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United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

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RESCUE AT SEA, STOWAWAYS AND MARITIME INTERCEPTION

Selected Reference Materials

2nd Edition – December 2011

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November 2007



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**The UN
Refugee Agency**

Rescue at Sea, Stowaways and
Maritime Interception

Selected Reference Materials

2nd Edition – December 2011

Division of International Protection (DIP)
UNHCR Geneva

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INTRODUCTION

The phenomenon of people taking to the seas in search of safety, refuge, or simply better economic conditions is not new. The mass exodus from Vietnam throughout the 1980s was followed in the 1990s by large-scale departures from Albania, Cuba and Haiti. More recently, international attention has focused on the movement of Somalis and Ethiopians across the Gulf of Aden, increasing numbers of sea arrivals in Australia, and the outflow of people from North Africa to Europe in the aftermath of the Libya crisis. But beyond these situations, irregular maritime movements are a reality in all regions of the world and raise a number of specific protection challenges, notably in the context of rescue at sea, stowaway incidents and maritime interception.

Most irregular maritime movements today are “mixed movements”, involving people with various profiles and needs, as opposed to being primarily refugee outflows. However, almost all of these movements include at least some refugees, asylum-seekers or other people of concern to UNHCR.

Rescue at Sea

The vessels used for irregular maritime movements are frequently overcrowded, unseaworthy and not commanded by professional seamen. Distress at sea situations are common, raising grave humanitarian concerns for those involved. Search and rescue operations, disembarkation, processing and the identification of solutions for those rescued are re-occurring challenges for States, international organizations, and the shipping industry. Recent amendments to the International Convention for the Safety of Life at Sea (SOLAS Convention) and the International Convention on Maritime Search and Rescue (SAR Convention), as well as associated International Maritime Organization (IMO) Guidelines, underline the duty of all State Parties to co-ordinate and co-operate in rescue at sea operations.¹ However a number of key challenges remain, especially when search and rescue (SAR) operations involve people without proper travel documentation. These challenges include, fundamentally, ensuring the safety of human life at sea, the timely identification of a place of safety for disembarkation, and providing access to asylum and other appropriate procedures, and as well as outcomes for all rescued persons depending on their profiles and needs.

Stowaways

Refugees and asylum-seekers also travel as stowaways.² Once discovered, it can be difficult to obtain permission from coastal States for their disembarkation, forcing shipmasters to maintain them on board for prolonged periods of time, often under difficult conditions. When selecting a place of disembarkation, it is important to ensure that refugees and asylum-seekers will be referred to appropriate follow-up processes where their international protection needs can be assessed and addressed.

¹ 1974 International Convention for the Safety of Life at Sea (SOLAS), entered into force 25 May 1980, as amended, Regulation 33, 1-1; 1979 International Convention on Maritime Search and Rescue (SAR), entered into force 25 March 1980, as amended, Chapter 3.1.9; IMO Resolution MSC.167(78), Annex 34, *Guidelines on the Treatment of Persons Rescued at Sea*, 2004; IMO Circular FAL.3/Circ. 194, *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, 2009, paragraph 2.3.

² A stowaway is a person who secretly boards a vehicle, such as an aircraft, bus, ship, cargo truck or train, to travel without paying.

Maritime Interception

States are increasingly taking measures to stop or prevent the arrival of vessels carrying undocumented people through maritime interception operations. Interception operations, particularly those carried out on the high seas or in the territorial waters of other States, do not always include sufficient protection safeguards to ensure that the principle of *non-refoulement*³ is upheld. This raises concerns that refugees and other people in need of international protection may be returned to situations where they are at risk of persecution or other serious harm.

The involvement of refugees and other persons of concern to UNHCR in mixed maritime movements can implicate different areas of international law, including the international law of the sea, international refugee law, international human rights law, international humanitarian law and international criminal law. This binder compiles selected provisions from each of these bodies of law to assist governments, UNHCR colleagues and other interested professionals to identify the legal framework applicable to refugees and asylum-seekers travelling irregularly by sea. The binder is not exhaustive, and only key provisions have been chosen. In addition to international law, the binder includes selected guidelines, recommendations, submissions, advisory opinions and policy papers issued by UNHCR and the International Maritime Organization (IMO). These materials provide further guidance on how relevant standards may be operationalized in practice. The binder also contains selected materials from a number of meetings and conferences convened by UNHCR on these issues.

For each document the United Nations Treaty Series reference has been included, where applicable. In addition, to the extent possible a weblink has been provided to enable easy access to the complete text. For most documents, reference is provided to an official UN website. Where this was not available, another website has been indicated. Although such external websites have been carefully chosen, their content and quality cannot be guaranteed by UNHCR. Some modifications have been made with regard to the format of the original documents for consistency reasons.

UNHCR is grateful for any comments on the binder or recommendations for the inclusion of further material in the next edition. All comments may be sent to the Asylum/Migration Unit at HQPR07@unhcr.org.

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³ 1951 Convention relating to the Status of Refugees, entered into force 22 April 1954, Article 33.

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A. INTERNATIONAL LAW OF THE SEA

A. INTERNATIONAL LAW OF THE SEA

I. INTERNATIONAL INSTRUMENTS

This Section sets out selected provisions of various international conventions that together constitute the main body of the international law of the sea. The selected provisions determine State jurisdiction over different areas of the oceans and seas and provide the legal framework for search and rescue operations, stowaway incidents and maritime interception. The Section starts with the United Nations Convention on the Law of the Sea (UNCLOS), an “umbrella” Convention containing general principles that can be effectively implemented through the adoption and implementation of other instruments. The other treaties contained in this Section are then extracted in reverse chronological order of their adoption.

1. United Nations Convention on the Law of the Sea (UNCLOS) *

Open for signature: 10 December 1982

Entry into force: 16 November 1994

The United Nations Convention on the Law of the Sea (UNCLOS) provides a comprehensive legal framework governing all uses of the world’s oceans and seas and their resources. It lays the foundation upon which international cooperation can be built.

UNCLOS describes the rights and obligations of all States, including flag States, in the various maritime zones within and beyond national jurisdiction such as the high seas. It also establishes sovereign rights and jurisdiction of coastal States in areas under national jurisdiction (in the territorial sea, contiguous zone and exclusive economic zone).

UNCLOS codifies long-established customary principles of maritime law, including the obligation of shipmasters to render assistance to any person found at sea in danger of being lost. In addition, UNCLOS requires every coastal State to promote the establishment, operation and maintenance of an adequate and effective search and rescue service and, where circumstances so require, to cooperate in this endeavour with neighbouring States. The legal framework provided by UNCLOS is further developed and elaborated in the SAR and SOLAS Conventions (see below Sections A.I.3 and A.I.4).

Selected Provisions

Article 2 - Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

* 1833 United Nations Treaty Series 397, available at: http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 3 - Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 4 - Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 8 - Internal waters

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

Article 17 - Right of innocent passage

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

Article 18 - Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:
 - (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
 - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 19 - Meaning of innocent passage

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

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

...

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(l) any other activity not having a direct bearing on passage.

...

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

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

...

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

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

Article 25 - Rights of protection of the coastal State

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

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

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

Article 27 - Criminal jurisdiction on board a foreign ship

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

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

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

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

...

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

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

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

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

Article 33 - Contiguous zone

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

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

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

Article 38 – Right of transit passage

1. In straits referred to in article 37,¹ all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of

¹ Article 37 limits the application of Section 2, Part III of UNCLOS (articles 37-44) to “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”

the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

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

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

Article 39 - Duties of ships and aircraft during transit passage

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

...

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

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

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

2. Ships in transit passage shall:

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

...

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

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

...

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

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

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

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

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

Article 44 - Duties of States bordering straits

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

Article 45 - Innocent Passage

1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation:

(a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or

(b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits

Article 52 - Right of innocent passage

1. Subject to article 53² and without prejudice to article 50³, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3.

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

Articles 39, 40⁴, 42 and 44⁵ apply *mutatis mutandis* to archipelagic sea lanes passage.

² Article 53 defines the “right of archipelagic sea lanes passage”.

³ Article 50 provides archipelagic States with the rights to the “delimitation of internal waters” within a State’s archipelagic waters.

⁴ Article 40 subjects “research and survey activities” during transit passage to authorization by States bordering straits.

⁵ Article 44 sets forth the “duties of States bordering straits”.

Article 55 - Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 87- Freedom of the high seas

1. The high seas are open to all States, whether coastal or land locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

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

Article 92 - Status of ships

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

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

Article 94 - Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

(a) the construction, equipment and seaworthiness of ships;

(b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship

flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

Article 98 - Duty to render assistance

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

- (a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
- (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

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

Article 110 - Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96⁶, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed

⁶ Articles 95 and 96 set forth the rules for "immunity of warships on the high seas" and "immunity of ships used only on government non-commercial service".

to a further examination on board the ship, which must be carried out with all possible consideration.

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

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

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

Article 111 - Right of hot pursuit

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

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

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

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

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

6. Where hot pursuit is effected by an aircraft:

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

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

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

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

Article 311 - Relation to other conventions and international agreements

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

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

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

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

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

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

2. International Convention on Salvage*

*Adoption: 28 April 1989
Entry into force: 14 July 1996*

*While primarily concerned with the prevention of maritime pollution and salvage of property, the International Convention on Salvage also sets out the duties of the salvor, owner and shipmaster when assisting a vessel or a person in distress at sea.***

Selected Provisions

Chapter I – General provisions

Article 1 – Definitions

For the purpose of this Convention:

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

...

Chapter II – Performance of Salvage operations

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

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

(a) to carry out salvage operations with due care;

(b) in performing the duty specified in paragraph (a), to exercise due care to prevent and minimize damage to the environment;

(c) whenever circumstances reasonably require, to seek assistance from other salvors; and

(d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

* 1953 United Nations Treaty Series 194, available at: http://untreaty.un.org/unts/120001_144071/24/10/00020398.pdf.

** The 1989 Convention on Salvage superseded the International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature, adopted on 23 September 1910, available at: <http://www.admiraltylawguide.com/conven/salvage1910.html>. The 1910 Assistance and Salvage Convention obliged shipmasters to render assistance to all persons, even though an enemy, found at sea in danger of being lost and incorporated the "no cure, no pay" principle under which a salvor is only rewarded for services if the operation is successful.

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

Article 10 - Duty to render assistance

1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.
3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.

Article 11 – Co-operation

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

3. International Convention on Maritime Search and Rescue (SAR)*

*Adoption: 27 April 1979
Entry into force: 25 March 1980*

The objective of the International Convention on Maritime Search and Rescue (SAR Convention) is to ensure that no matter where a distress at sea situation occurs, rescue operations will be co-coordinated by a search and rescue (SAR) organization and, when necessary, by cooperation between neighbouring SAR organizations. The obligation of shipmasters to assist vessels in distress is part of maritime tradition and is enshrined in international conventions (such as the 1974 SOLAS Convention, see below Section A.I.4), but the SAR Convention introduced for the first time a comprehensive international regime governing SAR operations. The Annex to the SAR Convention sets out in detail the requirements for States in order to provide adequate SAR services.

The SAR Convention defines “rescue” as an “operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”. Inter alia, the SAR Convention obliges State parties, individually or in cooperation with other States, to establish rescue co-ordination centres. It outlines operating procedures to be followed in the event of emergencies or alerts as well as during SAR operations. This includes the designation of an on-scene co-ordinator.

Selected Provisions

ANNEX

Chapter 1

Terms and definitions

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

...

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

...

1.3.13 *Distress phase*. A situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance;

* 1403 United Nations Treaty Series, available at:
<http://www.admiraltylawguide.com/conven/searchrescue19379.html>.

Chapter 2

Organization and co-ordination

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

2.1.1 Parties shall, as they are able to do so individually or in co-operation with other States and, as appropriate, with the Organization, participate in the development of search and rescue services to ensure that assistance is rendered to any person in distress at sea. On receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided.

...

2.1.4 Each search and rescue region shall be established by agreement among Parties concerned. The Secretary-General shall be notified of such agreements.

...

2.1.7 The delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States.

...

2.1.9 Parties having accepted responsibility to provide search and rescue services for a specified area shall use search and rescue units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea.

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

2.2 Development of national search and rescue services

2.2.1 Parties shall establish appropriate national procedures for overall development, co-ordination and improvement of search and rescue services.

2.2.2 To support efficient search and rescue operations, Parties shall:

.1 ensure the co-ordinated use of available facilities; and

.2 establish close co-operation between services and organizations which may contribute to improve the search and rescue service in areas such as operations, planning, training, exercises and research and development.

2.3 Establishment of rescue co-ordination centres and rescue sub-centres

2.3.1 To meet the requirements of paragraphs 2.2, Parties shall individually or in co-operation with other States establish rescue co-ordination centres for their search and rescue services and such rescue sub-centres as they consider appropriate.

2.3.2 Each rescue co-ordination centre and rescue sub-centre, established in accordance with paragraph 2.3.1, shall arrange for the receipt of distress alerts originating from within its search and rescue region. Every such centre shall also arrange for communications with persons in distress, with search and rescue facilities, and with other rescue co-ordination centres or rescue sub-centres.

2.3.3 Each rescue co-ordination centre shall be operational on a 24-hour basis and be constantly staffed by trained personnel having a working knowledge of the English language.

2004 AMENDMENTS TO THE INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE**

Amendments to the Annex of the SAR Convention in 2004 aimed to enhance cooperation between States in rescue at sea situations and to ensure that people in distress at sea are assisted while minimizing the inconvenience for the assisting ship. States are required to co-ordinate and co-operate to ensure that shipmasters are released from their obligations with minimum further deviation from the ship's intended voyage, and that survivors are disembarked and delivered to a place of safety as soon as reasonably practicable. This obligation has also been included in the SOLAS Convention (see below Section A.I.4).

Selected Provisions

ANNEX

CHAPTER 2 ORGANIZATION AND CO-ORDINATION

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

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

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

CHAPTER 3 CO-OPERATION BETWEEN STATES

3.1 Co-operation between States

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

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

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

“3.1.9 Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided

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

that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.”

CHAPTER 4 OPERATING PROCEDURES

4.8 Termination and suspension of search and rescue operations

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

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

4. International Convention for the Safety of Life at Sea (SOLAS)*

*Adoption: 1 November 1974
Entry into force: 25 May 1980*

The International Convention for the Safety of Life at Sea (SOLAS Convention) is one of the most important treaties concerning maritime safety. The original version of this Convention was adopted in 1914, in response to the Titanic disaster, but it has been updated and amended on numerous occasions. The Convention in force today is sometimes referred to as SOLAS, 1974, as amended. It requires flag States to ensure that their ships comply with minimum safety standards in construction, equipment and operation. It also includes an obligation for all shipmasters to provide assistance to persons in distress at sea as soon as possible after receiving a distress signal. It consists of various articles setting out general obligations, followed by an Annex divided into twelve chapters. Of these, Chapter five (often called 'SOLAS V') applies to all vessels on the sea. Many countries have incorporated these international provisions into national laws, so that any actor on the sea who is in breach of SOLAS V requirements may find themselves subject to legal proceedings in relevant national jurisdictions.

Selected Provisions

ANNEX

Chapter V: Safety of Navigation

Regulation 7

Search and rescue services

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

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

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

* 1184 United Nations Treaty Series 3, available at: <http://treaties.un.org/doc/Publication/UNTS/Volume1184/volume-1184-I-18961-English.pdf>.

undertaken to test its effectiveness. The plan shall be developed based on the guidelines developed by the Organization.

Regulation 33

Distress Messages: Obligations and Procedures

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

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

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

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

5 The provisions of this regulation do not prejudice the International Convention for the Unification of Certain Rules with regard to Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention.¹

¹ International Convention on Salvage, 1989, done at London on 28 April 1989, entered into force on 14 July 1996 [see above Section A.I.2].

AMENDMENTS TO THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA**

*Amendments to the SOLAS Convention were adopted in 2004 to address challenges encountered by shipmasters seeking to meet their obligations regarding rescue at sea, but not being able to bring a rescue operation to conclusion due to the lack of cooperation between concerned States. The amendments complement the obligation of the shipmaster to render assistance to persons in distress at sea with a corresponding obligation for States to cooperate and coordinate in rescue situations and, notably, to ensure that rescued persons are delivered to a place of safety with minimum further deviation from the ship's intended voyage. The term "place of safety" is not defined in the amendments.*** The amendments also emphasize that the obligation to provide assistance applies with respect to all persons in distress at sea, regardless of the nationality or status of such persons or the circumstances in which they are found, and obliges shipmasters to treat rescued persons humanely. According to the associated IMO Guidelines (see below Section A.II.3), the State responsible for the SAR region has "primary responsibility" for ensuring co-ordination and co-operation occurs.*

Selected Provisions

ANNEX

CHAPTER V

SAFETY OF NAVIGATION

Regulation 2 – Definitions

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

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

Regulation 33 – Distress messages: obligations and procedure

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

“Distress situations: obligations and procedures”

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

*** Note, however, that the IMO's Maritime Safety Committee (MSC) describes a place of safety as a location where the rescue action ends and the life of the person affected is no longer in danger: IMO Resolution MSC. 167(78), Annex 34, *Guidelines on the Treatment of Persons Rescued at Sea*, paragraph 6.12, extracts include below Section A.II.3.

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

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

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

“1-1 Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.”

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

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

Regulation 34 – Safe navigation and avoidance of dangerous situations

6 The existing paragraph 3 is deleted.

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

Regulation 34-1 Master’s discretion

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

5. Convention on Facilitation of International Maritime Traffic (FAL)*

*Adoption: 9 April 1965
Entry into force: 5 March 1967*

The main objective of the Convention on Facilitation of International Maritime Traffic (FAL Convention) is to facilitate maritime transport by simplifying and minimizing the formalities, documentary requirements and procedures associated with the arrival, stay and departure of ships engaged in international voyages. The Annex to the FAL Convention sets out necessary “standards” to facilitate international maritime traffic, as well as some non-binding “recommended practices”.

Amendments to the FAL Convention were adopted in 2002 to address delays in maritime traffic as a result of stowaways. The amendments establish a new section 4 specific to stowaways, with mandatory provisions to reduce the risk of stowaway incidents such as thorough searches of ships where there is a risk of embarkation by stowaways and strengthened preventative measures. The 2002 amendments also recognize and reinforce the rights of stowaways, notably by requiring humanitarian principles, including international refugee law, to be applied when dealing with stowaway incidents.

Amendments were also made to the Annex of the FAL Convention in 2005, including provisions relating to persons rescued at sea. The amendments require public authorities to facilitate the arrival and departure of ships that are engaged in rescue at sea operations and to provide emergency medical treatment to rescued persons without delay.

Selected Provisions

ANNEX

Section 1 - Definitions and general provisions

A. Definitions

For the purpose of the provisions of this annex, the following meanings shall be attributed to the terms listed:

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

* Consolidated text of the FAL Convention, as amended, incorporating the 2005 amendments, Resolution FAL.8(32), adopted on 7 July 2005, entered into force on 1 November 2006, available at: <http://www.tc.gc.ca/media/documents/marinesafety/fal-34-4-e.pdf>, as supplemented by Amendments to the Annex to the Convention on Facilitation of International Maritime Traffic, 1965, Resolution FAL.10(35), adopted January 2009, available at: [http://www.imo.org/blast/blastDataHelper.asp?data_id=25276&filename=10\(35\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=25276&filename=10(35).pdf).

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

Security measures. Measures developed and implemented in accordance with international agreements to improve security on board ships, in port areas, facilities and of goods moving in the international supply chain to detect and prevent unlawful acts.¹

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

...

Section 2 – Arrival, stay and departure of the ship

H. Special measures of facilitation for ships calling at ports in order to put ashore sick or injured crew members, passengers, persons rescued at sea or other persons for emergency medical treatment

2.20 Standard. Public authorities shall seek the co-operation of shipowners to ensure that, when ships intend to call at ports for the sole purpose of putting ashore sick or injured crew members, passengers, persons rescued at sea, or other persons for emergency medical treatment, the master shall give the public authorities as much notice as possible of that intention, with the fullest possible details of the sickness or injury and of the identity of the persons.

2.21 Standard. Public authorities shall, by radio whenever possible, but in any case by the fastest channels available, inform the master, before the arrival of the ship, of the documentation and the procedures necessary to put the sick or injured persons ashore expeditiously and to clear the ship without delay.

2.22 Standard. With regard to ships calling at ports for this purpose and intending to leave again immediately, public authorities shall give priority in berthing if the state of the sick person or the sea conditions do not allow a safe disembarkation in the roads or harbour approaches.

2.23 Standard. With regard to ships calling at ports for this purpose and intending to leave again immediately, public authorities shall not normally require the documents mentioned in Standard 2.1 with the exception of the Maritime Declaration of Health and, if it is indispensable, the General Declaration.

¹ Reference is made to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (SUA Convention), the International Ship & Port Facility Security Code (ISPS Code) and the International Convention for the Safety of Life at Sea, 1974 (SOLAS), Chapter XI-2.

2.24 Standard. Where public authorities require the General Declaration, this document shall not contain more data than those mentioned in Recommended Practice 2.2.2 and, wherever possible, shall contain less.

2.25 Standard. Where the public authorities apply control measures related to the arrival of a ship prior to sick or injured persons being put ashore, emergency medical treatment and measures for the protection of public health shall take precedence over these control measures.

2.26 Standard. Where guarantees or undertakings are required in respect of costs of treatment or eventual removal or repatriation of the persons concerned, emergency medical treatment shall not be withheld or delayed while these guarantees or undertakings are being obtained.

2.27 Standard. Emergency medical treatment and measures for the protection of public health shall take precedence over any control measures which public authorities may apply to sick or injured persons being put ashore.

Section 4 – Stowaways

A. General Principles

4.1 Standard. The provisions in this section shall be applied in accordance with international protection principles as set out in international instruments, such as the UN Convention relating to the Status of Refugees of 28 July 1951 and the UN Protocol relating to the Status of Refugees of 31 January 1967, and relevant national legislation.²

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

B. Preventive measures

4.3. Ship/Port preventive measures

4.3.1 Port/terminal authorities

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

² In addition, public authorities may wish to consider the non-binding conclusion of the UNHCR Executive Committee Conclusion on Stowaway Asylum-Seekers (1988, No. 53 (XXXIX)).

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

- a) regular patrolling of port areas;
- b) establishment of special storage facilities for cargo subject to high risk of access of stowaways, and continuous monitoring of both persons and cargo entering these areas;
- c) inspections of warehouses and cargo storage areas;
- d) search of cargo itself, when presence of stowaways is clearly indicated;
- e) co-operation between public authorities, shipowners, masters and relevant shore-side entities in developing operational arrangements;
- f) co-operation between port authorities and other relevant authorities (e.g. police, customs, immigration) in order to prevent smuggling of humans;
- g) developing and implementing agreements with stevedores and other shoreside entities operating in national ports to ensure that only personnel authorized by these entities participate in the stowing/unstowing or loading/unloading of ships or other functions related to the ships stay in port;
- h) developing and implementing agreements with stevedores and other shoreside entities to ensure that their personnel having access to the ship is easily identifiable, and a list of names of persons likely to need to board the ship in the course of their duties is provided; and
- i) encouragement of stevedores and other persons working in the port area to report to the port authorities, the presence of any persons apparently not authorised to be in the port area.

4.3.2 Shipowner/Shipmaster

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

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

- all doors, hatches and means of access to holds or stores, which are not used during the ships stay in port should be locked;
- access points to the ship should be kept to a minimum and be adequately secured;
- areas seaward of the ship should be adequately secured;

- adequate deck watch should be kept;
- boardings and disembarkations should, where possible, be tallied by the ships crew or, after agreement with the shipmaster, by others;
- adequate means of communication should be maintained; and
- at night, adequate lighting should be maintained both inside and along the hull.

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

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

4.3.3 National Sanctions

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

C. Treatment of the stowaway while on board

4.4 General principles – Humane treatment

4.4.1 Standard. Stowaway incidents shall be dealt with consistent with humanitarian principles, including those mentioned in Standard 4.1. Due consideration must always be given to the operational safety of the ship and the safety and well being of the stowaway.

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

4.5 Work on board

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

4.6 Questioning and notification by the shipmaster

4.6.1 Standard. Contracting Governments shall require shipmasters to make every effort to establish the identity, including nationality/citizenship of the stowaway and the port of

embarkation of the stowaway, and to notify the existence of the stowaway along with relevant details to the public authorities of the first planned port of call. This information shall also be provided to the shipowner, public authorities at the port of embarkation, the flag State and any subsequent ports of call if relevant.

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

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

4.7 Notification of the International Maritime Organization

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

D. Deviation from the planned route

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

- permission to disembark the stowaway has been granted by the public authorities of the State to whose port the ship deviates; or
- repatriation has been arranged elsewhere with sufficient documentation and permission for disembarkation; or
- there are extenuating security, health or compassionate reasons.

E. Disembarkation and return of a stowaway

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

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

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

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

- a case is unresolved at the time of sailing of the ship; or
- the presence on board of the stowaway would endanger the safe operation of the ship, the health of the crew or the stowaway.

4.10 Subsequent ports of call

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

4.11 State of Nationality or Right of Residence

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

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

4.12 State of Embarkation

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

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

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

4.13 *The flag State*

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

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

4.14 *Return of stowaways*

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

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

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

4.15 *Cost of return and maintenance of stowaways*

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

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

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

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

<i>Gender:</i>	<i>First language:</i>
<i>Date of birth:</i>	<i>Spoken:</i>
<i>Place of birth:</i>	<i>Read:</i>
<i>Claimed nationality:</i>	<i>Written:</i>
<i>Home address:</i>	<i>Other languages:</i>
	<i>Spoken:</i>
<i>Country of domicile:</i>	<i>Read:</i>
	<i>Written:</i>

Other details:

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

- 2) Inventory of the Stowaway's possessions:

- 3) Statement made by the Stowaway:

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

Date(s) of Interview(s):

Stowaway's signature:

Date:

Master's signature:

Date:

6. Convention on the High Seas*

*Adoption: 29 April 1958
Entry into force: 30 September 1962*

The Convention on the High Seas codifies the rules of customary international law relating to the high seas, including with respect to rescue at sea. This Convention was superseded by the United Nations Convention on the Law of the Sea (UNCLOS, see above Section A.I.1), which has incorporated most of its provisions, but it remains in force for those States not party to UNCLOS.

Selected Provision

Article 12

1. Every State shall require the master of a ship sailing under its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers,
 - (a) To render assistance to any person found at sea in danger of being lost;
 - (b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

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

* 450 United Nations Treaty Series 397, available at:
http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf.

II. IMO GUIDELINES

The International Maritime Organization (IMO) is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships. The Maritime Safety Committee (MSC), the highest technical governmental body of the IMO, and the Facilitation Committee (FAL), regularly adopt codes, amendments to the SOLAS and FAL Conventions, as well as recommendations and guidelines on various issues including stowaways and the treatment of persons rescued at sea. Although non-binding, these instruments provide guidance to States in framing national regulations and in operationalizing States' obligations relating to maritime safety.

1. Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases*

*These revised guidelines became effective on 1 October 2011, superseding a previous version from 1997.** The Revised Guidelines specify that shipmasters, shipowners, public authorities and other stakeholders have a responsibility to cooperate in order to prevent stowaway incidents and to resolve stowaway cases expeditiously, in a manner consistent with humanitarian principles. They will be particularly useful for Member States of the IMO that are not Contracting Governments to the FAL Convention and to those Contracting Governments that find it impracticable to comply with section 4 of the annex to the FAL Convention on stowaways (above Section A.I.5).*

THE MARITIME SAFETY COMMITTEE,

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

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

RECALLING the provisions of resolution A.1027(26) on Application and revision of the Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases (resolution A.871(20)),

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

* IMO Resolution MSC.312(88), adopted on 2 December 2010.

** According to IMO resolution A.1027(26), the revised guidelines (consisting of two parallel resolutions - MSC.312(88), adopted on 2 December 2010, and resolution FAL.11(37), adopted on 9 September 2011) supersede the previous version of these guidelines (1997, adopted by resolution A.871(20)). Resolution FAL.11(37) is available at: <http://www.imo.org/OurWork/Facilitation/Documents/FAL%2011.37.pdf>.

RECALLING FURTHER that, in accordance with article VII(2)(a) of the FAL Convention, the Facilitation Committee, at its twenty-ninth session, adopted by resolution FAL.7(29) Amendments to the Convention on Facilitation of International Maritime Traffic, 1965, as amended, which introduced a new section 4 on Stowaways in the Annex to the Convention, prescribing Standards and Recommended Practices on matters relating to stowaways (the FAL provisions on stowaways), which entered into force on 1 May 2003,

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

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

NOTING FURTHER that the Assembly, at its twentieth regular session, adopted, by resolution A.871(20), Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases (the Guidelines),

RECALLING that resolution A.1027(26) expressed conviction of the need to align, to the extent possible and desirable, the Guidelines with the FAL provisions on stowaways and to revise them in a manner that reflects developments in efforts undertaken to prevent stowaways, as well as to provide guidance and recommendations, taking into account the FAL provisions on stowaways, on measures which can be implemented by vessels to prevent cases involving stowaways,

RECOGNIZING that the revision of the Guidelines should be done in a manner that does not duplicate the existing provisions of the Special measures to enhance maritime security contained in chapter XI-2 of the International Convention for the Safety of Life at Sea, 1974, as amended, and in the International Ship and Port Facility Security (ISPS) Code, but augments and supplements them in the context of preventing cases involving stowaways,

RECALLING that one of the functional requirements of the ISPS Code is to prevent unauthorized access of any kind to ships, port facilities and their restricted areas, and that ship security assessments and port facility security assessments should consider all possible threats, including the presence of stowaways,

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

BEING AWARE that considerable difficulties continue to be encountered by shipmasters and shipping companies, shipowners and ship operators when stowaways are to be disembarked from ships into the care of the appropriate authorities,

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

NOTING that several Member States which are also Contracting Governments to the FAL Convention:

- (a) have notified the Secretary-General, in accordance with article VIII(1) of the FAL Convention (in relation to the Standards specified in section 4 of the Annex to the FAL Convention) either that they find it impracticable to comply with the above-mentioned Standards or of differences between their own practices and those Standards; or
- (b) have not yet notified the Secretary-General, in accordance with article VIII(3) of the FAL Convention, that they have brought their formalities, documentary requirements and procedures into accord in so far as practicable with the Recommended Practices specified in section 4 of the Annex to the FAL Convention,

NOTING ALSO that the parallel existence of the Guidelines and the FAL provisions on stowaways has raised questions in relation to the procedures to be followed for dealing with stowaways by Member States which are also Contracting Governments to the FAL Convention, in particular those referred to above,

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

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

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

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

RECALLING ALSO resolution A.1027(26), adopted by the Assembly at its twenty-seventh regular session, by which the Assembly, inter alia, authorized the Facilitation Committee and the Maritime Safety Committee to adopt jointly the necessary amendments to the Guidelines and to promulgate them by appropriate means,

HAVING CONSIDERED the work done by the Facilitation Committee, at its thirty-sixth session,

NOTING that the Facilitation Committee, at its thirty-seventh session, is expected to adopt a resolution on Revised guidelines on the prevention of access by stowaways and the allocation of responsibilities to seek the successful resolution of stowaway cases, in which it will adopt identical amendments to the Guidelines,

1. ADOPTS the Revised guidelines on the prevention of access by stowaways and the allocation of responsibilities to seek the successful resolution of stowaway cases, set out in the Annex to the present resolution;
2. AGREES that the provisions of this resolution should, in accordance with resolution A.1027(26), be considered as being of relevance only with respect to:
 - (a) Member States which are not Contracting Governments to the FAL Convention; and
 - (b) Member States which are Contracting Governments to the FAL Convention and which:
 - (i) have notified the Secretary-General, in accordance with article VIII(1) of the FAL Convention (in relation to the Standards specified in section 4 of the Annex to the FAL Convention) either that they find it impracticable to comply with the aforementioned Standards or of differences between their own practices and those Standards; or
 - (ii) have not yet notified the Secretary-General, in accordance with article VIII(3) of the FAL Convention, that they have brought their formalities, documentary requirements and procedures into accord in so far as practicable with the Recommended Practices specified in section 4 of the Annex to the FAL Convention;
3. URGES Governments to implement in their national policies and practices the amended procedures recommended in the annexed Guidelines as from 1 October 2011;
4. URGES ALSO Governments to deal with stowaway cases in a spirit of cooperation with other parties concerned, on the basis of the allocation of responsibilities set out in the annexed Guidelines;
5. INVITES shipping companies, shipowners, ship operators and other stakeholders to take on the relevant responsibilities set out in the annexed Guidelines and to guide their masters and crews as to their respective responsibilities in stowaway cases;
6. INVITES Governments to develop, in cooperation with the industry, comprehensive strategies to improve access control and prevent intending stowaways from gaining access to ships;
7. AGREES that the Maritime Safety Committee should continue to monitor the effectiveness of the annexed Guidelines on the basis of information provided by Governments and the industry, to keep them under review and to take such further action;
8. REQUESTS ALSO the Assembly to endorse the action taken by the Maritime Safety Committee and the Facilitation Committee.

ANNEX

Revised Guidelines on the Prevention of Stowaway Incidents and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases

1 Introduction

1.1 Masters, shipowners, public authorities, port authorities and other stakeholders, including those providing security services ashore, have a responsibility to cooperate to the fullest extent possible in order:

- .1 to prevent stowaway incidents; and
- .2 to resolve stowaway cases expeditiously and secure that an early return or repatriation of the stowaway will take place. All appropriate measures should be taken in order to avoid situations where stowaways must stay on board ships indefinitely.

1.2 However, no matter how effective port and ship security measures are, it is recognized that there will still be occasions when stowaways gain access to vessels, either secreted in the cargo or by surreptitious boarding.

1.3 The resolution of stowaway cases is difficult because of different national legislation in each of the several potentially involved States: the State of embarkation, the State of disembarkation, the flag State of the ship, the State of apparent, claimed or actual nationality/citizenship or right of residence of the stowaway, and States of transit during repatriation.

2 Definitions

For the purpose of these Guidelines:

- .1 *Attempted stowaway.* A person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person, and who is detected on board the ship before it has departed from the port.
- .2 *Port.* Any port, terminal, offshore terminal, ship and repair yard or roadstead which is normally used for the loading, unloading, repair and anchoring of ships, or any other place at which a ship can call.
- .3 *Public authorities.* The agencies or officials in a State responsible for the application and enforcement of the laws and regulations of that State which relate to any aspect of the present Guidelines.
- .4 *Security measures.* Measures developed and implemented in accordance with international agreements to improve security on board ships, in port areas,

facilities and of goods moving in the international supply chain to detect and prevent unlawful acts¹.

- .5 *Shipowner*. One who owns or operates a ship, whether a person, a corporation or other legal entity, and any person acting on behalf of the owner or operator.
- .6 *Stowaway*. A person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities.

3 Basic principles

On the basis of the experience thus far, the application of the following basic principles have been useful in preventing stowaway incidents and have been helpful in the speedy resolution of stowaway cases:

- .1 Stowaway incidents should be dealt with in a manner consistent with humanitarian principles. Due consideration must always be given to the operational safety and security of the ship and to the safety and well-being of the stowaway.
- .2 Public authorities, port authorities, shipowners and masters, should co-operate to the fullest extent possible in order to prevent stowaway incidents.
- .3 Shipowners, masters, port authorities and public authorities should have adequate security arrangements in place which, as far as practicable, will prevent intending stowaways from getting aboard a ship or, if this fails, will detect them before the ship leaves port or, at the latest, before it arrives at the next port of call.
- .4 Adequate, frequent and well timed searches minimize the risk of having to deal with a stowaway case and may also save the life of a stowaway who may, for example, be hiding in a place which is subsequently sealed and/or chemically treated.
- .5 Public authorities, port authorities, shipowners and masters, should co-operate to the fullest extent possible in order to resolve stowaway cases expeditiously and secure that an early return or repatriation of the stowaway will take place. All appropriate measures should be taken in order to avoid situations where stowaways must stay on board ships indefinitely.

¹ Reference is made to chapter XI-2 of the International Convention for the Safety of Life at Sea, 1974, as amended (1974 SOLAS Convention) and the International Ship and Port Facility Security Code, as amended (the ISPS Code); and to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (1988 SUA Convention) and its 2005 Protocol (2005 SUA Protocol).

