible for applications for asylum or other forms of international protection which are made prior to departure. The Home Office wants to build on the perceived achievements of existing juxtaposed controls in order to share more intelligence, take advantage of new technologies for detecting people, and link their operations into developments in e-Borders. However, increased surveillance is not cheap: controls based at Paris, Lille and Brussels cost £7,102,500 in 2005-06 and £8,492,000 in 2006-07.[82] Despite the cost, France and Britain have committed to an increase in the number of lorry checks at French and British ports. The French government has also promised an increase in the number of French undercover officers targeting gangs smuggling people into Britain.[83]

The purpose of juxtaposed controls is "*to move aspects of the UK border to ports across the Channel, to detect and deter potential clandestine illegal immigrants before they are able to set foot on UK soil, fundamentally altering the way the UK operates at its border*" (Cabinet Office 2007). The Government claims that they have been successful. In Kent the number of illegal immigrants arriving since 2002 has reduced by 88 per cent.[84] During 2006, 16,898 people were stopped attempting to cross 'illegally' into the UK from France and Belgium, and 6,801 were refused entry when they had reached UK territory.[85] It is claimed that 18,000 illegal immigrants were stopped in trucks crossing from France to Britain in 2007.[86]

As with visa restrictions and liaison officers, it is not just clandestine entrants that the Government is seeking to target with juxtaposed controls, and the Home Office has admitted that:

*"When, for example, Colombia and Ecuador were included as visa States, this was directly in response to an increase in the number of those nationals coming directly to the United Kingdom in order to apply for asylum. A similar aim is present in the juxtaposed controls in France, where asylum seekers are refused leave to enter."*[87]

It would appear that one express purpose of the above measures is to prevent asylum seekers making a claim in the UK. Even travellers with correct documentation and a valid UK visa will be stopped from travelling to the UK if the immigration officer suspects that they may seek asylum. By preventing access, the government hopes to decrease the economic and political costs of the UK asylum system and to spare the expense of returning refused asylum seekers to their country of origin.

*"The change that has made a difference today is the shifting of the border controls from England to the French coast. We have shifted the immigration and security check and ensured that people will not get here. Stopping people entering clandestinely has to make more sense than trying to process them and send them back whence they came."*[88]

The UK justifies the implementation of these

measures on the basis that refugees should seek asylum in the first country they reach. This policy is not grounded in international law and ignores the importance of community ties, cultural links and the sanctity of the family. Experts meeting under the auspices of UNHCR have stressed that any arrangement to encourage asylum seekers to seek protection at the first available opportunity "*should take account of meaningful links, such as family connections and other close ties, between an asylum seeker and a particular country […] The protection of the family as a natural and fundamental group unit of society is a widely recognized principle of human rights*" (UNHCR, 2003a: 2).

## Delegation of responsibility to private contractors

Private contractors in the port of Calais are authorised to act independently without any UK or French officials present, and replace UK immigration officers for identified tasks, including searching vehicles and detaining individuals. This delegation of responsibility for the implementation of juxtaposed controls raises fundamental questions about sovereignty and accountability. When UK officials act on UK territory overseas, such as UK Consulates, they are within the scope of national sovereignty and under the mandate of international law. This, in turn, empowers UK courts to monitor and scrutinise the acts of UK officials. However, when UK officials subcontract activities and responsibilities to private companies they attempt to avoid engaging obligations under international and national refugee and human rights law.

## Summary

The Refugee Council is concerned that, in conducting border control activities with no regard for protection needs, outposted liaison officers risk preventing access to safety for refugees. Furthermore, extra-territorial activity may lead to direct or indirect *refoulement*. This would clearly be contrary to the UK's obligations as signatory to the 1951 Refugee Convention and acts against the spirit of international responsibility sharing.

By preventing migrants from leaving their country of origin, the UK exposes refugees to the very authorities they are attempting to escape. Such actions also disregard article 13.2 of the Universal Declaration of Human Rights which states that "*Everyone has the right to leave any country, including his own, and to return to his country*". Turkey is just one country within which UK immigration officials are posted and from which refugees originate. Sri Lanka, Ethiopia, DRC and Sudan all host UK immigration officials and yet their nationals continue to receive refugee status in the UK, reflecting the fact that they are countries from which some individuals must flee in order to seek protection from persecution.

Our research found that outposted immigration officials fail to differentiate between different types of unauthorised travellers attempting to enter the UK. They do not acknowledge the difficulties that people fleeing persecution have in obtaining a passport or visa, nor the right of refugees not to be penalised for entering a country of asylum illegally. There is further evidence to suggest that outposted liaison officers have a direct effect on the ability of refugees to find protection in a safe country, whether or not they are in possession of valid travel documentation (Sianni, 2003).

Furthermore, bilateral agreements with third countries that allow UK immigration officials to function on their territory are characterised by their lack of transparency and democratic oversight. It is, therefore, almost impossible to know whether these agreements include provisions for access to protection and whether outposted UK immigration officials have complied with these requirements.

## Recommendations

The UK should put systems in place to ensure that the actions of its outposted immigration officials do not result in direct or indirect *refoulement* of individuals with protection needs.

The UK should ensure agreements between the UK and third countries that allow UK immigration officials to function on their territory are transparent. These agreements must contain clauses on UK responsibility to respect the principle of *non-refoulement* and should include measures to ensure access to protection wherever its immigration officials conduct measures to control irregular migration.

The UK should encourage host countries to allow intercepted individuals to have access to UNHCR, independent legal advisers and NGOs, in particular in transit zones.

UKBA should ensure that regular independent

monitoring is carried out to ensure extra-territorial border control is compliant with refugee protection, and in particular the prohibition on direct and indirect refoulement.

The UK should provide easily accessible advice and guidance on the responsibilities of outposted border officials in respect of refugee protection. This should include procedural guidelines on what to do when encountering a person in need of international protection.

Outposted UK immigration officials should receive training on international refugee and human rights legislation and procedures.

The UK should provide training to outposted immigration officials on the identification of vulnerable individuals and how to meet their needs.

UKBA must demonstrate that the activities of all outposted immigration officials are implemented in accordance with domestic equality obligations.

The role of the ILO and ALO should be clarified and a list of activities and powers made publically available.

Non-sensitive information with reference to general trends of persons stopped from coming to the UK should be shared publically.

Frameworks for working arrangements between ALOs/ILOs, private carriers and host authorities should include reference to the importance of ensuring the individual details of refugees are not shared with countries of origin or transit.

UK and EU operational manuals for ILOs and ALOs should include reference to refugee protection and practical instructions regarding action to be taken if a passenger expresses protection needs.

ILO/ALOs should be fully aware of local institutions and organisations that assist refugees and others in need of international protection and refer individuals on accordingly.

The UKBA, in conjunction with UNHCR and NGOs should explore giving ALOs the power to allow undocumented refugees safe passage to the UK in circumstances where they may be at risk. This could include a hotline facility to support ALOs to use this power when encountering an individual in need of protection.

ALOs should keep records of the details of intercepted persons, including whether they expressed protection needs.

The remit of the Independent Police Complaints Committee (IPCC) has recently been extended to cover matters of immigration enforcement. UKBA should ensure that the IPCC also has oversight of the activities undertaken in the context of juxtaposed controls, in particular if these are rolled out to refugee countries of origin and transit.

57 The term 'juxtaposed controls' refers to the reciprocal arrangements between Britain and France under which each state is permitted to operate full immigration controls on the territory of the other.

58 Article 1 of Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network.

59 These figures are taken from UKIS Border Control, Freedom of Information Practitioner, Ref: IND-FOI-5423. [Letter] (Response to Refugee Council Freedom of Information request, 20 February 2007).

60 These figures are data from 2005 as taken from: European Council, 2006. Draft Common Manual for Immigration Liaison Officers (ILOs) posted abroad by the Member States of the European Union. (8418/06), Brussels: European Council.

61 Home Office, 2006. The United Kingdom Airline Liaison Officer Network [brochure] May 2006.

62 The Code of Conduct for Immigration Liaison Officers, October 2002, was prepared by the International Air Transport Association Control Authorities Working Group (IATA/CAWG) to promote cooperation between EU Member State ILOs.

63 UKIS Border Control, Freedom of Information Practitioner, Ref: IND-FOI-5423. [Letter] (Response to Refugee Council Freedom of Information request, 20 February 2007).

64 Meeting with airline respondent, 13 May 2008.

65 Airline Liaison Officer induction training guidance provided by the Home Office on 20 February 2007 stipulates that ALOs will receive training on 'relevant UK legislation to which the ALO will be required to work when abroad, including Data Protection, Human Rights and Race Relations'.

66 This could include British citizens who have lost their passports due to natural disasters such as the 2004 tsunami in the Indian Ocean.

67 For more information see IATA, 2002. A Code of Conduct for Immigration Liaison Officers. October 2002.

68 This information was gained during meetings with UKBA officials.

69 Council of Europe and UNHCR, 2002. Proceedings: "*Round Table Process*" on carriers' liability – Second expert meeting on carriers' liability, Topic B: Respect of the humanitarian dimension, Brussels, Belgium 24 June 2002.

70 European Roma Rights Centre & Others v. Immigration Officer at Prague Airport and Secretary of State for the Home Department, [2002] EWHC 1989, at 20 – 21.

71 In the three weeks prior to introduction of the controls, there were over 200 asylum claims at UK ports from the Czech Republic. In the first three weeks after introduction of controls, there were only around 20 asylum claims.

72 During the period of July 2001 to April 2002, fewer than 1 per cent of non-Roma Czech nationals were refused entry. In contrast 90 per cent of apparently Roma were refused.

73 Home Office press release, 2005. UK borders further strengthened with expansion of airline liaison officer network. [Online] 22 February. Available at: http://press.homeoffice.gov.uk/press-releases/Uk_Borders_Further_Strengthened_?version=1 [accessed 8 August 2008].

74 Section 25(1)(d) of the Draft (partial) Immigration and Citizenship Bill, July 2008.

75 Goodwin-Gill, G. Submission on behalf of UNHCR to the Court of Appeal considering the case of the European Roma Rights Centre and Others v. the Immigration Office at Prague Airport (…) C1/2002/2183/QBACF.

76 This clause restricts Turkey's obligations under the 1951 Refugee Convention to individuals who become refugees as a result of events occurring in Europe. Refugee status determination for non-European refugees is conducted by UNHCR. For more information see Chapter 7 on page 59 (permanent transition).

77 Article 10 of Protocol between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning frontier controls and policing, co-operation in criminal justice, public safety and mutual assistance relating to the Channel Fixed Link Sangatte, 25 November 1991 (the Sangatte Protocol), Treaty Series No. 70 (1993) Cm2366.

78 Article 18 of the Sangatte Protocol.

79 Article 4 of the Additional Protocol to the Sangatte Protocol between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic on the establishment of bureaux responsible for controls on persons travelling by train between the United Kingdom and France, Brussels, 29 May 2000 the Additional Protocol), Treaty Series No. 33 (2002) Cm5586. For more information see Ryan, 2004.

80 *Nationality, Immigration and Asylum Act 2002*. (c.41), London: HMSO.'

81 Treaty between United Kingdom and France concerning the Implementation of Frontier Controls at the Sea Ports of Both Countries on the Channel and North Sea, Cm 5832 (2003). The Treaty was given effect in Britain by the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003 (SI 2003/2818).

82 Written answer from Liam Byrne to Humfrey Malins, 23 January 2008. [Online] Available at: www.theyworkforyou.com/wrans/?id=2008-01-23c.180330.h [accessed 31 October 2008].

83 Wintour, P., 2008. Britain and France to take nuclear power to the world. The Guardian, [Online] 22 March. Available at: www.guardian.co.uk/environment/2008/mar/22/nuclearpower.energy1 [accessed 29 October 2008].

84 Home Office press release, 2007. £1.2 billion pledged to strengthen off-shore border, [Online] 1 August. Available at: http://press.homeoffice.gov.uk/press-releases/e-borders-investment [accessed 26 August 2008].

85 Parliamentary question to Meg Hillier, 24 October 2007. [Online] Available at: www.theyworkforyou.com/whall/?id=2007-10-24a.124.0&s=asylum#g129.3 [accessed 29 October 2008].

86 Op cit. Wintour, P., 2008.

87 Evidence by James Munro, Assistant Director of the Immigration Service to the High Court, European Roma Rights Centre vs Immigration Officer at Prague Airport and the SSHD, 08/10/2002.

88 Hansard, 2002. Northern France. 2 December 2002: Column 614. [Online] Available at: http://hansard.millbanksystems.com/commons/2002/dec/02/northern-france [accessed 31 October 2008].

# Chapter Five – Carrier Sanctions

**The ability of UK immigration officials to monitor and control border points is constrained by the sheer volume of passengers, the number of embarkation points and the sovereignty of the State in which the UK is seeking to implement its own border controls. The UK can be accessed through ports all over the world. UKBA perceives overseas air, land and sea ports with weak or limited border controls as representing a significant risk to the UK's migration management programme as they are likely to be used by migrants seeking to reach the UK irregularly. It would be extremely difficult, and costly, for the government to post immigration officials at each port so it relies on private carriers, such as airlines and ferry companies, to make decisions on the authenticity of appropriate documents. This section will examine the role of private carriers in undertaking immigration control functions, and the impact of these controls on individuals seeking to enter the UK for the purpose of seeking asylum.**

*"Carrier sanctions pose a threat to basic principles of refugee protection, the operation of asylum procedures, procedural guarantees of a fair process and to international cooperation in resolving refugee problems."* (UNHCR, Roundtable on carriers' liability related to illegal immigration, 2001)

*"Between the possibility to seek protection from a foreign state and the individual fleeing persecution in his or her home state, the private transport company…[has now been] inserted."* (Elspeth Guild in Gibney, 2005)

A system of civil penalties for carriers that are found to have transported irregular migrants is set out in the Immigration and Asylum Act 1999 (IAA 1999). Under this legislation, a carrier is liable to a compulsory penalty of up to £2,000 where a passenger who arrives by air, land or sea requires leave to enter Britain but fails to produce a valid identity document and, where applicable, a visa.[88] In order to avoid the fine, carriers must show that they have taken adequate steps to identify and intercept passengers attempting to travel without valid documents. As such, carriers often contract out this function to security staff whose responsibility it is to identify forged, stolen or false travel documents and visas and to refuse boarding to anyone they suspect of having inadequate documentation.

The carriers' liability scheme was amended by Schedule 8 of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) which made it more flexible; the Secretary of State now has discretion both as to the imposition of the penalty and as to its level. There is also now a statutory right of appeal against the penalties.

From 2009, the Government's 'Authority to Carry' scheme will allow the UK to refuse a carrier authority to bring passengers to the UK based on real-time checks against Government databases. This will cover all passengers who do not pass through a juxtaposed control. The system will allow carriers to check the details of a passenger against Home Office databases and receive instant confirmation that they pose no known security or immigration threat. Passengers will be checked before take-off against UK watchlists, and passenger data will continue to be processed and risk assessed at JBOC[89], during transit. The government is also encouraging carriers to copy passenger documents, especially on high-risk routes, to assist with identification, re-documentation and removal.

