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The interception and rescue at sea of asylum seekers, refugees and irregular migrants

Report¹

Committee on Migration, Refugees and Population

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Summary

As Europe struggles to cope with the relatively large-scale arrival of mixed migratory flows by boat from Africa, arriving mainly through Italy, Malta, Spain, Greece and Cyprus, the surveillance of Europe's southern borders has become a regional priority. The passengers are often travelling in unseaworthy vessels, at the mercy of unscrupulous traffickers, and there have been many fatal incidents.

The Committee on Migration, Refugees and Population once again expresses its deep concern at some of the measures taken to deal with these desperate people. Sometimes they are "pushed back" to their country of origin, which calls into question the well-established principle of non-refoulement, and there seem to be different ideas about what constitutes the "place of safety" where those who are rescued must be taken. Even joint operations run by the European Union's border agency Frontex do not have all the adequate guarantees that human rights will be fully respected. Finally, countries on the southern borders of the European Union are having to face a disproportionate burden in dealing with these flows, which is unfair.

States have a clear moral and legal obligation to save persons in distress, but beyond this they should rigorously apply international law in dealing with these migratory flows. That means treating those intercepted humanely, giving them a fair chance to seek international protection when it is needed, and keeping detention to a minimum. Frontex staff need proper training in all these matters and the international community needs to spell out with greater consistency exactly how maritime law should be applied.

¹ Reference to committee: Doc. 11880 and Doc. 11905, Reference 3569 of 29 May 2009.

A. Draft resolution²

1. The surveillance of Europe's southern borders has become a regional priority. The European continent is having to cope with the relatively large-scale arrival of migratory flows by boat from Africa, reaching Europe mainly through Italy, Malta, Spain, Greece and Cyprus.

2. Migrants, refugees, asylum seekers and other persons risk their lives to reach Europe's southern borders, mostly in unseaworthy vessels. These journeys, always undertaken illicitly, mostly on board flagless vessels, putting them at risk of falling into the hands of migrant smuggling and trafficking rings, reflect the desperation of the passengers, who have no legal and above all no safer means of reaching Europe.

3. Although the number of arrivals by sea has fallen drastically in recent years, resulting in a shift of migratory routes (particularly towards the land border between Turkey and Greece), the Parliamentary Assembly, recalling, *inter alia*, its Resolution 1637 (2008) "Europe's boat people: mixed migration flows by sea into southern Europe", once again expresses its deep concern over the measures taken to deal with the arrival by sea of these mixed migratory flows. Many people in distress at sea have been rescued and many attempting to reach Europe have been pushed back, but the list of fatal incidents – as predictable as they are tragic – is a long one and it is currently getting longer on an almost daily basis.

4. Furthermore, recent arrivals in Italy and Malta following the turmoils in North Africa confirm that Europe must always be ready to face the possible large-scale arrival of irregular migrants, asylum seekers and refugees on its southern shores.

5. The Assembly notes that measures to manage these maritime arrivals raise numerous problems, of which five are particularly worrying:

5.1. Despite several relevant international instruments satisfactorily setting out the rights and obligations of states and individuals applicable in this area, interpretations of their content appear to differ. Some states do not agree on the nature and extent of their responsibilities in specific situations and some states also call into question the application of the principle of non-refoulement on the high seas;

5.2. While the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a "place of safety", the notion of "place of safety" does not appear to be interpreted in the same way by all member states. Yet it is clear that the notion of "place of safety" should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights;

5.3. Divergences of this kind directly endanger the lives of the persons to be rescued, in particular by delaying or preventing rescue measures, and are likely to dissuade seafarers from rescuing people in distress at sea. Furthermore, they could result in a violation of the principle of non-refoulement in respect of a number of persons, including some in need of international protection;

5.4. Although the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (Frontex) plays an ever increasing role in interception at sea, the guarantees of respect for human rights and obligations arising under international and European Union law in the context of the joint operations it co-ordinates are inadequate;

5.5. Finally, these sea arrivals place a disproportionate burden on the states located on the southern borders of the European Union. The goal of responsibilities being shared more fairly and greater solidarity in the migration sphere between European states is far from being attained.