- .6 Stowaways arriving at or entering a State without the required documents are, in general, illegal entrants. Decisions on dealing with such situations are the prerogative of the States where such arrival or entry occurs.
- .7 Stowaway asylum-seekers should be treated in accordance with international protection principles as set out in international instruments, such as the provisions of the United Nations Convention relating to the Status of Refugees of 28 July 1951 and of the United Nations Protocol relating to the Status of Refugees of 31 January 1967 and relevant national legislation.²
- .8 Every effort should be made to avoid situations where a stowaway has to be detained on board a ship indefinitely. In this regard States should co-operate with the shipowner in arranging the disembarkation of a stowaway to an appropriate State.
- .9 States should accept the return of stowaways who have full nationality/citizenship status in that State, or have a right of residence in that State.
- .10 Where the nationality or citizenship or right of residence cannot be established, the State of the original port of embarkation of a stowaway should accept the return of such a stowaway for examination pending final case disposition.

4 Preventive measures

4.1 Port/terminal authorities

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

4.1.2 Operational arrangements and/or security plans should, inter alia, address the following issues where appropriate:

- .1 regular patrolling of port areas;
- .2 establishment of special storage facilities for cargo subject to high risk of access of stowaways, and continuous monitoring of both persons and cargo entering these areas;
- .3 inspections of warehouses and cargo storage areas;
- .4 search of cargo itself, when presence of stowaways is clearly indicated;

² See also UNHCR Executive Committee on Stowaway Asylum-Seekers No. 53 (XXXIX) (1988).

- .5 cooperation between public authorities, shipowners, masters and relevant shore-side entities in developing operational arrangements;
- .6 cooperation between port authorities and other relevant authorities (for example, police, customs, immigration) in order to prevent smuggling of humans;
- .7 developing and implementing agreements with stevedores and other shore-side entities operating in ports to ensure that only personnel authorized by these entities participate in the stowing/unstowing or loading/unloading of ships or other functions related to the ships stay in port;
- .8 developing and implementing agreements with stevedores and other shoreside entities to ensure that their personnel having access to the ship are easily identifiable, and a list of names of persons likely to need to board the ship in the course of their duties is provided; and
- .9 encouraging stevedores and other persons working in the port area to report to the public and port authorities, the presence of any persons apparently not authorized to be in the port area.

4.2 Shipowner/Master

4.2.1 Shipowners and masters should ensure that adequate security arrangements are in place which, as far as practicable, will prevent intending stowaways from getting aboard the ship, and, if this fails, as far as practicable, will detect them before the ship leaves port or, at the latest, before it arrives at the next port of call.

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

- .1 all doors, hatches and means of access to holds or stores, which are not used during the ship's stay in port should be locked;
- .2 access points to the ship should be kept to a minimum and be adequately secured;
- .3 areas seaward of the ship should be adequately secured;
- .4 adequate deck watch should be kept;
- .5 boardings and disembarkations should, where possible, be tallied by the ship's crew or, after agreement with the master, by others;
- .6 adequate means of communication should be maintained; and
- .7 at night, adequate lighting should be maintained both inside and along the hull.

4.2.3 When departing from a port, where there is risk of stowaway embarkation, a ship should undergo a thorough search in accordance with a specific plan or schedule, and with priorities given to places where stowaways might hide. Search methods, which are likely to harm secreted stowaways should not be used.

4.2.4 Fumigation or sealing should not be carried out until a thorough search of the areas to be fumigated or sealed has taken place in order to ensure that no stowaways are present in those areas.

5 Responsibilities in relation to the resolution of stowaway cases

5.1 Questioning and notification by the master

It is the responsibility of the master of the ship which finds any stowaways on board:

- .1 to make every effort to determine immediately the port of embarkation of the stowaway;
- .2 to make every effort to establish the identity, including the nationality/citizenship and the right of residence of the stowaway;
- .3 to prepare a statement containing all available information relevant to the stowaway for presentation to the appropriate authorities (for example, the public authorities at the port of embarkation, the flag State and any subsequent ports of call if relevant) and the shipowner. In this respect the reporting form provided in the Appendix should be used and completed as far as practicable;
- .4 to notify the existence of a stowaway and any relevant details to the shipowner and appropriate authorities at the port of embarkation, the next port of call and the flag State; with the understanding that when a stowaway declares himself/herself to be a refugee, this information should be treated as confidential to the extent necessary for the security of the stowaway;
- .5 not to depart from the planned voyage to seek the disembarkation of a stowaway discovered on board the ship after it has left the territorial waters of the State where the stowaways embarked unless permission to disembark the stowaway has been granted by the public authorities of the State to whose port the ship deviates, or repatriation has been arranged elsewhere with sufficient documentation and permission given for disembarkation, or unless there are extenuating safety, security, health or compassionate reasons;
- .6 to ensure that the stowaway is presented to the appropriate authorities at the next port of call in accordance with their requirements;
- .7 to take appropriate measures to ensure the security, general health, welfare and safety of the stowaway until disembarkation, including providing him/her with adequate provisioning, accommodation, proper medical attention and sanitary facilities;

- .8 to ensure that stowaways are not made to work on board the ship, except in emergency situations or in relation to the stowaway's accommodation on board; and
- .9 to ensure that stowaways are treated humanely, consistent with the basic principles.

5.2 The shipowner

It is the responsibility of the shipowner of the ship on which stowaways are found:

- .1 to ensure that the existence of, and any relevant information on, the stowaway has been notified to the appropriate authorities at the port of embarkation, the next port of call and the flag State;
- .2 to comply with any removal directions made by the competent national authorities at the port of disembarkation; and
- .3 to cover any applicable costs relating to the removal, detention, care and disembarkation of the stowaway in accordance with the legislation of the States which may be involved.

5.3 The State of the first port of call according to the voyage plan

It is the responsibility of the State of first port of call according to the voyage plan after the discovery of the stowaway:

- .1 to accept the stowaway for examination in accordance with the national laws of that State and, where the competent national authority considers that it would facilitate matters, to allow the shipowner and the competent or appointed P&I Club correspondent to have access to the stowaway;
- .2 to favourably consider allowing disembarkation and provide, as necessary and in accordance with national law, secure accommodation which may be at the expense of the shipowner, where:
 - .1 a case is unresolved at the time of sailing of the ship, or
 - .2 the stowaway is in possession of valid documents for return and the public authorities are satisfied that timely arrangements have been or will be made for repatriation and all the requisites for transit fulfilled, or
 - .3 other factors make it impractical to remove the stowaway from the ship on arrival; such factors may include but are not limited to cases where a stowaway's presence on board would endanger the safe and secure operation of the ship, the health of the crew or the stowaway;
- .3 to make every effort to cooperate in the identification of the stowaway and the establishment of his/her nationality/citizenship or right of residence;

- .4 to make every effort to cooperate in establishing the validity and authenticity of a stowaway's documents and, when a stowaway has inadequate documents, to whenever practicable and to an extent compatible with national legislation and security requirements, issue a covering letter with a photograph of the stowaway and any other important information. The letter, authorizing the return of the stowaway either to his/her State of origin or to the point where the stowaway commenced his/her journey, as appropriate, by any means of transportation and specifying any other conditions imposed by the authorities, should be handed over to the operator effecting the removal of the stowaway. This letter will include information required by the authorities at transit points and/or the point of disembarkation;
- .5 to give directions for the removal of the stowaway to the port of embarkation, State of nationality/citizenship or right of residence or to some other State to which lawful directions may be made, in co-operation with the shipowner;
- .6 to inform the shipowner on whose ship the stowaway was found, as far as practicable, of the level of cost of detention and return of the stowaway, if the shipowner is to cover these costs. In addition, public authorities should keep such costs to a minimum, as far as practicable, and according to national legislation, if they are to be covered by the shipowner, as well as keeping to a minimum the period during which shipowners are held liable to defray costs of maintenance of a stowaway by public authorities;
- .7 to consider mitigation of charges that might otherwise be applicable when shipowners have cooperated with the control authorities to the satisfaction of those authorities in measures designed to prevent the transportation of stowaways; or where the master has properly declared the existence of a stowaway to the appropriate authorities in the port of arrival, and has shown that all reasonable preventive measures had been taken to prevent stowaways gaining access to the ship;
- .8 to issue, if necessary, in the event that the stowaway has no identification and/or travel documents, a document attesting to the circumstances of embarkation and arrival to facilitate the return of the stowaway either to his/her State of origin, to the State of the port of embarkation, or to any other State to which lawful directions can be made, by any means of transport;
- .9 to provide the document to the transport operator effecting the removal of the stowaway;
- .10 to take proper account of the interests of, and implications for, the shipowner when directing detention and setting removal directions, so far as is consistent with the maintenance of control, their duties or obligations to the stowaway under the law, and the cost to public funds;
- .11 to report incidents of stowaways to the Organization³;

³ Refer to FAL.2/Circ.50/Rev.2 on Reports on Stowaway Incidents, as may be amended.

- .12 to cooperate with flag State of the ship in identifying the stowaway and their nationality/citizenship and right of residence, to assist in removal of the stowaway from the ship, and to make arrangements for removal or repatriation; and
- .13 if disembarkation is refused, to notify the flag State of the ship the reasons for refusing disembarkation.

5.4 Subsequent ports of call

When the disembarkation of a stowaway has not been possible at the first port of call, it is the responsibility of the State of subsequent port of call to follow the guidance provided in paragraph 5.3.

5.5 State of embarkation

It is the responsibility of the State of the original port of embarkation of the stowaway (i.e. the State where the stowaway first boarded the ship):

- .1 to accept any returned stowaway having nationality/citizenship or right of residence;
- .2 to accept a stowaway back for examination where the port of embarkation is identified to the satisfaction of the public authorities of the receiving State; the public authorities of the State of embarkation should not return such stowaways to the State where they were earlier found to be inadmissible;
- .3 to apprehend and detain the attempted stowaway, where permitted by national legislation, if the attempted stowaway is discovered before sailing either on the ship or in cargo due to be loaded; to refer the attempted stowaway to local authorities for prosecution, and/or, where applicable, to the immigration authorities for examination and possible removal: no charge is to be imposed on the shipowner in respect of detention or removal costs, and no penalty is to be imposed;
- .4 to apprehend and detain the stowaway, where permitted by national legislation, if the stowaway is discovered while the ship is still in the territorial waters of the State of the port of his/her embarkation, or in another port in the same State (not having called at a port in another State in the meantime): no charge is to be imposed on the shipowner in respect of detention or removal costs, and no penalty is to be imposed;
- .5 to report incidents of stowaways or attempted stowaways to the Organization⁴; and
- .6 to reassess the preventative arrangements and measures in place and to verify the implementation and effectiveness of any corrective actions.

⁴ Refer to FAL.2/Circ.50/Rev.2 on Reports on Stowaway Incidents, as may be amended.

5.6 State of nationality or right of residence

It is the responsibility of the apparent or claimed State of nationality/citizenship of the stowaway and/or of the apparent or claimed State of residence of the stowaway:

- .1 to make every effort to assist in determining the identity and nationality/citizenship or the rights of residence of the stowaway and to document the stowaway, accordingly once satisfied that he or she holds the nationality/citizenship or the right of residence claimed;
- .2 to accept the stowaway where nationality/citizenship or right of residence is established; and
- .3 to report incidents of stowaways to the Organization⁵.

5.7 The flag State

It is the responsibility of the flag State of the ship:

- .1 to be willing, if practicable, to assist the master/shipowner or the appropriate authority at the port of disembarkation in identifying the stowaway and determining his/her nationality/citizenship or right of residence;
- .2 to be prepared to make representations to the relevant authority to assist in the removal of the stowaway from the ship at the first available opportunity;
- .3 to be prepared to assist the master/shipowner or the authority at the port of disembarkation in making arrangements for the removal or repatriation of the stowaway; and
- .4 to report incidents of stowaways to the Organization.

5.8 States of transit during repatriation

It is the responsibility of any States of transit during repatriation to allow, subject to normal visa requirements and national security concerns, the transit through their ports and airports of stowaways travelling under the removal instructions or directions of the State of the port of disembarkation.

⁵ Refer to FAL.2/Circ.50/Rev.2 on Reports on Stowaway Incidents, as may be amended.

APPENDIX

Form of Stowaway Details Referred to in Recommended Practice 4.6.2 of the Convention on Facilitation of International Maritime Traffic 1965, as amended

<p>SHIP DETAILS</p> <p><i>Name of ship:</i></p> <p><i>IMO number:</i></p> <p><i>Flag:</i></p> <p><i>Company:</i></p> <p><i>Company address:</i></p> <p><i>Agent in next port:</i></p> <p><i>Agent address:</i></p> <p><i>IRCS:</i></p> <p><i>INMARSAT number:</i></p> <p><i>Port of registry:</i></p> <p><i>Name of Master:</i></p> <p>STOWAWAY DETAILS</p> <p><i>Date/time found on board:</i></p> <p><i>Place of boarding:</i></p> <p><i>Country of boarding:</i></p> <p><i>Date/time of boarding:</i></p> <p><i>Intended final destination:</i></p> <p><i>Stated reasons for boarding the ship:*</i></p> <p><i>Surname:</i></p> <p><i>Given name:</i></p> <p><i>Name by which known:</i></p> <p><i>Gender:</i></p> <p><i>First language:</i></p> <p><i>Spoken:</i></p> <p><i>Read:</i></p> <p><i>Written:</i></p>	<p><i>Date of birth:</i></p> <p><i>Place of birth:</i></p> <p><i>Claimed nationality:</i></p> <p><i>Home address:</i></p> <p><i>Country of domicile:</i></p> <p><i>ID-document type, e.g., Passport No.:</i></p> <p><i>ID Card No. or Seaman's Book No.:</i></p> <p><i>If yes,</i></p> <p><i>When issued:</i></p> <p><i>Where issued:</i></p> <p><i>Date of expiry:</i></p> <p><i>Issued by:</i></p> <p><i>Photograph of the stowaway:</i></p> <div style="border: 1px solid black; width: 150px; height: 100px; margin: 10px auto; text-align: center; vertical-align: middle;"> <p>Photograph if available</p> </div> <p><i>General physical description of the stowaway:</i></p> <p><i>Other languages:</i></p> <p><i>Spoken:</i></p> <p><i>Read:</i></p> <p><i>Written:</i></p>
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* If the stowaway declares himself to be a refugee or an asylum seeker, this information shall be treated as confidential to the extent necessary to the security of the stowaway.

Other details:

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

- 2) *Inventory of the stowaway's possessions:*

- 3) *Statement made by the stowaway:*

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

Date(s) of interview(s):

Stowaway's signature:

Master's signature:

Date:

Date:

2. Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea^{*}

These Principles seek to harmonize the various national disembarkation practices of IMO Member States. Five essential principles are identified and recommended for incorporation into relevant State administrative procedures.

1. The Facilitation Committee, at its thirty-second (4 to 8 July 2005), thirty-third (3 to 7 July 2006) and thirty-fourth (26 to 30 March 2007) sessions, discussed the problems connected with disembarking persons rescued at sea. The discussions highlighted and emphasized the importance of the issue.

2. The Committee, at its thirty-fifth session (12 to 16 January 2009), acknowledging the necessity for Member Governments to have common ground regarding the administrative procedures for disembarking persons rescued at sea, identified the following five essential principles that Member Governments should incorporate into their administrative procedures for disembarking persons rescued at sea in order to harmonize the procedures and make them efficient and predictable:

.1 The coastal States should ensure that the search and rescue (SAR) service or other competent national authority coordinates its efforts with all other entities responsible for matters relating to the disembarkation of persons rescued at sea;

.2 It should also be ensured that any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress are to be carried out after disembarkation to a place of safety. The master should normally only be asked to aid such processes by obtaining information about the name, age, gender, apparent health and medical condition and any special medical needs of any person rescued. If a person rescued expresses a wish to apply for asylum, great consideration must be given to the security of the asylum seeker. When communicating this information, it should therefore not be shared with his or her country of origin or any other country in which he or she may face threat;

.3 All parties involved (for example, the Government responsible for the SAR area where the persons are rescued, other coastal States in the planned route of the rescuing ship, the flag State, the shipowners and their representatives, States of nationality or residence of the persons rescued, the State from which the persons rescued departed, if known, and the United Nations High Commissioner for Refugees (UNHCR)) should cooperate in order to ensure that disembarkation of the persons rescued is carried out swiftly, taking into account the master's preferred arrangements for disembarkation and the immediate basic needs of the rescued persons. The Government responsible for the SAR area where the persons were rescued should exercise primary responsibility for ensuring such cooperation occurs. If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance

^{*} International Maritime Organization, FAL.3/Circ.194, 22 January 2009, available at: http://www.imo.org/OurWork/Facilitation/docs/FAL_related_nonmandatory_instruments/FAL.3-Circ.194.pdf.

with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support;

.4 All parties involved should cooperate with the Government of the area where the persons rescued have been disembarked to facilitate the return or repatriation of the persons rescued. Rescued asylum seekers should be referred to the responsible asylum authority for an examination of their asylum request; and

.5 International protection principles¹ as set out in international instruments should be followed.

3. Member Governments are urged to ensure that their administrative procedures are in accordance with the principles set out in this circular, and to convey the information in this circular to the relevant competent national authorities.

¹ These include obligations not to return persons, where there are substantial grounds for believing that there is a real risk of different forms of irreparable harm, which may be derived from international human rights law. For example, article 33(1) of the 1951 Convention relating to the Status of refugees provides: “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”. Article 3(1) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides: “No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

3. Guidelines on the Treatment of Persons Rescued at Sea *

These Guidelines provide further guidance for States and shipmasters on the treatment of persons rescued at sea. The Guidelines relate particularly to and complement the 2004 amendments to the SAR and SOLAS Conventions (see above, Sections A.I.3 and A.I.4). The Guidelines define a “place of safety” as a location where rescue operations are considered to terminate, where survivors’ safety of life is no longer threatened and where basic needs, such as food, shelter and medical needs, can be met. They also refer to the need to avoid disembarkation of asylum-seekers and refugees in territories where they may be at risk of persecution. The Guidelines suggests that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, primarily falls on the Government responsible for the SAR region in which the persons were rescued.

THE MARITIME SAFETY COMMITTEE,

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

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

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

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

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

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

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

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

* IMO Doc. Resolution MSC. 167(78), Annex 34, adopted by the Maritime Safety Committee on 20 May 2004, available at: <http://www.unhcr.org/refworld/pdfid/432acb464.pdf>.

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

REALIZING FURTHER that the intent of the new paragraph 1-1 of SOLAS regulation V/33, as adopted by resolution MSC.153(78) and paragraph 3.1.9 of the Annex to the SAR Convention as adopted by resolution MSC.155(78), is to ensure that in every case a place of safety is provided within a reasonable time. It is further intended that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Contracting Government/Party responsible for the SAR region in which the survivors were recovered,

1. ADOPTS Guidelines on the treatment of persons rescued at sea the text of which is set out in the Annex to the present resolution;
2. INVITES Governments, rescue co-ordination centres and masters to establish procedures consistent with the annexed Guidelines as soon as possible;
3. INVITES Governments to bring the annexed Guidelines to the attention of authorities concerned and to ship owners, operators and masters;
4. REQUESTS the Secretary-General to take appropriate action in further pursuing his inter-agency initiative, informing the Maritime Safety Committee of developments, in particular with respect to procedures to assist in the provision of places of safety for persons in distress at sea, for action as the Committee may deem appropriate;
5. DECIDES to keep this resolution under review.

ANNEX 34

Guidelines on the Treatment of Persons Rescued at Sea

1 PURPOSE

1.1 The purposes of these Guidelines are to provide guidance to Governments¹ and to shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea.

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

2 BACKGROUND

IMO Assembly resolution A.920(22)

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

- .1 survivors of distress incidents are provided assistance regardless of nationality or status or the circumstances in which they are found;
- .2 ships, which have retrieved persons in distress at sea, are able to deliver the survivors to a place of safety; and
- .3 survivors, regardless of nationality or status, including undocumented migrants, asylum seekers and refugees, and stowaways, are treated, while on board, in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions.

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

¹ Where the term Government is used in these Guidelines, it should be read to mean Contracting Government to the International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended, or Party to the International Convention on Maritime Search and Rescue, 1979, as amended, respectively.

such as immigration and asylum that are beyond the competence of IMO, is an essential complement to IMO efforts.

SOLAS and SAR Convention amendments

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

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

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

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

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

3 PRIORITIES

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

Lifesaving

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

Preservation of the integrity and effectiveness of SAR services

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

Relieving masters of obligations after assisting persons

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

4 INTERNATIONAL AERONAUTICAL AND MARITIME SEARCH AND RESCUE MANUAL

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

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

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

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

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

5 SHIPMASTERS

General guidance

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

- .1 understand and heed obligations under international law to assist persons in distress at sea (such assistance should always be carried out without regard to the nationality or status of the persons in distress, or to the circumstances in which they are found);
- .2 do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs;

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

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

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

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

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

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

6 GOVERNMENTS AND RESCUE CO-ORDINATION CENTRES

Responsibilities and preparedness

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

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

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

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

6.5 Each RCC should have effective plans of operation and arrangements (interagency or international plans and agreements if appropriate) in place for responding to all types of SAR situations. Such plans and arrangements should cover incidents that occur within its

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

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

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

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

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

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

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

- .1 information about the survivors, including name, age, gender, apparent health and medical condition and any special medical needs;
- .2 the master's judgment about the continuing safety of the assisting ship;
- .3 actions completed or intended to be taken by the master;
- .4 assisting ship's current endurance with the additional persons on board;

- .5 assisting ship's next intended port of call;
- .6 the master's preferred arrangements for disembarking the survivors;
- .7 any help that the assisting ship may need during or after the recovery operation; and
- .8 any special factors (e.g., prevailing weather, time sensitive cargo).

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

Place of safety

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

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

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

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

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

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

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

Non-SAR considerations

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

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

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

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

APPENDIX

Guidelines on the Treatment of Persons Rescued at Sea

Some comments on relevant international law

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

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

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

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

application of the Convention's provisions to the ship. The SOLAS Convention also addresses in chapter V, regulation 7, the responsibility of Governments to arrange rescue services.

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

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

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

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

- International Convention on Maritime Search and Rescue, 1979, as amended, in entirety
- International Convention for the Safety of Life at Sea, 1974, as amended, chapter V, regulation 33
- Convention on Facilitation of International Maritime Traffic, 1965, in particular Section 6.C, Standards 6.8-6.10 International Convention on Salvage, 1983, Article 11
- United Nations Convention on the Law of the Sea, 1982, Article 98

- Resolution A.871(20) on Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases
- Resolution A.867(20) on Combating unsafe practices associated with the trafficking or transport of migrants by sea IMO Global SAR Plan – SAR.8/Circ.1 and addenda addresses (the Admiralty List of Radio Signals, Volume 5, is a practical alternative)
- United Nations Convention relating to the Status of Refugees, 1951 and its 1967 Protocol
- UN Convention against Transnational Organized Crime, 2000 and its Protocols, Protocol against the Smuggling of Migrants by Land, Sea and Air; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
- MSC/Circ.896/Rev.1 on Interim measures for combating unsafe practices associated with the trafficking or transport of immigrants by sea.

4. Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea*

These Interim Measures aim to promote awareness and co-operation among States to better address unsafe practices associated with the trafficking or transport of migrants by sea. The Interim Measures set out recommended actions for States, in accordance with domestic and international law.

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

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

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

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

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

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

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

* IMO Circular MSC/Circ.896/Rev.1, adopted on 12 June 2001, available at: http://www.imo.org/OurWork/Facilitation/docs/FAL_related_nonmandatory_instruments/MSC.1-Circ.896-Rev.1.pdf.

ANNEX

Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea

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

Definitions

2 For purposes of this circular:

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

2.2 "Organization" means the International Maritime Organization; and

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

- .1 obviously in conditions which violate fundamental principles of safety at sea, in particular those of the SOLAS Convention; or
- .2 not properly manned, equipped or licensed for carrying passengers on international voyages,

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

Purpose

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

Recommended actions by States

Compliance with international obligations.

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

- 1 ensuring compliance with the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS)¹;
- .2 collecting and disseminating information on ships believed to be engaged in unsafe practices associated with trafficking or transporting migrants;
- .3 taking appropriate action against masters, officers and crew members engaged in such unsafe practices; and
- .4 preventing any such ship:
 - .1 from again engaging in unsafe practices; and
 - .2 if in port, from sailing.

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

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

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

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

Co-operation.

8 States should co-operate to the fullest extent possible to prevent and suppress unsafe practices associated with the trafficking or transport of migrants by sea, in conformity with the international law of the sea and all generally accepted relevant international instruments. It is consistent with international law for a flag State to authorize a vessel flying its flag to be

¹ It is recalled that:

-regulation 1 of chapter I of SOLAS Convention provides that SOLAS applies to ships engaged on international voyages;

-regulation 2 of the same chapter defines as:

international voyage, a voyage from a country to which the present Convention applies to a port outside such country, or conversely.

passenger ship, a ship which carries more than twelve passengers.

cargo ship, any ship which is not a passenger ship.

The trafficking of migrants will normally constitute an international voyage. When this practice occurs on board cargo ships, multiple infringements of the SOLAS Convention are therefore committed.

boarded and inspected by a warship of another State, as described in paragraphs 12 and 20 below.

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

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

Measures and Procedures.

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

- .1 is flying its flag or claiming its registry, or
- .2 is without nationality, or
- .3 though flying a foreign flag or refusing to show its flag is, in reality, of the same nationality as the State concerned,

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

12 A State which has reasonable grounds to suspect that a ship exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another State is engaged in unsafe practices associated with the trafficking or transport of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed², request authorization from the flag State to take appropriate measures in regard to that ship. The flag State may authorize the requesting State to, *inter alia*:

- .1 board the ship;
- .2 inspect and carry out a safety examination of the ship, and
- .3 if evidence is found that the ship is engaged in unsafe practices, take appropriate action with respect to the ship, persons and cargo on board, as authorized by the flag State.

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

13 A flag State may, consistent with paragraph 8, subject its authorization to conditions to be mutually agreed between it and the requesting State, including conditions relating to responsibility and to the extent of effective measures to be taken including the use of force. A State shall take no additional actions without the express authorization of the flag State,

² If registry is refuted, the situation is that described in paragraph 11.2 above.

except those necessary to relieve imminent danger or those that follow from relevant bilateral or multilateral agreements.

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

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

- .1 immediately report the findings of the safety examinations conducted pursuant to paragraph 12 to the administration of the State whose flag the ship is entitled to fly or in which it is registered; and
- .2 immediately consult on the further actions to be taken after giving or receiving reports on the ship involved.

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

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

- .1 ensure the safety and the humanitarian handling of the persons on board and that any actions taken with regard to the ship are environmentally sound; and
- .2 take appropriate action in accordance with relevant domestic and international law.

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

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

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

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

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

Reports

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

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

APPENDIX

**Report on Interim Measures for Combating Unsafe Practices Associated
with the Trafficking or Transport of Migrants by Sea**

Date: _____ Time: _____

Ship Name: _____ Name on Hull? Y/N

Official/Document Number: _____

Flag: _____ International Call Sign: _____

Homeport: _____ Homeport on Hull? Y/N

Description: _____

Type of Propulsion/Horsepower: _____ Gross Tonnage: _____

Location: _____ N/S _____ E/W _____

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

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

Owner/Charterer: _____

Master: _____ Nationality: _____ Date of Birth: _____

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

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

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

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

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

Additional comments and recommendations (if any): _____

Maritime Authority: _____

B. INTERNATIONAL REFUGEE LAW

B. INTERNATIONAL REFUGEE LAW

I. INTERNATIONAL INSTRUMENTS

As mentioned in the Introduction, most irregular maritime movements today are “mixed movements”, involving people with various profiles and needs, as opposed to being primarily refugee outflows. However, many of these movements include at least some refugees, asylum-seekers or other people with international protection needs.

This section provides an overview of selected provisions of the 1951 Convention relating to the Status of Refugees that may be relevant to rescue at sea situations, stowaway cases and maritime interception operations involving asylum-seekers and refugees.

1. 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*

*Adoption: 28 July 1951
Entry into force: 22 April 1954*

The 1951 Convention defines who is a refugee, and sets out the rights of refugees in the host country. The 1967 Protocol removes the time and geographical limits of the 1951 Convention. One key provision is the right to be protected against refoulement. The principle of non-refoulement provides that no refugee should be returned in any manner whatsoever to any country where he or she would be at risk of persecution on the grounds of race, religion, nationality, membership of a social group or political option. The principle of non-refoulement is applicable to refugees before a formal declaration of their status. It also applies wherever a State has jurisdiction, de iure or de facto, including on the high seas. In addition, the 1951 Convention provides that refugees should not be penalized for illegal entry into a country providing that they present themselves without delay to the authorities and show good cause.

Selected Provisions

Article 1 - Definition of the term "refugee"

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

...

(2) [As a result of events occurring before 1 January 1951]** owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a

* 189 United Nations Treaty Series 150 and 606 United Nations Treaty Series 267, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

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

particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

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

Article 31 - Refugees unlawfully in the country of refuge

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

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

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

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

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

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

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

II. CONCLUSIONS ON INTERNATIONAL PROTECTION ADOPTED BY THE UNHCR EXECUTIVE COMMITTEE (EXCOM)

UNHCR's governing Executive Committee (ExCom) meets in Geneva annually. International protection is included as a priority theme on the agenda of each session, and the consensus reached in the course of its discussions is expressed in the form of Conclusions on International Protection (ExCom Conclusions). Although non-binding, they are relevant to the interpretation of the international protection regime and constitute expressions of opinion which are broadly representative of the views of the international community.

*ExCom has issued a number of conclusions on rescue at sea, stowaway incidents and maritime interception involving refugees, asylum-seekers, and other persons of concern to UNHCR. The conclusions emphasize in particular the issues of disembarkation and admission to territory, and the need to respect the principle of non-refoulement. Extracts from relevant conclusions are provided below, grouped by theme.**

1. Asylum-Seekers at Sea/Rescue at Sea

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

Selected Paragraph

Recalling also the duty of States and shipmasters to ensure the safety of life at sea and to come to the aid of those in distress or in danger of being lost at sea, as contained in numerous instruments of the codified system of international maritime law¹; recalling also Conclusions of the Executive Committee of relevance to the particular needs of asylum-seekers and refugees in distress at sea² and affirming that when vessels respond to persons in distress at sea, they are not engaged in interception;

b.) No. 38 (XXXVI) Rescue of Asylum-Seekers in Distress at Sea (1985)

The Executive Committee,

(a) Reaffirmed the fundamental obligation under international law for shipmasters to rescue all persons, including asylum-seekers, in distress at sea;

(b) Recalled the conclusions adopted by the Executive Committee at previous sessions recognizing the need to promote measures to facilitate the rescue of asylum-seekers in distress at sea [No. 20, No. 23, No. 26, No. 31, No. 34];

* The full text of all ExCom Conclusions extracted in this Section is available at: <http://www.unhcr.org/41b041534.html>. Footnote numbering in this Section is sequential, and does not correspond to the original footnote numbers.

¹ Including *inter alia* the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, 1974, as amended and the International Convention on Maritime Search and Rescue, 1979, as amended.

² In particular No. 15(XXX), No. 20(XXXI), No. 23(XXXII), No. 26 (XXXIII), No. 31 (XXXIV), No. 34 (XXXV) and No. 38 (XXXVI).

- (c) Expressed satisfaction that the rescue of asylum-seekers in distress at sea has increased significantly in 1985 but at the same time expressed concern that many ships continued to ignore asylum-seekers in distress at sea;
- (d) Welcomed the fact that the provision of an appropriate number of resettlement places had made it possible for the Rescue at Sea Resettlement Offers (RASRO) scheme to commence on a trial basis as from May 1985;
- (e) Welcomed the wide-ranging initiatives undertaken by UNHCR to promote the rescue of asylum-seekers in distress at sea and the support given to these initiatives by States;
- (f) Strongly recommended that States maintain their support of UNHCR action in this area and, in particular, that they:
 - (i) join or renew contributions to the DISERO (Disembarkation Resettlement Offers) and to the RASRO (Rescue at Sea Resettlement Offers) schemes, or to either of them, as soon as possible;
 - (ii) request shipowners to inform all shipmasters in the South China Sea of their responsibility to rescue all asylum-seekers in distress at sea.

c.) No. 31 (XXXIV) Rescue of Asylum-Seekers in Distress at Sea (1983)

- (a) Noted with concern that, according to available statistics as contained in document (EC/SCP/30), significantly fewer numbers of asylum-seekers in distress at sea are being rescued;
- (b) Welcomed the initiatives undertaken by UNHCR to meet this grave problem by promoting measures to facilitate the rescue of asylum seekers in distress at sea and expressed the hope that those initiatives would receive the widest possible support of governments;
- (c) Recommended that States seriously consider supporting the efforts of UNHCR to promote the Rescue at Sea Resettlement Offers (RASRO) scheme, as described in document (EC/SCP/30), and providing the necessary quotas and other undertakings to enable UNHCR to initiate the scheme on a trial basis;
- (d) Welcomed the support given by States to the DISERO scheme;
- (e) Commended the initiatives undertaken by UNHCR in co-operation with the International Maritime Organization aimed at identifying joint action for facilitating the rescue of asylum-seekers in distress at sea.

d.) No. 26 (XXXIII) Report of the Working Group on Problems related to the Rescue of Asylum-Seekers in Distress at Sea (1982)

- (a) *Noted* the report of the Working Group of Experts on the Rescue of Asylum-Seekers at Sea (EC/SCP/21);

(b) *Reiterated* the fundamental character of the obligation to rescue asylum-seekers in distress at sea;

(c) *Stressed* the importance for coastal States, flag States, countries of resettlement and the international community as a whole to take appropriate steps to facilitate the fulfilment of this obligation in its various aspects;

(d) *Considered* that solution of the problems connected with the rescue of asylum-seekers at sea should not only be sought in the context of legal norms but also through practical arrangements aimed at removing as far as possible the difficulties which have been encountered;

(e) *Noted* that the report of the Working Group of Experts contained a number of suggestions aimed at achieving such arrangements and called upon UNHCR to examine the feasibility of these suggestions;

(f) *Noted* the preliminary report submitted by the High Commissioner (EC/SCP/24) and requested UNHCR to continue its study of the matter and to submit a report to the Executive Committee at its thirty-fourth session, through its Sub-Committee on International Protection.

e.) No. 23 (XXXII) Problems related to the Rescue of Asylum-Seekers in Distress at Sea (1981)

The Executive Committee,

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

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

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

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

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

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

f.) No. 20 (XXXI) Protection of Asylum-Seekers at Sea (1980)

The Executive Committee,

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

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

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

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

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

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

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

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

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

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

(g) *Called* upon the United Nations High Commissioner for Refugees in co-operation with the International Committee of the Red Cross and other interested organizations actively to seek the co-operation of the international community to intensify efforts aimed at protecting refugees who are victims of acts of violence, particularly those at sea.

g.) No. 14 (XXX) General (1979)

Selected Paragraphs

(c) Noted with concern that refugees had been rejected at the frontier or had been returned to territories where they had reasons to fear persecution in disregard of the principle of non-refoulement and that refugees arriving by sea had been refused even temporary asylum with resulting danger to their lives and had in many cases perished on the high seas;

(d) Called upon all States to ensure that masters of vessels sailing under their flag scrupulously observed established rules regarding rescue at sea, and to take all necessary action to rescue refugees and displaced persons leaving their country of origin on boats in order to seek asylum and who are in distress;

2. Stowaways/Refugees without an Asylum Country

a.) No. 53 (XXXIX) Stowaway Asylum-Seekers (1988)

The Executive Committee,

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

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

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

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

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

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

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

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

b.) No. 15 (XXX) Refugees without an Asylum Country (1979)

The Executive Committee,

Considered that States should be guided by the following considerations:

General principles

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

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

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

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

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

Situations involving a large-scale influx of asylum-seekers

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

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

Situations involving individual asylum-seekers

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

(i) The criteria should make it possible to identify in a positive manner the country which is responsible for examining an asylum request and to whose authorities the asylum-seeker should have the possibility of addressing himself;

(ii) The criteria should be of such a character as to avoid possible disagreement between States as to which of them should be responsible for examining an asylum request and should take into account the duration and nature of any sojourn of the asylum-seeker in other countries;

(iii) The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account;

(iv) Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State;

(v) Reestablishment of criteria should be accompanied by arrangements for regular consultation between concerned Governments for dealing with cases for which no solution has been found and for consultation with the Office of the United Nations High Commissioner for Refugees as appropriate;

(vi) Agreements providing for the return by States of persons who have entered their territory from another contracting State in an unlawful manner should be applied in respect of asylum-seekers with due regard to their special situation.