## Scanning and detection technology

The government has been developing technology to improve detection at the borders, particularly the land and sea routes between northern France and the UK. New detection technology (NDT) including carbon dioxide detectors, X-ray scanners and heartbeat monitors, is used in conjunction with dog teams and manual searches to intercept people hiding in lorries and other vehicles heading for the UK. In February 2005 UK equipment was being used in Calais, Coquelles, Dunkirk, Ostend, Zeebrugge and Vlissingen.[90] The UK lends detection equipment free of charge to ferry and port operators in Channel and North Sea ports that are considered to be a high risk as departure points for irregular

migrants. In 2006 detection technology enabled the Border and Immigration Agency (BIA) as it then was, to intercept 17,000 immigrants attempting to cross to the UK irregularly.[91] It is not known if any of those intercepted were in need of international protection.

## Training for carrier personnel

To assist carriers in meeting their obligations under liability legislation, UKBA provides training to airlines and sea carriers, including guidance on visa requirements and forgery detection. It also operates a 24-hour helpline providing on-the-spot advice on whether boarding a particular passenger might result in a fine. In 2001, it was revealed that each year this line receives 50,000 calls.[92] The International Air Transport Association (IATA), which represents the global airline industry, has also provided training to carrier personnel on detection of fraudulent documents and produces the monthly Travel Information Manual (TIM) which shows the visa (including transit visas) requirements for every country. In Istanbul, one of our airline respondents provides training to its staff on document checking and behavioural analysis. They also attend briefings before the start of their shift to highlight any concerns or alerts that have been shared with the airline by ILOs around the world.

## Waiving charges

In 2002, the Home Office produced guidance for carriers on liability and charging procedures.[93] The guidance states that charges are waived if the carrier can show that it had taken all reasonable security and searching measures to ensure that no unauthorised person was allowed to board its service. Fines will also be lifted if the documents used to enter the UK are such convincing forgeries that the airline cannot be expected to identify them. UKBA has offered 'approved gate check status' to 310 stations abroad where document checks are considered sufficiently professional and fines are usually waived. Since October 2003,[94] ferry companies have been obliged to use detection technology provided by the government, and failure to do so can result in reduced access to UK ports. Airlines that fail to pay fines have been refused permission to use UK airports.[95]

Charges are also waived if, at the time of check-in, the person seeking to embark was either in imminent and self-evident danger of his or her life; had no reasonable means of obtaining the necessary documents; the United Kingdom was, in the circumstances, the only or clearly the most appropriate destination; and the carrier had no opportunity to verify his or her acceptability with the United Kingdom authorities. The recommended course of action for the carrier is to contact the nearest UNHCR or UK representative or port of arrival, to request guidance on how best to proceed (Home Office, 2002b).

Where a charge has been incurred by a carrier in respect of a person who is recognised as a refugee under the Convention and Protocol, it is the Government's policy to refund or waive the charge. UKBA does make a commitment that in every case where refugee status is recognised, it also determines whether liability to a charge was notified to a carrier in relation to that person's arrival in the UK. However, applications for asylum take several months or even longer to decide during which time a fine is taken from the carrier. A charge will only be refunded or waived in respect of a person who is granted full refugee status under the Convention and Protocol; this procedure does not apply to any person who is admitted for any other reason. This distinction between protection statuses appears to be entirely arbitrary, and means that all improperly documented passengers who subsequently receive some form of subsidiary protection constitute a financial burden for carriers. Furthermore, our research found that one of the major international airlines flying direct to the UK reported no knowledge of the refund in cases of refugee status. As a result, travellers suspected of intending to claim asylum were frequently denied boarding.

## The transfer of responsibility to private actors

The involvement of private actors, particularly overseas, makes it difficult on a practical level to ensure compliance with international legal obligations. It follows that a person wishing to raise a legal challenge where there is a breach in these circumstances would face real obstacles. The Refugee Council is concerned that the Government has effectively transferred migration management to private actors who are not trained in national and international refugee and human rights law. In his legal analysis for this report, Guy Goodwin-Gill notes that when State responsibility arises in international law, this cannot be "*contracted out*".

Our research revealed that in their dealings with irregular migrants, private carriers are motivated by three main factors:

1 avoiding financial penalty;

2 preventing security threats; and

3 maintaining good public relations.

Guy Goodwin-Gill points out that "*the nature of the airport liaison officer and similar operations in distant airports will not always allow issues and solutions to be properly identified, including rights and the need for protection*" (see page 24 of this report).

## Avoiding financial penalties

By making carriers financially accountable for the arrival of irregular migrants, UKBA has aligned immigration requirements with the separate business interests of carriers and has effectively privatised migration management. Private airlines, more concerned with protecting their corporate interests, such as maximising profit, are likely to prioritise the avoidance of a £2,000 fine irrespective of the protection needs of its passengers. Some airlines do not employ trained security staff to undertake checks because of the expense involved, which means that they must rely on general airline staff to do extra checks on top of their existing workload. Confusion over 'inadmissable passengers' can result in considerable cost to the airline in the form of delays to boarding, the offloading of baggage, missed departure slots and compensation to passengers.

Airlines can also be subject to financial coercion from other actors, such as fines from the airport authorities. For example in Turkey, having intercepted an irregular passenger, one of the major international airlines then finds itself under pressure to return that individual to the place of embarkation within 48 hours, or risk incurring further fines from their national authorities. In light of this urgency, the airline's priority is to hand over responsibility for the individual as soon as possible. In most cases, the passenger will be sent back to the country in which they boarded. This very often will not be their country of origin but would almost certainly increase the risk of chain *refoulement*.

## Preventing security threats

Our research found that irregular passengers are also considered a security threat, particularly on flights to the US, UK and Israel. Potential asylum seekers are considered an even greater risk due to, in the words of security staff responsible for document checks, "*their desperate state of mind that may lead them to take aggressive or threatening action*".[96] Consequently, security staff are more likely to deliberately deny boarding to an asylum seeker in an effort to reduce perceived risk to the airline and its passengers.

## Customer Service

Finally, airlines place a great deal of importance on customer service and prestige, and our research found that they were keen to avoid long delays, endless security checks and suspicious questioning for fear of antagonising passengers. As a result, airlines sought to make speedy judgements about the validity of a passenger's documents and the likelihood of incurring a fine upon arrival. It is unlikely that, in the time allowed to make this judgement, the airline staff would have the time to "*contact the nearest UNHCR or United Kingdom representative or the United Kingdom port of arrival, for advice and guidance on how best to proceed*" (Home Office, 2002b: 24), in order to verify whether the fine will be waived in respect of an improperly documented passenger in need of protection.

Financial penalties, security risks and public relations concerns have made carriers more cautious about who they allow to board their aircraft, and they have developed efficient and thorough immigration controls. These controls involve more than simply reviewing the passport or visa but also include behavioural analysis and profiling. Our research found that security personnel contracted by airlines rely more on behavioural analysis than document verification for the purpose of identifying irregular passengers and are influenced by guidance produced by the US on monitoring and interviewing suspect individuals.[97] Even if documents are valid, staff routinely attempt to identify passengers who are likely to destroy their documents en route, including those who may wish to claim asylum upon arrival in the UK. Passengers may be interviewed and, if considered suspicious, the airline may decide to take a digital photograph of the individual and make copies of their documents, which will then be sent to UKBA should the passenger destroy the documents en route. Alternatively, the airline may confiscate the documents and give them to the cabin crew for the duration of the flight. If the suspicion is particularly strong, the passenger may be denied boarding and, if in transit, may be returned to the country of embarkation.

By deliberately intercepting and refusing boarding to asylum seekers, private airlines are effectively

denying access to the UK asylum system, preventing people from leaving a country where their life is at risk and undermining the fundamental right to seek international protection. Of great concern is that security personnel send a monthly report, including the names of intercepted passengers, statistics and trends to client airlines and consulates. The collection and sharing of data, particularly with State representatives, highlights the vulnerability of refugees in the hands of unaccountable private agents.

## Time restrictions

The lack of adequate resources and time at the point of interception means that airlines employ practices that further threaten access to protection. Our research found that security and airline staff were frequently unable to communicate with intercepted passengers and where no interpreter was available, they would rely on 'gut feeling' and 'body language' in order to make a decision about the risk posed by a passenger. Our respondents informed us that most irregular passengers are identified in transit, but that this is also where time is most restricted and there is pressure on gate staff to complete boarding as quickly as possible. The fines received by one of the major international airlines have all been from transit passengers, as staff are not able to be as thorough with such pressure on them.

The Refugee Council is concerned that, under pressure to save time and avoid fines incurred as a result of errors made at this key pressure point, airline staff are more likely to err on the side of caution and refuse embarkation. Rather than alerting UNHCR or a UK immigration liaison officer, who may not be present in the port, our research suggests they will turn the passenger around and put him or her on the plane back to the point of embarkation. This may involve returning a refugee back to the country of origin and persecution or to a country which will, in turn, *refoule* the refugee. Where airline staff intercept within the country of origin, they deny refugees the right to leave their own country in order to seek protection and further expose vulnerable people to persecution, human rights abuse and inhumane and degrading treatment. Private carriers can not be held accountable for these violations but, as Guy Goodwin-Gill has explained in this report, the State retains responsibility for any acts which result in the *refoulement* of a refugee, even when those acts are outsourced to a private carrier.

## Interception: a success?

Our research found that the government has succeeded in assisting private carriers to comply with UKBA's migration management programme. One airline explained that in the past two years only one person has succeeded in evading their immigration control mechanisms in place at Istanbul airport, while another airline reported a 98 per cent success rate. Unfortunately these figures fail to show the number of refugees caught within this net. Carriers do not publish statistics on the number of inadequately documented passengers they refuse to transport, and it is impossible to know the number of refugees who have been affected.[98] Given that many people fleeing persecution have to resort to using a false passport and visa, or to entering clandestinely, hidden within lorries or trains, refugees are likely to be among those who have been denied boarding. Based on the nationalities intercepted by the airlines involved in our research, we can assume that refugees are being prevented from accessing safety within the UK. In 2007, the Istanbul office of one of our airline respondents refused 141 improperly documented passengers. Most of these were Turkish nationals, although they also reported intercepting Iraqis and Somalis. Another airline also reported intercepting passengers from refugee-producing countries such as Afghanistan, Iraq and Iran.

Asylum seekers appear to be a primary target of the UK's carriers liability legislation. The government has measured the success of carriers' liability legislation, and the use of detection technology to avoid incurring a fine, in terms of a reduction in asylum numbers in the UK:

*"The deployment of UK detection technology in continental Europe has been a key measure in reducing asylum applications from 8,770 in October 2002 to 3,610 in June 2003."*[99]

## The carrier viewpoint

Airlines, and their representatives, have repeatedly opposed efforts to encourage airline staff to take on the role of immigration officers, particularly with regard to access to protection. Both IATA and the International Transport Workers Federation (ITF),[100] a global federation of transport unions, have expressed their objection to the responsibilities that have been placed on their members.

*"IATA indicates that its members see immigration control as a matter that ought to be left in the hands of States, which have the expertise and jurisdiction*

*to examine the credibility of asylum claims and the obligation to protect refugees."* (Brouwer and Kumin, 2004: 10)

A number of national airlines have objected to the suggestion that their staff should engage in assessing which passengers have valid claims for asylum, arguing that such an assessment should take time and careful investigation which is not possible at check-in (Sianni, 2003). British Airways has described the challenge faced by airlines caught between an awareness of the potential protection needs of its passengers and the constraints of carriers' liability.

*"Since 1987, British Airways has carried no less than 400 passengers to the UK when we should not have done and these passengers have been granted refugee status. Not a temporary leave to remain or whatever, but a refugee status. Now there is a good reason for granting passengers that status in the UK. That 400 we carried, how many have we denied boarding that would have received refugee status had they gone through our checks? We do not know."*[101]

## Summary

The Refugee Council objects to the use of carrier sanctions as a method of immigration control, particularly one that appears to target asylum seekers. Private carriers should not be responsible for making life and death decisions about whether to allow an individual to leave one country and enter another for the purpose of claiming asylum. The airlines involved in our research did not show an awareness of refugee protection, had no systems in place to respond to the interception of a refugee, provided no training on international refugee and asylum law or procedures, had no contact with UNHCR and no direct support from UK immigration authorities in assisting a passenger seeking to flee persecution. Furthermore, our research revealed that airline employees, keen to avoid financial penalty, may act in a discriminatory way, singling out 'suspicious' persons on criteria such as race or gender, and denying them boarding. Airlines indicated that profiling is a key feature of their immigration control activities and that the attempted identification of asylum seekers is already taking place, further increasing the risk of *refoulement*.

By shifting responsibility for immigration control functions onto private actors, the UK appears to be seeking to overcome the constraints imposed by international rules concerning human rights protection and to distance itself, both geographically and legally, from immigration control. The airlines involved in our research all appealed for the increased involvement of ALOs at the point of interception. The Refugee Council supports the argument that UKBA should take full responsibility for interception activities undertaken by a group or person acting on the instructions, or under the direction, of the UK Government. As we have already established in Chapter Five ('A note on State Responsibility'), the 1951 Refugee Convention prohibits refoulement 'in any matter whatsoever', including as a result of functions delegated or outsourced to private actors. The actions of airline staff, in response to advice given or pressure applied by UK immigration liaison officials, is sufficient to establish the responsibility of the UK Government. While UKBA continues to be directly involved in interception within airports it must provide adequate support, particularly in transit zones, to assist airlines with assessments of documentation and to take responsibility for decisions regarding the embarkation of people with inadequate documentation who may wish to claim asylum. While most ALOs do enjoy unrestricted access in the airports within which they have been posted, some have been denied airside access or are posted outside the country altogether, as in the case of Turkey. While this remains the case, the use of airline staff in the place of UK immigration officials must not absolve the UK government of responsibility for guaranteeing access to protection, and measures must be put in place to ensure democratic oversight, accountability and judicial remedy for the activities of non-State agents.

## Recommendations

Records should be kept and made public as to the number and characteristics (age, gender, nationality, vulnerability) of persons who are intercepted, including whether any expressed protection concerns.

Carriers should be encouraged by UKBA to seek guidance when they come across an individual who may have protection needs.

UKBA should consider how to support carriers who come across passenger who may have protection needs, including waiving fines.

UKBA training for carriers should cover their

obligations under international refugee and human rights legislation.

Private carriers should be fully aware of procedures for the local system of referral to UNHCR, independent legal advisors and NGOs. Where private carriers contract out interception functions to private security firms, they must adhere to protection safeguards.

Where an individual is to be returned, a mandatory return interview should be conducted to afford individuals the opportunity to express protection concerns and to access independent legal advice.