6. The situation is rendered more complex by the fact that these migratory flows are of a mixed nature and therefore call for specialised and tailored protection-sensitive responses in keeping with the status of those rescued. To respond to sea arrivals adequately and in line with the relevant international standards, the states must take account of this aspect in their migration management policies and activities.

7. The Assembly reminds the member states of their obligations under international law, including the European Convention on Human Rights, the United Nations Convention on the Law of the Sea of 1982 and

² Draft resolution adopted unanimously by the committee on 1 June 2011.

the 1951 Geneva Convention relating to the status of refugees, and particularly of the principle of non-refoulement and the right to seek asylum. The Assembly also reiterates the obligations of the States Parties to the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue.

8. Finally and above all, the Assembly reminds the member states that they have both a moral and legal obligation to save persons in distress at sea without the slightest delay, and unequivocally reiterates the interpretation given by the Office of the United Nations High Commissioner for Refugees (UNHCR), which states that the principle of non-refoulement is equally applicable on the high seas. The high seas are not an area where states are exempt from their legal obligations, including those emerging from international human rights law and international refugee law.

9. Accordingly, the Assembly calls on the member states, when conducting maritime border surveillance operations, whether in the context of preventing smuggling and trafficking in human beings or in connection with border management, be it in the exercise of *de jure* or *de facto* jurisdiction, to:

- 9.1. fulfill without exception and without delay their obligation to save people in distress at sea;
- 9.2. ensure that their border management policies and activities, including interception measures, recognise the mixed make-up of flows of individuals attempting to cross maritime borders;
- 9.3. guarantee for all intercepted persons humane treatment and systematic respect for their human rights, including the principle of non-refoulement, regardless of whether interception measures are implemented within their own territorial waters, those of another state on the basis of an ad hoc bilateral agreement, or on the high seas;
- 9.4. refrain from any practices that might be tantamount to direct or indirect *refoulement*, including on the high seas, in keeping with the UNHCR's interpretation of the extraterritorial application of that principle and with the relevant judgements of the European Court of Human Rights;
- 9.5. carry out as a priority action the swift disembarkation of rescued persons to a "place of safety" and interpret a "place of safety" as meaning a place which can meet the immediate needs of those disembarked and in no way jeopardises their fundamental rights, since the notion of "safety" extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation;
- 9.6. guarantee access to a fair and effective asylum procedure for those intercepted who are in need of international protection;
- 9.7. guarantee access to protection and assistance, including to asylum procedures, for those intercepted who are victims of human trafficking or at risk of being trafficked;
- 9.8. ensure that the placement in a detention facility of those intercepted – always excluding minors and vulnerable categories –, regardless of their status, is authorised by the judicial authorities and occurs only where necessary and on grounds prescribed by law, that there is no other suitable alternative and that such placement conforms to the minimum standards and principles set forth in Assembly Resolution 1707 (2010) on the detention of asylum seekers and irregular migrants in Europe;
- 9.9. suspend any bilateral agreements they may have concluded with third states if the human rights of those intercepted are not appropriately guaranteed therein, particularly the right of access to an asylum procedure, and wherever these might be tantamount to a violation of the principle of non-refoulement, and conclude new bilateral agreements specifically containing such human rights guarantees and measures for their regular and effective monitoring;
- 9.10. sign and ratify, if they have not already done so, the aforementioned relevant international instruments and take account of the Guidelines of the International Maritime Organisation (IMO) on the Treatment of Persons rescued at Sea;
- 9.11. sign and ratify, if they have not already done so, the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and the so-called "Palermo Protocols" to the United Nations Convention against Transnational Organized Crime (2000);

9.12. ensure that maritime border surveillance operations and border control measures do not affect the specific protection afforded under international law to vulnerable categories such as refugees, stateless persons, women and unaccompanied children, migrants, victims of trafficking or at risk of being trafficked, or victims of torture and trauma.