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

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

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

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

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

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

3. Interception

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

The Executive Committee,

Noting the discussions which took place on interception measures at the Standing Committee³ as well as in the context of the Global Consultations on International Protection;⁴

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

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

Recalling the emerging legal framework⁵ for combating criminal and organized smuggling and trafficking of persons, in particular the Protocol Against the Smuggling of Migrants by Land, Sea and Air, which, inter alia, contemplates the interception of vessels enjoying freedom of navigation in accordance with international law, on the basis of consultations between the flag State and the intercepting State in accordance with international maritime law, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea;

Noting the saving clauses contained in each of the Protocols⁶ and the reference to the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the principle of non-refoulement;

Recalling also the duty of States and shipmasters to ensure the safety of life at sea and to come to the aid of those in distress or in danger of being lost at sea, as contained in numerous instruments of the codified system of international maritime law⁷; recalling also Conclusions of the Executive Committee of relevance to the particular needs of asylum-seekers and refugees in distress at sea⁸ and affirming that when vessels respond to persons in distress at sea, they are not engaged in interception;

³ EC/50/SC/CRP17, 9 June 2000.

⁴ EC/GC/O1/13, 31 May 2001, Regional Workshops in Ottawa, Canada and in Macau.

⁵ The United Nations Convention Against Transnational Organized Crime, 2000 and its Supplementary Protocols Against the Smuggling of Migrants by Land, Sea and Air; and to Suppress and Punish Trafficking in Persons, Especially Women and Children.

⁶ Article 19 of the Smuggling Protocol and Article 14 of the Trafficking Protocol.

⁷ Including *inter alia* the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, 1974, as amended and the International Convention on Maritime Search and Rescue, 1979, as amended.

⁸ In particular No. 15(XXX), No. 20(XXXI), No. 23(XXXII), No. 26 (XXXIII), No. 31 (XXXIV), No. 34 (XXXV) and No. 38 (XXXVI).

Recognizing also that States have international obligations regarding the security of civilian air transportation and that persons whose identities are unknown represent a potential threat to the security of air transportation as contained in numerous instruments of the codified system on international aviation law;⁹

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

- i. prevent embarkation of persons on an international journey;
- ii. prevent further onward international travel by persons who have commenced their journey; or
- iii. assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law; where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the traveling public as well as persons being smuggled or transported in an irregular manner;

(a) *Recommends* that interception measures be guided by the following considerations in order to ensure the adequate treatment of asylum-seekers and refugees amongst those intercepted;

- i. The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons;
- ii. All intercepted persons should be treated, at all times, in a humane manner respectful of their human rights. State authorities and agents acting on behalf of the intercepting State should take, consistent with their obligations under international law, all appropriate steps in the implementation of interception measures to preserve and protect the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment of persons intercepted;
- iii. Interception measures should take into account the fundamental difference, under international law, between those who seek and are in need of international protection, and those who can resort to the protection of their country of nationality or of another country;
- iv. Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where

⁹ Including, *inter alia*, the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions;

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

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

vii. Intercepted persons who do not seek or who are determined not to be in need of international protection should be returned swiftly to their respective countries of origin or other country of nationality or habitual residence and States are encouraged to cooperate in facilitating this process;¹⁰

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

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

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

b.) No. 89 (LI) General (2000)

Selected Paragraph

Noting the discussions in the Standing Committee on the interception of asylum-seekers and refugees, and *recognizing* the importance of adopting comprehensive measures, between all relevant States and in cooperation with UNHCR, international organizations and other appropriate organizations, to deal effectively with irregular migration, trafficking and smuggling of persons, potentially including refugees and asylum-seekers, and ensure in this context that international protection and assistance needs of asylum-seekers and refugees are identified and fully met, consistent with international protection responsibilities, in particular the principle of *non-refoulement*;

¹⁰ See Conclusion on the return of persons found not to be in need of international protection (A/AC.96/987, para. 21).

III. UNHCR GUIDELINES, INTERVENTIONS AND POSITION PAPERS

Pursuant to its mandate and supervisory responsibility (Article 35 of the 1951 Convention, above Section B.I.1, together with paragraph 8 of the UNHCR Statute^{}), UNHCR regularly provides guidance on the interpretation and application of international refugee law, including with regard to refugees and asylum-seekers at sea.*

1. Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims^{**}

Legal Standards and Policy Considerations with Respect to Extraterritorial Processing

This paper outlines UNHCR's views on extraterritorial processing of claims for international protection made by persons who are intercepted at sea. It provides an overview of the applicable standards under international human rights and refugee law as well as key policy parameters relating to four models for extraterritorial processing, from the perspective of UNHCR.

A) INTRODUCTION

1. Governments in some regions have adopted, or are considering, measures to process certain claims for international protection outside of their territory.¹¹ This is particularly the case following maritime interception operations,¹² where asylum-seekers and migrants are prevented from reaching their destination while on the high seas or in the territorial waters of a third State. In this context, some States view extraterritorial processing arrangements as a tool for entry management, as they seek to control access to their territory or jurisdiction.
2. UNHCR's position is that claims for international protection made by intercepted persons are in principle to be processed in **procedures within the territory of the intercepting State**. This will usually be the most practical means to provide access to reception facilities and to fair and efficient asylum procedures - core components of any protection-sensitive entry system - and to ensure protection of the rights of the individual.
3. However, under certain circumstances, the processing of international protection claims outside the intercepting State could be an alternative to standard 'in-country' procedures. Notably, this could be the case when extraterritorial processing is used as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space. The suggestions made in this paper are accordingly intended to support efforts by States to address complex mixed movement situations in solidarity with other

^{*} *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775 (1950), available at: <http://www.unhcr.org/3b66c39e1.html>.

^{**} Available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

¹¹ For practical reasons, such mechanisms will be referred to in this paper as 'extraterritorial' processing arrangements. As is outlined below, Part B, Section IV the term 'processing' may include a range of different types of procedures, including profiling or pre-screening, as well as full asylum procedures.

¹² There is no internationally accepted definition of interception, and its meaning is largely informed by State practice. A working definition is provided in Executive Committee Conclusion No. 97 (LIV) (2003) on Protection Safeguards in Interception Measures, available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010).

affected States and to implement their obligations under international refugee and human rights law in good faith.

4. If extraterritorial processing is part of a comprehensive or cooperative strategy to address mixed movements, the location of reception and processing arrangements is only one relevant element. With its *10-Point Plan on Refugee Protection and Mixed Migration*, ('10-Point Plan'), UNHCR has developed a tool that provides suggestions across a number of areas, including data collection, protection-sensitive entry systems, reception arrangements, profiling and pre-screening arrangements, and differentiated processes and procedures.¹³ This paper should be read in conjunction with the 10-Point Plan, and related strategies for comprehensive State cooperation in this field.
5. While the focus of this paper is on extraterritorial processing arrangements in the context of maritime interception operations, most of its recommendations could also apply to arrangements that may be established following rescue at sea operations carried out by a State on the high seas or in the territorial waters of a third State. It is beyond the scope of this paper to analyse the differences between these two types of intervention. Interception and rescue at sea operations are not equivalent and raise different policy questions, international law issues and responses.
6. Some of the considerations outlined in this paper may also apply to interception carried out by intercepting State authorities on the territory of a third State (e.g. through outposted immigration officers) or in 'international' or 'transit' areas in the intercepting State's own territory (e.g. at airports).

B) LEGAL STANDARDS

7. Extraterritorial processing and reception arrangements are subject to applicable international legal standards, notably under international refugee and human rights law. These are summarized below. Additional standards may apply under regional human rights and refugee law or national law.

I. Respect for the sovereignty of the host State

8. Formal authorization in accordance with international law by the State on whose territory the processing takes place (the 'host State'¹⁴) ensures that there is no violation of the host State's sovereignty. It also provides an opportunity to clarify the responsibilities of each State and the procedures to be followed.¹⁵

II. Existence of State jurisdiction

9. The existence of jurisdiction triggers State responsibilities under international human rights and refugee law.¹⁶ It is generally recognized that a State has jurisdiction, and

¹³ See: UNHCR, *Refugee Protection and Mixed Migration: a 10-Point Plan of Action*, www.unhcr.org/protect/PROTECTION/4742a30b4.pdf (accessed 20 September 2010).

¹⁴ The term 'host State' refers to a State on whose territory intercepted persons are located, without necessarily implying that this State has assumed responsibility for processing protection claims made by such persons.

¹⁵ Note that an intercepting State may have responsibility for intercepted persons, even if claims for international protection are processed on the territory of another State (see Part B, Section II below).

¹⁶ See e.g.: Art. 2 of the 1996 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 23 March 1976 ['ICCPR'] (obliging States to apply the rights in the ICCPR to 'all individuals within

consequently is bound by international human rights and refugee law, if it has **effective de jure and/or de facto control over a territory or over persons**.¹⁷ The existence of jurisdiction under international law does not depend on a State's subjective acknowledgment that it has jurisdiction. Jurisdiction is established as a matter of fact, based on the objective circumstances of the case.¹⁸

10. This means that State 'A' may have jurisdiction over – and responsibilities under international law towards – people who are on the territory of State 'B' if State A nonetheless has de facto control over those people or the area where they are located (e.g. where State A runs reception arrangements or asylum procedures on the territory of State B).¹⁹ It may also mean that a State has jurisdiction under international law due to its de facto control over people located on part of its own territory that has been defined as 'extraterritorial' for migration or other purposes under national law.²⁰ Further, it may mean that a State has jurisdiction over people under its de facto control who are located on the high seas.
11. Depending on the interception operation and processing arrangements, there may be some ambiguity about which State has jurisdiction over intercepted persons. Jurisdiction can be shared by several States (e.g. intercepting State, host State, State undertaking processing or some combination). Clarifying in advance which States have accepted practical responsibility for reception, processing and solutions for intercepted persons will avoid any impression that the objective of a State in taking part in an extraterritorial processing arrangement is to minimize its responsibility under international law or to shift burdens onto other States.

its territory and subject to its jurisdiction'); Art. 2, The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *entered into force* 26 June 1987 ['CAT'] (obliging State parties to prevent acts of torture to persons 'in any territory under its jurisdiction'). The concept of 'State jurisdiction' refers to a State's capacity to exercise particular substantive aspects of its sovereignty, especially its rights (or claims), liberties and powers: Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), 106f.

¹⁷ See e.g.: *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Gen. List No. 131, 9 July 1994; *Case Concerning Armed Activities in the Territory of the Congo (DRC v. Uganda)* (2005) ICJ Gen. List No. 166, 19 December 2005; Human Rights Committee General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*: 25/05/2004, CCPR/C/21/Rev.1/Add.13. Further references may be found in 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*, 26 January 2007, Part II (B), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search> (accessed 12 November 2009) ['UNHCR Advisory Opinion'].

¹⁸ This follows from the establishment of jurisdiction based on effective control, whether in law or in fact: See references cited above n [7].

¹⁹ Note that in certain circumstances, outlined in Part B, Section VII and Part C, Section I below, an intercepting State may transfer responsibility for intercepted persons to a third State in accordance with international law.

²⁰ Some governments have argued that an intercepting State may not have jurisdiction under international law over persons located on parts of its territory that have been excised under domestic law (e.g. declared 'international' or 'transit' areas in airports, ports and border areas, or other parts of State territory including remote territories or islands), on high seas, or on the territory of a third State that is under the control of the intercepting State (e.g. because the intercepting State is responsible for a military base or reception centre). Such arguments are inconsistent with the notion of jurisdiction under international law. Domestic law is not determinative of the existence of jurisdiction as a matter of fact under international law: The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* 27 January 1980, Article 27 (providing that a State may not invoke the provisions of its internal law as a justification for its failure to perform a treaty); see also Article 3 of ILC, *Draft Articles on the Responsibility of States for International Wrongful Acts with Commentaries* (2001).

III. Protection against *refoulement*

12. Protection against *refoulement* is a cornerstone of international human rights and refugee law. In addition to being enshrined in Article 33 of the 1951 Convention²¹ and various human rights treaties, in UNHCR's view the prohibition of *refoulement* is a rule of customary international law.²² The prohibition on *refoulement* is applicable also when a State has de jure or de facto jurisdiction extraterritorially.²³
13. Consistent with the principle of *non-refoulement*, a principal goal of all processing arrangements, extraterritorial or otherwise, is to ensure that no person is returned directly or indirectly to territories where they face a threat of persecution,²⁴ a real risk of torture,²⁵ arbitrary deprivation of the right to life²⁶ or irreparable harm.²⁷ The principle of *non-refoulement* applies not only to those formally recognized as refugees or beneficiaries of complementary forms of protection, but also to asylum-seekers pending a final determination of their claim.²⁸

IV. Scope and purpose of extraterritorial 'processing'

14. The scope and purpose of 'processing' in extraterritorial arrangements may vary. 'Processing' may be limited to a **profiling or pre-screening** exercise with built-in protection safeguards. 'Processing' could alternatively consist of **refugee status determination** ('RSD') and/or other relevant substantive procedures for persons with specific needs such as children or victims of trafficking.²⁹ Finally, in appropriate circumstances, 'processing' could involve grants of **temporary forms of protection** to particular groups instead of full RSD procedures.

a) *Profiling or pre-screening*

15. Where extraterritorial processing is limited to initial profiling or pre-screening, this is understood to mean a process that precedes formal RSD and aims to identify and differentiate between categories of arrivals (e.g. persons who are seeking international protection, victims of trafficking, unaccompanied children, irregular economic migrants). Its core elements include: providing information to new arrivals; gathering information about new arrivals through questionnaires and informal interviews; establishing a preliminary profile for each person; and counselling. Where extraterritorial processing is limited to profiling and pre-screening, it could also be used as a basis to refer people to

²¹ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137 *entered into force* 22 April 1954 ['1951 Convention'] and its 1967 Protocol Relating to the Status of Refugee, 606 U.N.T.S. 267, *entered into force* 4 October 1967 ['1967 Protocol']. The temporal and geographical limitations of the 1951 Convention contained in Article 1 B have been removed for the vast majority of State Parties through the 1967 Protocol.

²² UNHCR Advisory Opinion, above n [7].

²³ UNHCR Advisory Opinion, above n [7]; see also Part B, Section II above.

²⁴ Art. 33, 1951 Convention.

²⁵ Art. 3, CAT. See also: Art. 7, ICCPR.

²⁶ Art. 6, ICCPR.

²⁷ Human Rights Committee General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*: 25/05/2004, CCPR/C/21/Rev.1/Add.13.

²⁸ UNHCR Advisory Opinion, paragraph 6, above n [7].

²⁹ Such substantive procedures could be conducted after an initial profiling or pre-screening exercise, where practical.

authorities or procedures located inside the intercepting State's territory that can best meet their needs and manage their cases (including, for asylum-seekers, RSD procedures).

16. Profiling is effective if officials responsible for conducting profiling, whether border guards, coastguards or others, are trained to recognize potential international protection needs or other special needs; and have clear instructions and procedures to follow in this event (including referral to specialized and competent authorities). Profiling does not replace RSD, nor is profiling a de facto RSD procedure without or with limited procedural guarantees. If a person expresses in any manner a need for international protection, or there is any doubt whether an individual may be in need of international protection, referral to RSD is the required response.
17. Profiling and pre-screening arrangements require monitoring to ensure that they are conducted transparently and do indeed identify those who are seeking international protection.

b) *Refugee Status Determination*

18. Providing asylum-seekers with effective access to a fair and efficient asylum procedure where their international protection needs can be properly assessed ensures that the *non-refoulement* principle is respected.
19. A fair RSD procedure, wherever undertaken, requires submission of international protection claims to a specialized and professional first instance body, and an individual interview in the early stages of the procedure. Recognized international standards further include providing a reasoned decision in writing to all applicants, and ensuring that they have the opportunity to seek an independent review of any negative decision, with any appeal in principle having a suspensive effect. It is important that information received from applicants is treated confidentially.³⁰
20. Measures to ensure that access to asylum procedures is effective (namely, that applicants have legal and physical access to asylum procedures and the necessary facilities for submitting applications) include availability of legal advice and interpretation, and adequate time for the preparation of claims. It is also important that asylum applications are registered rapidly and dealt with in a reasonable timeframe. For unaccompanied and separated children an adapted 'child-friendly' RSD procedure is advisable.³¹

³⁰ Guidance on RSD has been provided by the UNHCR Executive Committee ('ExCom'). See e.g.: ExCom Conclusion No. 8 (XXVIII) (1977) and ExCom Conclusion No. 30 (XXXIV) (1983), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010); see also: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva, Jan. 1992; various UNHCR *Guidelines on International Protection*, <http://www.unhcr.org/refworld/rsd.html> (accessed 29 October 2009); UNHCR, *Global Consultations on International Protection: Third Track/Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001 (EC/GC/01/12), <http://www.unhcr.org/refworld/docid/3b36f2fca.html> (accessed 14 November 2009) ['Fair and Efficient Asylum Procedures']. For the treatment of asylum-seekers in situations of large scale influx see ExCom Conclusion No. 22 (XXXII), especially Part II(B), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010).

³¹ UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, www.unhcr.org/refworld/docid/4b2f4f6d2.html (accessed 20 August 2010). See also UNHCR, *Guidelines on determining the best interest of the child*, May 2008, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=48480c342&page=search> (accessed 20 August 2010); UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994,

21. Refugee status may also be determined on a group basis. This is appropriate if most of those arriving in the group can be deemed to be refugees on the basis of objective information related to the circumstances in the country of origin leading to their forced displacement.

c) *Temporary forms of protection*

22. Extraterritorial processes leading to the grant of temporary forms of protection may be appropriate in cases involving groups that are assessed generally as being in need of international protection, but where there is an expectation that their protection needs are only of short duration. Instead of conducting individual RSD, States may grant a protected status to the relevant group of persons on a temporary basis. Temporary forms of protection are not a substitute for 1951 Convention status. They build on its framework and do not exclude conferral of refugee status, should protection be required for a longer period of time.³²

V. Reception arrangements

23. Reception arrangements must address the basic needs of new arrivals and provide for a stay consistent with the right to an adequate standard of living.³³ On arrival, persons with acute medical needs are to be treated and a basic medical check up given to others. Information explaining available procedures and the practicalities of reception arrangements can be given in writing or verbally, in languages understood by new arrivals (e.g. using videos or trained interpreters).

24. If new arrivals are housed in reception centres, standard services will include regular, culturally appropriate meals, provision of basic non-food items, and access to communication devices (telephone, mail or email services). When designing reception centres, measures are needed to prevent overcrowding and ensure basic space and privacy for residents (including minimal facilities for religious/cultural practices and daily outdoor activity). Other factors include provision of adequate security, a confidential, accessible complaints procedure, as well as regular cleaning and maintenance of the centres.³⁴ These considerations are not exhaustive.

25. Open reception centres are the preferred way of housing arrivals. Depending on the specific situation, smaller group homes, community placements or private accommodation may be more appropriate than large reception centres. The use of semi-open reception centres with measures to ensure ongoing presence in the centre, such as daily reporting

<http://www.unhcr.org/refworld/docid/3ae6b3470.html> (accessed 20 August 2010).

³² See, e.g.: ExCom Conclusion No. 15 (XXX) (1979), ExCom Conclusion No. 19 (XXXI) (1980), ExCom Conclusion No. 68 (XLIII) (1992), ExCom Conclusion No. 74 (XLV) (1994), ExCom Conclusion No. 103 (LVI) (2005), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010).

³³ Art. 25, Universal Declaration of Human Rights, General Assembly Resolution 217A (III), U.N. Doc. A/810 (1948); Art. 11, International Covenant on Economic Social and Cultural Rights, 993 U.N.T.S. 3, *entered into force* 3 January 1976.

³⁴ For select UNHCR policy on reception conditions for asylum-seekers see e.g.: ExCom Conclusion No. 93 (LIII) (2002); UNHCR, *Reception of Asylum-seekers, Including Standards of Treatment, in the Context of Individual Asylum Claims*, Global Consultations on International Protection (3rd Meeting), 4 September 2001, EC/GC/01/17.

requirements and leave-with-permission, will in many cases be sufficient to minimize absconding.³⁵

26. Where reception centres are closed, this qualifies as ‘detention’ under international human rights law.³⁶ International human rights law provides that no person shall be subject to arbitrary detention³⁷ or be deprived of his or her liberty except on such grounds and in accordance with such procedures as established by law.³⁸ The concept of ‘arbitrariness’ is interpreted broadly to include ‘elements of inappropriateness, injustice and lack of predictability’.³⁹ Any period of detention is required to be necessary and reasonable in all the circumstances, proportionate and non-discriminatory.⁴⁰ Effective, independent and periodic review of detention by a court empowered to order release is also critical in ensuring compliance with international human rights standards.⁴¹
27. Prolonged stays in closed reception facilities are not appropriate. This is especially the case for persons who have been determined to be refugees or otherwise in need of international protection and for those who have specific needs (see Part B, Section VI below on the need for rapid outcomes for all persons).
28. Further, people with specific needs may require special considerations in terms of reception and processing arrangements, e.g.:
- **Children**, particularly unaccompanied and separated children: appointment of guardians, systematic ‘best interest’ determinations, assistance with access to asylum procedures and preparation of their claim, and alternative accommodation arrangements. Detention of children is permitted only as a measure of last resort, for the shortest possible period of time and in appropriate conditions;⁴²
 - **Women**: identification of ‘women-at-risk’ through pre-screening, separate sleeping and washing arrangements in reception centres, presence of appropriate female staff, including to conduct interviews;⁴³
 - **Trafficked persons**: special procedures to identify potential victims, separate them from traffickers, and to prevent traffickers and smugglers from accessing

³⁵ See: UNHCR, *Alternatives to Detention of Asylum-seekers and Refugees* (2006), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search> (accessed 14 December 2009).

³⁶ See especially: Art. 9, ICCPR; Human Rights Committee General Comment No. 8, *Right to Liberty and Security of Persons*, 30/06/82. For guidance on detention of asylum-seekers see e.g.: UNHCR’s Guidelines on Applicable Criteria and Standards for Detention (February 1999), <http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf> (accessed 29 October 2009); ExCom Conclusion No. 44 (XXXVII) (1986).

³⁷ Art. 9(1), ICCPR; Art. 9, UDHR.

³⁸ Art. 9(1), ICCPR.

³⁹ Human Rights Committee, *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990).

⁴⁰ *Van Alphen v. The Netherlands*, above n [29].

⁴¹ *Van Alphen v. The Netherlands*, above n [29]; Art. 9, ICCPR.

⁴² See: The Convention on the Rights of the Child, 1577 U.N.T.S. 3 entered into force 2 September 1990; General Comment No. 6 (2005) *Treatment of Unaccompanied and Separated Children outside their Country of Origin*, CRC/GC/2005/6.

⁴³ See e.g.: UNHCR, *The Handbook for the Protection of Women and Girls* (2008), <http://www.unhcr.org/protect/PROTECTION/47cfae612.html> (accessed 29 October 2009); UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response* (2003) <http://www.unhcr.org/3f696bcc4.html> (accessed 29 October 2009); Executive Committee Conclusions No’s. 39 (XXXVI) (1985), 54 (XXXIX) (1988), 60 (XL) (1989), 64 (XLI) (1990) and 73 (XLIV) (1993).

reception centres; assistance in preparing asylum claims; special short or longer term visas or migration options may be considered (e.g. in exchange for testimony against traffickers);⁴⁴

- **Victims of torture or trauma:** availability of basic medical facilities and psychological support, specific assistance with asylum applications or other procedures.

29. All of the above groups of persons may be in need of international protection. In addition to any special measures or procedures, they should have access to RSD procedures and assistance as appropriate in preparing their asylum claim.

VI. Providing outcomes for all intercepted persons

30. States with jurisdiction over extraterritorial reception and processing arrangements are also responsible for ensuring that timely outcomes are provided for all intercepted persons, whether they are found to be in need of international protection or not.⁴⁵ How cases are resolved will differ depending on the person's legal status. Effective outcomes will also balance State concerns, such as the need to stem future irregular movements and avoid the creation of pull factors, with international human rights and protection standards.

31. For **refugees or other people in need of international protection**, durable solutions will generally be geared towards resettlement and, depending on the arrangement and the particular circumstances in the country, some form of local solution. For these people, with clear entitlements under international refugee law, it is necessary for access to such solutions be guaranteed and available within a reasonable time. For those granted temporary forms of protection pursuant to extraterritorial processing arrangements based on an expectation that their protection needs will be only of short duration (see above, Part B, Section IV), it is appropriate for some form of local solution to be provided, including, e.g., freedom of movement and opportunities for self-reliance, pending the viability of return to their country of origin.

32. For **persons found not to be in need of international protection**, resolution of their situation will generally consist of return to the country of origin.

⁴⁴ See e.g.: OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, <http://www.ohchr.org/Documents/Press/OHCHR%20Recommended%20Guidelines.pdf> (accessed 29 October 2009); UNHCR's Guidelines on International Protection No. 7, *The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, HCR/GIP/06/07, 7 April 2006; Guidelines on International Protection No. 2, *'Membership of a Particular Social Group' Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002; Guidelines on International Protection No. 1, *Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002; The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, General Assembly Resolution 55/25, entered into force 25 December 2003.

⁴⁵ As outlined above (Part B, Section II), this could include the intercepting State, as well as any other State that is or becomes involved in extraterritorial processing arrangements (including the host State). See also: ExCom Conclusion No. 62 (XLI) (1990) and ExCom Conclusion No. 85 (XLIX) (1998), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010). As discussed above, Part B, Section IV, extraterritorial processing may in itself consist of finding and allocating responsibility for providing durable solutions in the context of regional processing arrangements.

33. Additional consideration is necessary for the identification of appropriate outcomes for persons with **specific needs** (see above, Part B, Section V).

VII. Transfer of State responsibility

34. Any transfer of responsibility for processing asylum claims made by intercepted persons from an intercepting State to another country is subject to appropriate protection safeguards.⁴⁶ Notably, transfer of responsibility may be possible:

- Where an asylum-seeker has valid links with the proposed country of transfer (such as close family, educational/language and similar links, previous issuance of an entry visa, or previous residence on the territory – although this would not normally mean mere transit); and/or
- Based on an agreement between the States concerned that guarantees the standards of treatment and procedural and substantive rights listed in Part B (e.g. the US-Canada ‘Safe Third Country Agreement’⁴⁷).

35. In both cases, formal assurances by the accepting country to respect essential protection standards are necessary. Such assurances generally provide that asylum-seekers i) will be admitted to that country; ii) will enjoy protection against *refoulement* there; iii) will have the possibility to seek and enjoy asylum; and iv) will be treated in accordance with accepted international standards. It is also necessary for the intercepting State to ensure that the accepting country does in practice meet essential protection standards.

C) MODELS OF EXTRATERRITORIAL PROCESSING: POLICY CONSIDERATIONS

36. This Part C outlines UNHCR’s views on four different models of extraterritorial reception and processing that have been considered or applied by intercepting States.

- I. ‘Third state’ processing
- II. ‘Out of country’ processing
- III. Regional processing
- IV. Processing onboard maritime vessels

37. These models include arrangements where responsibility for processing is transferred from the intercepting State to another State, as well as where the intercepting State retains responsibility for undertaking processing itself, but conducts this outside of its territory. All extraterritorial arrangements are subject to the legal standards set out in Part B.

I. ‘Third State’ processing

38. In certain circumstances, claims for international protection may be processed **in and by** a State other than the State that has carried out an interception operation (a ‘third State’⁴⁸),

⁴⁶ See: ExCom Conclusions No. 15 (XXX) (1979) and ExCom Conclusion No. 58 (XL) (1989), available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010); UNHCR, Fair and Efficient Asylum Procedures, above n [20].

⁴⁷ *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, 5 December 2002, <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> (accessed 15 July 2010).

if the third State is a party to the 1951 Convention and has a fair and effective asylum system in place.

39. This may be particularly appropriate where **the third State also has concurrent jurisdiction** over the intercepted persons, in addition to the intercepting State: for example, because the interception has been carried out by the intercepting State in the territorial waters of the third State.⁴⁹ This is consistent with UNHCR Executive Committee Conclusion No. 97 (LIV) (2003) which provides that ‘the State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons’.⁵⁰ Third State processing may also be appropriate during **rescue at sea operations** taking place in the search-and-rescue area of the third State, where, in addition to being a party to the 1951 Convention and having a fair and effective asylum system in place, the third State has been identified as the most suitable place for disembarkation or where maritime safety has required this.⁵¹
40. In a second category of cases, it may be acceptable for intercepting States to refer asylum-seekers for processing **in and by third States that do not otherwise have immediate jurisdiction** over those persons in the circumstances and under the conditions outlined in Part B, Section VII above: notably, where an asylum-seeker has valid links with that third country; and/or based on an agreement for transfer of responsibility between the States concerned.
41. In the interests of burden sharing and international cooperation, the preferred option where responsibility for processing is transferred to a third State is for the intercepting State to assist, e.g. by determining certain asylum claims and/or providing durable solutions to some refugees, including resettlement. It is useful if burden-sharing agreements between intercepting States and third States clearly delineate the protection responsibilities of each State in this regard. In the absence of a standing arrangement, ad hoc agreements on the roles and responsibilities of each State for protection-related issues can be concluded for particular interception operations or intercepted groups.
42. In all cases, the intercepting State maintains responsibilities for intercepted persons under international law as long as they are within its jurisdiction.⁵² Accordingly, it is for the intercepting State to ensure that the (proposed) third State is willing and able to provide access to fair and efficient asylum procedures and protection before responsibility is transferred (see Part B, Section VII). If formal assurances are not forthcoming, or if the

⁴⁸ The term ‘third State’ refers to the fact that this country is neither the country of origin of the asylum-seeker, nor the State that carried out the interception operation.

⁴⁹ See definition of ‘jurisdiction’ above, Part B, Section II. An intercepting State (State A) and a third State (State B) may also have concurrent jurisdiction where interception has been carried out by State A on the territory of State B. This may be the case, for example, where State A has outposted immigration officials at airports in State B who prevent persons without appropriate travel documentation from travelling to State A.

⁵⁰ ExCom Conclusion No. 97 (LIV) (2003) on Protection Safeguards in Interception Measures, available at <http://www.unhcr.org/41b041534.html> (accessed 12 August 2010).

⁵¹ See: United Nations General Assembly, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees*, A/AC.259/17, 11 April 2008.

⁵² For the scope of jurisdiction under international law, see Part B, Section II. For the transfer of responsibility to a third State in accordance with international law, see Part B, Section VII.

third State does not in fact process claims properly, then it is not appropriate for the intercepting State to transfer claimants to this third State.

43. As stated above, transfer of responsibility for processing to a third State is acceptable only if that State is a party to the 1951 Convention and has an asylum system in place that meets international standards. It is also not acceptable for a person's asylum claim to be transferred to a third State if the person is a national of that country or if there are other reasons why access to protection in that State would not be possible in his or her individual case.

II. 'Out of country' processing

44. 'Out of country' processing involves processing **by an intercepting State on the territory of another State** or on **part of the intercepting State's own territory** that has been delineated as 'extraterritorial' for migration or other purposes under national law.⁵³ Unlike 'third State' processing, discussed in Part C, Section I above, 'out of country' processing does not involve the transfer of responsibility for processing to another State. Rather, responsibility under international law is retained by the intercepting State itself.⁵⁴

45. In specific circumstances, 'out of country' processing may increase protection options. This may be the case where:

- A group has been intercepted in the territorial waters of a State that does not have an adequate asylum procedure in place or is not a party to the 1951 Convention, and relocation of persons to intercepting State territory is not possible (e.g. due to the number of claims);⁵⁵
- It can facilitate disembarkation of people rescued at sea on the high seas by commercial vessels;⁵⁶
- It is used as an element in a longer term strategy to establish or enhance the protection capacity of the country in which the processing takes place;
- It facilitates burden and responsibility sharing among destination States with varying capacities in a particular region.

46. The same procedural guarantees and reception standards that apply to regular 'in-country' procedures also apply to 'out of country' processing arrangements. In particular, measures to safeguard against prolonged stay in reception facilities with no or only limited freedom of movement before or after protection claims have been examined will be critical. This could include admission to the intercepting State's territory or resettlement in a third

⁵³ Examples of excision of certain parts of State territory under national law include airports, ports and other border areas through the creation of 'international' or 'transit' zones as well as islands or other remote areas. The European Court of Human Rights has held that, despite its name, the 'international zone' of an airport does not have extraterritorial status: *Amuur v France* 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.

⁵⁴ The existence of State jurisdiction as a matter of fact under international law is outlined in Part B, Section II. The transfer of responsibility to a third State under international law is described in Part B, Section VII.

⁵⁵ Cf. 'third State' processing outlined in Part C, Section I above where the third State is party to the 1951 Convention.

⁵⁶ See generally: United Nations General Assembly, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees*, A/AC.259/17, 11 April 2008, especially paragraphs 32 - 35.

country for those persons ultimately recognized as refugees, and return for those found not to be in need of international protection.

47. Responsibility for ‘out of country’ processing and reception arrangements, as well as ensuring the availability of timely and appropriate outcomes, will remain fully with the intercepting State.⁵⁷ Where processing is undertaken on the territory of a third State, that State may also have responsibilities under international law (Part B, Section II). In some cases, States have sought assistance from UNHCR, IOM or another international organization for ‘out of country’ processing or reception.⁵⁸ Full responsibility under international law in such situations remains with the State(s) concerned.

48. ‘Out of country’ processing by an intercepting State is not appropriate in any of the following alternative circumstances:

- Compliance with national and international standards cannot be guaranteed (Part B);
- There is no resolution, either for refugees or for those found not in need of international protection, within a reasonable time after protection claims have been determined;
- It negatively impacts on the availability or development of the asylum system (‘asylum space’) in the country on whose territory the processing takes place;
- Where people have been intercepted in the territorial waters of the intercepting State, if the ‘out of country’ processing arrangement involves processing by the intercepting State on the territory of another State.

49. Consistent with the understanding in this paper that States implement extraterritorial processing arrangements in good faith, it is also not appropriate to use such mechanisms where:

- It represents an attempt by an intercepting State to divest itself of responsibility and shift that responsibility to another State (or UNHCR or another international organization);
- It is used as an excuse by the intercepting State to deny or limit its jurisdiction and responsibility under international refugee and human rights law.

III. Regional processing

50. ‘Regional processing’ could involve joint processing carried out by several transit or destination States.⁵⁹ It could be appropriate in the event of large numbers of claims being made in several States but **arising from the same situations or particular migratory routes**. It could also be appropriate where there is a concern about **managing responsibility** for asylum processing and solutions more evenly between, or with more consistency among, destination States in a particular region.

⁵⁷ See: Part B, Section II above.

⁵⁸ The possible scope of UNHCR’s involvement in extraterritorial processing arrangements is discussed in Part D below.

⁵⁹ Note that while regional processing arrangements as described in this Section have been considered by States, they have not yet been implemented in any region.

51. It is recommended that such processing be undertaken under the joint responsibility of several States in regional processing centres located inside the territory of one or more of the participating States. Regional processing could be based on comprehensive plans of action to address targeted refugee groups: for example, persons of specific nationalities who are regularly found to need international protection in high numbers in relevant destination States; or persons from countries of origin that present complex claims which would benefit from a pooling of resources among governments in the region.⁶⁰
52. The scope of the ‘processing’ under a regional processing arrangement could be more or less extensive.⁶¹ For example, it could involve joint reception arrangements, registration and pre-screening of asylum-seekers by cooperating governments, followed by referral of different categories of claims to substantive RSD and other procedures in individual States. This could be supported by the adoption of common asylum procedures by States.⁶²
53. Alternatively, regional processing could involve full RSD procedures in line with the international standards set out in Part B, Section IV above, carried out jointly at the regional level with a consortium of national asylum officers and second instance decision makers. In certain circumstances, which would require further exploration, regional processing could also be undertaken upon the request of a group of States by a supranational, regional or international organization or a multi-agency task force (for the possible role of UNHCR, see below Part D). States could adopt different roles and responsibilities consistent with their capacity (hosting reception centres, offering relocation places for refugees, organising return, providing funds). Additional support, financially and in the form of resettlement places, could be made available by third States outside the region.
54. Responsibility for the identification and implementation of solutions for those in need of international protection and resolution for others would remain with all States involved in the regional processing arrangement.