UKBA should encourage host countries and carriers to allow time for access to UNHCR, NGOs and independent legal advisors.

88 A case at the Court of Appeal – International Transport Roth GNbH v Secretary of State for the Home Department [2002] EWCA 158, [2002] 3 WLR 344 – held that the nature of the Scheme was incompatible with the carrier's right to a fair trail under Article 6 ECHR and their right to the peaceful enjoyment of property.

89 JBOC is the joint border operations centre; the multi-agency operational hub for the e-Borders programme. JBOC is evolving into eBOC, the e-Borders operations centre mentioned in Chapter three on page 30.

90 Hansard, 2005. Identity cards and passports (forgery). 4 February 2005: Column 1150W. [Online] Available at: www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050204/text/50204w07.htm#50204w07.html_spnew0 [accessed 14 August 2008].

91 Home Office press release, 2007. British and French immigration ministers pledge close cooperation on secure border controls. [Online] 8 November. Available at: http://press.homeoffice.gov.uk/press-releases/secure-border-controls [accessed 14 August 2008].

92 Dave Roberts, Deputy Director, Immigration Service, Home Office speaking at the Round Table on Carriers' Liability Related to Illegal Immigration. Brussels, Belgium, 30 November 2001. Available online at: www.iru.org/index/cms-filesystem-action?file=en_events_2001/Illegal2001.pdf [accessed 29 October 2008].

93 For more information see Home Office, 2002b.

94 4NI.co.uk, 2003. Ferries face £2,000 fine for carrying 'illegal immigrants, [Online] 6 October. Available at: www.4ni.co.uk/nationalnews.asp?id=20774 [accessed 30 October 2008].

95 Cameroon Airlines and Kyrgyzstan Airlines have been refused permits to land at UK airports because of non-payment of carriers liability fines for transporting inadequately documented passengers. Hansard, 2004. Written Answers: British Airspace. [Online] 8 January 2004: Column 430W. Available at: www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040108/text/40108w02.htm#40108w02.html_spnew8 [accessed 14 August 2008].

96 Quote from a meeting with airline security staff in Turkey in May 2008.

97 One of the national airlines involved in the research based their monitoring and interviewing of passengers for UK flights on guidance produced by the Transport Security Administration, a US agency that conducts security operations across the country's transportation systems. For more information see: Transport Security Administration. Welcome to who we are. [Online] Available at: www.tsa.gov/who_we_are/index.shtm [accessed 30 October 2008].

98 Since 2005 one of our airline respondents has been composing a monthly list of refused passengers including the name of the passenger, destination, nationality and reason for refusal. This list is then sent to the UK ALO based in Greece but it is not made publicly available.

99 Hansard, 2003. Written Answers: Illegal immigration. [Online] 21 October 2003: Column 555W. Available at: www.publications.parliament.uk/pa/cm200203/cmhansrd/vo031021/text/31021w21.htm#31021w21.html_sbhd0 [accessed 31 October 2008].

100 In 1992, the ITF Civil Aviation Section passed a resolution that called for the repeal of all carriers' liability laws and condemned "*government policies and airline practices [which] are improperly pushing aviation employees into the role of policing immigration. Aviation employees are not trained for such duties, nor should aviation employees be involved in any measures which jeopardise the international rights of asylum seekers.*" International Transport Workers Federation, 1992. ITF statement on air transport workers refusing role as police auxiliaries against migrants. [Online] Available at: www.itfglobal.org/files/extranet/-1/738/Statement%20on%20aviation%20workers%20and%20deportees.pdf [accessed 31 October 2008].

101 James Forster, Manager, Facilitation, Government and Industry Affairs, British Airways speaking at the Round Table on Carriers' Liability Related to Illegal Immigration. Brussels, Belgium, 30 November 2001. Available online at: www.iru.org/index/cms-filesystem-action?file=en_events_2001/Illegal2001.pdf [accessed 29 October 2008].

# A note on State Responsibility

**Thomas Gammeltoft-Hansen, Policy Analyst at the Danish Refugee Council and PhD Researcher at the Danish Institute for International Studies**

When do activities carried out by immigration liaison officers incur a State legal responsibility under international refugee and human rights law?[102] Since ILOs take on a number of different functions, it may as a starting point be useful to distinguish between two different situations: those where migration officers exercise direct authority vis-à-vis an asylum seeker or refugee, and those where migration officers advise, direct or control either non-State entities, such as carriers, or national authorities of another State.

As regards the first instance, States must, as a general proposition, respect instruments like the European Convention on Human Rights, the Convention Against Torture and core provisions of the 1951 Refugee Convention, most notably the principle of *non-refoulement*, wherever a State exercises jurisdiction. The reach of a State's jurisdiction is not limited to its national territory but extends to all areas and individuals over which the State exercises effective control. One could, therefore, consider the juxtaposed controls scheme operated by Britain at Calais, Dunkerque and Boulogne to constitute a sufficient degree of exclusive and effective control over a specific geographic area, to entail British jurisdiction and thus human rights responsibilities.

Often however, migration officers do not exercise direct authority, but rather act to advise or instruct either national migration authorities or private actors, such as airport security staff in enacting migration control. Despite the claims occasionally forwarded to the contrary, it is important to emphasise that a State cannot rid itself of human rights obligations by outsourcing or delegating functions such as migration control. This is supported by the formulation chosen by the drafters of the 1951 Refugee Convention, prohibiting *refoulement* "*in any matter whatsoever*" (Art. 33). Secondly, the law of State responsibility clearly dictates that the conduct of individuals or groups is attributable to a State if that group or person "*is in fact acting on the instructions of, or under the direction or control of that State in carrying out its conduct*" or "*exercising elements of governmental authority*".[103] One may of course ask whether migration officers merely advising private carrier staff is enough to engage State responsibility. Combined with the operation of carrier sanctions, imposing hefty fines on any airline company bringing in unauthorised foreigners, there is a strong case that actions of migration officers in relation to individual cases may suffice to establish such responsibility.

In the case of migration officers liaising with the national authorities of another State, the test is somewhat different. Unlike in the case of private actors, the authorities of the host State will be directly bound by international refugee and human rights obligations, regardless of the role played by foreign migration officers. The State posting migration officers may, however, also incur a responsibility in case rejection of onwards travel amounts to *refoulement* or other human rights violations. Again, the law on State responsibility stipulates that a State "*which aids or assists another in the commission of an international wrongful act by the latter is internationally responsible for doing so*" if that State has knowledge hereof and the act would be equally wrongful if committed directly by that State.[104] This sets a broad principle by which migration officers must pay full respect to international refugee and human rights obligations when acting to aid or assist authorities of another State.

102 International Law Commission, 2001. Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA resolution 56/83, 12 December 2001, Art. 8 and 5. See further the commentary by James Crawford, The International Law Commission' "Articles on State Responsibility: Introduction, Text and Commentaries", Cambridge: CUP, 2002.

103 Ibid., Art. 16.

# **Chapter Six** – Displacement onto dangerous routes and methods

**Border controls are succeeding in reducing the number of irregular arrivals, including asylum seekers, to the UK. However, global asylum numbers are climbing. It would appear that border controls are simply making the routes used by irregular migrants more complicated and more dangerous, while empowering new and unaccountable actors in the form of smugglers and traffickers. This section will explore some of the secondary effects of border controls and the consequences for individual refugees forced to risk their lives to seek protection in the UK.**

*"It's not a matter of choice of going which country you go but actually it's a matter of survival, most of them, yes probably maybe there's 1 or 2 number of people… want to come here, because they've got their connections and they've got their families living here and they would prefer to come to here but actually the majority and actually the main aim of them actually is getting somewhere safe where they can live."* (DF, RCO representative, London)

*"When people they come this country, they ready to die."* (AB, refugee, London )

## Displacement onto dangerous routes and methods: Smugglers

As border controls have become more sophisticated and more widespread, legal and safe routes to protection in Europe have been cut off. Routes have become more dangerous, more circuitous and more crowded as refugees are driven to more desperate means to reach safety in another country.

*"it can be stated that increased border control has […] an impact on migration routes, but less on the total numbers, as (potential) migrants tend to shift the routes, rather than deciding to stay at home... higher physical risks for smugglers not only affect the prices of smuggling services, but also negatively impacts the treatment of the migrant by the smuggler."* (ICMPD, 2007: 33)

No longer able to flee quickly or easily, refugees have increasingly turned to certain members of their community – experts in acquiring false documents, crossing borders clandestinely or bribing immigration officials – to assist them in finding a safe passage to a country in which they can apply for asylum.

Our respondents relied heavily on what they called 'agents' to arrange false documents and plan or lead the route to safety. These 'agents', or 'smugglers' often offer the only route to safety for people experiencing persecution in their country of origin. While refugees have very limited access to information on the international protection regime, smugglers dominate both as advisors and facilitators. Some smugglers will be no more than local traders or nomads motivated by humanitarian principles, while others will be members of extended criminal networks. The latter may have no interest in assisting a refugee to safety and may advise a long and costly journey to Europe instead of asylum in a neighbouring country, in order to maximise their profits. Established agents are often well connected both with colleagues in other countries and with transportation employees and immigration officials within the country of origin.

*"The agencies might have sometimes some connection in the airport and things like that, they bring people to the airport and they say, ok they have friend who probably let them in, people who actually ease the access."* (DF, RCO representative, London)

Smuggling is a growing industry. Research in countries of transit has found a thriving industry of smugglers and traffickers specialising in assisting refugees to organise their departure.[104] Our RCO

respondents told us that where previously Afghan refugees had to travel to Pakistan to locate an agent, for the past two years they have been able to find them in cities along the border, within their own country. The continuation of conflicts and persecution in refugee-producing countries and the location of border controls closer to these very countries create a demand that feeds the smuggling industry, and inflates the prices charged by unscrupulous smugglers.

*"It's a big organisation, taking money, sometimes hiding the newcomers, the new people… they put them in one house to wait for the trip and then to take those people from Istanbul to Izmir, to the border, or to Edirne. They have to be in cooperation with the people who know the borders, who know the way to go, who know exactly the security work."* (SS, NGO representative, Turkey)

In an effort to maximise their profits, smugglers often subject the refugees they are assisting to crowded, unsanitary and dangerous transportation.

*"When I personally left Turkey to Greek it was 78 people in the back of the lorry. I was with 77 people, it was 78 people all together."* (AA, refugee and RCO representative, Leeds)

*"there is..., 20, 30, 50 people to one lorry... He is businessman, he is saving. If kill, if die, it's not his problem…. I know too many is been killed or been died, you know, somebody is put in freezer, you know, some lorry's freezer… somebody is died in lorry and somebody is died in sea."* (AD, refugee, Leeds)

Our respondents described being threatened and beaten by smugglers attempting to extract more money from them during the journey. One Iranian woman was threatened with a knife on her way to Turkey.

*"I was very scared at that time, I was crying and I couldn't do anything."* (MA, refugee, Turkey)

*"When you are going to an agent and they taking you from Pakistan, from Afghanistan to another country always they asking "give me money, I need some money to take you from here to there", if you not then they will say "ok, you stay here, when I got money I will take you."* (SR, RCO representative, Leeds)

If they succeed in making it to a safe country, many refugees then find themselves trapped within poorly paid employment in order to pay back the debt to their smuggler. Our research uncovered teenage children within the UK who are working long hours to pay back agents who brought them here.

*"Mainly they do [work on the black market]. Ten hours, twenty more hours on the black market. We have large number of them coming to the class half asleep. As they are working until 2am in the Fried Chicken shop."* (AFM, RCO representative, London)

The threat of capture by coastguards further motivates smugglers to mistreat, abandon or even kill the migrants they are transporting.

*"I think it was two years ago, a few years ago it was in a Baltic sea, between Poland and Lithuania, I think before the Swedish guard arrived to their ship to check, they got all them container dropped into the water and a large number of Afghans has been killed. And just is inhuman, and they just to avoid any fine or any... they drop, deliberately."* (AFM, RCO representative, London)

*"there is no normal way you can go from Somalia to get to Yemen that's why there is a lot of […] people smugglers who actually do not care the human life or anything, they wanted to take the money and […] they put them in the boats and sometimes when they are about 20kms away from the shore they chuck them away to the sea because they don't want to be caught by the coast guards of Yemen. A lot of people actually are lost their lives, women and children, elderly people, all people."* (DF, RCO representative, London)

As border controls make detection more likely, smugglers simply take more risks to get their human cargo to the destination.

*"Europe spend a lot of money to give to coast guards and the training in the sea to actually stop those people to coming there. That's why I think they take more risks because these people-smugglers they don't care how they get there, how many people die. […] what they actually worry about is to get the money from these people… in any which way they want to."* (DF, RCO representative, London)

## Dangerous land and sea routes

The danger involved in travelling irregularly to Europe was a recurring theme of our interviews with refugee respondents in the UK and Turkey. Unable

to fly due to the expense involved or the risk of encountering border controls, most of our respondents travelled by land and by sea. These routes were cheaper and easier to organise and, more often than not, the only option provided by the smugglers. Unfortunately, they are also the most dangerous routes to Europe.

*"we've got many people, even now are risking their lives to go to, with a makeshift boat they go to Yemen and actually many of them, majority of them […] drown and die in the sea. A lot of people actually go and walk in the barren deserts from Ethiopia or somewhere where they go to Libya and they're risking their lives… to come to Europe. And many of them actually perish in the sea."* (DF, RCO representative, London)

Our respondents in Turkey described their journey across the mountains from Iran on horse, truck or foot. They attempted to avoid the landmines and the scanning lights of the Turkish and Iranian watchtowers and described being shot at by Iranian and Turkish border guards. One Iranian refugee described his experience:

*"I was very scared really because when I was crossing the border I saw the towers, I saw those towers with big lights and I knew that there was a very big risk… We stopped three or four times on the way, the men who were accompanying us said, hide your head or lie on the ground. We did this and I felt this danger."* (SV, refugee, Turkey)

The border zones are often lawless areas, conflict zones or disputed territories. Our research indicated that there is a very high risk of kidnapping or physical attack by gangs in Sudan, Eritrea, Saudi Arabia and South Africa.

*"Since the introduction of the visa restrictions we have not only seen a surge in agents providing services but also gangs preying on refugees along Zimbabwean borders. They know that they are carrying valuables."* (SH, RCO representative, London)

The land routes through East Africa involve long and hazardous desert crossings in overcrowded vehicles, travelling at night to avoid border guards. Many refugees do not survive the journey.

*"The most dangerous route is between Sudan and Libya because there is no water, there is no food station there is no… just nothing. So what they do is pack, say forty to fifty people on the back of this four wheel drive, and they tell them not to pick up many things so that they can put more people on that, and if there is any problem with the car, because it's sandy – and if it's sandy they sometimes lose their way – they miss their way, they don't know, so they just drive around and they run out of fuel. So they say to them, ok we'll come back… and they never come back. And people die in groups – forty people at a time who die."* (AW, RCO representative, London)

Our respondents told us stories of refugees killed while hidden beneath lorries or suffocated within the air-tight refrigeration trucks.

