

**Meeting of State Representatives on Rescue at Sea and Maritime Interception
in the Mediterranean
Madrid, 23 -24 May 2006**

Background Discussion Paper¹

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

¹ 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 through 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.² 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;

² 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)³
- the 1958 Convention on the High Seas⁴
- the 1974 International Convention for the Safety of Life at sea (SOLAS)⁵
- the 1979 International Convention on Maritime Search and Rescue (SAR).⁶

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.*”⁷

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 amendments⁸ impose upon governments an obligation to coordinate and cooperate, to ensure *inter alia* that:

³ 1982 UNCLOS, Article 98.

⁴ 1958 Convention on the High Seas, Article 12.

⁵ Annex to the 1974, SOLAS Convention, Chapter V, Regulation 7 and Regulation 33.

⁶ Annex to the 1979 SAR Convention, Chapter 1.3.2. and Chapter 2.1.10.

⁷ Annex to the 1979 SAR Convention, Chapter 1.3.2.

⁸ 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 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 cases⁹. 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

⁹ 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.”*¹⁰

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”*.¹¹ 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”*.¹²

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”*.¹³

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.

¹⁰ 1965 Convention on Facilitation of International Maritime Traffic, as amended, 10 January 2002, IMO Resolution FAL.7 (29), Section 1.1.

¹¹ Ibid. Section 4.2.

¹² Ibid. Section 4.1.

¹³ 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.”¹⁴*

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*.¹⁵

Protection safeguards in interception measures

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 law¹⁶ and is applicable by all States even if they are not party

¹⁴ Conclusion on Protection Safeguards in Interception Measures (No. 97 (LIV) – 2003).

¹⁵ See 1951 Convention, Articles 1, 31 and 33.

¹⁶ 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*”¹⁷, 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.¹⁸

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.¹⁹

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.

¹⁷ The Hague Program, Presidency Conclusion, adopted on 5 November 2004, Council Doc. 14292/04, Annex 1, OJ C53/1, 3 March 2005.

¹⁸ 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.

¹⁹ 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 Union²⁰ 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 Council²¹, 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 institution building, asylum issues and increasing public awareness of the dangers of

²⁰ 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.

²¹ 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.

illegal migration.²² 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.²³ 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 2005,²⁴ and the Presidency Conclusions of December 2005²⁵, 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

²² 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.

²³ Signed by the Ministers of Interior and Justice of the EU, then ratified by the European Council in June 2005.

²⁴ 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.

²⁵ 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.²⁶

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 Population²⁷, 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.*”²⁸

²⁶ Communication from the Commission: Strengthened practical cooperation, COM(2006)67 final, 17 February 2006.

²⁷ 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.

²⁸ 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