IV. Processing onboard maritime vessels

55. Processing onboard maritime vessels is generally not appropriate. In exceptional circumstances, that would need to be defined further, initial **profiling or pre-screening** onboard the maritime vessel by the intercepting State may be one solution to ensure that persons with international protection needs are identified and protected against *refoulement*. Following profiling, those persons identified as having potential protection needs would need to be disembarked in the territory of the intercepting State to have their international protection claims considered in regular in-country RSD procedures. As stated above (Part B, Section IV), if during profiling a person expresses in any manner a need for international protection, or there is any doubt whether an individual may be in need of international protection, referral to RSD is the required response.
56. In general the carrying out of **full RSD procedures** onboard maritime vessels will not be possible, as there can be no guarantee of reception arrangements and/or asylum

⁶⁰ See: UNHCR Working Paper: A Revised ‘EU prong’ Proposal (22 December 2003), available at <http://www.unhcr.org/refworld/docid/400e85b84.html> (accessed 5 July 2010) [‘Revised EU Prong Proposal’].

⁶¹ See, also: above Section B, Part IV.

⁶² See: Revised EU Prong Proposal, above n [50].

procedures in line with international standards.⁶³ In terms of reception arrangements, this would require a vessel of a certain size, with adequate facilities to meet asylum-seekers' basic needs (including for medical treatment, food and fresh water, rest, interpretation, as well as space to conduct individual, confidential interviews). Even on large vessels the limitations on space may increase the risks of overcrowding and spread of contagious illnesses. It may also be more challenging to manage security risks on maritime vessels than in onshore reception centres.

57. Even if these standards could be met, full RSD procedures could only be carried out onboard maritime vessels for claimants whose asylum applications could be decided quickly, i.e. manifestly founded or unfounded cases. If determination of certain claims proved to be more complex during the course of such procedures, individuals would need to be disembarked and referred to regular in-country asylum procedures.
58. At the same time, other procedural requirements - such as access to legal assistance, allowing sufficient time to prepare asylum claims, providing a reasoned decision in writing, and allowing an independent appeal of any negative decision with suspensive effect - remain applicable for on-board RSD. Trained, professional asylum experts would be required on-board, as it is not appropriate for RSD to be carried out by border or coastguard officials. Trained translators or interpreters may also be necessary.
59. It is not appropriate to process the claims of vulnerable people or people with specific needs, including children, on-board maritime vessels other than through initial profiling or pre-screening (Part B, Section IV).

D) ROLE OF UNHCR

60. UNHCR has a supervisory responsibility under its Statute in conjunction with Article 35 of the 1951 Convention.⁶⁴ In order to exercise this responsibility, UNHCR or its partners need access to extraterritorial reception centres and permission to contact asylum-seekers and refugees. UNHCR may also provide advice to States, for instance on the inclusion of protection responsibilities in interception agreements.
61. In some situations, the Office could agree to become directly involved in extraterritorial reception arrangements or asylum procedures, or to assist with the search for durable solutions for refugees. This could be the case for rescue at sea operations involving the responsibility of several States, where UNHCR's engagement could be crucial for brokering an agreement. It could also form part of a strategy to establish or enhance the capacity of the State on whose territory asylum processing takes place. Finally, direct UNHCR involvement could be considered to assist States in establishing a comprehensive regional cooperation framework.
62. UNHCR's involvement is best undertaken in conjunction with State authorities, other international organizations and civil society.
63. Involvement by UNHCR will not be appropriate where it could call into question UNHCR's impartiality or mandate, or lead to UNHCR being seen as favouring one or the

⁶³ See: above, Part B, Sections IV and V.

⁶⁴ See: *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775 (1950).

other of the States involved. It is also not appropriate where it may have the effect of devolving State responsibility to provide access to an asylum procedure and search for durable solutions to UNHCR.

E) CONCLUSION

64. In general, processing of intercepted persons will take place inside the territory of the intercepting State. This is consistent with the responsibilities owed by the intercepting State to persons within its de jure or de facto control under international refugee and human rights law. It will also usually be the most practical alternative.
65. However, in certain circumstances, extraterritorial processing may be appropriate as part of burden-sharing arrangements in order to better and more fairly to distribute responsibilities to respond to refugee and mixed movement situations among interested States.
66. This paper has provided general guidance on four models of extraterritorial processing that have been considered by States and the international legal standards that apply to such models. However, the effectiveness of any particular extraterritorial processing arrangement and its consistency with international refugee and human rights law would depend on the details of each scheme.

Division of International Protection (DIP)
November 2010

2. Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy*

(Application no. 27765/09)

Selected excerpts

4. Extraterritorial Protection from *Refoulement*

4.1 The extraterritorial scope of the principle of *non-refoulement* under Article 33 (1) of the 1951 Convention

4.1.1 The obligation of states not to expel or return (*refouler*) a person to territories where his/her life or freedom would be threatened is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention. Article 33 (1) prohibits states from expelling or returning (*refouler*) a refugee in any manner whatsoever to a territory where s/he would be at risk of persecution. The prohibition of *refoulement* applies to all refugees, including those who have not been formally recognised as such, and to asylum-seekers whose status has not yet been determined.¹

4.1.2 The territorial scope of Article 33 (1) is not explicitly defined in the 1951 Convention. The meaning, purpose and intent of the provision demonstrate, in UNHCR's view, its extraterritorial application, e.g., to situations where a state acts outside its territory or territorial waters.² Furthermore, the extraterritorial applicability of human rights obligations contained in various instruments supports this position (further detailed below).

4.2 The extraterritorial scope of the principle of *non-refoulement* in human rights law

4.2.1 The complementary and mutually reinforcing nature of international human rights law and international refugee law speak strongly in favour of delineating the same territorial scope for all expressions of the *non-refoulement* principle, whether developed under refugee or human rights law. The extraterritorial applicability of the principle of *non-refoulement* is firmly established in international human rights law. This has been confirmed by the

* Available at: <http://www.unhcr.org/refworld/docid/4b97778d2.html>.

¹ EXCOM, Conclusion No. 6 (XXVIII), 1977, para. (c), EXCOM Conclusion No. 79 (XLVII), 1996, para. (j), EXCOM Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, Note on International Protection (submitted by the High Commissioner), A/AC.96/815, EXCOM Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>.

² 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, paras. 26-31, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>. See also UNHCR, *Gene McNary, Commissioner, Immigration and Naturalization Service, et al. (Petitioners) v. Haitian Centers Council, Inc., et al. (Respondents). Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondents*, October 1992, p. 8-13, <http://www.unhcr.org/refworld/docid/3f336bbc4.html>.

International Court of Justice.³ The United Nations Human Rights Committee has affirmed that the principle of *non-refoulement* developed under the International Covenant on Civil and Political Rights applies in any territory under a State Party's jurisdiction, and to any person within a State Party's actual control, irrespective of his/her physical location.⁴

4.2.2 Similarly, the United Nations Committee against Torture found that the prohibition of *refoulement* contained in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment applies to all people under a State Party's *de facto* control.⁵ Relevant in this regard is the Committee's view in the case of *J.H.A. v. Spain*,⁶ where the Committee observed that Spain had control over persons on board a vessel from the time the vessel was rescued and throughout the identification and repatriation process that subsequently took place.⁷ The Committee confirmed that the rescued passengers were within the jurisdiction of Spain and that Spain was under the duty to respect the prohibition of *refoulement* entailed in Article 3 of the Convention against Torture.⁸

4.2.3 The concept of jurisdiction is also used in regional human rights instruments to define the territorial scope of their application. The Inter-American Commission on Human Rights,⁹

³ Judgment of the International Court of Justice in *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, (2005) ICJ Gen. List No. 116, 19 December 2005, para. 180, <http://www.icj-cij.org/docket/files/116/10455.pdf>. Also, Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, <http://www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6&case=131&k=5a>, para. 111, and International Court of Justice, *Order on the Request for the indication of provisional measures, Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, (2008), ICJ Gen. List No. 140, 15 October 2008, para. 109, <http://www.icj-cij.org/docket/files/140/14809.pdf>.

⁴ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10, <http://www.unhcr.org/refworld/publisher,HRC,GENERAL,,478b26ae2,0.html>. See the decisions of the Human Rights Committee in: *Lopez Burgos v. Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3 and *Celiberti de Casariego v. Uruguay*, U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3. See Concluding Observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10 and U.N. Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11. See also, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/79/Add.50, 3 October 1995, para. 284 and U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10. The International Court of Justice has confirmed that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, see the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, para. 111.

⁵ Concluding Observations of the Committee against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006, para. 15. Also, Concluding Observations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CAT/C/CR/33/3, 10 December 2004, para. 4 (ii) (b), *General Comment No. 2* of the Committee against Torture, U.N. Doc. CAT/C/GC/2, 24 January 2008, para. 16.

⁶ Decision of the Committee against Torture in *J.H.A. v. Spain*, CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November 2008, <http://www.unhcr.org/refworld/docid/4a939d542.html>.

⁷ Decision of the Committee against Torture in *J.H.A. v. Spain*, U.N. Doc. CAT/C/41/D/323/2007, 21 November 2008, para. 8.2.

⁸ *Ibid.*

⁹ Inter-American Commission on Human Rights, *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37.

the European Court of Human Rights¹⁰ and the CPT¹¹ have developed similar interpretations of the concept of jurisdiction as mentioned above.

4.2.4 More particularly, in a case involving the interception, on the high seas, by the French Navy of a ship flying a Cambodian flag and the detention of the crew on that ship under the control of French officials until an harbour in France was reached, the European Court of Human Rights observed that France had “exercised full and exclusive control over the [ship] and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they [the crew members] were tried in France,” and concluded that the applicants were effectively within France’s jurisdiction for the purposes of Art. 1 of the European Convention on Human Rights (“ECHR”).¹²

4.3 The principle of *non-refoulement* in the context of interception and search and rescue operations on the high seas

4.3.1 As stated earlier, the principle of *non-refoulement* applies whenever a state exercises jurisdiction.¹³ Jurisdiction can be based on *de jure* entitlements and/or *de facto* control. *De jure* jurisdiction on the high seas derives from the flag state jurisdiction.¹⁴ *De facto* jurisdiction on the high seas is established when a state exercises effective control over persons. Whether there is effective control will depend on the circumstances of the particular case.

4.3.2 Where people are intercepted on the high seas, rescued and put on board a vessel of the intercepting state, the intercepting state is exercising *de jure* as well as *de facto* jurisdiction. While *de jure* jurisdiction applies when the people on board a ship are sailing under the flag of the intercepting state, it is also exercised – relevant to the case of “push-

¹⁰ European Court of Human Rights, *Öcalan v. Turkey (Preliminary Objections)*, Application No. 46221/99, judgment of 12 March 2003, para. 93,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=46221/99&sessionid=68753718&skin=hudoc-en>; *Ilaşcu and Others v. Moldova and Russia*, Application No. 48787/99, Grand Chamber judgment of 8 July 2004, paras. 382-384,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=48787/99&sessionid=68754005&skin=hudoc-en>; *Issa and Others v. Turkey*, Application No. 31821/96, judgment of 16 November 2004, para. 71,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=31821/96&sessionid=68754005&skin=hudoc-en>.

¹¹ CPT, *Report to the Italian Government*, para. 29.

¹² European Court of Human Rights, *Medvedyev and Others v. France*, Application No. 3394/03, Grand Chamber judgment of 29 March 2010, para. 67,

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=865670&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; see also *Viron Xhavara & 15 Others v. Italy and Albania*, Application No. 39473/98, Inadmissibility decision of 11 January 2001,

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=680165&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; see also *mutatis mutandis*, *Rigopoulos v. Spain*, Application No. 37288/97, Inadmissibility decision of 12 January 1999,

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=682200&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. Art. 1 ECHR provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.”

¹³ 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, para. 24, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

¹⁴ Article 92 in conjunction with Article 94 of the United Nations Convention on the Law of the Sea, U.N.T.S. 1833, p. 3, which entered into force 16 November 1994.

backs” – where the intercepting state has taken the persons on board its vessel, bringing them under its full (effective) control. In UNHCR’s view, as becomes clear from section 2.1 above, the Italian authorities were in full and effective control of the persons throughout the “push-back” operations until the formal hand-over to the Libyan authorities. Article 4 of the Italian Code of Navigation specifies that Italian ships on the high seas are considered as Italian territory. Accordingly, the Italian authorities acknowledge expressly that the ships, which operated in the present case, fall within Italian jurisdiction.¹⁵

4.3.3 When jurisdiction on the high seas has been established, the obligations deriving from it in relation to the principle of *non-refoulement* should be examined. The UNHCR’s Executive Committee has emphasized the fundamental importance of fully respecting this principle for people at sea,¹⁶ underlining that:

“interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.”¹⁷

4.3.4 In UNHCR’s view, the situation in which a state exercises jurisdiction on the high seas over people on board its vessels requires respect for the principle of *non-refoulement*. It follows that states are obliged, *inter alia*, not to hand over those concerned to the control of a state where they would be at risk of persecution (direct *refoulement*), or from which they would be returned to another country where such a risk exists (indirect *refoulement*). The existence of jurisdiction triggers state responsibilities under international human rights and refugee law¹⁸, including for protection against *refoulement*. The responsibility of a state to protect a person from *refoulement* is engaged because of any conduct exposing the individual to a risk of being subjected to persecution, torture or inhuman or degrading treatment.¹⁹ Thus, the absence of an explicit and articulated request for asylum does not absolve the concerned state of its *non-refoulement* obligation. The state authorities should allow the potential asylum-seeker an effective opportunity to express his or her wish to seek international protection.²⁰ This is particularly justified in the context of rescue at sea. In practice, as stated by an Italian official to the CPT, persons surviving a sea voyage are clearly not in a condition

¹⁵ Observations du Gouvernement italien, Requête no 27765/09 – Hirsi et 23 autres contre l’Italie, 9 avril 2010, paras 9 and 13.

¹⁶ EXCOM Conclusion No. 89 (LI), 2000.

¹⁷ EXCOM Conclusion No. 97 (LIV) 2003, para. (a) (iv).

¹⁸ UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, para. 9, <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

¹⁹ European Court of Human Rights, *Soering v. UK*, Application No. 14038/88, Plenary judgment of 7 July 1989, para. 91, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b6fec&skip=0&query=soering>; *Cruz Varas and Others v. Sweden*, Application No. 15576/89, Plenary judgment of 20 March 1991, para. 76, <http://www.unhcr.org/refworld/docid/3ae6b6fe14.html>.

²⁰ The responsibility of the concerned State may be engaged if its authorities fail to do so. This is reflected in general terms in the case law of the European Court of Human Rights, which held repeatedly that “the States (...) remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations”. See for instance, European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Grand Chamber judgment of 21 January 2011, para. 338, <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

in which they should be expected to declare their wish to apply for asylum.²¹ As the European Court of Human Rights held recently, the concerned state cannot hold against the asylum-seeker that he or she did not inform the authorities of the reasons of his claim where there is no procedure in place to allow him or her to do so.²² In any case, at the time of the “push-back” operations, the appalling situation of asylum in Libya had been repeatedly substantiated by numerous reports, which were publicly available and emanated from various sources including UNHCR,²³ Amnesty International²⁴ and Human Rights Watch.²⁵ A letter was addressed by UNHCR to the Presidency of the EU, at the beginning of the “push-backs” and ahead of the Justice and Home Affairs Council meeting of 4 and 5 June 2009, in which UNHCR drew the specific attention of Member States to the lack of protection available in Libya for asylum-seekers.²⁶ In those circumstances, the Italian authorities knew or ought to have known about the risk faced by the persons concerned upon return to Libya and, in the light of the recent case law of the Court,²⁷ should have assessed such risk. In UNHCR’s view, the state exercising jurisdiction needs to ensure that asylum-seekers are able to access fair and effective asylum procedures in order to determine their needs for international protection.

4.3.5. The European Court of Human Rights has clarified that the *non-refoulement* obligation under Article 3 ECHR includes an obligation for the returning state to verify the compliance, in practice, of the receiving state with international obligations in asylum matters.²⁸ More particularly, this assessment shall include whether the person concerned has access to an effective asylum procedure upon return, and whether he or she is subject to detention and living conditions which are in line with Article 3 ECHR.²⁹

4.3.6 The need to ensure the safety of asylum-seekers and refugees has also been acknowledged by the International Maritime Organization Guidelines on the Treatment of

²¹ CPT, *Report to the Italian Government on the visit to Italy carried out by the CPT from 27 to 31 July 2009*, 28 April 2010, para. 32.

²² European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Grand Chamber judgment of 21 January 2011, para. 366, <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

²³ On 7 May 2009, the day after the first pushback intervention, UNHCR issued a strong public statement expressing deep concern over the fate of the forcibly returned persons. UNHCR highlighted the likelihood that amongst the persons returned there were persons in need of international protection, urging the Italian government to ensure “full access to territory and asylum procedures”. This was followed by several other UNHCR statements regarding the possible violation of the principle of *non-refoulement* and reiterating concern over the fact that “Libya is not a State party to the 1951 Refugee Convention and does not have a national asylum law or refugee protection system”. See UNHCR, *Follow-up from UNHCR on Italy’s push-backs*, 12 May 2009, <http://www.unhcr.org/4a0966936.html>; and UNHCR, *UNHCR interviews asylum-seekers pushed back to Libya*, 14 July 2009, <http://www.unhcr.org/4a5c638b6.html>.

<http://www.unhcr.org/4a5c638b6.html>.

²⁴ Amnesty International, *Amnesty International Rapport 2008 - Lybie*, 28 May 2008, <http://www.unhcr.org/refworld/docid/4842725b2.html>.

²⁵ HRW, *Libya: Rights at Risk*, 2 September 2008, at: <http://www.hrw.org/en/reports/2008/09/02/libya-rights-risk>.

²⁶ UNHCR, *Letter of the High Commissioner for Refugees to the Czech Republic European Union Presidency*, 28 May 2009, <http://www.unhcr.org/refworld/docid/4ae9accd0.html>.

<http://www.unhcr.org/refworld/docid/4ae9accd0.html>.

²⁷ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Grand Chamber judgment of 21 January 2011, para. 352, <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

²⁸ *Ibid.*, paras. 345 - 358.

²⁹ *Ibid.* paras. 249-264, 216 -234, see also with regard to the responsibility of the transferring state paras. 365 - 368.

Persons Rescued at Sea.³⁰ According to these Guidelines, disembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedom would be threatened, should be avoided (unless maritime safety requires otherwise).

4.3.7 For interception or rescue operations carried out by EU Member States, UNHCR has clarified that,

“... disembarkation of people rescued in the Search and Rescue (SAR) area of an EU Member State should take place either on the territory of the intercepting/rescuing State or on the territory of the State responsible for the SAR. This will ensure that any asylum-seekers among those intercepted or rescued are able to have access to fair and effective asylum procedures. The disembarkation of such persons in Libya does not provide such an assurance.”³¹

...

³⁰ International Maritime Organization (IMO), *Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea*, 20 May 2004, <http://www.unhcr.org/refworld/docid/432acb464.html>. The IMO Guidelines on the Treatment of Persons Rescued at Sea, which were developed to provide guidance to governments and to shipmasters in implementing recent amendments to the SAR and SOLAS Conventions, clarify that “a place of safety” is a location where rescue operations are considered to terminate and where the survivor’s safety or life is no longer threatened and basic needs, such as food, shelter and medical needs, can be met.

³¹ UNHCR, *Letter of the High Commissioner for Refugees to the Czech Republic European Union Presidency*, 28 May 2009, <http://www.unhcr.org/refworld/docid/4ae9accd0.html>.

3. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*

Introduction **

1. In this advisory opinion, the Office of the United Nations High Commissioner for Refugees (“UNHCR”) addresses the question of the extraterritorial application of the principle of *non-refoulement* under the 1951 Convention relating to the Status of Refugees² and its 1967 Protocol.³

2. Part I of the opinion provides an overview of States’ *non-refoulement* obligations with regard to refugees and asylum-seekers under international refugee and human rights law. Part II focuses more specifically on the extraterritorial application of these obligations and sets out UNHCR’s position with regard to the territorial scope of States’ *non-refoulement* obligations under the 1951 Convention and its 1967 Protocol.

3. UNHCR has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of seeking permanent solutions to the problem of refugees by assisting governments and private organizations.⁴ As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”⁵ UNHCR’s supervisory responsibility under its Statute is mirrored in Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

4. The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. It provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations and also conducts such determinations under its own mandate. UNHCR’s interpretation of the provisions of the 1951 Convention and 1967 Protocol is considered an authoritative view which should be taken into account when deciding on questions of refugee law.

* Available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

** This Opinion was prepared in response to a request for UNHCR’s position on the extraterritorial application of the *non-refoulement* obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The Office’s views as set out in the Advisory Opinion are offered in a broad perspective, given the relevance of the legal questions involved to a variety of situations outside a State’s national territory.

¹ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereinafter “1951 Convention”].

** This Opinion was prepared in response to a request for UNHCR’s position on the extraterritorial application of the *non-refoulement* obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The Office’s views as set out in the Advisory Opinion are offered in a broad perspective, given the relevance of the legal questions involved to a variety of situations outside a State’s national territory.

² The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereinafter “1951 Convention”].

³ The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967 [hereinafter “1967 Protocol”].

⁴ See: *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, para. 1 (1950).

⁵ *Id.*, para. 8(a).

I. NON-REFOULEMENT OBLIGATIONS UNDER INTERNATIONAL LAW

A. *The Principle of Non-Refoulement Under International Refugee Law*

1. *Non-Refoulement Obligations Under International Refugee Treaties*

(i) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*

5. The principle of *non-refoulement* constitutes the cornerstone of international refugee protection. It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party to the 1967 Protocol.⁶ Article 33(1) of the 1951 Convention provides:

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

6. The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the “inclusion” criteria)⁷ and does not come within the scope of one of its exclusion provisions.⁸ Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.⁹ It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared.¹⁰ The

⁶ Article I(1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

⁷ Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term “refugee” shall apply to any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it”.

⁸ Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A(2) of the 1951 Convention, but who are not eligible for protection under the Convention because

- they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because
- they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because
- they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

⁹ See: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, para. 28.

¹⁰ This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) “*Non-refoulement*” (1977), para. (c) (reaffirming “the fundamental importance of the principle of *non-refoulement* ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.”). The UNHCR Executive Committee is an intergovernmental group currently consisting of 70 Member States of the United Nations (including the United States) and the Holy See that advises the UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding on States, they are relevant to the interpretation and application of the

principle of *non-refoulement* is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.

7. The prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or “renditions”, and non-admission at the border in the circumstances described below. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (*refoulement*) “in any manner whatsoever”.¹¹ It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.¹²

8. The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.¹³ It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.¹⁴ As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.¹⁵

9. The *non-refoulement* obligation under Article 33 of the 1951 Convention is binding on all organs of a State party to the 1951 Convention and/or the 1967 Protocol¹⁶ as well as any

international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight. UNHCR Executive Committee Conclusions are available at <http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174> (last visited on 26 October 2006).

¹¹ The meaning of the terms “expel or return (“*refouler*”)” in Article 33(1) is also discussed *infra* at Part II.A.

¹² See: UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, para. 4. See also P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, Cambridge (1995), at p. 341.

¹³ See: P. Weis, *supra* footnote 12, at p. 342.

¹⁴ This could include, for example, removal to a safe third country or some other solution such as temporary protection or refuge under certain circumstances. See E. Lauterpacht and D. Bethlehem, “The scope and content of the principle of *non-refoulement*: *Opinion*”, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), para. 76.

¹⁵ The 1951 Convention and the 1967 Protocol define those to whom international protection is to be conferred and establish key principles such as non-penalisation of entry (Article 31) and *non-refoulement* (Article 33). However, they do not set out procedures for the determination of refugee status as such. Yet it is generally recognised that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention outside the context of mass influx situations. See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, paras. 4–5. See also Executive Committee, Conclusion No. 81 (XLVIII) “*General*” (1997), para. (h); Conclusion No. 82 (XLVIII), “*Safeguarding Asylum*” (1997), para. (d)(iii); Conclusion No. 85 (XLIX), “*International Protection*” (1998), para. (q); Conclusion No. 99 (LV), “*General Conclusion on International Protection*” (2004), para. (l).

¹⁶ See *supra* footnote 6.

other person or entity acting on its behalf.¹⁷ As discussed in more detail in Part II below, the obligation under Article 33(1) of the 1951 Convention not to send a refugee or asylum-seeker to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction.

10. Exceptions to the principle of *non-refoulement* under the 1951 Convention are permitted only in the circumstances expressly provided for in Article 33(2), which stipulates that:

“The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

The application of this provision requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention.¹⁸

11. The provisions of Article 33(2) of the 1951 Convention do not affect the host State’s *non-refoulement* obligations under international human rights law, which permit no exceptions. Thus, the host State would be barred from removing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture.¹⁹ Similar considerations apply with regard to the prohibition of *refoulement* to other forms of irreparable harm.²⁰

12. Within the framework of the 1951 Convention/1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection. The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. The fundamental and non-derogable character of the principle of

¹⁷ Under applicable rules of international law, this applies to the acts, or omissions, of all organs, sub-divisions and persons exercising governmental authority in legislative, judicial or executive functions, and acting in that capacity in the particular instance, as well as to the conduct of organs placed at the disposal of a State by another State, even if they exceed their authority or contravene instructions. Pursuant to Articles 4–8 of the Articles of State Responsibility, the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct (*Articles on State Responsibility*, Articles 4–8). The Articles of State Responsibility were adopted by the International Law Commission without a vote and with consensus on virtually all points. The Articles and their commentaries were subsequently referred to the General Assembly with the recommendation that the General Assembly initially take note of and annex the text of the articles in a resolution, reserving to a later session the question whether the articles should be embodied in a convention on State responsibility. See J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentary*. Cambridge University Press, UK: 2002. The General Assembly annexed the Articles on State Responsibility to its resolution 56/83 of 12 December 2001 on Responsibility of States for Internationally Wrongful Acts.

¹⁸ For a detailed discussion of the criteria which must be met for Article 33(2) of the 1951 Convention to apply, see E. Lauterpacht and D. Bethlehem, *supra* footnote 14, paras. 145–192. On the “danger to the security” exception, see also “*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*” (hereinafter: “UNHCR, *Suresh Factum*”), in 14:1 *International Journal of Refugee Law* (2002).

¹⁹ See: UNHCR, *Suresh Factum*, *supra* footnote 18, paras. 18–50; E. Lauterpacht and D. Bethlehem, *supra* footnote 14, para. 159(ii), 166 and 179.

²⁰ See the discussion of *non-refoulement* obligations under international human rights law *infra* at Part IB.

non-refoulement has also been reaffirmed by the Executive Committee of UNHCR in numerous Conclusions since 1977.²¹ Similarly, the General Assembly has called upon States “to respect the fundamental principle of *non-refoulement*, which is not subject to derogation.”²²

(ii) *Other International Instruments*

13. States’ *non-refoulement* obligations with respect to refugees are also found in regional treaties, notably the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa²³ and the 1969 American Convention on Human Rights.²⁴ *Non-refoulement* provisions modelled on Article 33(1) of the 1951 Convention have also been incorporated into extradition treaties²⁵ as well as a number of anti-terrorism conventions both at the universal and regional level.²⁶ Moreover, the principle of *non-refoulement* has been re-affirmed in the

²¹ See, for example, Executive Committee, Conclusion No. 6 (XXVIII), *supra* footnote 10, para. (c) (reaffirming “the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.”); Conclusion No. 17 (XXXI) “*Problems of extradition affecting refugees*” (1980), at para. (b) (reaffirming “the fundamental character of the generally recognized principle of *non-refoulement*.”); Conclusion No. 25 (XXXIII) “*General*” (1982), para. (b) (reaffirming “the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law.”); Conclusion No. 65 (XLII) “*General*” (1981), para. (b) (emphasizing “the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection...”); Conclusion No. 68 (XLIII) “*General*” (1982), para. (f) (reaffirming “the primary importance of the principles of *non-refoulement* and asylum as basic to refugee protection); No. 79 (XLVIII) “*General*” (1996), para. (j) (reaffirming “the fundamental importance of the principle of *non-refoulement*); No. 81 (XLVIII), *supra* footnote 15, para. (i) (recognizing “the fundamental importance of the principle of *non-refoulement*”); No. 103 (LVI) “*Provision of International Protection Including Through Complementary Forms of Protection*” (2005), at (m) (calling upon States “to respect the fundamental principle of *non-refoulement*”).

²² See, for example, A/RES/51/75, 12 February 1997, para. 3; A/RES/52/132, 12 December 1997, at preambular para. 12.

²³ OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, 1001 U.N.T.S. 45, entered into force 20 June 1974 [hereinafter, “1969 OAU Convention”]. Article II(3) reads: “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras. 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].”

²⁴ 1969 American Convention on Human Rights “Pact of San José, Costa Rica”, 1144 U.N.T.S. 123, entered into force 18 July 1978 [hereinafter, “ACHR”]. Article 22(8) reads: “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”

²⁵ In the context of extradition, these provisions are usually referred to as “discrimination clauses”. See, for example, Article 3(2) of the 1957 European Convention on Extradition, ETS 024, 359 U.N.T.S. 273 entered into force 18 April 1960 (“[Extradition shall not be granted] if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons.”); Article 4(5) of the 1981 Inter-American Convention on Extradition, 20 I.L.M. 723 (1981), entered into force 28 March 1992 (“Extradition shall not be granted ... when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons.”)

²⁶ See, for example, Article 9(1) of the 1979 International Convention against the Taking of Hostages, 1316 U.N.T.S. 205, entered into force 3 June 1983 (“A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing: (a) that the request for extradition for an offence set forth in article 1 has been made for the purpose of prosecuting or

1984 Cartagena Declaration on Refugees²⁷ and other, important non-binding international texts, including, in particular, the Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967.²⁸

2. *Non-Refoulement* of Refugees Under Customary International Law

14. Article 38(1)(b) of the Statute of the International Court of Justice lists “international custom, as evidence of a general practice accepted as law”, as one of the sources of law which it applies when deciding disputes in accordance with international law.²⁹ For a rule to become part of customary international law, two elements are required: consistent State practice and *opinio juris*, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.³⁰

15. UNHCR is of the view that the prohibition of *refoulement* of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by *non-refoulement* obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law.³¹ As such, it is binding on all States, including those which have not yet

punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or (b) that the person’s position may be prejudiced: (i) for any of the reasons mentioned in subpara. (a) of this para. ...”). See also Article 12 of the 1997 International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998), entered into force 23 May 2001 (“Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons.”), and the almost identical provisions in Article 15 of the 1999 International Convention for the Suppression of the Financing of Terrorism, 39 I.L.M. 270 (2000), entered into force 10 April 2002; Article 5 of the 1977 European Convention on the Suppression of Terrorism, ETS 090, 1137 U.N.T.S. 93, entered into force 4 August 1978; Article 14 of the 2002 Inter-American Convention against Terrorism, 42 I.L.M. 19 (2003), entered into force 7 October 2003.

²⁷ Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85) [hereinafter, “Cartagena Declaration”]. The Conclusion set out in section III(5) reads: “To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees...” While not legally binding, the provisions of the Cartagena Declaration have been incorporated into the legislation of numerous States in Latin America.

²⁸ A/RES/2132 (XXII), 14 December 1967, at Article 3 (“No person referred to in Article 1, para. 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.”). See also Resolution (67) 14 on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967, para. 2 (recommending that Governments should “...ensure [...] that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution.”).

²⁹ Article 38(1) of the Statute of the International Court of Justice, 59 Stat. 1031, 1060 (1945).

³⁰ See: International Court of Justice, *North Sea Continental Shelf, Judgment*, 1969 ICJ Reports, page 3, para. 74. See also International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ Reports, page 392, para. 77.

³¹ See: UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (available at: <http://www.unhcr.org/home/RSDLEGAL/437b6db64.html>, last accessed on 30 October 2006); UNHCR, *Note on the Principle of Non-Refoulement (EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures)*, 1 November 1997 (available at: <http://www.unhcr.org/home/RSDLEGAL/438c6d972.html>, last accessed on 30 October 2006). See also New Zealand Court of Appeal, *Zaoui v. Attorney General*, 30 September 2004, (No 2) [2005] 1 NZLR 690, para. 34

become party to the 1951 Convention and/or its 1967 Protocol.³² In this regard, UNHCR notes, *inter alia*, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations.³³ Moreover, exercising its supervisory function,³⁴ UNHCR has closely followed the practice of Governments in relation to the application of the principle of *non-refoulement*, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of *non-refoulement* as binding, as demonstrated, *inter alia*, in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended *refoulement*, thus implicitly confirming their acceptance of the principle.³⁵

16. In a Declaration which was adopted at the Ministerial Meeting of States Parties of 12–13 December 2001 and subsequently endorsed by the General Assembly, the States party to the 1951 Convention and/or 1967 Protocol acknowledged "...the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law."³⁶ At the regional level, the customary international law character of the principle of *non-refoulement* has also been re-affirmed in a Declaration adopted by Latin American States participating at a gathering to celebrate the twentieth anniversary of the 1984 Cartagena Declaration.³⁷

("The prohibition on *refoulement*, contained in art 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all States, which arise when States follow certain practices generally and consistently out of a sense of legal obligation.") and para. 136 ("The Refugee Convention is designed to protect refugees from persecution and the *non-refoulement* obligation is central to this function. It is non-derogable in terms of art 42.1 and, as discussed above at para [34] has become part of customary international law."). See also E. Lauterpacht and D. Bethlehem, *supra* footnote 14, paras. 193–219; G. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, Oxford University Press (1996), at pp. 167–171.

³² The prohibition of *refoulement* of refugees under customary international law also applies, with regard to non-European refugees, in States which are party to the 1951 Convention, but which maintain the geographical limitation provided for Article 1B(1) of the Convention.

³³ This is the case, for example, in Bangladesh, India, Pakistan and Thailand.

³⁴ Under Paragraph 8 of the Statute of UNHCR, Article 35 of the 1951 Convention and Article II of the 1967 Protocol (see also *supra* footnote 4).

³⁵ As noted by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. U.S.*), Merits, 1986 ICJ Reports, page 14, para. 186, "[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

³⁶ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001, HCR/MMSP/2001/09, 16 January 2002 (available at: <http://www.unhcr.org/home/RSDLEGAL/3d60f5557.pdf>, last accessed on 30 October 2006) at preambular para. 4. Earlier, the Executive Committee of UNHCR observed that "the principle of *non-refoulement* ... was progressively acquiring the character of a *peremptory rule* of international law." See Executive Committee Conclusion No. 25 (XXXIII), *supra* footnote 21, para. (b). Pursuant to Article 53 of the 1969 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force 27 January 1980 [hereinafter: "1969 Vienna Convention"], peremptory norms of general international law, or *jus cogens*, are norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Article 64 of the 1969 Vienna Convention provides that peremptory norms of international law prevail over treaty provisions.

³⁷ Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 16 November 2004 (available at: <http://www.unhcr.org/home/RSDLEGAL/424bf6914.pdf> last

B. Non-Refoulement *Obligations Under International Human Rights Law*

1. International Human Rights Treaties

17. *Non-refoulement* obligations complementing the obligations under the 1951 Convention, which preceded the major human rights treaties, have also been established under international human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life³⁸, or torture or other cruel, inhuman or degrading treatment or punishment.³⁹

18. An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴⁰ which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

19. Obligations under the 1966 Covenant on Civil and Political Rights,⁴¹ as interpreted by the Human Rights Committee, also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁴² The

accessed on 30 October 2006), at preliminary para. 7 (“*Recognizing the jus cogens nature of the principle of non-refoulement, including non-rejection at the border, the cornerstone of international refugee law, which is contained in the 1951 Convention relating to the Status of Refugees and its Protocol of 1967, and also set out in Article 22 (8) of the American Convention on Human Rights and Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, ...*”). *See also* Section III(5) of the 1984 Cartagena Declaration on Refugees, *supra* footnote 27 (“...[The] principle [of *non-refoulement*] is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *ius cogens*.”).

³⁸ The right to life is guaranteed under Article 6 of the ICCPR and, for example, Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 005, 213 U.N.T.S. 222, *entered into force* 3 September 1953 [hereinafter: “ECHR”]; Article 4 ACHR; Article 4 of the African (Banjul) Charter on Human and People’s Rights, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986 [hereinafter: “Banjul Charter”].

³⁹ The right to be free from torture is guaranteed under Article 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture, 25 I.L.M. 519 (1992), *entered into force* 28 February 1987. Article 16 of the Convention Against Torture prohibits other cruel, inhuman or degrading treatment or punishment. A prohibition of torture and other cruel, inhuman or degrading treatment or punishment is guaranteed under Article 7 of the ICCPR and provisions in regional human rights treaties, such as, for example, Article 3 of the ECHR; Article 5(2) of the ACHR; or Article 5 of the Banjul Charter.