*"'Cos sometimes they put you, I don't know how you exactly to describe it but they put them under the truck. They hid them somewhere there and this lorry's driving maybe sixty, seventy mile an hour. And they're just there. It is dangerous."* (AA, refugee and RCO representative, Leeds)

The journey by truck or car is often followed by an equally dangerous sea crossing to Malta, Italy, Greece or Yemen.

*"Yes, when I was in the boat, because it was Sunday night I took that boat, Monday, Tuesday, Wednesday, Thursday, no water, no drink, no food, no nothing… we were four Somalian and another six or seven Kurdish or Iraqi."* (SA, refugee, London)

## Encountering border guards

Refugees who survive the journey in barely seaworthy boats or overcrowded cars encounter a further danger in the form of border guards from neighbouring countries, strategically posted at land or sea entry points along the route to the UK. The risk of being beaten, shot at or killed by border guards was a recurring feature of our respondents' journeys to the UK.

*"he give me two names of guys they die because they lost way and they went another way… in the Sahara, they would go to Egyptian way, and Egyptian police when they saw, they shoot them."* (SA, refugee, London)

*"They say they came from Turkey to Bulgaria and they said Bulgaria police beat us a lot, a lot and they wanted to kill us and they took all our money and they said they broken our ribs."* (SR, RCO representative, Leeds)

We interviewed a number of Afghan and Iranian refugees who had taken the land route from Iran to Turkey. The border is a vast and mountainous terrain, and is patrolled by Iranian border guards, the Turkish military and the Jandarma – the Turkish rural police. The Turkish army is comprised of young men fulfilling their military service and turnover is high. The border is extremely militarised due to ongoing conflict with the PKK, a proscribed Kurdish political party, and conditions are hostile. Our respondents would not consider approaching a Turkish border guard for assistance along the route or at the border point for fear of being shot.

*"maybe four or five years ago.... a group of people were trying to cross the border, the Greek border and then the Jandarma arrested them. They stay in the Jandarma barrack for almost two weeks and day and night they were beaten."* (SS, NGO representative, Turkey)

Some respondents encountered corrupt border guards who demanded bribes or stole money or documents leaving refugees stranded and vulnerable.

*"They paying money, sometimes police taking all their money and they send them back not to Afghanistan, to somewhere in the countryside and they will come back."* (SR, RCO representative, Leeds)

During our research, we identified particular problems with the lack of an adequate screening procedure at the Turkish border to identify refugees, and the absence of accommodation for intercepted migrants while their status is determined. There are no interpreters at the border to determine the needs or requirements of those who the border guards intercept, and border guards' knowledge of refugee law and procedures is limited. As a result, border officials either engage in a repetitive transfer of migrants back and forth over the borders with neighbouring countries or they *refoule* migrants, directly and indirectly, back to their country of origin (see 'Non-Refoulement', on page 70).

*"That guy, more than ten times he try to come here. Two times he went to Iran... they took him back to Afghanistan two times. Then he came to Turkey, from Turkey he went to Greece and from Greece they deported back to Afghanistan because Greece police arrested him in the water and they took him back to Turkey, Turkey to Iran to Afghanistan."* (SR, RCO representative, Leeds)

## Border controls as a deterrent

The Home Office is aware of the risks posed to migrants who seek ways to evade UK border controls. Border controls have become not only a mechanism for preventing entry, but the secondary effects they cause, including the threat of exploitation, physical danger and interception, are now used to communicate a deterrent message and to prevent irregular migration in all its forms, including economic and protection-related.

In 2006-07, the joint Home Office/FCO Migration Fund[105] spent £1.8million on overseas projects, including a number of campaigns directed at influencing migrants at the earliest possible point in their journey to the UK: the point at which they make the decision to leave their country of origin. In early 2007, the British High Commission ran a publicity campaign on illegal migration in Pakistan. Its aim was to warn Afghan and Pakistani men and women about the risks involved in irregular migration, particularly the use of agents; to raise awareness of UK enforcement activity; to encourage the use of legal migration channels; and, ultimately, to reduce irregular migration to the UK. The campaign used TV, radio and newspaper adverts in Urdu and Pashto, and 20,000 posters were distributed to schools, colleges, universities, railway stations, bookshops and travel agencies throughout the country. Similar campaigns have been financed by the UK and run in the Punjab in India, and with the involvement of IOM in both Vietnam and northern France.

These marketing campaigns aim to build on the highly visible nature of UK border controls in order to act as a deterrent to any prospective irregular migrants (Cabinet Office, 2007). They also aim to address some of the perceived 'pull factors'[106] such as the availability of work or benefits and the possibility of regularisation.[107] Home Office evaluation suggests that these campaigns have been effective in raising awareness amongst their target group, but there was no evidence of any direct impact on the decision-making of migrants or on the numbers of irregular arrivals to the UK (Foreign and Commonwealth Office, 2008). In terms of this research, these information campaigns are particularly significant as they reveal an underlying assumption of the UK Government that all irregular migrants are moving for economic reasons, and a failure to recognise the real motivations of refugees moving irregularly.

Our research challenged the notion of 'pull factors' and confirmed Home Office findings on the motivations of asylum seekers (Robinson and Seagrott, 2002) by revealing that the decision to leave the country of origin was primarily driven by the need to escape persecution and the desire to reach a place of safety.

*"most of us when we leave our countries, we don't – I'm especially talking about Iraq and Iraqis – they don't leave their country because they want money or something. They'll leave their country because maybe persecution."* (AA, refugee and RCO representative, Leeds)

Some of our respondents described their perception of the UK as a safe and tolerant country that is more likely to recognise their status as a refugee and guarantee their protection. Others chose to come to the UK, either to join friends or relatives, or because they were familiar with the language and culture due to a historical link between the UK and their country of origin. There is, for example, a long tradition of migration to the UK from Kenya and the northern part of Somalia, which were British colonial territories, and once these communities in the UK were established they served as a network for future arrivals (ICMPD, 2007).

For some respondents, networks of family and friends provided assistance both before and during the journey. This assistance usually took the form of financial support but there was also a considerable amount of information flowing back from relatives in Europe, to the country of origin. However, the reliability of information provided to asylum seekers by their social networks has been questioned (Koser and Pinkerton, 2002) and our research suggested that refugees can be misled by some of the information they had about the UK prior to their arrival.

*"They get surprised, because the idea, the knowledge they had before about the UK, and then they come here and see things, it's completely different."* (AW, RCO representative, London)

Many of our respondents fled their homes in a hurry, with little time to plan their route or consider their options. Our research found that refugees had little awareness of UK border controls and many knew nothing of the extent of the risks involved in irregular migration. Most of our respondents placed their trust, and large sums of money, in the possession of agents and relied on them to make the decisions about their route and their destination. This was particularly the case for our female respondents, who had very little control over their journey to the UK:

*"Of course, he just keep telling me have to do that way… I have to listen what he said, I have to follow… if I'm worried, he say me I have to respect and listen him, I don't have another option."* (AB, refugee, London)

Respondents perceived the agents as having a better understanding of border controls, of the risks involved in particular routes and of opportunities for safe and uninterrupted passage. Agents appeared to usually make decisions about routes based on the existence of contacts in transit countries and on the nature of certain border controls. They frequently have links to corrupt officials in embassies, airports or border posts, who either provide the necessary documents or allow passage.

*"The agencies might have sometimes some connection in the airport and things like that, they bring people to the airport and they say, ok they have friend who probably let them in, people who actually ease the access."* (DF, RCO representative, London)

"*Also there is police, also they making money. Agent have relationship with the police at the border. When I passed the border from Iran to Turkey there were a lot of police and they didn't tell us anything. When I asked the agent "why police didn't tell us anything" and they said "we are paying for police"."* (SR, RCO representative, Leeds)

Some of our respondents were offered a choice of route, usually based on how much they were prepared to pay, and the level of safety was in direct proportion to the cost of the journey. A flight from Pakistan to Europe including false documents can cost up to US$20,000, so many choose the more economical, more dangerous route overland by lorry through Eastern Europe or the even cheaper and more risky boat from Turkey to Italy or Greece.

*"So an agent... he will pass me to another agent to make some money to get some commission... The waterway... from Greek to Italy cost up to 2,500 US dollars. But the lorry way cost up to 5,000 US dollars."* (AA, refugee and RCO representative, Leeds)

*"Those who don't have connections come by sea, the traffickers get money from these people and their families back in Iran sell everything they have. The less connected have to find more dangerous routes."* (PN, RCO representative, London)

The refugees we interviewed were very rarely given much information by the agent about the route, the dangers and the risk of interception before setting off, and the information they were given was often deliberately deceptive. Those that did have some idea about the dangers ahead were prepared to take that chance in order to reach safety.

*"you see women, most of the people who drown in the sea, many of them are women, those women that are crossing the desert to Libya there are women and children in there. Some of them actually are heavily pregnant… a lot of people actually who came to Italy by this makeshift boat was included by a heavily pregnant woman who actually gave birth in there, in the boat during the journey. It's not something actually that's for this is women or children, or men or what, it's everyone doing it because like I say for them it's a matter of survival so they don't have nothing to lose. They're risking their lives and they know that many people actually died there in the sea, they know that and they say "Ok, yeah, I'll take my chance"."* (DF, RCO representative, London)

*"I think they know, they can imagine... but they still hope that that journey would be safer than staying in Afghanistan because they believe there are some institutions in these countries and the most it could get, they get sent to prison and they would explain why they are in this country, but not killed."* (AFM, RCO representative, London)

Our respondents explained that refugees are not even deterred by their own experience of interception and, having paid their smuggler for a guaranteed journey to the UK, they simply try again and again.

*"And the fourth or fifth time he tried again and he came here because he paid, he said, I told him "how much money have you spent", he said "no...one time I paid for my journey to that person who want to take me to England and he promised me, you will pay just one time, if you come back you don't need to pay me, ok"."* (SR, RCO representative, Leeds)

## Summary

By denying them a legal route to access protection in a safe country, refugees are effectively pushed into criminalisation, including having to pay bribes to visa officials, acquiring false documents or using human smugglers. Our research has shown how, through assimilation into the international criminal network, refugees become vulnerable to abuse and exploitation at the hands of smugglers.

We were told innumerable stories of physical danger and death as a result of the lack of safe routes to protection in Europe. There is no shortage of shocking data about the number of boats intercepted in the territorial waters of Member States or bodies found at sea or on beaches. Many irregular migrants, including refugees and people in need of protection, will take ever greater risks in the search for new routes to avoid UK and EU border controls. The NGO UNITED has documented almost 9,000 deaths of people attempting to enter the EU in recent years.[108] Some of these deaths were, no doubt, at the hands of smugglers, traffickers or border police, others will have drowned, suffocated or been crushed.

The Government's communication of these dangers for the purpose of deterring prospective irregular migrants indicates, yet again, that it does not recognise the mixed nature of migration flows. While this 'message' may succeed in preventing the arrival of economic migrants, it will have little impact on the decision-making process of refugees. Refugees flee their country of origin by compulsion, not by choice, and their destination is selected not for the economic or social benefits it offers, but because agents have determined where the refugee will be taken or because refugees are trying to reunite with family and community members. While no alternative exists, refugees will continue to entrust their lives to smugglers in the hope of finding protection in the UK. Our research suggests that unless the government provides legal and safe routes for individuals seeking international protection, border controls will simply expose refugees to further exploitation, danger and death.

## Recommendations

All Interior Ministry and border control staff, in countries where the UK seeks to influence the operation of national border control operations, should receive training and awareness-raising on refugee issues and on identifying victims of trafficking.

Attention should be paid by outposted immigration officials and carriers to the needs of vulnerable groups, including vulnerability based on age, gender and sexuality.

104 Moret, Joelle, Simone Baglioni and Denise Efionayi-Mader, 2006. The Path of Somali Refugees into Exile. A Comparative Analysis of Secondary Movements and Policy Responses. Swiss Forum for Migration and Population Studies No. 46, Neuchatel: Swiss Forum for Migration and Population Studies, cited in ICMPD, 2007.

105 In 2005 the Home Office and Foreign and Commonwealth Office established the Migration Funds totalling £8 million. For more information see Foreign and Commonwealth Office, 2008. Global Opportunities Fund, Annual Report 2006-2007, February 2008.

106 For the purpose of this report, 'pull factor' refers to the characteristic of a particular country which may make it attractive to individual asylum seekers. This could include the levels of acceptance of asylum seekers and the ways in which countries support refugees (Robinson and Seagroatt, 2002).

107 OM press release, 2007. Launch of new information campaign. [Online] 23 January. Available at: www.iom.int/jahia/Jahia/pbnEU/cache/offonce?entryId=12803 [accessed 31 October 2008].

108 UNITED webpage, 2007. List of 8855 refugee deaths through Fortress Europe. [Online] 14 March. Available at: www.united.non-profit.nl/pdfs/actual_listofdeath.pdf [accessed 27 August 2008].

# **Chapter Seven** – Refugees in permanent transition: evidence from the case of Turkey

**The vast majority of the world's refugees do not come to Europe or to the UK. Many are hosted within neighbouring countries or, if they have tried to move on further, may be trapped within transit countries such as Turkey, on the external border of the European Union. For the UK government, transit countries are a key target in its efforts to tackle irregular migration, and considerable resources are expended in order to ensure that migrants are intercepted in these areas. The Refugee Council is concerned that migrants intercepted in transit countries may be forced to remain in countries that are not signatories to the 1951 Refugee Convention, that violate their rights and that deny them access to effective protection. This section examines the consequences of efforts to contain refugees within their regions of origin, and the significance of these measures in relation to the UK's obligations under the 1951 Refugee Convention and international human rights.**

## The reality of refugee population distribution

By definition, a refugee must have crossed an international border in order to qualify for this status. However, the vast majority of conflict-generated movement happens *within* the borders of the country of origin. The UNHCR estimates that there are some 26 million Internally Displaced Persons (IDPs) in the world, and at the end of 2007, its offices were providing assistance to 13.7 million of these, an increase of almost one million on 2006 figures (UNHCR, 2007b: 2). Those who do make it outside their country of origin rarely travel further than the neighbouring countries. At the end of 2007, approximately one third of all refugees were residing in countries in the Asia and Pacific region (3,825,000 refugees), mostly from Afghanistan, while the Middle East and North Africa region hosted a quarter of all refugees (2,721,600 refugees), primarily from Iraq. Europe hosts only a small proportion of the world's refugees; at the end of 2007 this figure stood at 14 per cent (approximately 1,580,000 refugees). The UK now hosts less than 300,000, representing 2.6 per cent of the world's refugees (ibid: 7). As these statistics show, most refugees do not make it to Europe but seek protection in neighbouring countries. What these figures do not show is the number of refugees who have not registered with UNHCR within neighbouring or transit countries, due to their intention to continue onwards to another country. These migrants are in the minority and many of our respondents confirmed that many do not make it further than the transit countries in which they have stopped to rest, earn some money and investigate the onward route. In Chapter Six (Displacement onto dangerous routes and methods) we highlighted the significance of financial resources for refugees seeking to travel to Europe, and the desperate measures that people will go to in order to seek protection in a safe country. As this chapter will show, our research found that some refugees are prevented from further movement by a lack of money, by imprisonment or *refoulement* by third country authorities, and by the border control efforts of the UK and other Member States.

