

ECRE



EUROPEAN
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ON REFUGEES
AND EXILES

***Defending Refugees' Access
to Protection in Europe***

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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.

The Management of External Borders

1.1. The External Borders of the EU: What Are They?

The EU's Schengen Borders Code³ 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 Regulation⁵ 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.

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 Mitsellegas, '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 Council¹³ 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 States¹⁵ 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.

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 Iraqis²² 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 Coast 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, Libya³⁰ 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 process³⁵ 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 headquarters³⁹ 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 Rights⁵⁰ 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 University 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 Blackmun 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. “*Compliance 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.

⁵⁸ See James C. Hathaway, *The Rights of Refugees in International Law*, Cambridge, Cambridge University 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 University 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

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 Directive⁸¹

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 access 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 biometrics¹⁰⁰ 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 Visas¹⁰² 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.

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 countries¹³⁰ or including information coming from private actors.¹³¹

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 availability¹³³ 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 framework¹³⁵ 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 Mitselgeas, '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 interoperability, 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*

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;

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, material 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 entry¹⁷⁷ 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 access 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 interoperability, 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.