⁴⁰ The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *entered into force* 26 June 1987 [hereinafter: “Convention Against Torture”].

⁴¹ 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 23 March 1976 [hereinafter: “ICCPR”].

⁴² With regard to the scope of the obligations under Article 7 of the ICCPR, *see* Human Rights Committee in its *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 (“States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*”); and *General Comment No. 31 on the Nature of the*

prohibition of *refoulement* to a risk of serious human rights violations, particularly torture and other forms of ill-treatment, is also firmly established under regional human rights treaties.⁴³

20. The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all persons who may be within a State's territory or subject to its jurisdiction, including asylum seekers and refugees,⁴⁴ and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed.⁴⁵ It is non-derogable and applies in all circumstances,⁴⁶ including in the context of measures to combat terrorism⁴⁷ and during times of armed conflict.⁴⁸

General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 21 April 2004, para. 12. Similarly, in its *General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6, 3 June 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[...] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment and right not to be arbitrarily deprived of liberty] of the Convention." (para. 27).

⁴³ See, for example, the jurisprudence of the European Court of Human Rights, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's decisions in *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989 and subsequent cases, including *Cruz Varas v. Sweden*, Application No. 15567/89, 20 March 1991; *Vilvarajah et al. v. United Kingdom*, Application No. 13163/87 et al., 30 October 1991; *Chahal v. United Kingdom*, Application No. 22414/93, 15 November 1996; *Ahmed v. Austria*, Application No. 25964/94, 17 December 1996; *TI v. United Kingdom*, Application No. 43844/98 (Admissibility), 7 March 2000. In the Americas, see, for example, Article 22(8) of the 1969 ACHR ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.") or Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture ("Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.").

⁴⁴ For States Party to the ICCPR, this has been made explicit by the Human Rights Committee in its *General Comment No. 31*, *supra* footnote 42, para. 10 ("... [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. ..."). See also *infra* at Part II.B.

⁴⁵ See: Human Rights Committee, *General Comment No. 31*, *supra* footnote 42, para. 12. See also *supra* footnote 42.

⁴⁶ See, for example, Human Rights Committee, *General Comment No. 29 on States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; Human Rights Committee, *Concluding Observations/Comments on Canada*, U.N. Doc. CCPR/C/CAN/CO/5, 2 November 2005, para. 15; Committee Against Torture, *Gorki Ernesto Tapia Paez v. Sweden*, U.N. Doc. CAT/C/18/D/39/1996, 28 April 1997, para. 14.5. The absolute nature of the prohibition of *refoulement* to a risk of torture and other forms of ill-treatment under Article 3 of the ECHR has been affirmed by the European Court of Human Rights, for example, in *Chahal v. United Kingdom*, *supra* footnote 42.

⁴⁷ See, for example, Committee Against Torture, *Agiza v. Sweden*, U.N. Doc. CAT/C/34/D/233/2003, 20 May 2005; Human Rights Committee, *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005, 10 November 2006; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System*, 28 February 2000, para. 154. See also United Nations Commission on Human Rights, Resolution 2005/80 of 21 April 2005 on Protection of human rights and fundamental freedoms while countering terrorism; Security Council resolutions 1456 (2003) of 20 January 2003, 1535 (2004) of 26 March 2004, 1624 (2004) of 14 September 2005, the Declaration on Measures to Eliminate International Terrorism (annex to General Assembly resolution 49/60 of 9 December 1994), the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (annex to General Assembly resolution 51/210 of 17 December 1996), the 2005 World Summit Outcome (General Assembly resolution 60/1

2. Human Rights-Based *Non-Refoulement* Obligations Under Customary International Law

21. The prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens*.⁴⁹ It includes, as a fundamental and inherent component, the prohibition of *refoulement* to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments. The prohibition of arbitrary deprivation of life, which also includes an inherent obligation not to send any person to a country where there is a real risk that he or she may be exposed to such treatment, also forms part of customary international law.⁵⁰ The prohibition of *refoulement* to a risk of cruel, inhuman or degrading treatment or punishment, as codified in universal as well as regional human rights treaties is in the process of becoming customary international law, at the very least at regional level.⁵¹

22. Under the above-mentioned obligations, States have a duty to establish, prior to implementing any removal measure, that the person whom it intends to remove from their territory or jurisdiction would not be exposed to a danger of serious human rights violations

of 16 September 2005) and the Plan of Action annexed to the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly on 8 September 2006 (A/RES/60/288).

⁴⁸ International human rights law does not cease to apply in case of armed conflict, except where a State has derogated from its obligations in accordance with the relevant provisions of the applicable international human rights treaty (for example, Article 4 ICCPR). In determining what constitutes a violation of human rights, regard must be had to international humanitarian law, which operates as *lex specialis* to international human rights in law during a time of armed conflict. This has been confirmed, *inter alia*, by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 25; and the judgement of 19 December 2005 in *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, paras. 215–219. *See also*, for example, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/USA/CO/3, 15 September 2006, para. 10; Human Rights Committee, *General Comment No. 31*, *supra* footnote 42, para. 11; *see also* Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006 para. 14.

⁴⁹ *See*, for example, Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11 (“The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, para. 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). “); *see also* the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Delalic and Others*, Trial Chamber, Judgement of 16 November 1998, para. 454; *Prosecutor v. Furundzija*, Trial Chamber, Judgement of 10 December 1998, paras. 134–164; *Prosecutor v. Kunarac and Others*, Trial Chamber, Judgement of 22 February 2001, para. 466. *See also* the judgement of the House of Lords in *Pinochet Ugarte, re.* [1999] 2 All ER 97, paras. 108–109. *See also*, for example, *Filartiga v. Pena Irala*, 630 F.2d 876 (2d. Cir. 1980).

⁵⁰ *See* Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8 (“... [P]rovisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in ... torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives ...”).

⁵¹ *See*, for example, the jurisprudence of the European Court of Human Rights referred to *supra* footnote 43; *see also* Article 19(2) of the European Charter of Fundamental Rights, [2000] OJ C364; and preambular para. 13 of the Council of Europe Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA.

such as those mentioned above. If such a risk exists, the State is precluded from forcibly removing the individual concerned.

II. EXTRATERRITORIAL APPLICABILITY OF THE PRINCIPLE OF *NON-REFOULEMENT* UNDER THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL

23. The Sections of this Advisory Opinion which follow examine the territorial scope of Article 33(1) of the 1951 Convention in light of the criteria provided for under international law for the interpretation of treaties. In accordance with the relevant rules, as stated in the 1969 Vienna Convention on the Law of Treaties,⁵² the meaning of a provision in an international treaty must be established by examining the ordinary meaning of the terms employed, in light of their context and the object and purpose of the treaty.⁵³ Subsequent practice of States in applying the treaty as well as relevant rules of international law must also be taken into consideration in interpreting a treaty.⁵⁴

24. For the reasons set out below, UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.⁵⁵

A. Scope Ratione Loci of Article 33(1) of the 1951 Convention: Ordinary Meaning, Context, Object and Purpose of the 1951 Convention

25. As noted above, the focus of the present inquiry is the territorial scope of the *non-refoulement* provision under Article 33(1) of the 1951 Convention. In keeping with the primary rule of treaty interpretation stated in Article 31(1) of the 1969 Vienna Convention, it is necessary, first, to examine the ordinary meaning of the terms of Article 33(1) of the 1951 Convention, taking into account their context as well as the object and purpose of the treaty of which it forms part.

⁵² *Supra* footnote 36 [hereinafter, “1969 Vienna Convention”]. The 1969 Vienna Convention is generally regarded as expressing rules which constitute customary international law.

⁵³ Article 31(1) of the 1969 Vienna Convention provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁵⁴ Article 31(3) of the 1969 Vienna Convention provides that, in interpreting a treaty: “... there shall be taken into account, together with the context, ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between parties.”

⁵⁵ In a decision which addressed the applicability *inter alia* of Article 33(1) of the 1951 Convention to the return to Haiti of persons intercepted on the high seas by U.S. coast guard vessels, the United States Supreme Court determined that Article 33(1) of the 1951 Convention is applicable only to persons within the territory of the United States (*Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155 (1993)). For the reasons set out in this advisory opinion, UNHCR is of the view that the majority opinion of the Supreme Court in *Sale* does not accurately reflect the scope of Article 33(1) of the 1951 Convention. *See also* Inter-American Commission on Human Rights in *The Haitian Centre for Human Rights et al. v. United States*, *supra* footnote 43, para. 157 (“... The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.”).

26. The obligation set out in Article 33(1) of the 1951 Convention is subject to a geographic restriction only with regard to the country where a refugee may not be sent to, not the place where he or she is sent from. The extraterritorial applicability of the *non-refoulement* obligation under Article 33(1) is clear from the text of the provision itself, which states a simple prohibition: “No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened...”.

27. The ordinary meaning of “return” includes “to send back” or “to bring, send, or put back to a former or proper place”.⁵⁶ The English translations of “*refouler*” “include words like ‘repulse’, ‘repel’, ‘drive back’.”⁵⁷ It is difficult to conceive that these words are limited to refugees who have already entered the territory of a Contracting State. The ordinary meaning of the terms “return” and “*refouler*” does not support an interpretation which would restrict its scope to conduct within the territory of the State concerned, nor is there any indication that these terms were understood by the drafters of the 1951 Convention to be limited in this way.⁵⁸

28. A contextual analysis of Article 33 of the 1951 Convention further supports the view that the scope *ratione loci* of the *non-refoulement* provision in Article 33(1) is not limited to a State’s territory. The view has been advanced that Article 33(2) of the 1951 Convention, which permits exceptions to the principle of *non-refoulement* only with regard to a refugee who constitutes a danger to the security or the community of the country in which he is, implies that the scope of Article 33(1) is also limited to persons within the territory of the host country.⁵⁹ However, in UNHCR’s opinion this view is contradicted by the clear wording of Article 33(1) and 33(2), respectively, which address different concerns,⁶⁰ as well as the fact that the territorial scope of a number of other provisions of the 1951 Convention is made

⁵⁶ See: *Merriam-Webster Online Dictionary*, 10th edition, available at: <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=return> (last accessed on 15 October 2006).

⁵⁷ This was also noted by the majority of the United States Supreme Court in *Sale*, *supra* footnote 55 (at 181) which, however, went on to state that “‘return’ means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination” (at 182), and that “... because the text of Article 33 cannot reasonably be read to say anything at all about a nation’s actions toward aliens outside its own territory, it does not prohibit such actions.” (at 183). As noted by Blackmun J in his dissenting opinion in *Sale*, *supra* footnote 55, “[t]he majority’s puzzling progression (‘*refouler*’ means repel or drive back; therefore ‘return’ means only exclude at a border; therefore the treaty does not apply) hardly justifies a departure from the path of ordinary meaning. The text of Article 33(1) is clear, and whether the operative term is ‘return’ or ‘*refouler*’, it prohibits the Government’s actions.” (at 192–193).

⁵⁸ In support of its finding that Article 33(1) does not apply outside a State’s territory, the majority of the United States Supreme Court in *Sale*, *supra* footnote 55, relied on statements by a number of delegates involved in the drafting of the 1951 Convention. However, these statements were expressions of concern related to a possible obligation to grant asylum to large numbers of arrivals in mass influx situations. In UNHCR’s view, these portions of the negotiating history do not warrant the conclusion that the drafters of the 1951 Convention reached consensus about an implicit restriction of the territorial scope of the principle of *non-refoulement* as provided for in Article 33(1). See also UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, *supra* footnote 31.

⁵⁹ See: *Sale*, *supra* footnote 55, at 179–180.

⁶⁰ See also the dissenting opinion of Blackmun J in *Sale*, *supra* footnote 55, at 194 (“Far from constituting ‘an absurd anomaly [...], the fact that a state is permitted to ‘expel or return’ a small class of refugees found within its territory but may not seize and return refugees who remain outside its frontiers expresses precisely the objectives and concerns of the Convention. Non return is the rule; the sole exception (neither applicable nor invoked here) is that a nation endangered by a refugee’s very presence may ‘expel or return’ him to an unsafe country if it chooses. The tautological observation that only a refugee already in a country can pose a danger to the country ‘in which he is’ proves nothing.”)

explicit.⁶¹ Thus, where the drafters of the 1951 Convention intended a particular clause of the 1951 Convention to apply only to those within the territory of a State Party, they chose language which leaves no doubt as to their intention.

29. Furthermore, any interpretation which construes the scope of Article 33(1) of the 1951 Convention as not extending to measures whereby a State, acting outside its territory, returns or otherwise transfers refugees to a country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian object and purpose of the 1951 Convention and its 1967 Protocol. In this context, it is worth recalling the first two paragraphs of the Preamble to the 1951 Convention, which read:

“Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,⁶²

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.”

30. A comprehensive review of the *travaux préparatoires*⁶³ confirms the overriding humanitarian object and purpose of the Convention and provides significant evidence that the *non-refoulement* provision in Article 33(1) was intended to prohibit any acts or omissions by a Contracting State which have the effect of returning a refugee to territories where he or she is likely to face persecution or danger to life or freedom. For example, when the 1951 Convention was in the course of preparation, the Secretary-General stated in a Memorandum dated 3 January 1950 to the *Ad Hoc* Committee on Statelessness and Related Problems that “turning a refugee back to the frontier of the country where his life or liberty is threatened... would be tantamount to delivering him into the hands of his persecutors.”⁶⁴ During the discussions of the Committee, the representative of the United States vigorously argued that:

“[w]hether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular

⁶¹ For example, Articles 2, 4 and 27 require simple presence of a refugee in the host country, while Articles 18, 26 and 32 require that he or she be “lawfully on the territory” of a Contracting State, and Articles 15, 17(1), 19, 21, 23, 24 and 28 apply to refugees who are “lawfully staying” in the country of refuge.

⁶² One of the fundamental rights enshrined in the Universal Declaration of Human Rights, General Assembly resolution 217A (III), U.N. Doc. A/810 at 71 (1948), is the right of everyone “to seek and enjoy in other countries asylum from persecution” under Article 14.

⁶³ Pursuant to Article 32 of the 1969 Vienna Convention, *supra* footnote 37, recourse to the preparatory work of the treaty is a supplementary means of treaty interpretation is permitted only where the meaning of the treaty language is ambiguous or obscure; or where interpretation pursuant to the general rules set out in Article 31 of the 1969 Vienna Convention leads to a result which is manifestly absurd or unreasonable. It is a well-established principle that when the meaning of the treaty is clear from its text when viewed in light of its context, object and purpose, supplementary sources are unnecessary and inapplicable, and recourse to such sources is discouraged. *See*, for example, International Court of Justice, *Interpretation of the Treaty of Lausanne*, P.C.I.J., Ser. B, No. 12 (1925), at 22; *The Lotus Case*, P.C.I.J., Ser. A, No. 10 (1927), at 16; *Admission to the United Nations Case*, 1950 ICJ Reports 8. Thus, while UNHCR is of the view that recourse to the drafting history of Article 33(1) of the 1951 Convention is not necessary given the unambiguous wording of this provision, the *travaux préparatoires* are nevertheless of interest in clarifying the background, content and scope of Article 33(1).

⁶⁴ *Ad Hoc* Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons – Memorandum by the Secretary General, U.N. Document E/AC.32/2, 3 January 1950, Comments on Article 24 of the preliminary draft, para. 3.

position, he must not be turned back to a country where his life or freedom could be threatened.”⁶⁵

31. The same representative of the United States proposed that the words “undertakes not to expel or return (*refouler*)” should replace the words “not turn back” in order to settle any doubts that *non-refoulement* applied to refugees whether or not they had been regularly admitted to residence,⁶⁶ an amendment that ultimately formed the basis for the “expel or return” final wording of Article 33 of the 1951 Convention. It is also worth noting that at one point the Chairman of the *Ad Hoc* Committee suspended the discussion, observing that it had indicated agreement on the principle that refugees fleeing from persecution on account of their race, religion, nationality or political opinion should not be pushed back into the arms of their persecutors.⁶⁷

B. Extraterritorial Applicability of Article 33(1) of the 1951 Convention: Subsequent State Practice and Relevant Rules of International Law

32. Limiting the territorial scope of Article 33(1) of the 1951 Convention to conduct of a State within its national territory would also be at variance with subsequent State practice and relevant rules of international law applicable between the States party to the treaty in question. In accordance with Article 31(3) of the 1969 Vienna Convention,⁶⁸ these elements also need to be taken into account in interpreting a provision of an international treaty.

33. Subsequent State practice is expressed, *inter alia*, through numerous Executive Committee Conclusions which attest to the overriding importance of the principle of *non-refoulement* irrespective of whether the refugee is in the national territory of the State concerned.⁶⁹ Subsequent State practice which is relevant to the interpretation of the *non-refoulement* obligation under the 1951 Convention and 1967 Protocol is also evidenced by other international refugee and human rights instruments drawn up since 1951, none of which places territorial restrictions on States’ *non-refoulement* obligations.⁷⁰

⁶⁵ Statement of Mr. Henkin of the United States, U.N. Doc. E/AC.32/SR.20, Feb 1, 1950, paras. 54–55.

⁶⁶ U.N. Doc. E/AC.32/SR.20, para. 56.

⁶⁷ Statement of the Chairman, Mr. Chance of Canada, U.N. Doc. E/AC.32.SR.21, 2 February 1950, at page 7. The Chairman then invited the representatives of Belgium and the United States to confer with him to attempt the preparation of a suitable draft for later consideration.

⁶⁸ *Supra* footnote 54.

⁶⁹ See, for example, Executive Committee, Conclusion No. 6 (XXVIII), *supra* footnote 10, at para (c) (reaffirming “the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State ...”); Conclusion No. 15 (XXX) “*Refugees without an Asylum Country*” (1979) paras. (b) and (c) (stating that “[a]ction whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the principle of *non-refoulement*” and noting that “[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.”); Conclusion No. 22 (XXXII) “*Protection of Asylum-Seekers in Situations of Large-Scale Influx*” (1981), at II.A.2. (“In all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed.”); Conclusion No. 53 (XXXIX) “*Stowaway Asylum-Seekers*” (1988), para. (1) (providing *inter alia* that “[l]ike other asylum seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.”).

⁷⁰ These include, in particular, the 1969 OAU Convention (*supra* footnote 23); the 1969 ACHR (*supra* footnote 24); and the Convention Against Torture (*supra* footnote 40). See also the expressions of the principle of *non-refoulement* in non-binding texts such as, for example, the 1984 Cartagena Declaration (*supra* footnote 27); the 1967 Declaration of Territorial Asylum adopted by the General Assembly (*supra* footnote 28); and Resolution (67) 14 of the Committee of Ministers of the Council of Europe (*supra* footnote 28).

34. In keeping with the above-mentioned rules of treaty interpretation, it is also necessary to have regard to developments in related areas of international law when interpreting the territorial scope of Article 33(1) of the 1951 Convention. International refugee law and international human rights law are complementary and mutually reinforcing legal regimes.⁷¹ It follows that Article 33(1), which embodies the humanitarian essence of the 1951 Convention and safeguards fundamental rights of refugees, must be interpreted in a manner which is consistent with developments in international human rights law. An analysis of the scope *ratione loci* of States' *non-refoulement* obligations under international human rights law is particularly pertinent to the question of the extraterritorial applicability of the prohibition on returning a refugee to a danger of persecution under international refugee instruments.

35. As discussed in more detail below, States are bound by their obligations not to return any person over whom they exercise jurisdiction to a risk of irreparable harm. In determining whether a State's human rights obligations with respect to a particular person are engaged, the decisive criterion is not whether that person is on the State's national territory, or within a territory which is *de jure* under the sovereign control of the State, but rather whether or not he or she is subject to that State's effective authority and control.

36. In its General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the [ICCPR], the Human Rights Committee has stated that "States are required by Article 2(1) [of the ICCPR] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."⁷² The General Comment reaffirms consistent jurisprudence of the Human Rights Committee to the effect that States can "be held accountable for violations of rights under the ICCPR which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it"⁷³ and that in certain circumstances, "persons may fall under the subject-matter of a State Party [to the ICCPR] even when outside that State's territory."⁷⁴

⁷¹ The complementarity between *non-refoulement* obligations under international refugee and human rights law has been highlighted, for example, in the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 16 November 2004 (available at: <http://www.unhcr.org/home/RSDLEGAL/424bf6914.pdf>, last accessed on 30 October 2006). This Declaration was adopted by Latin American States participating at a gathering to celebrate the twentieth anniversary of the 1984 Cartagena Declaration. See also Executive Committee, Conclusion No. 79 (XLVII), *supra* footnote 21; No. 81 (XLVII) "General" (1997); Conclusion No. 82 (XLVIII) "Safeguarding Asylum" (1997), which specifically refer to the prohibition of return to torture, as set forth in the Convention Against Torture, and Executive Committee Conclusion No. 95 (LIV) "General Conclusion on International Protection" (2003), para. (1) (noting the "complementary nature of international refugee and human rights law as well as the possible role of the United Nations human rights mechanisms in this area ...").

⁷² General Comment No. 31, *supra* footnote 42, para. 10.

⁷³ See the decisions of the Human Rights Committee in *Lopez Burgos v. Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3; and *Celiberti de Casariego v. Uruguay*, U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3. In both decisions, the Human Rights Committee has also held that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." See also the decision of the Human Rights Committee in *Pereira Montero v. Uruguay*, U.N. Doc. CCPR/C/18/D/106/1981, 31 March 1983, para. 5.

⁷⁴ See, for example, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/79/Add.50, 3 October 1995, para. 284. In 2006, the Human Rights Committee also reaffirmed the applicability of the provisions of the ICCPR with reference to conduct of the United States at Guantánamo Bay.

37. The International Court of Justice has confirmed that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.⁷⁵ The Court observed that, “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.”⁷⁶

38. Similarly, the Committee against Torture has affirmed that the *non-refoulement* obligation contained in Article 3 of the Convention Against Torture applies in any territory under a State party’s jurisdiction.⁷⁷ With regard to those provisions of the Convention Against Torture which “are expressed as applicable to ‘territory under [the State party’s] jurisdiction’”, the Committee Against Torture reiterated “its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised” and made it clear that these provisions “apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.”⁷⁸

39. The extraterritorial applicability of human rights treaties is also firmly established at the regional level. The European Court of Human Rights has examined the concept of “jurisdiction” in a number of decisions and consistently held that the decisive criterion is not whether a person is within the territory of the State concerned, but whether or not, in respect of the conduct alleged, he or she is under the effective control of, or is affected by those acting on behalf of, the State in question. Thus, in a decision in which it examined the circumstances in which the obligations under the European Convention apply extraterritorially, the European Court of Human Rights held that while, “from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial”,⁷⁹ it may extend extraterritorially if a State, “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be

See Concluding Observations of the Human Rights Committee, United States of America, *supra* footnote 48, para. 10. See also Concluding Observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10 and U.N. Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11.

⁷⁵ See the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, para. 111. See also the recent judgement of the International Court of Justice in *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, (2005) ICJ Gen. List No. 116, 19 December 2005, para. 216.

⁷⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* footnote 75, para. 109.

⁷⁷ See, for example, Committee Against Torture, Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, *supra* footnote 48. Having requested the State Party’s views on the extraterritorial applicability of Article 3 of the Convention against Torture in the context of Guantánamo Bay, the Committee expressed its concern (“...that the State party considers that the non-refoulement obligation, under article 3 of the Convention, does not extend to a person detained outside its territory. ... The State party should apply the *non-refoulement* guarantee to all detainees in its custody, ..., in order to comply with its obligations under article 3 of the Convention. ...”) (para. 20).

⁷⁸ *Id.*, para. 15. This applies, *inter alia*, to Article 16 of the Convention Against Torture, which prohibits acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 of the Convention.

⁷⁹ *Bankovic et al. v. Belgium and 16 other contracting States (Admissibility)*, Application No. 52207/99, 12 December 2001, para. 59.

exercised by that government.”⁸⁰ A situation in which a person is brought under the “effective control” of the authorities of a State if they are exercising their authority outside the State’s territory may also give rise to the extraterritorial application of Convention obligations.⁸¹

40. Also relevant in the present context is the judgement of the European Court of Human Rights in *Issa and Ors v. Turkey*, which confirmed that

“a State may also be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State [...]. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory [...].”⁸²

41. The Inter-American Commission on Human Rights held in its decision in *Coard et al. v. the United States* that “while the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with, but required by the norms which pertain.”⁸³

42. In UNHCR’s view, the reasoning adopted by courts and human rights treaty bodies in their authoritative interpretation of the relevant human rights provisions is relevant also to the prohibition of *refoulement* under international refugee law, given the similar nature of the obligations and the object and purpose of the treaties which form their legal basis.⁸⁴

43. Thus, an interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party to the 1951 Convention and/or its 1967 Protocol would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with

⁸⁰ *Id.*, para. 71. See also *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgement of 23 February 1995, Series A, No. 310, para. 62 (“In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of ‘jurisdiction’ under this provision is not restricted to the national territory of the High Contracting Parties. [...] [t]he responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.”).

⁸¹ *Öcalan v. Turkey (Preliminary Objections)*, Application No. 46221/99, Judgement of 12 March 2003, para. 93 (the former PKK leader had been arrested by Kenyan authorities and handed over to Turkish officials operating in Kenya). See also *Ilascu and Others v. Russia and Moldova*, Application No. 48787/99, Judgement of 8 July 2004, paras. 382-394 (finding that the complainants came within the “jurisdiction” of the Russian Federation, and that the responsibility of the Russian Federation for acts which occurred on the territory of Moldova was engaged by the conduct of its own soldiers there, as well as that of the Transdniestrian authorities, on the basis of the support provided by Russia to the latter) on the basis of the actions of its own soldiers as well as their support to the Transdniestrian authorities).

⁸² *Issa and Ors v. Turkey*, Application No. 3821/96, Judgement of 16 November 2004, para. 71, with references, *inter alia*, to decisions of the Human Rights Committee and the Inter-American Commission of Human Rights.

⁸³ *Coard et al. v. the United States*, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37.

⁸⁴ As noted by the International Law Commission in its Report of the fifty-eighth session (1 May-9 June and 3 July-11 August 2006), U.N. Doc. A/61/10, at pp. 414–415, “Article 31(3)(c) [of the 1969 Vienna Convention, *supra* footnote 37] also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.”

relevant rules of international human rights law. It is UNHCR's position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with *non-refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.

UNHCR, Geneva
26 January 2007

4. Rescue at Sea – A Guide to Principles and Practice as applied to Migrants and Refugees*

This leaflet has been prepared jointly by the International Maritime Organization (IMO) and the Office of the United Nations High Commissioner for Refugees (UNHCR). It is intended for masters, ship owners, government authorities, insurance companies, and other interested parties involved in rescue at sea situations. It provides guidance on relevant legal provisions, and on practical procedures to ensure the prompt disembarkation of survivors of rescue operations, and measures to meet their specific needs, particularly in the case of refugees and asylum-seekers.

I. INTRODUCTION

Sea-borne migrants and refugees are not a new phenomenon. Throughout the ages, people around the world have risked their lives aboard un-seaworthy ships and other craft, whether in search of work, better living conditions and educational opportunities, or international protection against persecution or other threats to their life, liberty or security, often placing their fate in the hands of unscrupulous, criminal smugglers. The term “boat people” has entered common parlance, designating all those who travel by sea in such a perilous way.

Search and Rescue (SAR) services throughout the world depend on ships – for the most part merchant vessels - to assist persons in distress at sea. Nowadays, distress signals can be rapidly transmitted by satellite and terrestrial communication techniques both to search and rescue authorities ashore, and to ships in the immediate vicinity. The rescue operation can be swift and coordinated.

Yet, even when the rescue has been accomplished, problems can arise in securing the agreement of States to the disembarkation of migrants and refugees, especially if proper documentation is lacking. Recognizing this problem, member States of the International Maritime Organization (IMO) have adopted amendments to two of the relevant international maritime conventions.¹ These aim to ensure that the obligation of the ship master to render assistance is complemented by a corresponding obligation of States to co-operate in rescue situations, thereby relieving the master of the responsibility to care for survivors, and allowing individuals who are rescued at sea in such circumstances to be delivered promptly to a place of safety.

II. THE LEGAL FRAMEWORK

This section contains relevant obligations and definitions as defined under international law.

* Available at: <http://www.unhcr.org/450037d34.html>.

¹ 1974 International Convention for the Safety of Life at Sea; and 1979 International Convention on Maritime Search and Rescue. Amendments were adopted in May 2004. They entered into force on 1 July 2006.

INTERNATIONAL MARITIME LAW

Obligations of the shipmaster

The shipmaster has an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found. This is a longstanding maritime tradition as well as an obligation enshrined in international law. Compliance with this obligation is essential to preserve the integrity of maritime search and rescue services. It is based on, *inter alia*, two essential texts:

- **1982 United Nations Convention on the Law of the Sea (UNCLOS Convention)** provides that
 - “Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.” (Art. 98 (1))

- **1974 International Convention for the Safety of Life at Sea (SOLAS Convention)** obliges the
 - “master of a ship at sea which is in a position to be able to provide assistance, on receiving information² from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so...”
(Chapter V, Regulation 33(1))

Obligations of Governments and Rescue Co-ordination Centres

Several maritime conventions define the obligations of State Parties to ensure arrangements for distress communication and coordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts:

- **1982 United Nations Convention on the Law of the Sea (UNCLOS Convention)** imposes an obligation on every coastal State Party to
 - “...promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.”
(Art. 98 (2))

- **1974 International Convention for the Safety of Life at Sea (SOLAS Convention)** requires State Parties
 - “... to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements

² The word “signal” was replaced by “information” as part of the May 2004 amendments.

shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary ...”
(Chapter V, Regulation 7)

- **1979 International Convention on Maritime Search and Rescue (SAR Convention)** obliges State Parties to

“...ensure that assistance be provided to any person in distress at sea... regardless of the nationality or status of such a person or the circumstances in which that person is found” (Chapter 2.1.10) and to *“ [...] provide for their initial medical or other needs, and deliver them to a place of safety.”* (Chapter 1.3.2)

- Amendments to the SOLAS³ and SAR⁴ Conventions aim at maintaining the integrity of the SAR services, by ensuring that people in distress at sea are assisted while minimizing the inconvenience for the assisting ship. They require the Contracting States/Parties to
 - co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship’s intended voyage; and
 - arrange disembarkation as soon as reasonably practicable.

They also oblige masters who have embarked persons in distress at sea, to treat them with humanity, within the capabilities of the ship.

Guidelines on the Treatment of Persons Rescued at Sea⁵ were developed in order to provide guidance to governments and to shipmasters in implementing these amendments. They contain the following provisions:

- The government responsible for the SAR region in which survivors were recovered is responsible for providing a place of safety or ensuring that such a place of safety is provided (para. 2.5).
- A place of safety is a location where rescue operations are considered to terminate, and where:
 - the survivors’ safety or life is no longer threatened;
 - basic human needs (such as food, shelter and medical needs) can be met; and
 - transportation arrangements can be made for the survivors’ next or final destination (para. 6.12).
- While an assisting ship may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made. (para. 6.13)

³ Amending SOLAS Regulation 33.

⁴ Amending SAR Chapter 3.1.9.

⁵ Resolution MSC.167(78), adopted in May 2004 by the Maritime Safety Committee together with the SAR and SOLAS amendments.

- Disembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedom would be threatened should be avoided. (para. 6.17)
- Any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation. (para. 6.20)

INTERNATIONAL REFUGEE LAW

If people rescued at sea make known a claim for asylum, key principles as defined in international refugee law need to be upheld. While the ship master is not responsible to determine the status of the people on board, he needs to be aware of these principles.

The **1951 Convention relating to the Status of Refugees**, defines a refugee as a person who

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his [or her] nationality,⁶ and is unable to or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country”. (Article 1A(2))

and prohibits that refugees or asylum-seekers

be expelled or returned in any way “to the frontiers of territories where his [or her] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” (Article 33 (1))⁷

This refers principally to the country from which the individual has fled but also includes any other territory where he [or she] faces such a threat.

An **asylum-seeker** is an individual who is seeking international protection and whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.

III. PROCEDURES

The following checklists are intended to define action that needs to be taken by the various parties involved in rescue at sea.

Action by the shipmaster

⁶ Or for stateless persons, the country of former habitual residence.

⁷ An obligation not to return a person where there are substantial grounds for believing that there is a real risk of irreparable harm derives from international human rights law (for example Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights). The 1984 Convention against Torture and Other Cruel, Inhuman Treatment or Punishment explicitly prohibits return where there are substantial grounds for believing that a person would be in danger of being subjected to torture.

Inform the Rescue Co-ordination Centre (RCC) responsible for the region as to:

- ✓ **the assisting ship**
 - its name, flag and port of registry;
 - name and address of the owner and the owner's agent at the next port;
 - position of the vessel, its next intended port of call, its continuing safety and current endurance with additional persons on board;
- ✓ **the survivors**
 - name, age (if possible), gender;
 - apparent health, medical condition and special medical needs;
- ✓ **actions completed** or intended to be taken by the master;
- ✓ **master's preferred arrangement** for disembarking the survivors;
- ✓ **any help** needed by the assisting ship;
- ✓ **any special features** (e.g. prevailing weather, time sensitive cargo, etc.).

If people rescued at sea claim asylum

- ✓ alert the closest RCC;
- ✓ contact UNHCR;
- ✓ do not ask for disembarkation in the country of origin or from which the individual has fled;
- ✓ do not share personal information regarding the asylum-seekers with the authorities of that country, or with other who might convey this information to those authorities.

Action by Governments and Rescue Co-ordination Centres (RCCs)

The RCCs have an important role to play to ensure co-operation and co-ordination arrangements under the Amendments to the SOLAS and SAR Conventions. They need to maintain effective plans of operation and co-ordinating arrangements (interagency or international plans and agreements if appropriate) in order to respond to all types of search and rescue situations, notably:

- ✓ a recovery operation;
- ✓ disembarkation of survivors from a ship;
- ✓ delivery of survivors to a place of safety;
- ✓ arrangements with other entities (such as customs, border control and immigration authorities, ship owner or flag State), while survivors are still aboard the assisting ship with regard to nationalities, status or circumstances of the survivors; including temporary provisions for hosting survivors while such issues are being resolved; and
- ✓ measures to relieve the ship as soon as practicable, avoiding undue delay, financial burden or other difficulties incurred by assisting persons at sea.

INTERNATIONAL ORGANIZATIONS AND USEFUL CONTACT INFORMATION

- ✓ The **International Maritime Organization (IMO)** provides machinery for cooperation among governments on technical regulations and practices affecting shipping engaged in international trade, and facilitates the adoption of the highest practicable standards in matters such as maritime safety.
www.imo.org (details of RCCs available by clicking on Circulars and GMDSS)
Tel.: +44 207 735 7611
- ✓ The **Office of the United Nations High Commissioner for Refugees (UNHCR)** provides international protection and assistance to refugees, stateless persons and others of concerns. UNHCR can be contacted under the following telephone number +4122 739 8111.
www.unhcr.org
- ✓ The **Office of the High Commissioner for Human Rights (OHCHR)** promotes universal ratification and implementation of human rights treaties and ensures the practical implementation of universally recognized human rights norms.
www.ohchr.org
- ✓ The **International Organization for Migration (IOM)** is committed to the principle that humane and orderly migration benefits migrants and society and acts with its partners in the international community to assist in managing migration, advance understanding of migration issues and uphold the human dignity and well-being of migrants.
www.iom.int
- ✓ The **United Nations Office on Drugs and Crime (UNODC)** deals with questions of transnational organized crime and combats criminal trafficking and smuggling.
www.unodc.org
- ✓ The **Office of Legal Affairs (OLA)/Division for Ocean Affairs and the Law of the Sea** promotes the wider acceptance of UNCLOS and assists States in the uniform and consistent application and effective implementation of its provisions.
www.un.org/depts/los

5. Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach *

I. INTRODUCTION

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

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

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

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

II. INTERCEPTION AND OTHER MEASURES AGAINST IRREGULAR MIGRATION

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

* Executive Committee of the High Commissioner’s Programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, available at: <http://www.unhcr.org/excom/EXCOM/3ae68d144.pdf>.