## Durable solutions and permanent transition

The UNHCR has identified three 'durable solutions' for the management of the global refugee population: integration into the country of asylum, return to the country of origin or resettlement to another country (UNHCR, 2003b). For some refugees trapped within transit countries, none of these solutions is available and hence they are described as being in a situation of 'permanent transition'. This chapter will use evidence gained from our respondents in Turkey, both refugees and the NGOs that assist them, to portray the extent of this problem and to identify the various elements which, when combined, result in denying access to meaningful protection for some refugees in Turkey.

Turkey is not alone in experiencing the phenomenon of 'permanent transition' and it has been documented in a number of other refugee contexts where European border controls are active, including Ukraine, Tanzania, Kenya, Morocco and Libya, as we will show in this section.

## Access to refugee protection in the region of origin

Before we can even start thinking about durable solutions, we must first address the fundamental issue of whether refugees can access effective protection in the countries within which the UK, and other EU Member States, operate border controls. In the absence of an internationally agreed definition of 'effective protection', UNHCR has identified the following critical factors for access to 'effective' or 'sufficient' protection in the context of secondary movers:

A. The State must be party to the 1951 Refugee Convention and/or its Protocol, offer access to fair and efficient procedures and present no risk of *refoulement*, both chain and direct;

B. Protection from torture, the right to life and freedom from arbitrary detention;

C. A genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable timeframe;

D. Pending a durable solution, stay is permitted under conditions which protect against arbitrary expulsion and deprivation of liberty and which provide for adequate and dignified means of subsistence;

E. The unity and integrity of the family is ensured;

F. Specific protection needs of the affected persons, including those deriving from age and gender, are able to be identified and respected (UNHCR, 2003a).

A 2003 European Commission Communication built on this definition and articulated a more detailed concept of socio-economic well being that it viewed as being central to the provision of refugee protection:

*"including, as a minimum, access to primary healthcare and primary education, as well as access to the labour market, or access to means of subsistence sufficient to maintain an adequate standard of living."* (European Commission 2003a: 6)

These standards have been criticised for failing to go far enough to ensure adequate protection and livelihood for refugees (Human Rights Watch, 2003; Amnesty International, 2003). These commentators argue that for a State to be classed as offering effective protection it must respect the basic civil and political rights of refugees, such as the rights to freedom from arbitrary deprivation of liberty or property and guarantee legal status for the individual.

In this section we will explore whether any of the above conditions are met in some of the countries where the UK and other European Member States implement border controls, including Turkey, and the resulting impact on refugees and the countries of transit in which they are hosted.

## Access to fair and efficient asylum procedures and protection against *refoulement*

The ability to enjoy any of the durable solutions is entirely dependent on access to a fair and efficient asylum procedure. Unfortunately, many of the transit countries within which the UK and other EU Member States implement border controls do not guarantee access to an asylum system, and have been criticised for their lack of respect for human rights and their treatment of non-nationals. The UK has ALOs based in Pakistan, United Arab Emirates, Bahrain, India, Bangladesh, Thailand, Malaysia, Sri Lanka and Jordan, none of which are signatories to the 1951 Refugee Convention. Despite this, the UK and other EU Member States continue to apply pressure on these and other transit countries to reinforce their border controls and better manage irregular migration through their territory. As a result, irregular migrants are caught within their borders, and may be denied access to protection. ABCDS, an NGO that assists irregular migrants in Morocco, has recorded the experiences of refugees living in the woods of Oujda, unable to move onwards into Europe and denied adequate protection within Morocco.[109] Likewise, migrants intercepted in Libya are routinely arrested and forcibly returned with no opportunity to express a claim for asylum. Furthermore, they are subjected to physical abuse, lengthy and arbitrary detention and, in some cases, death (Human Rights Watch, 2006).

Many of our NGO respondents in Turkey emphasised the difficulty refugees experience trying to access the asylum process within Turkey. When an irregular migrant is caught, s/he will often be detained, charged and held administratively in a

'foreigners' guesthouse' or detention centre. Testimony collected by the Helsinki Citizens' Assembly (hCa), a Turkish NGO which assists refugees, shows that it is extremely difficult to make a claim for asylum from detention. The lack of information on the asylum procedure in Turkey is a significant barrier preventing intercepted refugees from accessing protection. Asylum seekers are not counselled on the asylum procedure, they are not offered advice or information by the police and there is a lack of interpreters. Once they have entered the asylum process, interpreters are provided by UNHCR and a limited amount of free legal aid is available through a range of NGOs and the Turkish Bar Association.

Our evidence showed that the lack of interpreters and legal representation became most serious when refugees were apprehended at the border or while clandestinely travelling through Turkey. At these stages, where independent legal representation and interpretation is crucial, there seemed to be no system for referral either to lawyers, NGOs or to UNHCR. One respondent explained how the Turkish police often refuse to accept applications for asylum and provide false or misleading information about asylum procedures. According to a recent report by a Turkish NGO, 51 Afghan refugees were detained by the Turkish authorities on the Aegean Coast in the summer of 2007. Police refused to process their asylum applications and instead began preparations for deportation. When the detainees refused to comply, they were beaten (hCa, 2007). Our respondents informed us that the Ministry of Interior refuses to accept asylum applications from transit zones in airports as these zones are not considered Turkish territory. One respondent in particular had received a number of telephone calls from intercepted refugees in the transit zone at Istanbul Atatürk Airport. Despite our respondent's attempts to prevent deportation by making applications to the European Court of Human Rights, many of those who made contact were deported, or *refouled*, before their claim for asylum had been heard. In 2007, two Iranians and three Sri Lankans were deported from Istanbul Atatürk Airport without being allowed to apply for asylum (hCa, 2007). UNHCR in Turkey informed us that they become aware of attempts to claim asylum at the airport only once it is too late for them to intervene.

The threat of *refoulement* was the most common grievance reported to us by our refugee and NGO respondents in Turkey.

*"It's not good there, because I told you, just you come to the police, you know, just touch you, he's taking you in prison and after put you border in Iraq."* (AD, refugee, Leeds)

Refugees in Turkey incur a significant risk of *refoulement*, either in detention or at the point of interception at the border and on the territory. The Turkish rural police, the Jandarma, estimate that they intercept between 4-5,000 people every month at the border and within Turkey. Most of these will be returned to their country of origin or departure before they have had a chance to claim asylum. There is also evidence that Turkey has returned asylum seekers without any attempt to assess their requirement for protection.[110]

*"I was scared in Turkey… because they said if police catch you they will send you back to Iran, they not gonna send you to Iran government and they will send you by Kurdish people and Kurdish people, a lot of Afghan people they killed, Afghan people they took them money and they took them eyes and they broken their hand and their legs and that was very dangerous, because I was very scared of Turkey police sell us back by Kurdish, Iran Kurdish people and they will kill us. That was very dangerous…. They will sell, they give to them and they will take some money from them."* (NMS, refugee, Leeds)

There are also cases of refugees recognised by UNHCR being arrested, detained and repatriated by the Turkish police. A few cases received media attention immediately prior to our visit: in April 2008, UNHCR publically criticised the return by force of a group of Iranians, including five refugees, to Iraq. When denied entry to Iraq, the group was forced to swim across the river separating the two countries and four Iranians drowned, including at least one recognised refugee.[111] During 2007, a recognised Iranian refugee was deported while awaiting resettlement after being detained for failing to register with the Turkish police. In the same year, another Iranian refugee was deported from the Alien's Guesthouse in Ankara despite having an open file with UNHCR.[112]

These examples display a lack of guaranteed respect by the Turkish authorities for the cornerstone principle of refugee law, that of *non-refoulement*. The fear of return to the country of persecution can work as a strong push factor away from the first country of asylum, in this case from Turkey. Indeed, our refugee and refugee community

organisation (RCO) respondents in the UK explained that a refugee's perception of safety within a transit country is a key feature in their decision to continue on to another country.

*"Turkey wouldn't give them asylum. Turkey would send them back straight away to Iraq and then if you've left the country because of political reason, because of any other reason then you would be really scared to go back. This is why a lot of people prefer to pay 800 US dollars to an agent in Iraq."* (AA, refugee and RCO representative, Leeds)

*"the links that were there between South Africa and Zimbabwe […], it was like, if you seek asylum into the South African authority you are like handing your name back to the Zimbabweans. We knew all of that, we were advised, it's not safe."* (KI, refugee, Leeds)

As we have already explained in this report, assertions by the UK and other EU Member States, that refugees come to the UK as a result of 'pull factors' are not grounded in any evidence base. Our research suggests that the urge to leave the first country of asylum and seek protection in another country is motivated by a lack of adequate protection within these allegedly 'safe' countries.

## Access to refugees in transit, detention and border zones

Civil society oversight would provide some guarantee of access to protection within third countries. Unfortunately, many of the countries in which the UK operates border controls and pursues its migration management objectives, deny UNHCR and NGOs access to intercepted migrants, and border control activities are far removed from public scrutiny. In Turkey, UNHCR, local NGOs and legal representatives are not permitted access to airport transit zones or allowed airside and they have extremely limited or ad hoc access to detention facilities. Access to airside transit zones is essential as our research has shown that, in Turkey, while most irregular passengers are identified in transit rather than at check-in, there is no opportunity to claim asylum and *refoulement* is reported. UNHCR has been repeatedly refused access to the air and land borders in Turkey and there is no indication that independent humanitarian organisations are present within these zones. The Turkish land borders are heavily securitised due to high levels of smuggling and criminality, as well as ongoing conflict between the Turkish army and the Kurdistan Workers' Party (PKK). The Turkish authorities are wary of allowing local and international NGOs or UNHCR access to the border due to the issue of state sovereignty. As a result, there is no civil society or humanitarian presence at the border. From 2006 to 2007, the government of the Netherlands funded a project to improve access to protection and reception conditions for people who were intercepted by the Jandarma in Turkey. The project intended to encourage the Jandarma to conduct screening for protection needs and to allow UNHCR to have access to intercepted migrants. Very few cases were referred by the police to UNHCR during the lifetime of the project. In total, 2,800 people were covered by the project but less than 50 people were referred to UNHCR.

Our research suggests that UNHCR and NGO access to airport transit zones, airside gate check points, land and sea borders and detention facilities is vital. A number of EU Member States have already participated in UNHCR coordinated border monitoring activities, involving the cooperation of local NGOs with national border guards.[113] Unfortunately, in many transit countries relations between NGOs and the national authorities are poor. In Turkey, for example, relationships between NGOs and local authorities are ad hoc and fragile in some circumstances. Despite this, by allowing local NGO staff, UNHCR representatives and legal practitioners access to the borders and to intercepted migrants, these projects have gone some way to ensuring transparency of border control activities and may contribute to guaranteeing protection-sensitive borders.

## Protection from torture, the right to life and freedom from arbitrary detention

Evidence from our refugee respondents in Turkey and the UK suggests that some refugees do not enjoy physical protection in the first country of asylum.

## Continuing persecution

One of the reasons for the perceived and/or actual continuing persecution in Turkey by government and non-State agents from whom they fled is the proximity of the refugee to his or her country of origin. A number of our Iranian refugee respondents expressed their concern about the close relationship between the Turkish and Iranian governments. They suspect that there are Iranian spies within Turkey, some disguised as refugees, reporting back to Iran on the activities of high-profile political activists and dissidents. We were told about a similar situation in South Africa.

*"Zimbabwe intelligence officials operate throughout the whole of the Southern African region. We have had cases were Zimbabwean officials have arrested individuals on South African soil and brought them back in the boot of a car."* (SH, RCO representative, London)

One particular respondent was tracked down in South Africa by Zimbabwean government representatives and forced to flee to the UK in order to reach safety.

## Violence within the transit country

Other respondents were afraid of physical attack by the police within the transit country. We heard many cases of refugees being beaten or robbed by the Turkish, Greek or Bulgarian police.

*"the police officers now they are very very clever, not like before. Before openly they were against migrants and refugees… there was no protecting migrants and whatever. And now, I don't know, they are clever, they wouldn't arrest you on the street like this, or hassle you but then… like evening, when they make patrols… they get information on this person, what he's doing, he's working, has money or many people inside, then they go there, they make control whatever… person they get, they take. Now they start to go in these so-called telephone office, the place where you have the cheap cheap calls. So they go there, they target people, they see so many people, they make control. And the most they take foreigners people, they bring someone and they search them. If they find money, they take money and then they take them somewhere they free them."* (SS, NGO representative, Turkey)

During 2007, cases of physical violence by Turkish police against refugees included cuffing, gagging and beating to enforce removal directions, robbery during police raids, and the abuse of refugee children.[114] We also heard evidence of corruption and violence at the hands of the South African police.

*"The South African police are also very corrupt and often rip people's papers apart in order to receive bribes. If they are not sufficiently bribed they send them to Ndela (repatriation camp) […] I remember one case a women that had been gang raped by South African officials in Ndela and then tried to escape to the UK."* (SH, RCO representative, London)

Female refugees in Turkey are particularly vulnerable to abuse and suffer domestic violence, social exclusion and aggression from the local police. During 2007, around 65 asylum seekers and refugees who had registered with UNHCR reported suffering sexual and gender-based violence while in Turkey, but only 20 complained to authorities (USCRI, 2008). Our NGO respondents in Turkey informed us that when women complain to the police about domestic violence, they are instructed to return home and make peace with their husband. They also explained that police do not provide any protection for women who are hospitalised as a result of domestic violence. It is possible to move abused refugee women to another city, or speed up resettlement, but this depends on the goodwill of the local government. Although there are shelters for women in danger in Turkey, we were informed that the social services will not assist women with psychological problems or if they have been a sex worker. Many refugee women suffer from psychological problems as a result of persecution in the country of origin and the experience of displacement, and yet they can find themselves excluded from mainstream support services.[115]

Turkish society is still very conservative, and homosexuality is not tolerated in many of the satellite cities where refugees reside. Our NGO respondents told us that lesbians and gay men are frequently beaten and killed. The police can be dismissive about such attacks and rarely follow up reports of violence or abuse. One of our respondents described a situation when she was targeted by some local men because she is a lesbian. They presented themselves as policemen and came to her home requesting her ID card. They broke the door down and entered with guns. The police eventually arrived and arrested the men who were then sentenced to imprisonment. Our respondent was then threatened by their relatives and forced to retract her statement. Afraid that she would be killed, she told the judge that she had lied and the men were released.

