INTERCEPTION OF ASYLUM-SEEKERS AND REFUGEES: THE INTERNATIONAL FRAMEWORK AND RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH[1]

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.[2]

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.

1. 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

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[1] 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.

[2] 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[3] 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

[3] 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.[4] 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.[5]

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.

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[4] 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.

[5] 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.[6] 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.[7]

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

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[6] Conclusion No. 6 (XXVIII) of 1977 (A/AC.96/549, para.53(4)).
[7] 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.[8]

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.[9] The Office shares the concerns raised

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

[9] 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,[10] 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.[11]

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.

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

[11] See draft Article 7 *bis.*

comprehensive approach, with a view to the possible adoption of a conclusion on such an approach:[12]

(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,[13] enhanced efforts should be undertaken for their readmission including, where appropriate, through the assistance of

[12] 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).

[13] 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