¹ UNHCR supports the distinction made by the Vienna Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (created by the General Assembly in its resolution 53/111 of 9 December 1998) between smuggled migrants and trafficked persons. As currently defined in the two draft Protocols supplementing the main Draft Convention, trafficking concerns the recruitment and transportation of persons for a criminal purpose, such as prostitution or forced labour, and usually involves some level of coercion or deception. Smuggling, on the other hand, involves bringing a migrant illegally into another country, but normally without continued exploitation of the smuggled person after arrival.

A. International Cooperation against smuggling and trafficking of persons

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

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

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

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

B. Interception and State Practice

(i) Defining interception

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

(ii) Description of interception practices

11. Interception of undocumented or improperly documented persons² has taken place for many years, in a variety of forms. Although interception frequently occurs in the context of

² In this paper, the term “undocumented” or “improperly documented” persons refers to those who are not in possession of the required documentation for travel to and entry into the country of intended destination.

large-scale smuggling or trafficking of persons, it is also applied to individuals who travel on their own, without the assistance of criminal smugglers and traffickers.

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

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

(iii) Reasons for interception

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

15. Many of the undocumented asylum-seekers are found to be irregular movers, that is refugees who had already found protection in another country and for whom protection continues to be available.³ The perception is spreading, especially among traditional resettlement countries, that such refugees are seeking to circumvent established resettlement channels by using the services of criminal smugglers.

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

³ See Conclusion No. 58 (XL) of 1989 (A/AC.96/737, para.25) concerning the problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection.

C. Impact on asylum-seekers and refugees

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

18. Immigration control measures, although aimed principally at combating irregular migration, can seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum. As pointed out by UNHCR in the past, the exclusive resort to measures to combat abuse, without balancing them by adequate means to identify genuine cases, may result in the *refoulement* of refugees.⁴

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

III. THE INTERNATIONAL LEGAL FRAMEWORK

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

A. International refugee law

(i) Interception and non-refoulement

21. The fundamental principle of *non-refoulement* reflects the commitment of the international community to ensure that those in need of international protection can exercise their right to seek and enjoy in other countries asylum from persecution, as proclaimed in Article 14 (1) of the Universal Declaration of Human Rights. It applies whenever a State or one of its agents contemplates the return of persons “in any manner whatsoever” to territories where they may be subjected to persecution, irrespective of whether or not they have been

⁴ See Note on International Protection of 3 July 1998 (A/AC.96/898), para. 16.

formally recognized as refugees.⁵ The overriding importance of the observance of *non-refoulement* – both at the border and within the territory of a State - has been repeatedly reaffirmed by the Executive Committee which has also recognized that the principle is progressively acquiring the character of a peremptory rule of international law.⁶

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

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

(ii) Interception and illegal entry

24. The indiscriminate application by States of interception measures to asylum-seekers derives from the assumption that genuine refugees should depart from their country of origin or from countries of first asylum in an orderly manner. However, some countries of origin impose strict exit control measures, which makes it difficult for refugees to leave their countries legally.

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

(iii) Interception and irregular movement

26. Many intercepted asylum-seekers and refugees have moved from a country other than that of their origin. The phenomenon of refugees who move in an irregular manner from countries in which they had already found protection, in order to seek asylum or resettlement elsewhere, is a growing concern. The return of such refugees to countries of first asylum can be envisaged whenever the refugees will be protected there against *refoulement*; will be permitted to remain there and treated in accordance with recognized basic human standards until a durable solution has been found.⁷

27. However, in the absence of specific agreements to allow refugees who moved in an irregular manner to re-enter the country in which they had already found protection, efforts to return irregular movers have not always been successful. In addition, refugees who initially found protection in the country of first asylum, sometimes feel compelled to depart

⁵ Conclusion No. 6 (XXVIII) of 1977 (A/AC.96/549, para.53(4)).

⁶ Conclusion No. 25 (XXXIII) of 1982 (A/AC.96/614, para.70(1)).

⁷ Conclusion No. 58 (XL) of 1989 (A/AC.96/737, para. 25).

spontaneously, for instance due to a deterioration of protection standards in the country of first asylum. This may require concerted international efforts to address such problems, and to assist States in building their capacity to establish effective protection mechanisms, not least in an effort to promote international solidarity.

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

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

29. UNHCR, along with other international organizations, has actively participated in the discussions of the Ad Hoc Committee in Vienna.⁸ The Office shares the concerns raised by many States that the criminal and organized smuggling of migrants, on a large scale, may lead to the misuse or abuse of established national procedures for both regular immigrants and asylum-seekers.

30. The current draft Protocol against the Smuggling of Migrants by Land, Air and Sea,⁹ prepared by the Ad Hoc Committee, includes a draft provision which would authorize States Parties to intercept vessels on the high seas, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea.¹⁰

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

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

⁸ Note by the United Nations High Commissioner for Human Rights, International Organization for Migration, United Nations High Commissioner for Refugees, and the United Nations Children's Fund on the Protocol concerning migrant smuggling and trafficking in persons (A/AC.254/27) of 8 February 2000, and Corrigendum (A/AC.354/27/Corr.1) of 22 February 2000.

⁹ A/AC.254/4/Add.1.Rev.5.

¹⁰ See draft Article 7 *bis*.

IV. RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH

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

34. Together with States and other international and national actors, UNHCR is prepared to contribute to the ongoing discussion on the problem of organized smuggling as it affects asylum-seekers and refugees. Further progress will require a protection-oriented approach which addresses the problem through a variety of measures. The following elements are intended as basis for a discussion within the Executive Committee on a comprehensive approach, with a view to the possible adoption of a conclusion on such an approach:¹¹

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

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

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

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

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

(f) In regions in which only a few countries have become party to the 1951 Convention and the 1967 Protocol, States Parties should actively promote a broader

¹¹ The desirability of a comprehensive approach by the international community to the problems of refugees has been already acknowledged in Conclusion No. 80 (XLVII) of 1996 (A/AC.96/878, para. 22).

accession to the 1951 Convention and the 1967 Protocol throughout that region, including the establishment of fair and effective procedures for the determination of refugee status, in particular in transit countries, and the adoption of implementing legislation;

(g) In cases where refugees and asylum-seekers have moved in an irregular manner from a country in which they had already found protection,¹² enhanced efforts should be undertaken for their readmission including, where appropriate, through the assistance of concerned international agencies. In this context, States and UNHCR should jointly analyze possible ways of strengthening the delivery of protection in countries of first asylum. There could also be more concerted efforts to raise awareness among refugees of the dangers linked to smuggling and irregular movements;

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

V. CONCLUSION

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

¹² Conclusion No. 58 (XL) (A/AC.96/737, para.25).

IV. RELEVANT UNHCR MEETING AND CONFERENCE MATERIALS

UNHCR has convened a number of expert meetings on the protection of refugees and asylum-seekers at sea, including: an Expert Roundtable on Rescue at Sea in Lisbon, Portugal, in 2002 (see below, Sections B.IV.4 and B.IV.5); an Expert Meeting on Interception and Rescue in the Mediterranean in Athens, Greece, in 2005; and a Meeting of State Representatives on Rescue at Sea and Maritime Interception in the Mediterranean in Madrid, Spain, in 2006. The main conclusions of these meetings have been synthesized in UNHCR's report to the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (Section B.IV.3). In 2011, UNHCR organized an Expert Meeting in Djibouti to discuss practical proposals to strengthen international cooperation, including burden and responsibility sharing, in rescue at sea situations involving refugees and asylum-seekers (below, Section B.IV.1 and B.IV.2).

1. Refugees and Asylum-Seekers in Distress at Sea – how best to respond? Expert Meeting in Djibouti, 8 - 10 November 2011, Summary Conclusions*

Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) convened an Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea in Djibouti from 8 to 10 November 2011. This expert meeting was one in a series of events organized to mark the 60th anniversary of the 1951 Convention relating to the Status of Refugees.¹ Participants included 40 experts drawn from governments, regional bodies, international organizations, non-governmental organizations and academia. A background paper was prepared by UNHCR to facilitate discussion.² One day of the expert meeting involved field trips to the Loyada border crossing point and Ali-Addeh refugee camp, and the sea departure point at Obock.
2. Building on the conclusions of the Expert Meeting on International Cooperation to Share Burdens and Responsibilities in Amman, Jordan, in June 2011,³ the purpose of this expert meeting was to explore how responses to rescue at sea situations involving refugees and asylum-seekers could be improved and made more predictable through practical cooperation to share burdens and responsibilities.
3. These Summary Conclusions do not necessarily represent the individual views of participants or UNHCR, but reflect broadly the themes and understandings emerging from the discussion.

* Available at: <http://www.unhcr.org/refworld/docid/4ede0d392.html>.

¹ For more information and documentation relating to the 2011 Commemorations see: UNHCR, *Commemorating the Refugee and Statelessness Conventions*, www.unhcr.org/commemorations. All documents from the expert meeting are available at UNHCR, *Expert Meetings*, <http://www.unhcr.org/pages/4d22f95f6.html>.

² UNHCR, *Refugees and Asylum-Seekers in Distress at Sea – how best to respond?*, October 2011, <http://www.unhcr.org/4ec1436c9.html>.

³ See UNHCR, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities: Summary Conclusions*, June 2011, <http://www.unhcr.org/refworld/docid/4e9fed232.html>.

A. The reality of irregular mixed movements by sea

4. Complex mixed migratory movements have always been and will continue to be a reality of human existence. The situation in the Gulf of Aden region provides ample evidence of many of these complexities, echoed in all regions faced with irregular sea movements, including the Asia-Pacific, the Mediterranean, the Caribbean and Southern Africa. Individuals may be motivated by a mix of push and pull factors such as conflict, persecution, lack of livelihood opportunities, as well as the desire to seek a better life. They may accordingly have differing protection and other needs. Many people moving irregularly may also resort to dangerous modes of travel when orderly channels are not available.
5. Governments affected by these mixed movements, in the Gulf of Aden as in other regions, face the difficult task of balancing their sovereign right to control their borders and protect national security with the need to uphold the rights of people involved. This is especially the case when such travel is facilitated by human smugglers and traffickers.
6. The Gulf of Aden region also demonstrates the particular challenges of irregular movements by sea. In light of the frequently overcrowded and unseaworthy vessels used for the sea crossing, distress situations are regular occurrences. Search and rescue capacities of coastal States are limited or non-existent, and shipmasters have sometimes faced difficulties in obtaining permission to disembark rescued groups. Concerns about piracy can further limit a commercial vessel's ability or willingness to rescue persons in distress.

B. The legal framework

7. The international legal framework for the protection of human life at sea is made up of different but interrelated bodies of law: international law of the sea; international human rights and refugee law; and, where sea movements are triggered by situations of armed conflict, international humanitarian law.
 - The duty to rescue people in distress is a longstanding maritime tradition and is part of customary international law. It is expressed in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and in several other international law of the sea instruments.⁴ The duty to render assistance applies in all maritime zones and to every person in distress without discrimination, including asylum-seekers and refugees. The specific legal framework governing rescue at sea does not apply to interception operations that have no search and rescue component.⁵

⁴ Article 98 of UNCLOS, entered into force 16 November 1994; Chapter V, Regulation 33 1-1 of the 1974 International Convention for the Safety of Life at Sea (SOLAS), entered into force 25 May 1980, as amended; Chapter 2.1.10 of the 1979 International Convention on Maritime Search and Rescue (SAR), entered into force 25 March 1980, as amended.

⁵ There is no internationally accepted definition of interception, and its meaning is largely informed by State practice. UNHCR Executive Committee Conclusion No. 97 (LIV) (2003) on "Protection Safeguards in Interception Measures" contains a working definition of interception as "one of the measures employed by States to: (i) prevent embarkation of persons on an international journey; (ii) prevent further onward international travel by persons who have commenced their journey; or (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law; where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter".

- International human rights law guarantees human dignity, including for those moving irregularly by sea. The principle of *non-refoulement* enshrined in international refugee and human rights law ensures that people rescued at sea are not disembarked in places where they may face torture, persecution or other serious harm.⁶ These provisions apply wherever a State exercises effective jurisdiction, including extraterritorially.⁷
- International humanitarian law obliges parties to an armed conflict to take all possible measures to search for, collect and evacuate the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment and to ensure their adequate care. There are also obligations on parties to take feasible measures to account for persons reported missing, with respect to the right of families to know the fate of their missing relatives, and with respect to the management of the dead and related issues.⁸

C. Gaps in the implementation of the legal framework governing rescue at sea

8. Recent amendments to the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) and the 1979 International Convention on Maritime Search and Rescue (SAR Convention), as well as associated International Maritime Organization (IMO) Guidelines, have strengthened the framework governing rescue at sea, notably by establishing an obligation for all States to co-ordinate and co-operate in rescue at sea operations.⁹
9. Nevertheless, practical and operational challenges remain. These are due, in part, to the fact that search and rescue operations can trigger the responsibilities of different States and that these responsibilities may conflict with migration management and security objectives relating to irregular sea arrivals. Lack of capacity to implement search and rescue (SAR) obligations or to receive persons rescued at sea upon disembarkation can be additional complicating factors. The inability to properly address these challenges can lead not only to loss of life at sea, but also to significant costs for the shipping industry and the international community. Such failure may also deny the protection due to asylum-seekers and refugees under the principle of *non-refoulement*.

⁶ Article 33 of the 1951 Convention relating to the Status of Refugees, entered into force 22 April 1954 (1951 Convention); Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights, entered into force 23 March 1976 (ICCPR); Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987 (CAT).

⁷ For references, including to relevant case law of the International Court of Justice (ICJ) and Human Rights Committee general comments, see 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*, 26 January 2007, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

⁸ Articles 18, 19, 20, 21 of the 1949 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, entered into force 21 October 1950; Article 26 of the 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War, entered into force 21 October 1950; Articles 10, 17, 32, 33, 34 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force 7 December 1978; Articles 4, 8 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), entered into force 7 December 1978.

⁹ For further details see UNHCR, *Refugees and Asylum-Seekers in Distress at Sea – how best to respond?*, October 2011, <http://www.unhcr.org/4ec1436c9.html>.

10. Fundamentally, a core challenge in any particular rescue at sea operation involving asylum-seekers and refugees is often the timely identification of a place of safety for disembarkation, as well as necessary follow-up, including reception arrangements, access to appropriate processes and procedures, and outcomes. If a shipmaster is likely to face delay in disembarking rescued people, he/she may be less ready to come to the assistance of those in distress at sea. Addressing these challenges and developing predictable responses requires strengthened cooperation and coordination among all States and other stakeholders implicated in rescue at sea operations.

D. Towards solutions: operational tools to enhance international cooperation

11. This section sets out three proposed operational tools to enhance cooperative responses to rescue at sea situations involving refugees and asylum-seekers, in light of the challenges identified above: (I) a *Model Framework for Cooperation*; (II) Standard Operating Procedures for Shipmasters; and (III) Mobile Protection Response Teams.

I. Model Framework for Cooperation

12. A *Regional agreement on concerted procedures relating to the disembarkation of persons rescued at sea* is under development by the IMO for the Mediterranean region.¹⁰ This is a useful pilot scheme that seeks to allocate maritime responsibilities more predictably among various States in the region, especially relating to the disembarkation of people rescued at sea.

13. As a complement to the IMO initiative, cooperative arrangements could be developed to support countries of disembarkation and/or processing. This could include assistance for reception arrangements and burden-sharing schemes to provide a range of outcomes to individuals, depending on their profile and needs. The *Model Framework for Cooperation in Rescue at Sea Operations involving Asylum-Seekers and Refugees* (Model Framework) (**Annex I**) proposed by UNHCR offers a starting point for such discussions. The Model Framework is based on and further develops UNHCR's *10 Point Plan of Action on Refugee Protection and International Migration*.¹¹ The Model Framework is without prejudice to and flows from existing international law, including international refugee and human rights law. It is a complement to, and not a substitute for, mechanisms adopted to implement the SAR and SOLAS Conventions.

14. The negotiation of cooperative arrangements based on the Model Framework would be most successful where one or more governments are committed to lead the process and facilitate the necessary political consensus among concerned States. UNHCR and other agencies could advocate for, and act as conveners of, such arrangements. Dedicated expert meetings at the regional level to support the development of the Model Framework would help to adapt it to regional realities. While it is envisaged that the Model Framework would be used on a regional basis, the engagement and support of the international community would be

¹⁰ IMO Facilitation Committee, 37th session, FAL 37/6/1 of 1 July 2011.

¹¹ UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, 2007, <http://www.unhcr.org/protect/PROTECTION/4742a30b4.pdf>.

essential, in particular resettlement countries. States outside the region concerned but who are involved in shipping or naval activities in that region could also participate in cooperative arrangements.

15. It is important that support for reception arrangements provided as part of the Model Framework include mechanisms to rapidly identify and distinguish among different groups of rescued persons. Persons found to be in need of international protection and assistance are to be separated from those identified as criminal perpetrators, such as traffickers and smugglers. Reception arrangements should also include mechanisms to manage the remains of persons who have perished at sea and ensure family tracing. The important guidance developed by the International Committee of the Red Cross (ICRC) in this respect could be more widely distributed, and may benefit from specific targeting to the context of irregular mixed movements by sea.¹²
16. Given that many migrants in an irregular situation rescued at sea do not qualify for refugee status or complementary protection, it is necessary to establish within the Model Framework cooperative responses to facilitate the return of people not in need of international protection who are unable to stay in the country of disembarkation and/or processing. Solutions for refugees could, where appropriate, build on existing good practices supporting host States to facilitate self-reliance and local integration. Resettlement can also be part of an overall regional strategic effort to address rescue at sea incidents involving refugees, including as a burden-sharing tool. These traditional solutions may be complemented by temporary or permanent options offered by migration frameworks. Care is required to ensure that rapid processing and/or an increase in resettlement places for asylum-seekers or refugees rescued at sea does not create pull factors or lead persons traveling irregularly by sea to create “distress” situations in order to promote rescue.

II. Standard Operating Procedures for Shipmasters

17. The Model Framework could be complemented by *Standard Operating Procedures for Shipmasters* (SOPs) when faced with distress at sea situations involving undocumented migrants, refugees and asylum-seekers. The SOPs could be incorporated into “industry best practice” guidance to be developed in conjunction with the International Chamber of Shipping (ICS), to ensure that humanitarian and protection concerns are taken into account.
18. Shipmasters of commercial vessels are not responsible for identifying or differentiating between groups of rescued persons or making substantive decisions on the merits of any international protection claims. However, SOPs could provide guidance as regards the appropriate procedures to be followed when asylum-seekers and refugees may be among groups of rescued persons.
19. The SOPs could, for example, include:

¹² See, e.g., ICRC, *Management of Dead Bodies after Disasters*, 2006, http://www.icrc.org/eng/assets/files/other/icrc_002_0880.pdf ; ICRC, *The Need to Know: Restoring Links between Dispersed Family Members*, 2011, <http://www.icrc.org/eng/resources/documents/publication/p4037.htm>.

- contact points for relevant authorities (i.e. Maritime Rescue Coordination Centres) in specific countries;
- a list of potential places of safety for disembarkation, as may be designated by Governments for their respective Search and Rescue Region (SRR), along with relevant criteria that may assist to make a determination in any particular case;
- advice on information that shipmasters may be able to collect about rescued persons;
- recommendations on proper management of the human remains and handling of data on deceased persons.

III. Mobile Protection Response Teams

20. *Mobile Protection Response Teams* could form part of cooperative arrangements to address rescue at sea situations involving undocumented migrants, refugees and asylum-seekers, including those based on the Model Framework. Mobile protection response teams would be composed of experts with complementary backgrounds and expertise from a range of stakeholders, including States, international organizations and NGOs. They could provide support to and capacity-building for States of disembarkation and/or processing in addressing the needs of irregular mixed groups. It is envisaged that the teams would have a particular role in reception arrangements, profiling and referral and, where appropriate, asylum or other status determination procedures.¹³
21. UNHCR, in cooperation with IOM and other agencies, will further develop the concept of *Mobile Protection Response Teams*, including through elaboration of a pilot scheme.

IV. Regional processes to address irregular mixed movements

22. Arrangements to strengthen international cooperation in rescue at sea emergencies involving refugees and asylum-seekers may benefit from inclusion in broader regional processes to address irregular mixed movements. While State-led processes are critical, multi-stakeholder bodies working on these issues, such as the Regional Mixed Migration Secretariat in the Horn of Africa and Yemen sub-region, can also play a supporting role - providing policymakers with analyses on migration dynamics and facilitating data exchange among States and other stakeholders.
23. Examples of comprehensive regional approaches to address irregular mixed movements include the Regional Cooperation Framework established through the Bali Process in the Asia-Pacific region.¹⁴ Where possible, such approaches can aim to address all phases of the displacement and migration cycle, from root causes to solutions, situating responses to the rescue at sea component within a broader context. They can provide alternatives to irregular migration to deter people without protection needs from undertaking dangerous sea journeys

¹³ See further UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, <http://www.unhcr.org/refworld/docid/4d9430ea2.html>, Chapters 4, 5 and 6.

¹⁴ UNHCR, *Regional Cooperative Approach to Address Refugees, Asylum-Seekers and Irregular Movement*, November 2010, <http://www.baliprocess.net/files/Regional%20Cooperation%20Approach%20Discussion%20document%20-%20final.pdf>.

(e.g., legal migration opportunities), and strengthen protection capacities in transit States to avoid onward movements (e.g., livelihood projects). Regional processes may also foresee mechanisms to combat human smuggling and trafficking, as well as for voluntary return for those without international protection needs.

Division of International Protection
UNHCR
5 December 2011

Model Framework for Cooperation following Rescue at Sea Operations involving Refugees and Asylum-Seekers (Model Framework)

The aim of this Model Framework is to strengthen the protection of refugees and asylum-seekers in distress at sea through enhanced international cooperation among concerned States and other stakeholders.

The Model Framework focuses on actions that may be undertaken after a rescue at sea operation involving refugees and asylum-seekers, among others, has been carried out. It offers a starting point for discussion and would require adaptation to the specific regional circumstances to be addressed. The Model Framework could form the basis for an ad hoc arrangement in a particular rescue at sea emergency, or be used to develop a standing cooperative arrangement to increase predictability of responses among certain States. It could also be adopted as one element in a broader comprehensive regional approach to address irregular mixed movements.¹

The Model Framework is based on and further develops UNHCR's "10-Point Plan of Action on Refugee Protection and Mixed Migration" (the 10-Point Plan)² and uses its terminology. UNHCR's publication "Refugee Protection and Mixed Migration: The 10-Point Plan in action" provides a number of practical examples on the implementation of the 10-Point Plan, including in the context of sea arrivals, and contains a detailed glossary setting out relevant terms and definitions.³

The Model Framework could be merged with or exist independently of the "Regional agreement on concerted procedures relating to the disembarkation of persons rescued at sea", which has been proposed by the International Maritime Organization (IMO) as a pilot in the Mediterranean region.⁴

I. Purpose and Underlying Principles

- 1) The purpose of this Model Framework is to improve responses following rescue at sea operations involving refugees and asylum-seekers travelling as part of irregular mixed movements.

¹ For information on comprehensive regional approaches see UNHCR, *International Cooperation to Share Burden and Responsibilities*, June 2011, <http://www.unhcr.org/refworld/docid/4e533bc02.html> and UNHCR, *Regional Cooperative Approach to address Refugees, Asylum-Seekers and Irregular Movement*, November 2010, <http://www.baliprocess.net/files/Regional%20Cooperation%20Approach%20Discussion%20document%20-%20final.pdf>.

² UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, 2007, <http://www.unhcr.org/protect/PROTECTION/4742a30b4.pdf>.

³ UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, <http://www.unhcr.org/refworld/docid/4d9430ea2.html> (the 10-Point Plan Compilation). The *Glossary*, in whole or in part, could be annexed to the Model Framework in the event that further clarification of terminology is desired.

⁴ IMO Facilitation Committee, 37th session, FAL 37/6/1 of 1 July 2011.

- 2) Specifically, the Model Framework aims to:
 - (i) maximize efforts to reduce loss of life at sea;
 - (ii) ensure more predictability in identifying places for disembarkation;
 - (iii) ensure that rescued people are not disembarked in or transferred to places where they may face persecution, torture or other serious harm; and
 - (iv) establish measures for burden and responsibility sharing to support States providing for disembarkation, processing and/or solutions.

- 3) The Model Framework is without prejudice to, and flows from, existing international law, including international refugee and human rights law. It is a complement to, and not a substitute for, mechanisms adopted to implement the SAR and SOLAS Conventions.⁵ The Model Framework is based on the principles of international cooperation, including burden and responsibility sharing.

II. Scope and Application

This Model Framework applies to rescue at sea operations involving refugees and asylum-seekers, irrespective of the nature of the rescuing vessel;⁶ and where disembarkation at a place of safety and/or processing of rescued persons is being considered in a State other than the flag State of the rescuing vessel.⁷

III. Operational Arrangements

- 1) Principal actors
 - (i) States implicated by a particular rescue at sea operation may include:
 - the flag State(s) of the rescuing vessel(s);
 - the flag State of the vessel in distress;
 - the State(s) in whose Search and Rescue Region (SRR) the rescue operation takes place;
 - the State where rescued persons are disembarked;
 - the State where rescued persons are processed;
 - States of transit and origin of rescued persons;
 - third States, including resettlement States, as appropriate.⁸

 - (ii) Any or all of these States may consider joining this Model Framework. International organizations, including UNHCR, and non-governmental organizations may provide additional support as necessary and appropriate.⁹

⁵ 1979 International Convention on Maritime Search and Rescue (SAR), entered into force 25 March 1980, as amended; 1974 International Convention for the Safety of Life at Sea (SOLAS), entered into force 25 May 1980, as amended.

⁶ i.e., regardless of whether the vessel is commercial or a public (coastguard or military).

⁷ These situations warrant cooperative arrangements as they may trigger the responsibility of different States.

⁸ In some situations, States may have assumed more than one of these roles.

⁹ See Part IV for the role of UNHCR specifically.

2) Undertakings by [Concerned States]

(i) In joining this Model Framework, [each *Concerned State*¹⁰] commits to undertake specific responsibilities. The nature and scope of this contribution may differ among States.

(ii) Possible roles and responsibilities may include:

- coordinating search and rescue (SAR) activities;
- carrying out SAR activities;
- providing a place for disembarkation and initial reception;
- processing rescued persons;
- providing solutions for rescued persons;
- providing financial support to affected States.

3) Establishment of Task Force

(i) [*Concerned States*] may establish a Task Force to ensure smooth coordination and cooperation among principal actors and other stakeholders.

(ii) Functions of the Task Force could include:

- designation of specific focal points to share information;
- establishing clear lines of communication;
- clarification of responsibilities.

(iii) The Task Force will be mindful of the need to arrange for disembarkation of rescued persons at a place of safety as soon as reasonably practical and to release shipmasters from their obligations with minimum further deviation from the ship's intended voyage.

4) Identification of a country for disembarkation

(i) [*Concerned States*] will agree on the most appropriate country for disembarkation, possibly on the basis of a predetermined list of places for disembarkation identified by [*Concerned States*].

(ii) Relevant factors in identifying the place of disembarkation include:

- practical considerations (e.g., maritime safety; geographical proximity; the extent to which the rescuing vessel will be required to deviate from its intended voyage; the needs of rescued persons; facilities at the proposed site of disembarkation, including access to fair and efficient asylum procedures);
- applicable SAR and SOLAS provisions;¹¹
- the principle of *non-refoulement*.¹²

¹⁰ The names of the States party to the Model Framework could be inserted in place of [*Concerned States*].

¹¹ 1979 International Convention on Maritime Search and Rescue (SAR), entered into force 25 March 1980, as amended; 1974 International Convention for the Safety of Life at Sea (SOLAS), entered into force 25 May 1980, as amended.

¹² Article 33 of the 1951 Convention relating to the Status of Refugees, entered into force 22 April 1954 (1951 Convention); Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights, entered into force 23 March 1976 (ICCPR); Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987 (CAT).

5) Reception arrangements

(i) [*Concerned States*] will cooperate to ensure adequate reception arrangements are in place at the site of disembarkation.

(ii) The purpose of reception arrangements includes:

- addressing the immediate needs of new arrivals, e.g., medical treatment, shelter and food, family tracing;
- providing for stay consistent with an adequate standard of living;¹³
- providing protection from direct or indirect *refoulement*;
- proper management of human remains and handling of data on deceased persons.

6) Mechanisms for profiling and referral

(i) [*Concerned States*] may establish mechanisms for profiling and referral¹⁴ to rapidly identify and differentiate among rescued persons according to their background and needs.

(ii) Functions of such mechanisms could include:

- the provision of information to rescued persons;
- gathering of information through questionnaires and/or informal interviews;
- the establishment of preliminary profiles for each person;
- counselling and referral to differentiated processes and procedures, including asylum procedures for those who may be in need of international protection.

(iii) Best practice is for profiling and referral to be conducted by expert teams, consisting of officials and representatives from diverse backgrounds, including government, international agencies and/or non-governmental organizations.

7) Determining international protection needs

(i) [*Concerned States*] will agree on an appropriate place, and the authorities responsible, for processing any asylum claims made by rescued persons in accordance with applicable international standards.¹⁵

(ii) Processing may occur:

- in the country of disembarkation;
- in the flag State of the rescuing vessel;¹⁶ or
- in a third State, which has agreed to assume responsibility in line with applicable international standards.¹⁷

¹³ Article 11 of the International Covenant on Economic Social and Cultural Rights (ICESCR), entered into force 3 January 1976.

¹⁴ For further information see Chapter 5 (“Mechanisms for profiling and referral”) of the 10-Point Plan Compilation, above n 3.

¹⁵ UNHCR, *Fair and Efficient Asylum Procedures: a Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005, <http://www.unhcr.org/refworld/docid/432ae9204.html>.

¹⁶ This may be appropriate, for example, where the flag State of the rescuing vessel is also a coastal State within the area where those persons are rescued.

¹⁷ UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

(iii) In any of the cases identified above processing may be undertaken by the authorities of the State where processing occurs, and/or by authorities of another relevant State, subject to applicable international standards.¹⁸

(iv) The existing capacity of each State to undertake fair and efficient asylum procedures will be a relevant factor in determining the location of processing.

8) Outcomes for rescued persons

(i) [*Concerned States*] may provide for a range of outcomes for rescued persons depending on their profile and needs.

a) *Persons in need of international protection*

- Persons who have been recognized as refugees or as being otherwise in need of international protection should be permitted to stay in the country of processing or [another *Concerned State*] and provided with the possibility to obtain self-reliance.
- [*Concerned States*] may agree to provide additional support to host States to enhance protection and available solutions.
- Resettlement may be considered to countries within and beyond the region concerned should local integration in the country of processing not be possible, or pursuant to a regional cooperative arrangement to share burdens and responsibilities.¹⁹

b) *Persons not in need of international protection*

- Persons found not to be in need of international protection may nonetheless be permitted to remain (temporarily and/or permanently) in the country of processing or [another *Concerned State*] if permission to do so is granted by the relevant authorities.
- Those without international protection needs may also be able to take advantage of migration options to other countries, as appropriate, including on the basis of specific cooperative arrangements.
- Absent alternative solutions, such persons will need to return to their countries of origin, preferably on a voluntary basis and subject to applicable human rights law and humanitarian considerations. Assistance may be provided to support voluntary return, as necessary.²⁰

¹⁸ See above n 17.

¹⁹ See, e.g., UNHCR, *Regional Cooperative Approach to address Refugees, Asylum-Seekers and Irregular Movement*, November 2010, <http://www.baliprocess.net/files/Regional%20Cooperation%20Approach%20Discussion%20document%20-%20final.pdf>. See also UNHCR, *International Cooperation to Share Burden and Responsibilities*, June 2011, <http://www.unhcr.org/refworld/docid/4e533bc02.html>.

²⁰ UNHCR, *Protection Policy Paper: The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role*, November 2010, <http://www.unhcr.org/refworld/docid/4cea23c62.html>.

c) *Other categories of persons with specific needs*

- Other processes and procedures may be adopted for other groups with specific needs, e.g. unaccompanied or separated children, disabled persons, victims of trafficking.²¹

9) Additional support and capacity building measures for country(ies) of disembarkation/processing

[*Concerned States*] may agree on additional support and capacity building measures for the country(ies) of disembarkation and/or processing, such as increased resettlement places, financial or technical support for the asylum system, and/or other activities.

IV. Role of UNHCR

- 1) UNHCR may become a party to this Model Framework, or other cooperative arrangements, as appropriate.
- 2) UNHCR's engagement will not prejudice pre-existing arrangements that UNHCR may have with [any *Concerned State*] for the purposes of carrying out its regular mandate responsibilities.
- 3) Activities that may be undertaken by UNHCR under this Model Framework, as appropriate and resources permitting, include:
 - supporting reception arrangements;
 - initiating/participating in expert teams for profiling and referral, along with other actors;
 - supporting refugee status determination (RSD);
 - supporting the return of persons without international protection needs by identifying and bringing together relevant partner organizations, in particular the International Organization for Migration (IOM);
 - coordinating resettlement activities.

²¹ See Chapter 5 ("Mechanisms for profiling and referral") and Chapter 6 ("Differentiated processes and procedures") of the 10-Point Plan Compilation, above n 3.

2. Refugees and Asylum-Seekers in Distress at Sea – how best to respond? Expert Meeting in Djibouti, 8 - 10 November 2011, Background Paper*

This paper proposes a number of operational tools to improve responses to complex rescue at sea emergencies involving refugees and asylum-seekers, among others travelling as part of irregular mixed movements. The tools specifically focus on enhancing inter-State cooperation, including burden and responsibility sharing. The suggestions in this paper will be discussed at the Expert Meeting in Djibouti from 8 to 10 November 2011.

I. INTRODUCTION

The phenomenon of people taking to the seas in search of safety, refuge, or simply better economic conditions is not new. The mass exodus from Vietnam throughout the 1980s was followed in the 1990s by large-scale departures from Albania, Cuba and Haiti. More recently, international attention has focused on the movement of Somalis and Ethiopians across the Gulf of Aden, increasing numbers of sea arrivals in Australia, and the outflow of people from North Africa to Europe in the aftermath of the Libya crisis. But beyond these situations, irregular maritime movements are a reality in all regions of the world.

Most irregular maritime movements today are “mixed movements”, involving people with various profiles and needs, as opposed to being primarily refugee outflows.¹ However, all of these movements include at least some refugees, asylum-seekers or other people of concern to the Office of the United Nations High Commissioner for Refugees (UNHCR or the Office). They generally take place without proper travel documentation and are often facilitated by smugglers or traffickers. The vessels used for the journey are frequently overcrowded, un-seaworthy and not commanded by professional seamen. Distress at sea situations are common, raising grave humanitarian concerns for those involved. Search and rescue operations, disembarkation, processing and the identification of solutions for those rescued are re-occurring challenges for States, international organizations, including UNHCR, the International Maritime Organization (IMO) and the International Organization for Migration (IOM), as well as the shipping industry.

The IMO in particular has continually sought to clarify the roles and responsibilities of various stakeholders that may be involved in or implicated by a rescue at sea operation. Recent amendments to the International Convention for the Safety of Life at Sea (SOLAS Convention) and the International Convention on Maritime Search and Rescue (SAR Convention), as well as accompanying IMO Guidelines, underline the duty of all State Parties to co-ordinate and co-operate in rescue at sea operations.² However gaps remain, especially

* Available at: <http://www.unhcr.org/refworld/docid/4ec211762.html>.

¹ “Mixed movements” involve individuals or groups travelling in an irregular manner along similar routes and using similar means of travel, but for different reasons. Mixed movements can include migrants in an irregular situation as well as refugees, asylum-seekers and other persons with specific needs such as trafficked persons, stateless persons, and unaccompanied or separated children. These categories are not mutually exclusive.

² 1974 International Convention for the Safety of Life at Sea (SOLAS), entry into force 25 May 1980, as amended, Regulation 33, 1-1; 1979 International Convention on Maritime Search and Rescue (SAR), entry into force 25 March 1980, as amended, Chapter 3.1.9; IMO Resolution MSC.167(78), Annex 34, *Guidelines on the Treatment of Persons Rescued at Sea*, 2004; IMO Circular FAL.3/Circ. 194, *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, 2009, 2.3.

when search and rescue (SAR) operations involve people without proper travel documentation.