Fear of attack by agents of persecution from the country of origin, by the host country police or by the general public, is an important reason for the secondary movement of refugees. If a transit country cannot guarantee the physical safety of the refugees it hosts then it cannot be considered a 'safe country' and it does not offer 'effective protection'.

## Genuine prospect of an accessible durable solution within a reasonable timeframe

Refugees residing in key transit countries to the UK have a current and outstanding fear of persecution.

In Kenya, refugees from Somalia and southern Sudan, the vast majority of Kenya's refugee population, are recognised as refugees on a prima facie basis.[116] Refugee recognition rates in Turkey are relatively high.[117] While many of these refugees may long to return to their country of origin, it is extremely unlikely that this will be possible in some cases. Therefore the two remaining durable solutions, integration and resettlement, may offer the only real opportunity of a lasting outcome for many of the refugees residing in countries in the region of origin.

As mentioned earlier, Turkey is one of the original signatories of the 1951 Refugee Convention and the 1967 Protocol but it has retained the so-called 'geographical limitation' clause. This clause restricts its 1951 Refugee Convention obligations to individuals who become refugees "*as a result of events occurring in Europe*".[118] However, refugees in Turkey almost exclusively originate from a small number of non-European countries, principally Iraq, Iran, Afghanistan, Somalia, Eritrea and other African States. As a result, the vast majority of refugee status determination is carried out in Turkey by the UNHCR. Certain profiles are recognised as refugees on a prima facie basis, including individuals from Central and Southern Iraq; other profiles have near-100 per cent recognition rate such as Baha'is from Iran. Alongside the UNHCR procedure, non-European refugees must file a separate 'temporary asylum' application with the Turkish government. The purpose of this parallel procedure is to decide, independently of the UNHCR assessment, whether an individual has a legitimate need for 'temporary asylum' in Turkey. In the vast majority of cases, UNHCR and the Turkish authorities reach agreement on who is recognised as a refugee and who is not.

Our refugee and NGO respondents in Turkey were concerned about the long delays involved in decisions on applications for asylum, followed by long waits for resettlement – neither with any guarantee of a positive outcome. At the time of our research trip in May 2008, asylum seekers who submitted claims in Ankara and Istanbul had to wait a year for an initial asylum interview, while in Van the wait was approximately three months. According to evidence from refugees and NGOs in Turkey, a final decision on an asylum application takes from two to ten years in the most extreme cases.

*"Another of my friends went three months ago to Finland with UNHCR and he stayed in Van for eight years."* (SV, refugee, Turkey)

This process can be delayed by difficulties obtaining country of origin information, translations or further information from relatives. We heard evidence from one young woman who had been waiting eleven years for a decision on her asylum claim and allocation of a resettlement place. Respondents described how asylum cases could be delayed, closed and reopened numerous times, and seemed to be unclear as to the reasons for this. Some suggested that the Turkish office of UNHCR is struggling to manage the caseload with insufficient resources. The Office has a caseload of 14-15,000 people, including a large number of Iraqis whose cases were frozen while UNHCR carried out 'enhanced registration' to establish where they were from.

*"I think most of problem about refugees is about UNHCR's procedures, because for example it done about me, about January 2008, most of people who came to Turkey when I came, I mean we were in same time and we thought that we will go to USA on same time, but all of them have been interviewed by the International Catholic Migration Commission except me and my brother. I went to UNHCR and asked them what happened to my file, what's the reason I'm not invited to interview. They said we sent your file to Ankara. I called Ankara, they said we didn't receive your file, it's in Van. I said where is this file, it's in the air. So, three months later I've been invited to interview."* (SV, refugee, Turkey)

Some of our refugee respondents in Turkey expressed disillusionment with UNHCR's status determination. There was a lack of clarity about the decision-making process and refugees reported distrust and frustration due to unexplained refusals. Evidence submitted to the US Committee for Refugees and Immigrants (USCRI) suggests that only applicants with legal counsel from one particular NGO had access to UNHCR's detailed reasons for rejecting applicants. The rest received letters offering only general categories of reasons for denial.

Our research found that the consequence of this delay and uncertainty is the gradual wearing down of refugees' expectations and resolve. Disillusioned and with only limited funds remaining, some refugees choose to move on irregularly.

*"Most of cases, people stay and get tired, and then they decide probably to go illegally. So many people. And then later on some cases are accepted but the people are not here, the people have left."* (SS, NGO representative, Turkey)

The Van office of UNHCR informed us that in the past year they knew of approximately 20 cases of refugees who had submitted a claim to UNHCR, but had continued on irregularly to Europe.

Amongst the top ten major refugee hosting countries, there are a number of States that have been repeatedly criticised for their treatment of non-nationals.[119] Aside from their poor human rights standards, these countries have insufficient capacity to host asylum seekers, they lack the infrastructure necessary to guarantee 'effective protection' and they conduct the forcible return of persons to places where they would face serious human rights abuses (Refugee Council, 2003b). Efforts to improve access to protection within regions experiencing protracted refugee situations including the Western Newly Independent States (Ukraine, Moldova, Belarus) and sub-Saharan Africa (Great Lakes/East Africa)[120] have been heavily criticised by NGOs for failing to ensure access to durable solutions. Critics have responded to Regional Protection Programmes[121], by accusing EU Member States of undermining the notion of international solidarity and placing the "*responsibility of refugee protection on countries where responsibility, enforceability and accountability for effective protection is likely to be diminished, weak or unclear*" (Amnesty International, 2005; 3). Ukraine has been criticised for lacking an effective system of adjudication, reception and resettlement for refugees and does not offer an effective programme of integration of refugees into Ukrainian society (ECRE, 2006). Similarly, Tanzania has been accused of denying adequate protection to refugees from the Great Lakes and reducing humanitarian assistance for Burundian refugees already present in the territory (Amnesty International, 2005).

On the subject of access to protection in the region of origin, UNHCR has concluded that:

*"It is equally clear that a good proportion of the world's refugees will be unable to find an early solution to their plight within their region of origin, and that the onward movement of refugees and asylum seekers will continue to take place while standards of living and levels of human security differ so greatly from one part of the world to another."* (UNHCR, 2006a: 60)

## Integration

A significant proportion of our respondents, both refugees and NGOs, claimed that refugees do not view Turkey as a country of asylum but as a transit country which offers the best possibility of being resettled elsewhere. This view is reflective of Turkey's legal position with regards to the 1951 Refugee Convention and the 'geographic limitation' clause. Turkey assumes only a limited responsibility for non-European refugees and offers them the status of 'temporary asylum seeker' while UNHCR undertakes status determination. Officially, 'temporary asylum seeker' status entitles refugees in Turkey to the same civil and political rights as foreign nationals, subject to possession of a valid resident's permit. In practice, refugees experience difficulties enjoying these rights, including seeking access to court, marrying or divorcing, accessing government services and education and freedom of movement.

Although refugees in Turkey are not confined to camps, they are required to reside in areas assigned by the Ministry of Interior. The Turkish authorities have implemented a system to disperse refugees outside Istanbul and Ankara and away from the coastal tourist areas. Refugees' access to healthcare and education is then reliant on their compliance with dispersal to one of 30 'satellite cities'. Once dispersed, refugees must report regularly – typically three times a week, or even daily – to the local police. Refugees who refuse to move and decide to remain 'illegally' within one of the major cities are denied access to government support, are subject to heavy fines and are more vulnerable to *refoulement*. One of our NGO respondents told us that the majority of Iraqi refugees in Turkey, particularly the Chaldean Christians, do not go to the satellite cities and instead live in Istanbul 'illegally' in order to be near the Christian church and their faith community, and to work.

Respondents outlined some of the negative impacts of being moved to satellite cities including racism, homophobia, a lack of personal security, poverty and distance from community links. Some satellite cities, such as Van, are small and remote and offer little in the way of legal employment. While NGOs and community support organisations do their best to provide assistance to dispersed refugees, they are often based in the major cities and can only rarely visit the areas of dispersal.

In effect, this evidence suggests that non-European refugees cannot integrate officially in Turkey. Since nearly all refugees in Turkey are non-European, they are forced to live on the margins of society with no

prospect of enjoying the rights and entitlements that refugee status should bring. As one respondent put it, refugees "*have obligations, they don't have rights*" (SS, NGO representative, Turkey). In light of this, resettlement emerges as the only real durable solution for them (see below).

The clause preventing refugee integration is an anomaly that is unique to only four signatories to the Convention: Turkey, Monaco, Congo and Madagascar.[122] However, a de facto lack of integration opportunities is seen in other countries where the geographic limitation does not apply. In a memorandum to the House of Lords, the Refugee Council outlined some of the hardships experienced by refugees in Kenya, one of the key transit countries in which the UK conducts border controls (Refugee Council, 2003a). In Kenya, refugees are considered a source of insecurity, environmental degradation and economic loss. They are frequently unable to obtain legal status and live under the threat of physical harassment, detention, *refoulement*, and sexual violence.

*"It's horrific and horrible… in Nairobi, the Somalis the way they live there, it's horrific. The Somalis most of them times are proud people but when you see, a lot of them actually begging and things like that, in a foreign country. It is very dangerous… there is many people feel, actually they say there is nothing worse than staying there."* (DF, RCO representative, London)

Most refugees in Kenya are forced to live in camps with no opportunity for self-sufficiency. According to UNHCR, the Dadaab and Kakuma camps in Kenya are plagued by security problems including banditry, rape and murder. Women and children, in particular, are vulnerable to abuse, exploitation and sexual assault, especially when they go to fetch firewood outside the camps.[123] USCRI has launched a campaign to end this practice of 'refugee warehousing' to enable refugees in countries such as Thailand and Tanzania to access sustainable integration opportunities.

## Resettlement

The global resettlement system was understood by respondents to offer the only real possibility for refugees to enjoy a durable solution. Currently a number of States conduct selection missions to Turkey to offer resettlement, including USA, Australia, Canada and Finland. People with status are automatically put forward for resettlement, and they are then assessed by representatives from the resettlement country. States are under no legal obligation to resettle refugees and are entitled to apply their own selection criteria.[124] As a result, certain groups are more likely to be resettled and at a faster rate than others and no rights-based explanation is necessary. Often those whose personal security is not considered to be at immediate risk, or those suspected of being less able to integrate, are not selected for resettlement. NGO respondents in Turkey described situations where certain family members (in many cases the younger ones) were accepted for resettlement whilst other family members, such as parents or grandparents, were 'left behind' in Turkey. It is clear that in some circumstances, resettlement countries show little respect for the principle of family unity and undermine the validity of resettlement as a durable solution.

Resettlement is not a durable solution for all non-European refugees in Turkey. On the contrary, it is not an option for certain groups including Somalis from Yemen, Iranians ex-Iraq and Sri Lankans. Resettlement quotas are not large and allocations are rapidly filled.[125] There is only limited resettlement to Europe so many refugees, particularly Iraqis and Afghans with family in Sweden and the UK, choose to make their own way.[126]

For the UK government, resettlement is the preferred route for refugees to reach safety in Europe. Our research shows that it is presently an imperfect system, involving long delays, unhelpful selection criteria and expensive periods of economic inactivity. In any event, resettlement is not an alternative to allowing access to asylum in the UK.

## Pending a durable solution, stay is permitted under conditions which provide for adequate and dignified means of subsistence

The long wait for asylum and resettlement decisions is critically combined with harsh living conditions for refugees in Turkey, including a near total absence of any means of livelihood. Refugee respondents in Turkey repeatedly communicated their difficulties relating to financial assistance, social services and healthcare. They have no realisable right to work and no State or UNHCR assistance to live on. Financial or in-kind support from NGOs is limited and rarely reaches beyond the major cities. For the extremely vulnerable, there may be access to State funds but these are dependent on the discretion of the provincial authority and the availability of local

Social Assistance and Solidarity Funds, which are normally reserved for Turkish citizens. Most local authorities do not allocate enough money for the purpose of supporting refugees as they do not monitor the numbers within their city. Hospital treatment is an expensive necessity for refugees, many of whom experience severe health problems as a result of persecution and flight. There is a long referral process for claiming back money for health services and refugees require evidence from the police that they are registered with the authorities. UNCHR contracted hospitals and pharmacies to provide a small number of recognised refugees with medical services on an emergency basis. In certain satellite cities the situation is not so bleak and some local authorities are working with UNHCR and local NGOs to improve living conditions for refugees. For example, UNHCR has run seminars, funded by the UK migration fund, to assist local authorities with the reception and integration of refugees.

Refugees are required by the Turkish authorities to pay residence fees of approximately US$300 per person, every six months. Since, at best, they can hope to earn no more than 200 to 300 New Turkish Lira (YTL) (approximately US$200) per month through irregular employment, this is an extremely high price to pay for the chance of acquiring status and resettlement. Refugees are subject to heavy fines if they move without authorisation or do not fulfil their obligation to report with the local police. Critically, refugees are barred from leaving Turkey, including for the purpose of resettlement, until full payment is made. A lot of families end up with fines totalling 5,000YTL and no income. The impossibility of paying these fees was cited by the majority of respondents as weighing heavily on refugees and even further delayed refugees' ability to take up resettlement places.

*"we have severe economic problems because we should pay... to police or another organisation, we should pay something for being in Turkey, yearly I should pay $500... For those families that have more members, for example a family with 5 members it's very huge amount of money. There is a family in Van who have been accepted by US and his flight date passed, I mean he should fly to USA about one month ago but he couldn't go because he was owed to Turkish government, he was owed about $10,000, and how can find this money. He couldn't go but he is accepted by USA."* (SV, refugee, Turkey)

With no income, no assistance, and no hope of speedy resettlement, refugees are forced into irregular working, exploitation and destitution.

*"there are many Iraq and Iranian refugees are working, they are working as a construction worker most of them… daily a Turk person daily earn 50YTL, but the employee of this construct job will pay to an Iranian person or Iraq person, 20YTL, less than half."* (SV, refugee, Turkey)

*"to survive here… you have to get work and once you don't have a resident's permit or working permit then you have to accept those kind of simple works, I say simple because small wage. And you have to accept any way they propose you… otherwise you cannot get some money for your rent, for your food, for whatever. And sometimes they working in terrible, dangerous situation in underground factories where, most of them they get accident. And there is no social security, there is nobody who can help."* (SS, NGO representative, Turkey)

Respondents further identified a causal link between the lack of assistance and the costs of living, and the risk posed to vulnerable groups who often resorted to prostitution as a means of survival. Female-headed households as well as lesbian and gay refugees are particularly at risk of experiencing economic and social exclusion due to their position on the very margins of the refugee community.

*"it is, kind of the fact that a woman has to be supported by a man sometimes. When she doesn't get… anything to do she cannot go to steal like a man, sometimes, can do. So she has to find support, support is always man who can use the situation that she is weak and then she fall into that trap, and she become forced girlfriend to someone just to get where to sleep, to get food."* (SS, NGO representative, Turkey)

Prostitution amongst refugee women in Turkey is relatively common as they have no alternative means of supporting themselves and their families. This form of work leaves women extremely vulnerable to violence, they cannot access certain services, such as women's shelters, and it is very hard to find accommodation.

The long wait, coupled with the expense and difficulty of living unsupported and the uncertainty of the status determination process leaves many refugees feeling hopeless and desperate. One respondent described how she had given up on the

asylum system entirely, including the possibility of resettlement. Refugees are forced to find their own durable solution and are vulnerable to smugglers who offer them an alternative solution. For the equivalent value of two years residency in Turkey, refugees can pay a smuggler to take them directly to Europe. For many this is a far more appealing prospect than years of poverty, insecurity and hopelessness.

*"one of my friends is about eleven years that he is in Van and he couldn't go any other country. About two months ago he said, I have been certificate as a refugee by UNHCR and was very happy and he couldn't believe this.... He said... if I hadn't this certification for six or five months later, if I couldn't catch this I would go to Europe illegally. I can't stay more, I am eigthteen years old and I was here from seven years old and up to now I am in Turkey and I am losing my life and I can't stay anymore. I will go to Europe near my relative in Sweden."* (SV, refugee, Turkey)

## Summary

As we have already highlighted, the UK government believes that refugees should seek asylum in the first safe country they reach, despite the fact that there is nothing in international law that obliges them to do so. Governments intent on restricting access to their territory promote two very contrasting images of the refugee with very different entitlements. Those who leave their region of origin to seek protection in Europe, known as 'onward movers', are less entitled and less deserving of protection than the impoverished masses of 'good refugees' who stay in camps and urban slums in developing countries. States assume that 'onward movers' have chosen to leave the first country of asylum for economic reasons, throwing into question their claim for protection.

Our research highlights the flaws of such an approach by revealing the lack of effective protection available in many of the countries within which the UK operates border controls, resulting in onward movement. They include countries that are not signatories to the 1951 Convention, that have poor human rights records, that have no established asylum procedures and that only tolerate the presence of refugees on a temporary basis (on the condition that UNHCR will resettle them). The consequence of border controls implemented close to regions of origin is to trap refugees in neighbouring countries that are already suffering under the burden of human displacement, poverty and environmental disaster.

Refugees and asylum seekers who cannot find effective protection, including not only physical safety, but some form of sustainable livelihood within the region of origin will move on, in an irregular manner if necessary, to other parts of the world, undermining any attempt to control or manage global migration. In summary, where protection only amounts to 'not being sent back' (where even that is sometimes in question), the Refugee Council holds that asylum cannot be considered fully enjoyed. Refugees who move in search of protection, particularly outside their region of origin, must not be penalised for or prevented from doing so.

## Recommendations

The UK should use its influence to increase standards of refugee protection and respect for the principle of *non-refoulement* internationally.

Where the UK is involved in interception activities in the territory of a third country, it must ensure access to adequate asylum procedures and guarantees that refugees will not be refouled.

UNHCR and NGO access to individuals intercepted at air, land and sea border zones should be written into agreements the UK makes with countries in which it conducts extra-territorial immigration control. The presence of independent humanitarian organisations in detention facilities at the border and inland should also be considered.

109 No Borders. Abcds: Statement. [Online] Available at: http://noborders.wikidot.com/abcds [accessed 27 August 2008].

110 In 2007, Turkey forcibly repatriated as many as 75 and deported to third countries at least 123 asylum seekers that had been intercepted travelling irregularly through the country. The Turkish authorities made no attempt to assess their requirements for protection. For more information see US Committee for Refugees and Immigrants (USCRI), 2008. World Refugee Survey. [Online] Available at: www.refugees.org/article.aspx?id=2114&subm=179&area=About%20Refugees& [accessed 31 October 2008].

111 UNHCR press release, 2008. UNHCR deplores refugee expulsion by Turkey which resulted in four deaths. [Online] 25 April. Available at www.unhcr.se/en/news/press08/press_080425.html [accessed 30 October 2008].

112 For more information see Helsinki Citizens' Assembly, 2007.

113 Between December 2006 to November 2007, the Hungarian Helsinki Committee initiated a project entitled 'Monitoring access of asylum seekers to territory and procedure at European airports – exchange of experience and best practices'. The project involved cooperation between UNHCR, national border guards and local NGOs at six major airports in EU Member States. Between August 2006 to February 2007, UNHCR was involved in a tripartite arrangement between the Slovenian border police and General Police Administration and a regional representative, the Legal Information Centre for NGOs, to improve understanding of police practices at the border and to ensure the right of migrants to apply for protection.

114 For more information on physical protection in Turkey see Op Cit. USCRI, 2008.

115 This information was taken from meetings with NGO representatives in Turkey in May 2008.

116 Refugees recognised on a prima facie basis are recognised as a group and do not undergo individual status determination. For more information see UNHCR Strengthening Capacity Project, 2005. Analysis of refugee protection capacity, Kenya. [Online] Available at: www.unhcr.org/protect/PROTECTION/429b1d3e2.pdf [accessed 31 October 2008].

117 In 2007, UNHCR recognised 100 per cent of Iraqi asylum claims and 88 per cent of Iranian claims. Overall the recognition rate was 85 per cent. For more information see UNHCR, 2008. UNHCR Background note: protection of asylum seekers and refugees in Turkey, May 2008.

118 For an explanation of the legal context for the protection of refugees in Turkey, see Helsinki Citizens' Assembly, 2007.

119 According to UNHCR Global Trends 2007, Pakistan continues to be the asylum country with the single largest number of refugees (2 million), the Syrian Arab Republic was host to 1.5 million Iraqi refugees, making it the second largest refugee hosting country at the end of 2007, and the Islamic Republic of Iran hosted close to 964,000 refugees.

120 For more information on these efforts see European Commission, 2005.

121 RPPS are designed according to the specific needs of the host country, include a registration scheme for all persons of concern to UNHCR in the area, activities to improve reception conditions and assistance to the local community hosting the refugees.

122 UNHCR, 2007. States Parties to the 1951 Convention relating to the status of refugees and the 1967 Protocol. [Online] 1 November. Available at: www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf [accessed 30 October 2008].

123 For more information see UNHCR Strengthening Protection Capacity Project, 2005. Analysis of Refugee Protection Capacity, Kenya. [Online] April 2003. Available online at: www.unhcr.org/protect/PROTECTION/429b1d3e2.pdf [accessed 30 October 2008].

124 For more information on resettlement see ICMC, 2007. Welcome to Europe! A guide to resettlement: a comparative review of resettlement in Europe. [Online] Available at: www.icmc.net/pdf/welcome_to_europe.pdf [accessed 31 October 2008].

125 In 2007, the US resettled 2,040 refugees while Canada received 364 and Australia took 145. UNHCR, 2008. Background note: protection of asylum seekers and refugees in Turkey, May 2008.

126 In the past 8 years, the UK has received, on average, only 10 refugees per year from Turkey.

# Non-Refoulement

The principle of *non-refoulement,* the cornerstone of international refugee protection, is enshrined in Article 33(1) of the 1951 Refugee Convention:

*"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."*

Although this principle does not entail the right of the individual to be admitted and granted asylum, it does establish a basic requirement to grant individuals temporary access to the territory for the purpose of examining their application for protection. This protection applies not only to recognised refugees, but also to those who have not yet had their status formally declared, in particular to asylum seekers who should not be expelled from the country until their status has been finally determined. This fundamental and non-derogable rule is applicable to all forms of forcible removal, including non-admission at the border, as stipulated by Article 3(b) of the Schengen Borders Code (Weinzierl, 2007). It applies not only in respect of return to the country of origin or former habitual residence, but also to any other place where a person has reason to fear threats to his life or freedom.

The removal of a refugee from one country to another that will subsequently send the individual onward to the place of feared persecution constitutes 'indirect *refoulement*', for which several countries may bear joint responsibility. Obligations under the European Convention on Human Rights (ECHR) require that, prior to removing an individual, the state in question must first examine whether the receiving country will forward the person on to another state in which he or she would be exposed to human rights violations.

It has been disputed whether non-arrival policies breach the principle of *non-refoulement* and other obligations in international refugee and human rights law. Many States, including the US, have argued that they have no responsibility to guarantee the protection of refugees who have not yet reached their territory and that the provisions of the 1951 Refugee Convention do not apply extra-territorially (Gibney, 2005; Hathaway, 2006). Such an interpretation permits interception measures by taking advantage of a purported gap in protection that exists while an individual is in transit. UNHCR advises, on the contrary, that the prohibition on *refoulement* does not contain any explicit geographic limitation and applies wherever the State in question intercepts (and thereby assumes some degree of jurisdiction over) a person:

*"UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State."* (UNHCR, 2007a: 12)

Interception measures implemented by one State on the territory of another, such as the posting of ALOs in a foreign airport or the use of visa restrictions and

carrier sanctions, would incur a corresponding duty by the intercepting state to fulfil their human rights obligations, as enshrined in international law (ECRE, 2004a). Whether these measures directly violate Article 33 or not, it is likely that they will increase the risk of direct *refoulement* and, as such, are fundamentally inconsistent with the humanitarian object and purpose of the 1951 Convention and its Protocol (Noll, 2002). Unfortunately, as we have seen in the case of intercepted and diverted boats in the high seas and territorial waters of third countries, there is little evidence of how this obligation translates into good operational practice.

# Case studies

## Case study one: NMS, Leeds

NMS is a 32-year-old Afghan refugee who arrived in the UK in April 2008. He escaped Afghanistan by hiding in the back of a car. When he reached Iran he was hidden in a cellar with others until it was safe to walk across the border to Turkey. During the night a group of Iranians came to the cellar with guns and stole all their money and documents. They were warned that if they complained, the smuggler would kill them.

*"When they took money from our pocket and they also say to us "don't make any problems for that other agent which is car driver because… in the future that will be very dangerous for you and for other Afghan people […] we spoke with another agent and we say to him, they took all our money, and he said "don't make that complaint because from somewhere they deported you, you will come back to this agent that will make problem maybe kill you."*

He continued the journey by lorry from Istanbul to the coast where he boarded a boat bound for Greece. The boat was small and massively overloaded and experienced problems reaching Greece in the bad weather. For five days he was trapped on the boat with 52 other people, as it was tossed about by the waves.

*"Was small, 52 we've been together… everybody cried a lot and we were scared and 17 people they been in coma… the weather was very hot and we couldn't find any water to drink… the waves were very very high."*

When he tried to seek rescue from the coastguard the smugglers threatened him with a knife.

*"I spoke with the boat driver and I say to him "please come I can't speak English, speak with the police" and he switch off the telephone… and he said "oh, they gonna put me for twelve years in the jail, in two hours we will reach Greece", and for that we spent five days in the sea… a lot of time [Greek] police call to us and they ask us "where are you? We like to help you but we couldn't find you where are you", because we couldn't see everywhere, everywhere was water and for that they couldn't come and they couldn't find us."*

He eventually made it to Greece, then travelled in a lorry across Europe to the UK. In total, the journey cost him US$23,000 and very nearly killed him.

*"Everywhere was very dangerous and when I fighted in Afghanistan that was better than that journey which I came here. I was very scared and everywhere was very dangerous."*

## Case study two: SV, Turkey

SV is a 25-year-old Iranian Baha'i who arrived in Turkey in 2004 with his brother, with the intention of joining the rest of his family and claiming asylum at the UNHCR. The journey was long and dangerous; it took them 15 hours to cross the border by horse and on foot, running or crawling past Iranian and Turkish watchtowers.

*"I knew that if I go near this towers I will shooted by them because these towers were exactly on the border, and they are working over there and their job is shooting every person."*

Despite the risks involved in the journey, SV would

not approach a Turkish border guard for help for fear of being shot.

*"It was very dangerous because we knew that we should hide ourselves from any Turkish soldiers before coming to Van… it's possible that these soldiers shoot us while crossing the border because we are doing illegally… we knew that this is dangerous to go to claim asylum to the soldiers."*

SV knew many cases of people who had been intercepted crossing from Iran to Turkey and their experiences were a warning for anyone following the same route. One was beaten by Turkish guards and dragged along the ground behind a horse, until they thought he was dead. SV's cousin was intercepted by Iranian soldiers and imprisoned without food or water for two days.

Only two weeks previously, a friend of SV was intercepted by Turkish police trying to cross the border illegally from Iran. He was taken to court and told that he would be deported. Neither his family, friends nor UNHCR were able to access him in detention and, without a translator to assist him, he was unable to make a claim for asylum. He has been deported to Iran and his whereabouts are unknown.

## Case study three: SA, London

SA is a 46-year-old Somali refugee who fled her home ten years ago due to the ongoing conflict. She wanted to come directly to the UK because her children were already here, and she did not want to take the risk of travelling irregularly across two continents.

*"My mind it was here because my children they was here, yeah, I never ask somewhere else."*

When her children left Somalia the journey was much easier and cheaper.

*"that time it was easy, no, not like today. It was $100 I think, the journey, but now $2,000, $3,000… everywhere is increasing… Before they didn't look very well and, you know, and every country now has, yeah, border guards… it's harder now. My children when they come to here, I pay one man, I give him money, they took them from Somalia to here, nothing problem."*

She applied for a visa to enter the UK while she was in Ethiopia but her application was repeatedly refused.

*"In Ethiopia they told me you have to your child ask you… my son, he ask but they give negative... I don't know the reason, they give three times."*

The only option she felt remained was to travel on to Sudan where she crossed the Sahara desert overnight into Libya.

*"It was so difficult but that is the Sahara, is so big, you can't imagine what is the difficulties there, it's so dry… how many people died… during my journey not one died but on the way, you saw, on the way the people died on the floor, there are bones, there are these things."*

From Libya she took a small boat to Italy with 15 other people, then travelled up through Europe to the Netherlands, where she was able to get a boat to the UK. She was returned to the Netherlands by the UK authorities but made another attempt to join her family, trapped in a lorry on a small, overcrowded boat. Bad weather made the crossing impossible and the boat was stuck in the dock for five days.

*"it was Sunday night, they told me tomorrow morning you get to UK 8 o'clock but… because it was windy we stayed there. Sunday there, Monday, Tuesday… inside the lorry, we don't have water, we don't have nothing inside and we feel scared that when you go out you can't come inside the lorry. And Thursday night about 9 o'clock and is come UK about 1 o'clock like this. I was really sick […]. I go out, I say, no I can't stay inside any more."*

It took SA two years and US$2,000 to reach safety – and her family – in the UK.