UNHCR, in close cooperation with the IMO, has also convened several meetings of governments and other stakeholders to explore how protection of persons of concern to the Office travelling irregularly by sea can be enhanced.³ Separately, UNHCR has begun discussions on how to enhance international cooperation among States in response to refugee challenges, including for those travelling as part of irregular maritime movements.⁴

The purpose of this paper is to build on these developments by proposing practical tools that could enhance responses following rescue at sea operations involving refugees and asylum-seekers. Part II provides an overview of the key challenges. Part III summarizes the applicable legal framework. Part IV introduces four tools that could be developed to improve cooperative arrangements to address rescue at sea situations. Further detail on each of the four tools is outlined in Annexes A to D.^{**}

The suggestions made in this paper are based on UNHCR's mandate for persons in need of international protection. Areas within the specific responsibility of the IMO and other maritime actors are not addressed. The suggestions are also limited to rescue at sea emergencies. While some proposals could also apply to interception operations, generally these scenarios raise different legal and policy questions, and may also require different responses.⁵

II. ANALYZING THE CHALLENGES

The 2004 amendments to the SAR and SOLAS Conventions and the corresponding IMO Guidelines, outlined in the Introduction, have made improvements to the global SAR regime. There remain, however, a number of key challenges in ensuring the safety of life at sea and providing access to international protection for those in need.

These challenges include:

- Lack of capacity and/or willingness on the part of coastal States to fully implement their obligations under the SAR and SOLAS Conventions⁶ (e.g., insufficient controls

³ The recommendations and conclusions from several of these meetings were considered by a broader group of States during the United Nations consultative process on the law of the sea in 2008: UNHCR, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees: report of the Office of the United Nations High Commissioner for Refugees*, 11 April 2008, A/AC.259/17, available at: <http://www.unhcr.org/refworld/docid/49997aeb27.html>.

⁴ *Expert Meeting on International Cooperation to Share Burdens and Responsibilities*, Amman, Jordan, June 2011, documents available at: <http://www.unhcr.org/pages/4d22f95f6.html>.

^{**} *Editorial Note: Annex A to this document has been updated and replaced by Annex I to "Distress at Sea Situations Involving Refugees and Asylum-Seekers – how best to respond?, Summary Conclusions" available above Section B.IV.1*

⁵ For consideration of processing arrangements following interception operations, including applicable international legal standards, see: UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

⁶ See above, n 2.

to prevent the departure of unseaworthy vessels, no declared SAR area, insufficient SAR services).

- Difficulties faced by shipmasters in finding a coastal State willing to provide a place of safety for disembarkation, due to the costs and other complexities involved in processing and identifying solutions for rescued persons, as well as concerns about border security and human smuggling and trafficking, or creating pull factors.⁷ This can in turn make shipmasters reluctant to assist those in distress.
- Restrictive definitions of what constitutes a “distress situation”, resulting in lack of timely assistance.
- Tensions among States and delays in the initiation of rescue operations due to differing views on SAR and SOLAS responsibilities, resulting in prolonged stay of rescued persons on board vessels (costly, and can threaten maritime safety).
- Inadequate reception and processing facilities at places of disembarkation to meet people’s immediate needs, ensure protection against *refoulement*⁸ and provide timely outcomes, including for refugees.

III. LEGAL FRAMEWORK

The legal framework governing search and rescue at sea and the treatment of refugees, asylum-seekers, and other groups travelling as part of mixed movements up to and following disembarkation is contained in the international law of the sea, international refugee and human rights law. Core principles include:⁹

- The duty to render assistance to those in distress at sea without discrimination.¹⁰
- The obligation to ensure arrangements for distress communication and coordination.¹¹

⁷ Under the SAR and SOLAS Conventions the State responsible for the SAR area where persons are rescued is to “exercise primary responsibility for ensuring ...co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety...”: see above n 2. But there is no definitive obligation for one particular State to provide for disembarkation, cf. the IMO *Guidelines on the Treatment of Persons Rescued at Sea* which highlight that the Government responsible for the SAR area where the persons were rescued has the responsibility to provide a place of safety or to ensure that a place of safety is provided, see above, n 2.

⁸ See below, n 13.

⁹ For a more comprehensive overview see UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (Final version, including Annexes), 18 March 2002, available at: <http://www.unhcr.org/refworld/docid/3cd14bc24.html>. The observations and recommendations made during previous meetings convened by UNHCR and other actors could provide additional guidance: UNHCR, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees: report of the Office of the United Nations High Commissioner for Refugees*, 11 April 2008, A/AC.259/17, available at: <http://www.unhcr.org/refworld/docid/49997aeb27.html>.

¹⁰ Article 98 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), entered into force 16 November 1994; Chapter V, Regulation 33 1-1, SOLAS Convention; Chapter 2.1.10 SAR Convention.

¹¹ Article 98(2), UNCLOS; Chapter V, Regulation 7, SOLAS Convention.

- The duty to cooperate to ensure that shipmasters providing assistance for those in distress are released from their obligations and that survivors are disembarked from the assisting ship and delivered to a place of safety as soon as reasonably practicable.¹²
- The principle of *non-refoulement*, which prohibits return to territories where an individual may face persecution, torture, inhuman and degrading treatment or other irreparable harm. The principle of *non-refoulement* also applies when a State acts extraterritorially.¹³
- The obligation to treat rescued persons humanely in line with international human rights law.¹⁴
- The duty to respect the sovereignty of other States.¹⁵
- The underlying principle of international cooperation in the refugee regime, stemming from the Charter of the United Nations and the 1951 Convention relating to the Status of Refugees.¹⁶

IV. OPERATIONAL TOOLS

In UNHCR's experience, a successful resolution of complex rescue at sea situations will often require close cooperation among affected States, including mechanisms for burden and responsibility sharing. Annexes A to D set out a number of practical tools to improve such responses, for discussion and further development at the Expert Meeting.¹⁷

The tools proposed are:

¹² Regulation 33, 1-1, SOLAS Convention, as amended; Chapter 3.1.9, SAR Convention, as amended; IMO Resolution MSC.167(78), Annex 34, *Guidelines on the Treatment of Persons Rescued at Sea*, 2004, see above n 2.

¹³ See especially, Article 33 of the 1951 Convention relating to the Status of Refugees, entered into force 22 April 1954 (1951 Convention); Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights, entered into force 23 March 1976 (ICCPR); Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987 (CAT). See also 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*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

¹⁴ See generally, ICCPR, CAT and the 1966 International Covenant on Economic, Social and Cultural Rights, entered into force 3 January 1976 (ICESCR); Regulation 33.6, SOLAS Convention.

¹⁵ Article 2, Charter of the United Nations, entered into force 24 October 1945 (UN Charter).

¹⁶ Articles 55 and 56, UN Charter; Preamble, 1951 Convention. These instruments do not specify how international cooperation is to be implemented in practice, and it is best understood as a methodology underlying State action in the refugee area: see *Expert Meeting on International Cooperation to Share Burdens and Responsibilities*, Amman, Jordan, June 2011, documents available at: <http://www.unhcr.org/pages/4d22f95f6.html>.

¹⁷ In addition to the proposals outlined in this paper, UNHCR's recent discussion paper on international cooperation to share burden and responsibilities provides further examples of and suggestions for cooperative arrangements. These include the "DISERO" and "RASRO" schemes and the Eurema Project for relocation of refugees from Malta to other European countries: UNHCR, *International Cooperation to Share Burden and Responsibilities*, June 2011, available at: <http://www.unhcr.org/refworld/docid/4e533bc02.html>. See also UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.unhcr.org/refworld/docid/4d9430ea2.html>.

- A Draft Model Framework for Cooperation (Annex A)^{***}
- Mobile protection response teams to support the reception and processing of rescued persons (Annex B)
- Specific resettlement quotas for refugees rescued at sea (Annex C)
- Standard operating procedures for shipmasters (Annex D)

These suggestions are not exhaustive. Every regional situation is different and the tools would need to be adapted to the specific circumstances. The development of mobile protection response teams and specific resettlement quotas could also be adopted as part of the Draft Model Framework for Cooperation or independently from it, as appropriate.

V. CONCLUSION

The frequency of rescue at sea emergencies involving refugees and asylum-seekers and the high number of those who perish at sea are in themselves compelling calls for action. The suggestions outlined in this paper are designed to improve cooperation and ensure a more predictable and timely response to the various stages of rescue at sea emergencies. UNHCR would welcome careful review and consideration of these proposals at the Expert Meeting, as well as additional suggestions.

UNHCR
October 2011

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^{***} Editorial Note: Annex A to this document has been updated and replaced by Annex I to “Distress at Sea Situations involving Refugees and Asylum-Seekers – how best to respond?, Summary Conclusions” available above Section B.IV.1.

ANNEX B

Mobile Protection Response Teams

Some States of disembarkation and/or processing may require support to ensure that the immediate needs of rescued persons are met, in addition to registration, refugee status determination or other procedures, and finding appropriate outcomes.

The “Praesidium Project” in Lampedusa, Italy, considerably improved the reception and processing of irregular sea arrivals. Teams of representatives from the Italian Government, UNHCR, IOM and a number of non-governmental partners: (1) provide information and legal assistance to new arrivals; (2) identify asylum-seekers, trafficked persons and unaccompanied or separated children in need of protection; (3) conduct capacity-building and training of reception staff; and (4) contribute to the development of a referral system for specific groups and vulnerable individuals.¹ There are similar such examples in other regions.²

Building on these models, international or regional mobile protection response teams could be established on a stand-by basis and deployed, on request, to support and develop government capacity in reception and processing of rescued persons.

Mobile Protection Response Teams – Possible Function and Elements

- Appropriate where it is not possible to establish permanent “Praesidium” arrangements on short notice or where maritime incidents remain isolated;
- Support governments in establishing reception arrangements for rescued persons and meeting their immediate needs;
- Provide information and counselling upon disembarkation;
- Undertake initial profiling of arrivals to identify asylum-seekers, unaccompanied/separated children, trafficked persons or other people with specific needs and assist in addressing these needs;
- Support refugee status determination (RSD) and other processing through assistance with interpretation, compilation of country of origin information, or case management;
- Provide advice and support with regard to processing resettlement cases;³
- Include experts with different backgrounds and relevant experience from governments, UNHCR and other international organizations such as IOM, and non-governmental organizations.

¹ See “Italy: Strengthening Reception Capacity to handle Migrants reaching the Island of Lampedusa (Praesidium Project)”, in UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.unhcr.org/refworld/docid/4d9430ea2.html> , Chapter 4, page 113.

² *ibid*, “Yemen: The Mayfa’a and Ahwar Reception Centres” and “Yemen: Additional Reception Arrangement”, Chapter 4, page 111.

³ See further Annex C.

ANNEX C

Specific Resettlement Quotas for Refugees Rescued at Sea

Third countries may consider allocating a number of places out of existing resettlement quotas for persons rescued at sea who are recognized as refugees and who may have resettlement needs.¹ It may be particularly appropriate to draw on such quotas where the disembarking and/or processing country is not in a position to integrate refugees, or as part of a broader cooperative regional arrangement to share burdens and responsibilities among States.

Approximately 500 places per year in total would be sufficient, amounting to only 0.5% of the global ceiling currently available. The places could be drawn from region specific quotas or unallocated or emergency quotas, as deemed appropriate by the resettlement country concerned.

Resettlement Quotas for Refugees Rescued at Sea

- Individuals rescued at sea could be disembarked and the claims of those who wish to seek asylum processed in a country willing to host them temporarily;
- Host State(s) supported by UNHCR (or in exceptional circumstances UNHCR on its own²) would process asylum claims;
- UNHCR would submit cases of refugees in need of resettlement to participating States;
- Timelines could be established for temporary stay in the disembarkation and/or processing country and completion of the resettlement process;
- Resettlement countries could provide for flexible arrangements to finalise the resettlement process, allowing for expedited decision-making and departure procedures;
- Priority for resettlement would be given to persons with most pressing protection vulnerabilities, and family links would be taken into account;
- To avoid “pull factors”, resettlement quotas may also be used for vulnerable refugees who are already in the country of disembarkation/processing;
- If places from the rescue at sea resettlement quota remain unutilized towards the end of a particular year, they could be reallocated for other purposes.

¹ Not everyone rescued at sea will be in need of international protection. As part of the Draft Model Framework for Cooperation, outlined in Annex A, cooperative arrangements for the pooling of resources for joint returns of persons without international protection or other humanitarian needs could be considered: see, e.g., Point 3 “Regional Support for return to countries of origin”, Annex 2, UNHCR, “Regional Cooperative Approach to address Refugees, Asylum-Seekers and Irregular Movement”, November 2010, available at: <http://www.baliprocess.net/files/Regional%20Cooperation%20Approach%20Discussion%20document%20-%20final.pdf>.

² For example, in States not party to the 1951 Convention relating to the Status of Refugees or States where there is no asylum system, UNHCR may undertake RSD on an exceptional basis for an interim period of time until State capacity is developed.

ANNEX D

Standard Operating Procedures for Shipmasters

In 2006, the IMO and UNHCR developed a leaflet outlining the most important obligations under the international law of the sea and refugee law relating to the rescue of migrants and refugees in distress at sea.¹

This leaflet could be supplemented with Standard Operating Procedures (SOPs) for shipmasters when rescuing groups, including refugees and asylum-seekers.

Standard Operating Procedures for Shipmasters – Suggested Provisions

- Definition of a “distress situation”, e.g., SAR activities should be initiated wherever there are indications that a vessel or the conditions of the people on board do not allow for safe travel, creating a risk that people may perish at sea. Relevant factors include overcrowding, poor conditions of the vessel, or lack of necessary equipment and expertise;
- Clarify information that should be sought from rescued persons;
- Provide indicators to assess whether rescued persons may be asylum-seekers or have other specific needs;
- Suggest recommendations on treatment of refugees and asylum seekers;
- Provide contact details of all relevant actors, including UNHCR and interpreters. While some general contacts could be provided, this information would need to be region/situation specific.

¹ UNHCR and IMO, *Rescue at Sea: A guide to principles and practice as applied to migrants and refugees*, September 2006, available at: <http://www.unhcr.org/refworld/docid/45b8d1e54.html>.

3. The treatment of persons rescued at sea: Conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees*

United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea

Ninth meeting, 23-27 June 2008

United Nations General Assembly, A/AC.259/17, 11 April 2008

Report of the Office of the United Nations High Commissioner for Refugees

INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) has convened three meetings since 2002 on rescue at sea and refugee protection: the expert round table on rescue at sea in Lisbon in March 2002; the expert meeting on interception and rescue in the Mediterranean in Athens in September 2005; and the meeting of State representatives on the same issue in Madrid in May 2006.

2. The meetings brought together participants from Governments, the shipping industry, international organizations, non-governmental organizations and academia. They resulted in a number of important observations and recommendations, aimed at preserving the integrity of the global search and rescue regime for which irregular migration poses a particular challenge, and at meeting the humanitarian and protection needs of those in distress. However, participants also recognized that efforts to improve search and rescue operations for migrants and refugees in distress at sea are only one aspect of addressing the broader challenges of irregular maritime migration. This requires tackling all the different aspects of this phenomenon in a comprehensive manner, from the root causes to differentiated solutions after disembarkation.

3. The points below synthesize the main conclusions of the meetings. They include suggestions for the strengthening of the maritime search and rescue regime, as well as recommendations for a broader approach to address irregular maritime migration beyond the imminent rescue phase.

4. An inter-agency meeting on rescue at sea¹ and a forum convened by UNHCR on the theme “High Commissioner’s dialogue on protection challenges” brought about some further suggestions which have also been incorporated into the present document.

* Available at: <http://www.unhcr.org/refworld/docid/49997aeb27.html>.

¹ The following agencies participated in the inter-agency meeting: the Division for Ocean Affairs and the Law of the Sea, United Nations Secretariat, New York; the International Labour Organization; the International Maritime Organization; the International Organization for Migration; the Office of the United Nations High Commissioner for Human Rights; and the Office of the United Nations High Commissioner for Refugees.

CONCLUSIONS AND RECOMMENDATIONS

International migration by sea

5. Irregular maritime migration is only a small component of the overall phenomenon of international migration, but it raises specific challenges which need to be addressed.

6. While it is not in essence a refugee² problem, there are refugee protection issues to contend with which must be addressed as part of the broader response to irregular maritime migration, and asylum must effectively be made available in such situations for those requiring it.

7. Irregular maritime migration requires a collaborative response, involving a wide range of actors, including intergovernmental organizations.

8. Human rights and refugee law principles are an important point of reference in handling rescue at sea situations.

Preserving the integrity of the search and rescue regime, including through capacity-building measures

9. The rescue of persons in distress at sea is not only an obligation under the international law of the sea but also a humanitarian necessity, regardless of who the people are or what their reasons are for moving.

10. The integrity of the global search and rescue regime, as governed by the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue, must be scrupulously protected. This is a responsibility of the international community as a whole.

11. It is critical that flag States exercise effective jurisdiction and control over their vessels, particularly by prohibiting them to be used for smuggling or trafficking purposes. Strict compliance with safety standards set out in relevant international instruments is also necessary. Unseaworthy vessels should not be permitted to sail.

12. Effective measures are required to prevent small ships and other ships that are not subject to international regulation from being used for smuggling or trafficking purposes. Some States may require assistance and support in that regard.

13. States should ensure that masters of ships flying their flag take the steps required by relevant instruments (the 1974 and 1979 Conventions and the UNCLOS 1982 United Nations Convention on the Law of the Sea) to provide assistance to persons in distress at sea.

14. States should take the necessary measures to disseminate, to shipmasters and government officials involved in rescue at sea operations, relevant provisions of maritime law and accompanying guidelines, including new amendments.

² The term “refugee” throughout the present document includes persons who qualify for refugee status under the 1951 Convention relating to the Status of Refugees (well-founded fear of persecution) as well as people who are unable to return to their country owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing the public order.

15. States should cooperate in taking all necessary measures to ensure the effective implementation of the amendments to the 1979 Convention, the 1974 Convention relating to the delivery of persons rescued at sea to a place of safety, as well as the associated Guidelines on the Treatment of Persons Rescued at Sea.³

16. States should facilitate rescue operations by ensuring that the necessary enabling arrangements are in place in their search and rescue area.

17. Rescue coordination centres⁴ should make plans and arrangements for the disembarkation of persons rescued at sea and their delivery to a place of safety.

18. Parties to the 1979 Convention and the International Maritime Organization (IMO) could provide support to States in establishing functioning and sustainable search and rescue facilities. Such support could also lead to gradual harmonization of approaches to search and rescue.

19. As parties to the 1979 Convention, it may be necessary for some States to support and assist other States in establishing functioning, sustainable search and rescue facilities. Such support would lead to the gradual harmonization of approaches to search and rescue.

20. States should avoid the categorization of interception operations as search and rescue operations, because this can lead to confusion with respect to disembarkation responsibilities.⁵

Duties of shipmasters, shipping and insurance agencies

21. The responsibility to assist persons in distress at sea is an obligation on shipmasters established under maritime law. The duty is triggered at the outset of the actual rescue and ends when passengers have been disembarked at a place of safety.

22. Decisions as to when and where to land rescued persons will be influenced by factors such as the safety and well-being of the ship and its crew and the appropriateness of the place of landing (safety, closeness and the ship's pre-rescue schedule).

23. Shipping and/or insurance companies should promptly inform IMO, UNHCR and other relevant actors when disembarkation proves problematic or when rescued persons claim asylum. This facilitates cooperation in finding an appropriate disembarkation solution.

³ Under the 1979 and 1974 Conventions, States parties have an obligation to coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that such release does not further endanger the safety of life at sea. The party responsible for the search and rescue region must exercise primary responsibility for ensuring that such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, which will regularly require disembarkation on land.

⁴ A rescue coordination centre is a unit responsible for promoting the efficient organization of search and rescue services and for coordinating the conduct of such operations within a search and rescue region.

⁵ The responsibilities of States regarding search and rescue are described in footnote 3 above. As regards interception, the United Nations Convention on the Law of the Sea grants coastal States enforcement rights in certain maritime zones to prevent and punish the infringement of immigration laws. These rights must be exercised in accordance with international law. Under the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, boarding and inspection of ships may be undertaken by a State party, other than the flag State, where a vessel is suspected of being engaged in the smuggling of migrants by sea in accordance with the safeguards outlined in the Protocol.

24. Cases of refusal of disembarkation should be documented by shipping companies and reported through the flag State to IMO. This information can then be used by relevant intergovernmental organizations to better quantify the problem and devise solutions with the concerned States.

25. Shipping and insurance companies should, through the flag State, provide regular statistics to IMO on incidents of stowaways.

26. Shipping companies should ensure that shipmasters are made aware of the practical consequences resulting from the IMO guidelines on the treatment of persons rescued at sea through the provision of multilingual information material.

Minimizing the inconvenience for private actors in fulfilling their maritime obligations

27. Shipmasters who undertake rescue operations should not be seen as part of the problem; rather, their actions in saving the lives of persons in distress should be recognized and supported by States.

28. The professional judgement of shipmasters as regards the determination of when and where to disembark the persons rescued should be sought and given due weight, in addition to any relevant requirements of the Government responsible for the search and rescue region in which the survivors were recovered or of another responding coastal State. Shipping companies should not be penalized in any manner whatsoever for disembarking or attempting to disembark people rescued at sea.

29. The shipmaster has the right to expect the assistance of coastal States with facilitation of disembarkation and completion of the rescue.

30. States should not impose a requirement that shipping companies or their insurers cover the repatriation costs of people rescued at sea as a precondition for disembarkation.

31. A non-State vessel is not an appropriate place to screen and categorize those rescued, including whether they are refugees or otherwise in need of protection, or devise solutions for them; nor should such a vessel be used as a floating detention centre.

Disembarkation

32. The responsibility for finding solutions to enable timely disembarkation in a humane manner rests exclusively with States and not with private actors. States have a duty to coordinate and cooperate in finding a place of safety under maritime law.

33. Disembarkation procedures should not be governed by immigration control objectives.

34. Disembarkation procedures should be harmonized, speedy and predictable in order to avoid recurrent time-consuming case-by-case negotiation problems, which can endanger the lives of those rescued. Procedures should balance the interests of the shipping industry and the basic needs of individuals rescued at sea.

35. Disembarkation, particularly when it involves large numbers of persons, does not necessarily entail the provision of durable solutions in the country of disembarkation.

Reception standards, profiling and referral to differentiated procedures after disembarkation

36. Comprehensive reception arrangements should be established for persons rescued at sea which meet the needs of the rescued persons, according to their situations and in line with their international human rights standards. Such reception arrangements should include provisions of adequate health care.

37. Rapid-response teams could assist States facing large-scale arrivals. There may be value in establishing multidisciplinary teams (which include government experts as well as international and local governmental and non-governmental organizations) for maritime arrival situations; such teams would address any immediate needs, provide information and refer arrivals to appropriate response mechanisms (profiling). The teams may include or benefit from the expertise of non-governmental organizations.

38. Persons claiming asylum should be allowed to enter the national asylum procedure without delay; in countries where no asylum procedure exists, they should be referred to UNHCR. The State providing for disembarkation will generally be the State whose refugee protection responsibilities are first engaged.

39. Fair and efficient asylum procedures help to distinguish individuals who qualify for refugee protection or who are protected against refoulement under international and regional human rights instruments from those who do not have such needs.

40. Trafficked persons and other vulnerable groups, such as separated children, will require specific assistance and appropriate protection. They may have a claim to refugee protection.

Comprehensive solutions

41. Refugees should receive protection and, in due course, access to a durable solution, either through local integration or resettlement.

42. Persons not seeking asylum and those who are found not to qualify for refugee protection or have no other compelling humanitarian reasons to remain should be encouraged and assisted to return to their country of origin in humane and safe conditions, unless an alternative legal migration option might be available to them. The International Organization for Migration and other organizations may offer support to States in implementing assisted voluntary return programmes.

43. Return should be complemented by efforts to reintegrate migrants in their community of origin, to ensure the sustainability of return and avoid a “recycling” phenomenon.

44. The development of an appropriate response to secondary movements of refugees⁶ is a critical challenge.

⁶ This recommendation refers to the phenomenon of refugees who move in an irregular manner from countries in which they have already found protection in order to seek asylum or permanent resettlement elsewhere.

Combating smuggling and trafficking

45. More vigorous and effective action is needed to prevent smuggling and trafficking as well as to identify, arrest and prosecute smugglers and traffickers. However, any action taken should follow a human rights-based approach.

46. States should renew their cooperation in protecting witnesses who assist in identification and prosecution of smugglers and traffickers. Protection of victims of trafficking shall not be made conditional upon their capacity and willingness to cooperate in legal proceedings.

47. Measures to combat smuggling and trafficking of persons must not adversely affect the human rights and dignity of persons and must not undermine international refugee protection responsibilities (human rights-based approach).

Prevention: information strategy and addressing root causes

48. Multilateral cooperation should include a proper review of mechanisms for the creation of orderly migration and protection channels in order to provide alternative opportunities for migrants.

49. States, relevant intergovernmental organizations and non-governmental actors should explore the feasibility of establishing mass information campaigns to inform prospective clandestine passengers of the risks associated with irregular maritime migration. Such campaigns should touch upon the various risks associated with overland travel en route to the prospective embarkation point. They should be targeted at communities in countries of origin, transit countries and migrant communities in countries of destination.

50. States should adopt broader, longer-term multilateral commitments to address the root causes of irregular migration. Additional efforts are called for, such as re-targeting aid to achieve sustainable development and the development of alternative legal migration channels.

Improved information management

51. Collection of empirical data on the scale and scope of irregular maritime migration, interception, rescue at sea, disembarkation and treatment of persons disembarked should be harmonized and more systematically compiled by Governments and international agencies. Statistical information should be disaggregated and include the numbers and profile of persons intercepted and disembarked as stowaways or following a rescue.

52. An exchange of data would enable all stakeholders to better address emerging trends and reinforce their cooperation to combat trafficking and abuse or exploitation of migrants.

53. Improved communication procedures among all actors and a better understanding and analysis of the challenges in relation to disembarkation may facilitate the sharing of best practices and the identification and realization of timely and fair solutions.

Cooperation and responsibility-sharing

54. International cooperative efforts to address complex rescue at sea situations should be built around burden-sharing arrangements. These arrangements could encompass the

processing of asylum applications and realization of durable solutions, such as resettlement, as well as solutions for non-refugees.

55. Cooperation should also include capacity-building initiatives, including the elaboration and/or revision of national migration and asylum law policies.

56. UNHCR should mobilize States to establish adequate burden-sharing arrangements for refugees and asylum seekers and/or standby resettlement programmes, as appropriate.

4. Expert Roundtable: Rescue at Sea - Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees (Summary of Discussions)*

Summary of Discussions

25-26 March 2002, Lisbon, Portugal

This Expert Roundtable addressed the question of rescue-at-sea and specific aspects relating to the protection of asylum-seekers and refugees, basing the discussion on UNHCR's *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (March 2002). The roundtable was composed of 33 participants from governments, the shipping industry, international organisations, non-government organisations, and academia. The first day was organised around two expert panels, while the second day was divided into two working groups to consider (1) guidelines on rescue-at-sea and disembarkation and (2) an international cooperative framework.

The following propositions relate principally to specific aspects of rescue-at-sea by non-State vessels. They do not represent the individual views of each participant, but reflect broadly the tenor of the general discussion.

1. The integrity of the global search and rescue regime already in place and governed by the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) was fully recognised, and needs to be scrupulously protected.
2. Rescue-at-sea is first and foremost a humanitarian issue, with the fact of distress the priority defining feature, and rescue and alleviation of distress the first and absolute imperative, regardless of who the people are and how they came to be where they are.
3. The undertaking to rescue is an obligation of ships' masters, provided for under maritime law, and an old humanitarian tradition. The duty of the master begins with the actual rescue and ends when the rescue is complete which necessitates delivery to a place of safety.
4. The duty of the master does not entail other responsibilities, such as determining the character or status of the people rescued.
5. To ensure full and effective discharge of duties with respect to rescue, it is important that the professional judgment of the master is respected, with regard to the determination of when and where to land the persons rescued. Factors influencing the exercise of this judgment will be the safety and wellbeing of the ship and its crew, and the appropriateness of the place of landing, defined by one or a combination of factors, such as its safety, its closeness, and its location on the ship's schedule.
6. The master has the right to expect the assistance of coastal States with facilitation and completion of the rescue, which occurs only when the persons are landed somewhere or otherwise delivered to a safe place.

* Available at: <http://www.unhcr.org/refworld/docid/3cd14e3b4.html>.

7. A non-State vessel, under a competent master and crew, is not an appropriate place in which to screen and categorize those rescued or devise solutions for them, whatever these might be. Nor is it appropriate to use the ship as, in effect, a “floating detention centre”.

8. On completion of the rescue, following delivery to a place of safety, other aspects of the matter come to the fore. These include screening for protection needs, conditions of stay and treatment, and realisation of solutions. Their resolution will depend variously on factors such as, or considerations relating to, the preceding situation of the persons concerned and their mode of transport, as well as on how best to achieve a balancing of responsibilities of all concerned.

9. International law does not prescribe how such additional aspects of the problem must be resolved, though certain provisions of international maritime law, considered as customary international law, are of great importance. The legal gaps concern where disembarkation should take place and which parties are responsible for follow-up action and effecting solutions. International law does, however, more generally give indicators of how they might be resolved. It offers a framework for resolution of the situation, albeit that there are important gaps to be filled by evolving practice together with further development of the law.

10. In terms of the law, human rights principles are an important point of first reference in handling the situation. This body of law requires certain rights to be respected regardless of the formal status of the persons concerned. The law also imposes some general constraints on how the people can be treated. In other words, human rights law prescribes that, wherever and by whomever, certain standards must be upheld and certain needs addressed. Refugee law is similarly prescriptive as regards the refugee component in the rescued caseload.

11. Practice and State policies help to fill the legal gaps, with the laws likely to follow rather than precede practice. The International Maritime Organisation is encouraged to undertake a legal gaps analysis (within its focal point structure), with a view to encouraging positive development of the law.

12. Policy makers are encouraged to recognise:

- The issue of “boat people” is best approached as a challenge, not a crisis.
- Signals are important and the wrong ones should not be sent either to States generally or to ships’ masters, which would have the effect of undermining the integrity of global search and rescue activities.
- Any measures to combat people smuggling must not undermine international refugee protection responsibilities.
- The issue is multi-disciplinary and must be approached as such.

13. General responsibilities concerning rescue should be accepted as including that:

- Coastal States have a responsibility to facilitate rescue through ensuring that the necessary enabling arrangements are in place.
- Flag States are responsible for ensuring that ships’ masters come to the assistance of people in distress at sea.
- The international community as a whole must cooperate in such a way as to uphold the integrity of the search and rescue regime.

14. Determining the character or status of those rescued by non-State vessels must normally be undertaken on dry land. If asylum-seekers and refugees are found to be among them, the State providing for disembarkation will generally be the State whose refugee protection responsibilities are first engaged. This entails in principle ensuring access to fair and efficient asylum procedures, and the provision of adequate conditions of reception. The transfer of responsibility for determining refugee status to another State is permissible under international law under certain conditions and provided that appropriate protection safeguards are in place. Furthermore, disembarkation, particularly when it involves large numbers of people rescued, does not necessarily mean the provision of durable solutions in the country of disembarkation.

15. International cooperative efforts to address complex rescue-at-sea situations should be built around burden-sharing arrangements. These arrangements could encompass the processing of asylum applications and/or the realization of durable solutions, such as resettlement. They should furthermore address, as appropriate, the issue of readmission to first countries of asylum and/or safe third countries, as well as return arrangements for those found not to be in need of international protection. Preventative action concerning people smuggling is another important aspect of any international cooperative framework.

16. In follow-up to this expert roundtable, there was support for the more systematic compiling of empirical data on the scale and the scope of the problem. This, coupled with an analysis of the data, should be done by the varying actors from their various perspectives. UNHCR, for its part, would consolidate guidance on rescue-at-sea involving asylum-seekers and refugees. The International Maritime Organisation's inter-agency initiative will be informed of the outcome of this Expert Roundtable and IMO is encouraged to utilise its existing mechanisms to address any inadequacies in the law. UNHCR's Executive Committee and the UNHCR, IOM consultative mechanism, Action Group on Asylum and Migration (AGAMI) were considered as other appropriate fora to take the discussion further.

UNHCR
11 April 2002

5. Expert Roundtable: Rescue at Sea - Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees (Background Note)*

Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea

25-26 March 2002, Lisbon, Portugal

I. Introduction

1. The phenomenon of people taking to the seas in search of safety, refuge, or simply better economic conditions is not new. The mass exodus of Vietnamese boat people throughout the 1980s was followed in the 1990s by large-scale departures from places such as Albania, Cuba and Haiti. The term “boat people” has now entered into common parlance, with asylum-seekers and migrants trying to reach the closest destination by boat, in the Mediterranean, the Caribbean and the Pacific regions.

Since the vessels used are often overcrowded and un-seaworthy, rescue-at-sea, disembarkation and processing of those rescued has re-emerged as an important but difficult issue for States, international organisations, the shipping industry and, of course, the vulnerable boat people themselves. In an effort to stem the flow of boat people, destination States have increasingly resorted to interception measures within the broader context of migratory control measures, albeit that in some instances adequate protection safeguards have not been evident.

2. This paper examines provisions from different strands of international law that bear on the rescue-at-sea of asylum-seekers and refugees. It focuses on relevant norms, and highlights areas of law which require clarification. It also looks at institutional collective efforts to tackle this issue in the past and suggests elements that could be explored further to address the current situation more effectively within an international co-operative framework.

II. General legal framework

3. The legal framework governing rescue-at-sea and the treatment of asylum-seekers and refugees rests on the applicable provisions of international maritime law, in interaction with international refugee law. Aspects of international human rights law and the emerging regime for combating transnational crime are also relevant. The following paragraphs set out the more pertinent legal provisions and offer an interpretation, which would, though, benefit from analysis and further elaboration.

A. International maritime law

4. Aiding those in peril at sea is one of the oldest of maritime obligations. Its importance is attested by numerous references in the codified system of international maritime law as set out in several conventions, namely:

- the United Nations Convention on the Law of the Sea of 1982, (UNCLOS);
- the International Convention for the Safety of Life at Sea of 1974, as amended, (SOLAS);

* Available at: <http://www.unhcr.org/protect/PROTECTION/3e5f35e94.pdf>.

- the International Convention on Maritime Search and Rescue of 1979, as amended, (SAR);
- the 1958 Convention on the High Seas (to the extent that it has not been superseded by UNCLOS).

Responsibilities of different actors

5. These conventions explicitly contain the obligation to come to the assistance of persons in distress at sea.¹ This obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved. The legal framework also foresees different sets of responsibilities that need to be considered both independently and to the degree to which they inter-relate.

6. The responsibility of the ship master² – The ship master is responsible for providing assistance and/or rescue. International maritime law does, however, not elaborate on any continuing responsibility of the master once a rescue has been effected. Indicative of the nature of the responsibility assumed by the master is the fact that he or she may be criminally liable under national law for failing to uphold the duty to render assistance whilst commanding a vessel under the flag of certain States.³ In addition, the master bears responsibilities not only to those rescued but also for the general safety of his vessel. Effecting a rescue may, under certain circumstances, result in danger to both, as for example when the number of persons rescued outnumbers those legally permitted to be aboard and exceeds the availability of lifejackets and other essential safety equipment.

7. The responsibility of coastal States - This is stipulated as the obligation to develop adequate search and rescue services. The relevant instruments do not expand on the responsibility of coastal States for disembarkation or landing of those rescued nor any consequent follow up actions.⁴ Obviously, coastal States with particularly long coastlines, those with a large

¹ See for example, paragraph 2.1.10 of Chapter 2 of the Annex to SAR, 1979, which states, “Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found”. Regulation 15 of Chapter V of the Annex to SOLAS, obliges each State to “ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea around its coasts.” Article 98(1) of UNCLOS, 1982, states that every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers, *inter alia*, to render assistance to any person found at sea and in danger of becoming lost. Some of these provisions have become so universally recognised as to be considered customary international law.

² The obligation of ship masters to provide assistance is repeatedly articulated in international maritime law. First codified in 1910, it is incorporated in Article 98 of UNCLOS and Article 10 of the 1989 Salvage Convention. It is also explicitly mentioned in SOLAS (V/7). All three conventions require the master of a ship, so far as he can do without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea and to proceed with all possible speed to the rescue of persons in distress. It is again specifically mentioned in SOLAS (V/33) but is not referred to in SAR, the emphasis of which is more on the responsibilities of States Parties to that Convention.

³ This is the case in the UK and in Germany, for example.