# **Annexe One** – Interview Schedules

## UK based refugees

1. Demographics and background information
2. Routes and methods used
   - 2.1 When you left your country of origin, did you know that you were coming to the UK?
   - 2.2 What route did you use to get to the UK?
   - 2.3 Did you choose the route?
   - 2.4 If you did not choose the route, who did?
   - 2.5 Can you tell me a bit about your journey?
   - 2.6 Did you come directly from your country of origin or through a transit country?
   - 2.7 (*If s/he come through a transit country*) How long did you spend there?
   - 2.8 Did you receive UNHCR refugee status overseas before coming to the UK (*not as part of a resettlement programme*)?
   - 2.9 Were you selected for resettlement?
   - 2.10 Did you feel that your life was in danger at any point during your journey to the UK?
   - 2.11 Did you arrive in the UK with any ID/travel papers?
   - 2.12 *If s/he did arrive with papers*:
     a. What sort of papers? (*passport/visa*)
     b. If it includes a visa: What sort of visa?
     c. Where did you get the visa?
     d. Did you have to submit any biometric information for the visa?
     e. Was it necessary to use false information to obtain it?
     f. Did you use your own passport? (*was it false/use someone else's*)
   - 2.13 *If s/he didn't arrive with papers*:
     a. Why didn't you have any papers when you arrived in the UK?
   - 2.14 If s/he had a passport but didn't arrive with a visa:
     a. Why didn't you have a visa?
     b. Were you refused a visa?
     c. Was there a delay in getting the visa?
   - 2.15 How did you feel about travelling to the UK without the authorised papers?
   - 2.16 Did you rely on a network of some sort to get to the UK?
   - 2.17 Are you aware of networks in the UK which assist the journey of family members/ co-nationals to the UK?
   - 2.18 How long did your journey to the UK take?
   - 2.19 How much did the journey cost?
   - 2.20 Was this your first attempt to get to the UK?
3. Experiences of border controls/interception
   - 3.1 Did you encounter any border control officers on your route to the UK?
   - 3.2 Did anyone in the airport check your documents or biometric data before you boarded a flight to the UK?
   - 3.3 How were you treated by airline staff?
   - 3.4 Were you ever refused boarding by an airline?
4. Refugee perspective on potential solutions
   - 4.1 What do you think the UK government could do to make their border controls more sensitive to the protection needs of individuals like yourself?
   - 4.2 If you could, what advice would you give to someone from your country who is about to

flee persecution and considering coming to the UK?

## UK immigration officials based overseas

1. Background information
   Informal discussion about ILO/ALO to gather some background information.
   - 1.1 What is your title/role?
   - 1.2 How long have/were you been based in the host country?
   - 1.3 Why were you posted there?
   - 1.4 Have you been based anywhere else – where?
   - 1.5 What is your professional background?
2. Details of the job and responsibilities
   - 2.1 What does your job involve – can you explain to me what you do on a day-to-day basis?
   - 2.2 How much contact do you have with migrants?
   - 2.3 How do you deal with migrants that are attempting to travel irregularly – how are border control measures implemented in practice?
     a. Is there access to legal advice, healthcare, translation, support agencies?
   - 2.4 Do you think that these measures have been successful?
     a. How do you measure success – what criteria do you apply?
   - 2.5 What is your perception of protection issues within this context?
     a. Have you received any training?
     b. What procedures are in place to deal with this?
     c. Have you ever encountered an asylum seeker?
   - 2.6 Are there any protected entry procedures in place so that refugees can be issued a humanitarian visa for entering the UK?
3. Relationship with other agencies
   - 3.1 How do you coordinate with other UK agencies such as the police?
   - 3.2 How do you coordinate with other international agencies, such as INTERPOL, FRONTEX?
   - 3.3 How do you coordinate with the representatives of other EU Member States in the host country and/or other countries?
   - 3.4 What sort of relationship do you have with the host country authorities?
     a. How much do you cooperate on border controls?
   - 3.5 How much coordination do you have with private carriers? What sort of relationship do you have?
   - 3.6 Are there any 'high risk' carriers?
     a. How do you decide who is 'high risk'?
     b. How do you deal with them?
4. Data gathering and sharing
   - 4.1 What sort of data do you collect on the irregular migrants that you intercept?
   - 4.2 Do you publish this data i.e annual reports?
   - 4.3 How do you share this data with other UK agencies and databases?
   - 4.4 How do you share this data with other international agencies and databases, such as EURODAC and other EU Member States?
   - 4.5 How do you share this data with host country authorities?
5. ILO/ALO perspective on potential solutions
   - 5.1 What do you think the UK government could do to make their border controls more sensitive to the protection needs of irregular migrants?

## Turkey NGO

1. Details of NGO and client base
   - 1.1 Informal discussion about the NGO to get some background information.
   - 1.2 How many refugees are there in [ ]?
   - 1.3 Where are the refugees that you assist from?
   - 1.4 What is the gender ratio?
   - 1.5 Do you deal with any vulnerable refugees such as women-headed households, unaccompanied minors, victims of torture or trauma, people with disability/illness?
   - 1.6 Has the profile of the refugees you assist changed over time?
   - 1.7 Do you have any access to refugees in detention?
   - 1.8 Do you have access to refugees in transit?
     a. Do you ever get calls from the transit lounge? How would you respond – what is the process?

1.9 How much freedom do you have to conduct your refugee support activities?

2. Routes and methods used

2.1 Do your clients talk to you about the routes and methods they have used to flee their country of origin?

2.2 What geographic routes and methods do they use?

2.3 Do they have any control over this journey?
a. If yes, why do they choose this route/method?
b. If no, who makes the decision?

2.4 How do these routes/methods differ between clients?

2.5 How do refugees from northern Iraq enter Turkey and what happens to them on arrival?

2.6 Do your clients usually come directly from their country of origin or through a transit country?
a. If they come through a transit country, how long do they tend to spend there?
b. Why would they stay there for that period of time?
c. Do they claim asylum there?

2.7 Have these routes changed over recent years?

2.8 Do your clients travel alone or with the company or assistance of others?

2.9 Can you tell me anything about smuggling agents and networks within and beyond Turkey?

2.10 Can you estimate how many of your clients travel with ID/travel papers of some sort?
a. What papers do they have?
b. Did any of your clients use false papers to get here?
c. For the ones that don't have papers – why don't they have papers?

2.11 Can you estimate how many of your clients travel with a visa?
a. What sort of visa?
b. Where did they get the visa?

2.12 Can you estimate how many of your clients travel without a visa?
a. Why don't they have a visa?

2.13 How long is the average journey to Turkey for your clients?

2.14 How much would this journey cost?
a. How do they find the money for this?

2.15 Have the methods used to reach a safe country changed over recent years?

2.16 Do your clients talk about the dangers involved in their journey?

2.17 Are you aware of any particular difficulties experienced by vulnerable groups such as women, children or the elderly, during their journey?

2.18 What would happen to an individual who attempted to enter Turkey in an unauthorised manner?

3. Conditions in Turkey (questions apply to refugees with and without UNHCR status)

3.1 What is the RSD process like in Turkey?

3.2 How effective is the resettlement process?

3.3 How do your clients support themselves/their families while they are in Turkey?

3.4 What sort of support do they receive and from whom?

3.5 What rights do they have?

3.6 Do they experience any threats to their physical safety, either from Turkish or external agents?

3.7 How does the local population respond to the presence of refugees in satellite cities?

3.8 How does the local/regional government deal with the presence of large numbers of refugees in their area?

4. Future plans

4.1 Do your clients talk to you about their future plans i.e to stay in Turkey or to leave?

4.2 What do most of them intend to do?

4.3 Where do they intend to go?

4.4 What routes/methods do they tend to use to get out of Turkey? Can you give me some examples/anecdotes?
a. What are some of the risks involved?

4.5 How much would a journey like this cost and how do they fund it?

4.6 Other than UNHCR resettlement, are there any legal routes for refugees to leave Turkey?

4.7 Do any of your clients with UNHCR refugee or 'mandate' status choose to leave Turkey before they are resettled?

4.8 How long do your clients tend to stay in

Turkey before leaving?

4.9 Do your clients rely on a network of some sort during their journey?

4.10 What service does this network provide?

4.11 Have you encountered clients who have made multiple attempts to transit through Turkey on their way to the UK or another country?

4.12 The situation in Turkey and other transit countries has been described as a 'bottleneck' due to the number of irregular migrants forced to remain but with the intention of continuing on to Europe. How would you describe the situation?

5. Experiences of border controls/interception

5.1 Have your clients ever talked to you about their experiences of border controls during their journey?
a. How were they treated/what happened to them?
b. Do you know of any cases of *refoulement*?

5.2 What would happen to an individual who attempted to leave Turkey in an unauthorised manner?

5.3 Have any of your clients ever tried to claim asylum in an airport?

5.4 How were clients treated by airline staff?

5.5 Were any clients refused boarding by an airline?

6. Perspective on potential solutions

6.1 What do you think the UK government could do to make their border controls more sensitive to the protection needs of individuals like your clients?

## Private carriers

1. How do you implement border control measures?
   a. What sort of border control measures?
   b. Who has overall responsibility for border control?
   c. Who implements border controls on the ground?
   d. Where does it take place?
   e. How do you respond when you encounter an irregular migrant?
   f. Do they have the opportunity to appeal/seek legal advice?
   g. What is your response if they wish to seek asylum?
   h. Is there any discretion?
2. How have your border control responsibilities changed over time?
   a. Have you been receiving more pressure/demands from national border control authorities? How has this manifested itself?
   b. How have you responded to these demands?
3. What networks do you rely on to undertake immigration control?
   a. Airport Chaplains or other faith representatives?
   b. Airport staff?
   c. Immigration staff from UK and host country? (ALOs/ILOs)
   d. Civil society, NGOs, legal advisors?
   e. International aviation networks?
4. What is your relationship with national ALOs and ILOs?
5. Do you keep any records on irregular passengers intercepted by your staff?
   a. What sort of information do you record?
   b. How do you use/share this information?
6. Which routes are particularly risky for you with regard to irregular migration?
   a. Why? Who is using that route?
   b. What do you do to mitigate against this risk?
7. What are your main priorities/concerns with regard to border controls?
8. Do particular airports have different procedures?
   a. How does the airline cooperate with airport staff?
   b. Are certain airports less conscientious about border controls?
   c. Are certain airport/immigration staff more or less diligent? Is corruption a problem?
9. What impact has increased responsibility for border controls had on your ability to provide your services.
10. How do you feel about being responsible for immigration control activities?
    a. How have staff adjusted to the new expectations/role?
    b. What is the position/attitude of the industry union/association?
11. What is your experience of carriers' sanctions?
    a. From which State?
    b. How much did you pay?
    c. What were you required to do: return or

forward transport?

d. Is there any remedy/relief from fine if the person enters the asylum system or gets status?
e. What is required to become an 'authorised carrier' and is this realistic?
f. How do you feel about obligations under Carriers' Liability legislation?

12. What is your awareness of protection issues within the context of border controls?
    a. What are your responsibilities towards refugees/asylum seekers? How do you meet these responsibilities? How this be improved?
    b. Are your staff trained on immigration and refugee law and policy? Can we see a training manual/schedule? Can we have a visit to see border control staff at work?
    c. How do your staff respond when they intercept someone that they suspect may be a refugee? Do they have discretion to allow embarkation?
    d. Who do/can you refer to for assistance in dealing with refugees?

13. What would you find helpful in dealing with irregular migrants and in meeting the obligations under carriers' legislation?
    a. What assistance from other agencies would be useful?

# Glossary

**Refugee**
Article 1(2) of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol defines a refugee as a person who:

*"[…]owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*

For the purpose of this report, we use the term 'refugee' to describe any person who meets the criteria set out in the 1951 Refugee Convention, something which necessarily occurs before the s/he gains formal recognition as a refugee (Hamood, 2006).

**Asylum seeker**
An asylum seeker is someone who has left their country of origin and submitted an application to be recognised as a refugee but is still awaiting formal determination of their status. Article 14 of the Universal Declaration of Human Rights establishes the right to seek asylum.

**Migrant**
In this report, the term 'migrant' includes all persons who move temporarily or permanently to another country, including labour migrants and refugees, unless otherwise specified.

**Irregular migration**
In this report, we use the term 'irregular migration' rather than 'illegal migration' as it is less of a value-laden term and more accurately reflects the experiences of migrants who may, during one journey, move in and out of formal regularity and irregularity (de Haas, 2007). Most 'irregular migrants' enter destination countries legally, but become irregular by breaching the terms of their visa by overstaying or working illegally. At the same time, many migrants who enter a country illegally can acquire legal status through some form of regularisation (for example marriage or work). We will use a definition of irregular migration that focuses on the actual process of international movement: "*crossing borders without proper authority, or violating conditions for entering another country*" (Jordan & Düvell 2002 cited in de Haas, 2007: 4). As such, we will focus more on 'irregular entry', also known as 'clandestine entry', rather than 'irregular stay'.

**Interception**
Interception has been defined by UNHCR as "*encompassing all measures applied by a State outside its national territory in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea and making their way to the country of prospective destination*" (UNHCR, 2000b: 2). This term is used interchangeably with similar terms including 'interdiction', 'non-arrival' or 'non-entrée' measures and 'extra-territorial border controls'.

**Carrier sanctions**
Under the Immigration and Asylum Act 1999, the

UK introduced a system of civil penalties to impose on carriers that are found to have transported an insufficiently documented passenger (a passenger who does not have a proper passport or authorisation to enter that country). In addition to a fine of up to £2,000 per irregular passenger, carriers are also responsibile for accommodation, repatriation and other related costs. In order to avoid the fine, carriers must show that they have taken adequate steps to identify and intercept passengers attempting to travel without valid documents.

**Airline Liaison Officer**
UK Airline Liaison Officers (ALOs) are based in airports around the world, and work directly with airlines to reduce the number of inadequately documented arrivals in the UK. ALOs support carriers in discharging their responsibilities under the carrier sanctions regime, in order to avoid incurring a fine. They assist carriers by offering advice on the acceptability of documents presented for travel, and whether or not the airline is likely to be fined if they allow embarkation.

**Refoulement** is "*return in any manner whatsoever to a territory in which the refugee would be at risk of persecution*" (see 'The legal dimensions', page 22).

**Trafficking and smuggling**
There is a significant difference between 'human trafficking' and 'people-smuggling' and the terms should not be used interchangeably. Trafficking describes the irregular movement of people either within or across borders, for the purpose of financial gain. It is inherently coercive and exploitative, involving the threat or use of force and the abuse of power over individuals.[128] Smuggling also involves the illegal facilitation of border crossing but, in principle, it involves willing parties and does not imply the same level of abuse and exploitation as trafficking.[129] It is important to recognise that the distinction between the two experiences sometimes blurs: people who may have willingly sought the services of a smuggler in order to cross a border may become exposed to serious human rights violations along the way, and may even find themselves the victims of traffickers when they are trapped in exploitative labour in order to pay their transportation debt.

128 For a full definition see United Nations, 2000. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UNGA Res. 55/25, 15 November 2000.

129 For a full definition see United Nations, 2000. *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, UNGA Res. 55/25, 15 November 2000, [Smuggling Protocol], art. 3a.

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