⁴ The obligation of States to render assistance to persons in distress at sea is an enshrined principle of maritime law. Article 98 of UNCLOS requires every coastal State to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements, to co-operate with neighbouring states for this purpose. The detail of search and rescue obligations is to be found in SAR, which defines rescue as involving not only the retrieving of persons in distress and the provision of initial medical care but also their delivery to a place of safety. The SAR Convention expands further on the technical obligations of States vis-à-

coverage area for search and rescue operations and those located on major shipping routes, would be otherwise particularly affected.

8. The responsibility of flag States – Flag States are of course bound by the dictates of international maritime law, but in practice responsibilities can be difficult to locate given the distinction between those vessels that have a clear relationship to the flag under which they sail and those operating under the open registry system - so called *flags of convenience*.⁵ Flag State responsibility has been invoked partly on the basis of the vessel being considered a “floating extension” of the State in question, which is problematic as regards *flags of convenience*. While this position may not have a firm legal grounding, it seems to have contributed to the practice of attributing certain responsibilities to flag States and/or the commercial vessels operating under their authority. For example, with regard to the treatment of stowaways, a practice has evolved which holds ship owners largely responsible for any stowaways found aboard their vessels.⁶

9. The nature of flag State responsibility is also affected by the distinction between commercial vessels and vessels owned or operated by a government and used only on government non-commercial service. Such *State vessels* include, *inter alia*, naval vessels, coast guard vessels and national lifeboats specifically tasked with search and rescue operations. Where such vessels engage in rescue operations within territorial waters, the responsibility for those rescued would devolve on that State. This may arguably be the case even where such scenarios occur on the high seas, particularly if the rescue occurs in the context of interception measures.

10. The roles and responsibilities of international agencies and the international community as a whole – International agencies, such as the International Maritime Organisation (IMO), UNHCR and the International Organisation for Migration (IOM) have specific but differing responsibilities towards persons rescued-at-sea. IMO has the widest and most direct set of responsibilities. It oversees the development of international maritime law, with emphasis on safety aspects, providing technical advice and assistance to States to ensure that they respect their obligations. UNHCR has a specific responsibility to guide and assist states and other actors on the treatment of asylum-seekers and refugees found at sea and to monitor compliance with refugee protection responsibilities in such scenarios.⁷ IOM plays a specific

vis rescue operations but without specifically mentioning the question of disembarkation or landing of those rescued.

⁵ In relation to flag States, Article 6 of the Convention on the High Seas, 1958, states: “*Ships shall sail under the flag of one State only and save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.*” In addition and more specifically on the point of non-commercial vessels, Article 9 of the same Convention states that, “*Ships owned or operated by a State and used only on government non commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.*”

⁶ Despite efforts to promote shared responsibilities for resolving the problem of stowaways, as exemplified by the development of IMO *Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases* (under the auspices of the FAL Committee/Convention of the Facilitation of Maritime Traffic), practice continues to focus on the responsibilities of the shipping companies, including to the extent of obliging them to re-assume responsibility for those stowaways disembarked and considered under national asylum systems but whose cases are ultimately rejected. It is worth noting that the Guidelines were developed to fill the gaps resulting from the fact that the 1957 International Convention Relating to Stowaways has yet to enter into force.

⁷ For further detail on the competence of UNHCR please refer to Annex 1, *Background Note; Concerning the Competence of the United Nations High Commissioner for Refugees (UNHCR), in relation to rescue-at-sea*

role regarding the needs of migrants at sea, as part of its broader mandate to address issues related to migration. The international community as a whole has a responsibility in terms of developing appropriate responsibility-sharing mechanisms involving States and other actors in order to ensure appropriate responses to the array of scenarios involving migrants, asylum-seekers, refugees and others facing difficulties at sea. Responsibilities assumed by the international community extend not only to response measures but also include preventative actions.⁸

Delivery to a place of safety

11. The obligation to come to the aid of those in peril at sea is beyond doubt. There is however, a lack of clarity, and possibly lacunae, in international maritime law when it comes to determining the steps that follow once a vessel has taken people on board.

12. The SAR definition of rescue⁹ implies disembarkation since the requirement of delivery to a place of safety cannot be considered to be met by maintaining people on board the rescuing vessel indefinitely. Neither SAR nor other international instruments elaborate, however, on the criteria for disembarkation. Recent discussions at IMO fora have also highlighted the lack of clarity on this issue. Faced with this gap in the law, UNHCR has consistently argued for prompt disembarkation at the next port of call.¹⁰

13. The effectiveness of the international search and rescue regime rests on the swift and predictable action of all actors. This however, poses a particular challenge where it transpires that there are asylum-seekers and refugees among those rescued.

In such instances, States have questioned the extent of their responsibilities and have delayed, and even blocked, disembarkation, arguing that this would result in a strain on their asylum systems, encourage irregular movement and even contribute to smuggling operations. These concerns are valid and need to be fully reflected in the design of an international co-operative framework to deal with the situation of asylum-seekers rescued at sea.

14. From the perspective of the master, the security of his vessel and the health and safety of those aboard are of paramount concern. Existing guidelines and procedures rarely take sufficient account of the potential for danger if the ship were prevented from proceeding immediately to the first appropriate port of call. Health and safety concerns include:

- insufficient water and provisions for the number of people on board;
- insufficient medical care for the number of people on board;
- medical emergencies at sea;
- exceeding the number of persons legally permitted to be on board;
- insufficient life-saving equipment for the number of people on board;
- insufficient accommodation for the number of people on board;

matters, as distributed to the participants in COMSAR 6, Working Group 1, during the Committee session held in London, 18 to 20 February 2002.

⁸ See for example the Preamble to the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, 2000*, which acknowledges the need to strengthen international co-operation in order to address the root causes of migration.

⁹ Described in the Annex, Chapter 1, paragraph 1.3.2 as, “an operation to retrieve persons in distress, provide for their medical or other needs, and deliver them to a place of safety”.

¹⁰ The term “next port of call” is nowhere mentioned in international maritime law in connection with rescue-at-sea but has been used in this context by UNHCR’s Executive Committee in a number of its Conclusions on the subject.

- risk to the safety of both crew and passengers if the persons taken on board display aggressive or violent behaviour or threaten to do so.

15. From UNHCR's perspective, the pressing humanitarian challenge in any rescue situation is to ensure an immediate life-saving solution for the plight of severely traumatised persons, without an over-emphasis on legal and practical barriers. It is crucial that ship masters are actively facilitated in their efforts to save lives, confident that safe and timely disembarkation will be guaranteed.

16. In consequence, there are a number of factors, which come into play when considering the question of disembarkation or landing of rescued persons and in particular of asylum-seekers and refugees. These include; i) legal obligations; ii) practical, security and humanitarian concerns; and iii) commercial interests. On occasion, these differing considerations may be perceived as competing or conflicting interests and there is a need for a deeper analysis of the interplay between them. UNHCR believes that guidance on formulating the most appropriate responses can be found in an analysis of the interface between international maritime law and other relevant bodies of international law and practice, and in particular the dictates of international refugee law.

B. International refugee law¹¹

17. International maritime law assumes that the nationality and status of the individual are of no relevance vis-à-vis the obligation to rescue.¹² By contrast, international refugee law is premised on the understanding that a person has a well founded fear of persecution, on specific grounds, before he or she can avail of international protection. Clarification of status is therefore crucial in the refugee context to determine obligations owed to the refugee. It is clear that a ship master is not the competent authority to determine the status of those who fall under his temporary care after a rescue operation. Ensuring prompt access to fair and efficient asylum procedures is therefore key to ensuring the adequate protection of asylum-seekers and refugees amongst those rescued.

18. State responsibility under international refugee law, and in particular the 1951 Convention relating to the Status of Refugees, is activated once it becomes clear that there are asylum-seekers among those rescued. Consistent with the object and purpose of the 1951 Convention and its underlying regime, the responsibilities of States to ensure admission, at least on a temporary basis, and to provide for access to asylum procedures have been elaborated upon in a number of Executive Committee Conclusions of UNHCR's Programme (EXCOM Conclusions).

Whilst not exhaustive, these include:

¹¹ The main body of international refugee law, comprised of the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and numerous Conclusions of the Executive Committee of UNHCR (EXCOM Conclusions), is further complemented by international human rights law. Much of the emphasis of international refugee law is placed on the identification of those who meet the definition of a refugee contained in Article 1 A(2) of the 1951 Convention and thus benefit from international protection. Please note that Article 11 of the 1951 Convention makes explicit reference to refugee seamen. See p. 82 of *Convention Relating to the Status of Refugees; Its History, Contents, and Interpretation, a Commentary by Nehemiah Robinson*, republished by UNHCR in 1997, for further information on the rationale behind this provision and the obligations it imposes on flag States. The 1957 Hague Agreement Relating to Refugee Seamen further elaborates on these specific obligations.

¹² As specified for example in the Annex, Chapter 2, paragraph 2.1.10 of the SAR Convention.

- EXCOM Conclusion No. 22 (1981), Part II A, para. 2 states: “In all cases the fundamental principle of *non-refoulement*, including - non-rejection at the frontier - must be scrupulously observed.”
- EXCOM Conclusion No. 82 (1997), para. d, (iii) reiterates: “The need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs”
- EXCOM Conclusion No. 85 (1998), para. q: “...reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining status and protection needs.”

19. The 1951 Convention defines those on whom it confers protection and establishes key principles such as non-penalisation for illegal entry and *non-refoulement*.¹³ It does not, however, set out specific procedures for the determination of refugee status as such. Despite this it is clearly understood and accepted by States that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention.¹⁴ States require such procedures to identify those who should benefit from international protection under the 1951 Convention, and those who should not.

20. The principle of access to fair and efficient procedures is equally applicable in the case of asylum-seekers and refugees rescued at sea. The reasons motivating their flight and the circumstances of their rescue frequently result in severe trauma for the persons concerned. In UNHCR’s view, this provides added impetus for prompt disembarkation followed by access to procedures to determine their status. Achieving this objective requires clarity on a number of key issues, including: i) the identification of asylum-seekers among those rescued, as well as, ii) the determination of the State responsible under international refugee law for admission and processing of the asylum-seekers.

The identification of asylum-seekers

21. As regards the first question, at a land border, the identification of an asylum-seeker usually occurs through the lodging of an asylum request with the competent State authorities. This may be done by a formal written application or verbally, to the border authorities at the point of entry. In the case of rescue-at-sea, the mechanism of lodging an asylum application is unclear.

22. While the legal regime applicable on board ship is that of the flag State, this does not mean that *all* administrative procedures of the flag State would be available and applicable in such situations. The master will not be aware of the nationality or status of the persons in distress and cannot reasonably be expected to assume any responsibilities beyond rescue. The identification of asylum-seekers and the determination of their status is the responsibility of State officials adequately trained for that task.

¹³ 1951 Convention Relating to the Status of Refugees, Articles, 1, 31 and 33.

¹⁴ See, EXCOM Conclusion No. 81 (XLVII) 1997, para. (F) (A/AC.96/895, para 18); EXCOM Conclusion No. 82 (XLVIII) 1997 para. (d)(iii) (A/AC/96/895); EXCOM Conclusion No 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3). It should be noted that in mass influx situations, access to individual procedures may not prove practicable and other responses may be required.

23. In UNHCR's view, the identification and subsequent processing of asylum-seekers is an activity most appropriately carried out on dry land. Onboard processing, both in the form of initial screening and more comprehensive determination, has been attempted in past refugee crises. It proved problematic in various respects, including *inter alia*, ensuring adequate access to translators, safeguarding the privacy of the interviews carried out under difficult conditions on board ship, ensuring access to appropriate counsel and providing appropriate appeal mechanisms.

24. Onboard processing may be appropriate in some limited instances depending on the number and conditions of the persons involved, the facilities on the vessel and its physical location. It would, however, be impractical for situations involving large numbers of people or where their physical and mental state is not conducive to immediate processing. Onboard processing is inappropriate where the rescued persons are aboard a commercial vessel. The first priority in most instances remains prompt and safe disembarkation followed by access to fair and efficient asylum procedures. An effective response to the challenge of properly identifying asylum seekers should therefore acknowledge that the status of the rescued persons is best determined by the appropriate authorities after disembarkation.

Determination of the State responsible under international refugee law

25. This raises the question of determining the State responsible under international refugee law for admitting the asylum-seekers (at least on a temporary basis) and ensuring access to asylum procedures. International refugee law, read in conjunction with international maritime law, suggests that this is generally the State where disembarkation or landing occurs. This will normally be a coastal State in the immediate vicinity of the rescue.

26. The flag State could also have primary responsibility under certain circumstances. Where it is clear that those rescued intended to request asylum from the flag State, that State could be said to be responsible for responding to the request and providing access to its national asylum procedure. In the event that the number of persons rescued is small, it might be reasonable for them to remain on the vessel until they can be disembarked on the territory of the flag State. Alternatively, circumstances might necessitate disembarkation in a third State as a transitional measure without that State assuming any responsibility to receive and process applications. Arguably, and even on the high seas, the responsibility accruing to the flag State would be stronger still, where the rescue operation occurs in the context of interception measures. The cumulative effect of the original intended destination and the deliberate intervention of the State to prevent the asylum-seeker from reaching the final destination underpins such an argument.¹⁵

27. The Executive Committee of UNHCR has formulated a number of Conclusions in relation to rescue-at-sea emphasising the question of disembarkation and admission. These Conclusions reflect the experience of the 1980s, which was characterised by serious concerns that refusals to permit disembarkation, especially if only requested on a temporary basis, would have the effect of discouraging rescue-at-sea and undermining other international

¹⁵ EXCOM Conclusion No. 15 (XXX) of 1979 states, *inter alia*, "The intentions of the asylumseeker as regards the country in which he wishes to request asylum should as far as possible be taken into account." This does not imply an unfettered right of asylum-seekers to pick and choose at will the country in which they intend to request asylum. Rather the reference is framed in the context of situations involving individual asylum-seekers and is but one of a number of criteria. It does, however, provide guidance as to how to address the problem of refugees without an asylum country.

obligations. Whilst the current situation is not as acute as that faced during the 1980s, there are similarities and now, as then, lives are at risk. The underlying need to uphold the obligation to rescue in full compliance with the consequent obligations that arise under international refugee law remains paramount.

28. The most salient guidance from EXCOM Conclusions includes the following:

- EXCOM Conclusion No. 14 (1979), para. c, notes as a matter of concern: "...that refugees had been rejected at the frontier... in disregard of the principle of *non-refoulement* and that refugees, arriving by sea had been refused even temporary asylum with resulting danger to their lives...."
- EXCOM Conclusion No. 15, (1979) para. c, states: "It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."
- EXCOM Conclusion No.23, (1981) para. 3 states "In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities."

29. In summary, the Executive Committee pronouncements, taken in conjunction with the obligation under international maritime law to ensure delivery to a place of safety, call upon coastal States to allow disembarkation of rescued asylum-seekers at the next port of call.¹⁶

"Next port of call"

30. Since the "next port of call" with reference to the disembarkation of rescued persons is nowhere clearly defined, there are a number of possibilities, which would need to be further explored to clarify this concept. In many instances, especially when large numbers of rescued persons are involved, it will in effect be the nearest port in terms of geographical proximity given the overriding safety concerns. Under certain circumstances, it is also possible to conceive the port of embarkation as the appropriate place to effect disembarkation, arising from the responsibility of the country of embarkation to prevent un-seaworthy vessels from leaving its territory. Another option would be the next scheduled port of call. This would be appropriate, for instance, in cases where the number of people rescued is small and the safety of the vessel and those on board is not endangered nor likely to necessitate a deviation from its intended course. There may be instances where the next port of call may not be the closest one but rather the one best equipped for the purposes of receiving traumatised and injured victims and subsequently processing any asylum applications. In other situations, involving State vessels intercepting illegal migrants, the nearest port of that State could be regarded as the most appropriate port for disembarkation purposes. From a safety and humanitarian perspective, ensuring the safety and dignity of those rescued and of the crew, must be the overriding consideration in determining the point of disembarkation.

¹⁶ As previously noted, the term "next port of call" in connection with disembarkation or landing of rescued persons is unknown as such to maritime law but rather results from EXCOM Conclusions.

31. With due regard to all of these considerations the development of criteria that help to define the most appropriate port for disembarkation purposes will be informed by the following factors:

- the legal obligations of States under international maritime law and international refugee law;
- the pressing safety and humanitarian concerns of those rescued;
- the safety concerns of the rescuing vessel and the crew;
- the number of persons rescued and the consequent need to ensure prompt disembarkation;
- the technical suitability of the port in question to allow for disembarkation;
- the need to avoid disembarkation in the country of origin for those alleging a well founded fear of persecution;
- the financial implications and liability of shipping companies engaged in undertaking rescue operations.

C. International human rights law

32. International human rights law also contains important standards in relation to those in distress and rescued at sea. The safe and humane treatment of all persons rescued regardless of their legal status or the circumstances in which they were rescued is of paramount importance. Basic principles such as the protection of the right to life, freedom from cruel, inhuman or degrading treatment and respect for family unity by not separating those rescued must be upheld at all times.¹⁷

D. International criminal law

33. Questions of international criminal law arise where the rescue operation is necessitated as a consequence of smuggling operations. People smuggling may indeed be a factor when large numbers of persons are found on poorly equipped and un-seaworthy vessels, flouting the basic standards of maritime safety. Combating this crime is a matter of concern for States world-wide, alarmed by its scale and scope and the huge profits generated from it.

34. The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, while not yet in force, constitutes the most comprehensive legal instrument, to date, covering smuggling of persons.¹⁸ Under the Protocol, the fact that migrants, including asylum-seekers and refugees, were smuggled does not deprive them of any rights as regards access to protection and assistance measures. In the context of rescue-at-sea, it is crucial that the rights of those rescued are not unduly restricted as a result of actions designed to tackle the crime of

¹⁷ For further discussion of the applicable human rights standards please see *Reception of Asylum- Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/01/17, the contents of which can be considered to apply *mutatis mutandis* in rescue situations.

¹⁸ Article 16(1) obliges States to take “*all appropriate measures ... to preserve and protect the rights of persons*” who have been the object of smuggling, “*in particular the right to life and the right not to be subjected to torture or other cruel, inhuman, or degrading treatment, or punishment.*” In addition, according to Article 16(3), States should “*afford appropriate assistance to migrants whose lives and safety are endangered*” by reason of being smuggled. In applying the provisions of Article 16, States are required in its paragraph 4 to take into account the special needs of women and children.

people smuggling. Criminal liability falls squarely upon the smugglers and not on the unwitting users of their services.

35. With respect to the special circumstances of asylum-seekers and refugees, it should be noted that the Protocol contains a general saving clause in its Article 19 to ensure compatibility with obligations under international refugee law.¹⁹ It is clear from the formulation of Article 19 that there is no inherent conflict between the standards set by the international law to combat crimes and those contained in international refugee law. Combating crime does not mean a diminution of the rights of asylum-seekers and refugees.

III. The international co-operative framework

36. Given the complexity of rescue-at-sea situations, not least due to the involvement of different actors and sets of responsibilities, there is a need for an effective international co-operative framework in this area. The overriding objective of such a framework is to develop responses defining responsibilities in a manner that can be activated without undue delay.

A. Past practice and current challenges

37. A brief examination of past practices provides some guidance as to the type of arrangements, which may be required to face current challenges.

- The crisis of the Vietnamese boat people prompted specialised response mechanisms to support rescue efforts and the subsequent search for durable solutions. The most important of these were the Disembarkation Resettlement Offers Scheme (DISERO) and the Rescue-at-Sea Resettlement Offers Scheme (RASRO).²⁰ Both schemes provide an indication of the level of State co-operation required to secure effective response mechanisms.
- The constituent elements of both schemes included:
 - agreement of the coastal States to allow disembarkation
 - agreement of the coastal States to provide temporary refuge
 - open-ended guarantees from contributing third States that those rescued would be resettled elsewhere.

38. Eventually however, both DISERO and RASRO were terminated as the guarantee that any Vietnamese rescued at sea would be resettled within 90 days did not square with the 1989 Comprehensive Plan of Action guidelines. These required that all new arrivals undergo screening to determine their status. Countries in the region became increasingly unwilling to disembark rescued boat people, fearing that resettlement guarantees would not be forthcoming.

¹⁹ Article 19 states that “nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non- refoulment as contained therein.”

²⁰ Article 19 states that “nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non- refoulment as contained therein.”

39. Any consideration of mechanisms akin to DISERO and RASRO in the current context will need to take account of the fact that the vast majority of those rescued were considered *prima facie* refugees, in direct flight from their place of origin. Today's situation is characterised by complex movements and mixed flows where the refugee status of those involved must be carefully determined.²¹ The composite nature of today's movements, coupled with more restrictive asylum practices generally, compounds the difficulty of agreeing on policies and standards for the processing of asylum applications of persons rescued at sea.

B. Elements of an international framework

40. Against this background, it is suggested here to explore an international framework, the goals of which would generally be the following:

- Support for the international search and rescue regime;
- Easing the burden on States of disembarkation;
- An equitable responsibility sharing approach to the determination of refugee status and international protection needs of those rescued;²²
- An equitable responsibility sharing approach to the realisation of durable solutions to meet international protection needs;²³
- Agreed re-admission and strengthened assistance, financial and otherwise, to first countries of asylum;
- Agreement by countries of origin to accept the return of their nationals determined, after access to fair and efficient asylum procedures, not to be in need of international protection.

41. In order to ensure the effectiveness of an international framework the roles and responsibilities of numerous actors would have to be clarified. The principal actors involved would include:

- The asylum-seekers and refugees;
- Countries of origin;
- Countries of first asylum;
- Countries of transit;
- Countries of embarkation;
- Countries of disembarkation;
- Flag States;
- Coastal States;
- Resettlement countries;

²¹ Most of the migratory flows which have given rise to the current debate on rescue-at-sea are characterised as mixed. This should not, however, be taken to exclude the possibility of *prima facie* recognition in the event of a massive outflow by sea directly from a country of origin, similar to that of the Vietnamese in the 1980s. In such a scenario individual refugee status determination would be impractical and response mechanisms would need to be tailored accordingly.

²² This could, for instance, include stand-by arrangements to assist states in processing asylum applications, when the number of rescued asylum-seekers overwhelms the capacity of the individual asylum system at the point of disembarkation. This could mean the dispatch of additional asylum officers from third countries, transfer arrangements for the processing of cases and capacity-building measures to strengthen protection and assistance. Potential distribution mechanisms in the immediately affected region, based on pre-arranged quotas and criteria, could play a positive role in facilitating such arrangements.

²³ Specific resettlement pools for rescue-at-sea situations could, for instance, be created. This would require the activation of emergency mechanisms to deal with especially pressing cases.

- The donor community;
- International organisations, notably UNHCR, IMO and IOM.

42. From UNHCR's perspective the main concerns at stake which involve issues of refugee law, include:

- The right to seek and enjoy asylum;
- *Non-refoulement*;
- Access to fair and efficient asylum procedures;
- Conditions of treatment;
- Appropriate balance between State responsibilities and that of international organisations;
- Safe return to first countries of asylum;
- Durable solutions for those recognised as refugees;
- Orderly and humane return of persons determined not to be in need of international protection.

43. A workable framework will also need to take due account of the broader context, including the following factors:

- The impact on smuggling and irregular movement;
- Interception practices;
- The adverse impact of exporting condoned practices;
- Appropriate responsibility sharing vs. individual State responsibility;
- The impact on resettlement policy;
- The challenge of dealing with cases found not to be in need of international protection.

44. In addition, the importance of preventative measures should not be overlooked. Many concrete steps can be taken to discourage people from risking dangerous sea voyages. Public information campaigns, actions to prevent the departure of un-seaworthy vessels, and stringent criminal law enforcement measures directed against smugglers are features of such measures.

45. Finally, certain information needs need to be met. These include: i) measures to fill existing information gaps on the scale and scope of the problem; ii) measures to compile and analyse the existing legislative norms in a more detailed fashion, including recommendations for amendments where these prove necessary; iii) an open and transparent exchange of information on current practices in order to identify good state practice, and; iv) the development of a comprehensive information strategy designed to inform public opinion on problems related to rescue-at-sea, especially on the rights and obligations of those involved.

IV. Concluding observations

46. It is hoped that this Background Note helps to stimulate a discussion on how to address complex rescue-at-sea situations involving asylum-seekers and refugees.

UNHCR
18 March 2002²⁴

²⁴ Final version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, held in Lisbon, Portugal on 25-26 March, 2002.

C. INTERNATIONAL HUMAN RIGHTS LAW

C. INTERNATIONAL HUMAN RIGHTS LAW

International human rights law sets out the basic civil, political, economic, social and cultural rights that all human beings should enjoy regardless of their nationality or status. This Section contains selected provisions that are of particular relevance for the protection of refugees, asylum-seekers and migrants travelling irregularly by sea.

1. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

Adoption: 18 December 1990

Entry into force: 1 July 2003

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Migrant Workers Convention) sets out international standards for the treatment, welfare and rights of migrant workers regardless of their status. Note that this Convention does not apply to refugees or stateless people.

Selected Provisions

Article 8

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.

2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

Article 10

No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 17

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment

* 2220 United Nations Treaty Series 39481, available at: <http://www2.ohchr.org/english/law/cmw.htm>.

appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

4. During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.

5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.

7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

Article 35

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration as provided in part VI¹ of the present Convention.

Article 68

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

- (a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;
- (b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on

¹ Part VI of the Convention addresses “Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families”.

persons, groups or entities which organize, operate or assist in organizing or operating such movements;

- (c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

Article 70

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

Article 71

1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.

2. As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.

2. Convention on the Rights of the Child*

*Adoption: 20 November 1989
Entry into force: 2 September 1990*

The Convention on the Rights of the Child (CRC) sets out international standards for the treatment, welfare and rights of children. It contains specific provisions regarding the rights of children seeking international protection, taking into account their particular needs and best interests.

Selected Provisions

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

...

Article 22

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

* 1577 United Nations Treaty Series 27531, available at: <http://www2.ohchr.org/english/law/crc.htm>.

3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

*Adoption: 10 December 1984
Entry into force: 26 June 1987*

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT) aims to prevent and ban torture. It prohibits the return of any person to a country where he or she might be in danger of being subject to torture and other cruel, inhuman or degrading treatment or punishment.

Selected Provision

Article 3

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

...

* 213 United Nations Treaty Series 221, available at: <http://www2.ohchr.org/english/law/cat.htm>.

4. International Covenant on Civil and Political Rights*

*Adoption: 16 December 1966
Entry into force: 23 March 1976*

The International Covenant on Civil and Political Rights (ICCPR) sets out a number of civil and political rights, including the right to life, protection against arbitrary detention and torture, freedom of movement for those lawfully within the territory of a State, equality before the law and the right to due process.

*Most of the rights provided under the ICCPR are applicable to all persons within a State's territory and subject to its jurisdiction, without distinction of any kind. According to the Human Rights Committee** General Comment 31 (extracts also set out below), this means that a State Party must respect and ensure the rights laid down in the ICCPR to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. This is particularly relevant for rescue at sea or interception operations that take place on the high seas or in the territorial waters of another State.*

Selected Provisions

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

* 999 United Nations Treaty Series 171, available at: <http://www2.ohchr.org/english/law/ccpr.htm>.

** The Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR by its State parties. The Committee publishes its interpretation of the content of human rights provisions on thematic issues or its methods of work ("general comments").

Article 6

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

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

Article 7

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

Article 9

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

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

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

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

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

Article 10

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

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

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

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

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

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

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

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

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

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

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the

Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

...

Human Rights Committee, General Comment 31 [80]***
The Nature of the General Legal Obligation Imposed on States Parties to the Covenant****

Adoption: 29 March 2004 (2187th meeting)

Selected Paragraphs

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

...

12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

*** Available at: <http://www2.ohchr.org/english/bodies/hrc/comments.html>.

**** International Covenant on Civil and Political Rights.

5. International Covenant on Economic, Social and Cultural Rights*

*Adoption: 16 December 1966
Entry into force: 3 January 1976*

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of all individuals to an adequate standard of living, which includes the provision of food, clothing, and accommodation, as well as a right to enjoy the highest attainable standards of physical and mental health and the right to education. The rights provided under the ICESCR are applicable to all persons with a State's territory and subject to its jurisdiction, without discrimination of any kind.

Selected Provisions

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

* 993 United Nations Treaty Series 14531, available at: <http://www2.ohchr.org/english/law/cescr.htm>.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

...

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

D. INTERNATIONAL HUMANITARIAN LAW

D. INTERNATIONAL HUMANITARIAN LAW

This Section includes selected provisions of international humanitarian law that may be relevant where irregular movements by sea occur in the context of armed conflict. In particular, international humanitarian law obliges parties to an armed conflict to take all possible measures to search for, collect and evacuate the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment and ensure their adequate care. There are also obligations on parties to take feasible measures to account for persons reported missing, with respect to the right of families to know the fate of their missing relatives, and with respect to the management of the dead and related issues.

The foundation of international humanitarian law consists of four Conventions (I – IV), established by the Diplomatic Conference for the Establishment of International Conventions for the Protection for Victims of War, held in Geneva in 1949 (collectively “the Geneva Conventions of 1949”). There are also three Protocols Additional to the Geneva Conventions (I - III), which bring up to date the rules governing the conduct of hostilities and those protecting war victims. The application of the Geneva Conventions is limited to “international armed conflicts” (i.e. opposing two or more States); only Common Article 3 to the Geneva Conventions and Additional Protocol II apply to “non-international armed conflicts” (i.e. between government forces and non-governmental armed groups, or between such groups only).

*These instruments codified long-standing rules of customary international law, which continue to be of relevance, particularly in non-international armed conflicts.**

1. Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea**

*Adoption: 12 August 1949
Entry into force: 21 October 1950*

This Convention (II) replaced Hague Convention (X) of 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. It codifies obligations for each party to an international armed conflict to search for, collect and evacuate the shipwrecked, sick and wounded, to protect them against pillage and ill-treatment and ensure their adequate care. It also establishes certain standards with respect to the management of the dead and related issues.

Selected Provisions

Chapter II. Wounded, Sick and Shipwrecked

...

* For relevant rules of customary international humanitarian law see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (2005).

** 75 United Nations Treaty Series 85, available at: <http://www.icrc.org/ihl.nsf/FULL/370?OpenDocument>.

Article 18

After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.

Article 19

The Parties to the conflict shall record as soon as possible, in respect of each shipwrecked, wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification. These records should if possible include:

- (a) designation of the Power on which he depends;
- (b) army, regimental, personal or serial number;
- (c) surname;
- (d) first name or names;
- (e) date of birth;
- (f) any other particulars shown on his identity card or disc;
- (g) date and place of capture or death;
- (h) particulars concerning wounds or illness, or cause of death.

As soon as possible the above-mentioned information shall be forwarded to the information bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of the double identity disc, or the identity disc itself if it is a single disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

Article 20

Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. Where a double identity disc is used, one half of the disc should remain on the body.

If dead persons are landed, the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 shall be applicable.

Article 21

The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.

Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance.

They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.

...

2. Convention (IV) relative to the Protection of Civilian Persons in Time of War*

*Adoption: 12 August 1949
Entry into force: 21 October 1950*

Convention IV was adopted after World War II to enhance the protection of civilians in wartime. Inter alia, this Convention creates an obligation for parties to an armed conflict to facilitate the right of families to know the fate of their missing relatives and to renew contact with them.

Selected Provision

Part II. General Protection of Populations Against Certain Consequences of War

...

Article 26

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

...

* 75 United Nations Treaty Series 287, available at: <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*

*Adoption: 8 June 1977
Entry into force: 7 December 1978*

Protocol I contains specific provisions regarding the protection of victims of international armed conflicts. Inter alia, it sets out standards regarding the protection and care of the wounded, sick and shipwrecked, as well as with regards to missing persons and the treatment of the remains of deceased persons.

Selected Provisions

Part. II WOUNDED, SICK AND SHIPWRECKED

Section I : General Protection

Article 8 *Terminology*

For the purposes of this Protocol:

a) "Wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, newborn babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;

b) "Shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol;

...

Article 10 *Protection and care*

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

* 1125 United Nations Treaty Series 3, available at: <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

...

Article 17 *Role of the civilian population and of aid societies*

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.

2. The Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for as long as they are needed.

...

Section III Missing and Dead Persons

Article 32 *General principle*

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

Article 33 *Missing persons*

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.

2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

- (a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
- (b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red

Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

Article 34 *Remains of deceased*

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

- (a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
- (b) to protect and maintain such gravesites permanently;
- (c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country or such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

4. A High Contracting Party in whose territory the grave sites referred to in this Article are situated shall be permitted to exhume the remains only:

- (a) in accordance with paragraphs 2 (c) and 3, or
- (b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country or its intention to exhume the remains together with details of the intended place of reinterment.

...

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*

*Adoption: 8 June 1977
Entry into force: 7 December 1978*

Protocol II applies to victims of non-international armed conflicts (an estimated 80% of all victims of armed conflicts since 1945). The aim of Protocol II is to extend the essential rules of the law of armed conflicts to internal wars. It establishes certain fundamental guarantees with regards to the treatment of victims of non-international armed conflicts. It also contains specific provisions with regards to the search, protection and care of those wounded, sick or shipwrecked as a result of such conflicts.

Selected Provisions

Part II Humane Treatment

Article 4 *Fundamental guarantees*

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
 - (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
 - (b) collective punishments;
 - (c) taking of hostages;
 - (d) acts of terrorism;
 - (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;
 - (f) slavery and the slave trade in all their forms;
 - (g) pillage;
 - (h) threats to commit any or the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:
 - (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
 - (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

* 1125 United Nations Treaty Series 609, available at: <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>.

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

...

Part III. Wounded, Sick and Shipwrecked

Article 7 *Protection and care*

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 8 *Search*

Whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

...

E. INTERNATIONAL CRIMINAL LAW

E. INTERNATIONAL CRIMINAL LAW

*This Section includes selected provisions of international criminal law that may be relevant to asylum-seekers, refugees and undocumented migrants who have been trafficked or smuggled by sea.**

1. Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime**

*Adoption: 15 November 2000
Entry into force: 28 January 2004*

This Protocol is the most comprehensive international legal instrument to date addressing human smuggling. The Protocol sets out a number of measures to prevent the smuggling of migrants by sea, while safeguarding the rights and safety of those involved, including asylum-seekers and refugees. Inter alia, it specifically authorises States, under certain conditions, to intercept vessels if they may have smuggled people onboard. The Protocol also contains a general saving clause to ensure compatibility with international human rights and refugee law.

Selected Provisions

Article 3

Use of terms

For the purposes of this Protocol:

- (a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;
- (b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;
- (c) "Fraudulent travel or identity document" shall mean any travel or identity document:

* For further with regards to human trafficking see: UNHCR. "Refugee Protection and Human Trafficking – Selected Legal Reference Materials", December 2008, available at: <http://www.unhcr.org/4986fd6b2.html>.

** Available at:

http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf.

- (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or
 - (ii) that has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
 - (iii) that is being used by a person other than the rightful holder;
- (d) "Vessel" shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

...

II. Smuggling of migrants by sea

Article 7

Cooperation

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

Article 8

Measures against the smuggling of migrants by sea

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization

from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

- (a) To board the vessel;
- (b) To search the vessel; and
- (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

Article 9

Safeguard clauses

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

- (a) Ensure the safety and humane treatment of the persons on board;
- (b) Take due account of the need not to endanger the security of the vessel or its cargo;

- (c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;
- (d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

- (a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
- (b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

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

3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

6. States Parties may cooperate with relevant international organizations in the implementation of this article.

7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.

...

IV. Final provisions

Article 19

Saving clause

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

2. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*

*Adoption: 15 November 2000
Entry into force: 25 December 2003*

The purpose of this Protocol is to prevent and combat trafficking in persons, to protect and assist victims and to promote international cooperation. The saving clause ensures that obligations and responsibilities of States and individuals under international law, including international human rights law, international humanitarian law, and international refugee law, are not affected by any of its provisions – in particular, the principle of non-refoulement.

Selected Provisions

Article 3

Use of terms

For the purposes of this Protocol:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

* Available at: <http://www2.ohchr.org/english/law/protocoltrafficking.htm>.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

...

II. Protection of victims of trafficking in persons

Article 6

Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, *inter alia*, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
 - (a) Information on relevant court and administrative proceedings;
 - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
 - (a) Appropriate housing;
 - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
 - (c) Medical, psychological and material assistance; and
 - (d) Employment, educational and training opportunities.
4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.
5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

...

IV. Final provisions

Article 14

Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