10. The Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union states and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations co-ordinated by that agency. While the Assembly welcomes the proposals presented by the European Commission to amend the rules governing that agency, with a view to strengthening guarantees of full respect for fundamental rights, it considers them inadequate and would like the European Parliament to be entrusted with the democratic supervision of the agency's activities, particularly where respect for fundamental rights is concerned.

11. The Assembly also considers it essential that efforts be made to remedy the prime causes prompting desperate individuals to risk their lives by boarding boats bound for Europe. The Assembly calls on all the member states to step up their efforts to promote peace, the rule of law and prosperity in the countries of origin of potential immigrants and asylum seekers.

12. Finally, in view of the serious challenges posed to coastal states by the irregular arrival by sea of mixed flows of individuals, the Assembly calls on the international community, particularly the IMO, the UNHCR, the International Organization for Migration (IOM), the Council of Europe and the European Union (including Frontex and the European Asylum Support Office) to:

12.1. provide any assistance required to those states in a spirit of solidarity and sharing of responsibilities;

12.2. under the auspices of the IMO, make concerted efforts to ensure a consistent and harmonised approach to international maritime law through, *inter alia*, agreement on the definition and content of the key terms and norms;

12.3. establish an inter-agency group with the aim of studying and resolving the main problems in the area of maritime interception, including the five problems identified in the present resolution, setting clear policy priorities, providing guidance to states and other relevant actors and monitoring and evaluating the use of maritime interception measures. The group should be made up of members of the IMO, the UNHCR, the IOM, the Council of Europe, Frontex and the European Asylum Support Office.

B. Draft recommendation³

1. The Parliamentary Assembly refers to its Resolution ... (2011) on the interception and rescue at sea of asylum seekers, refugees and irregular migrants.
2. The Assembly notes that, on its southern borders, Europe has to cope with a relatively large number of arrivals by boat of mixed migratory flows. Recent arrivals following the turmoils in North Africa confirm that Europe must be ready to face such arrivals on a relatively large scale. It is therefore a matter of urgency that the five main problems noted by the Assembly in its aforementioned resolution with respect to the existing measures to manage these maritime arrivals are speedily resolved.
3. The Assembly welcomes the Council of Europe Secretary General's initiative to call an extraordinary meeting of the Committee of Ministers to examine possible Council of Europe action in case of the massive arrival of asylum seekers and migrants from the southern Mediterranean. It further welcomes the support given by the Committee of Ministers to the Secretary General's proposals on the elaboration of emergency action plans, as well as regarding the training of officials dealing with asylum requests.
4. While widely supporting these decisions, the Assembly reminds the Committee of Ministers of its dual responsibility: to support those member states that are in need, but also to make sure that all human rights obligations are complied with in the context of the interception and rescue at sea of asylum seekers, refugees and irregular migrants, including by guaranteeing to those intercepted access to a fair and efficient asylum procedure.
5. The Assembly therefore calls on the Committee of Ministers to:
 - 5.1. include in the training material all necessary elements to enable the trained persons to proceed to a screening assessment of the international protection needs of intercepted persons and to ensure that staff involved in the operations of the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union (Frontex) are trained accordingly;
 - 5.2. define, in close co-operation with the Office of the United Nations High Commissioner for Refugees (UNHCR), guidelines and standard operating procedures, when interception and rescue at sea takes place, determining minimum administrative procedures to guarantee that those persons with international protection needs are identified and provided with the appropriate protection;
 - 5.3. continue monitoring the situation of large-scale arrivals of irregular migrants and asylum seekers, and in particular the issue of interception and rescue at sea, including by holding extraordinary meetings on the situation, where appropriate, and use the good offices of the UNHCR with its representative at the Council of Europe, where relevant.

³ Draft recommendation adopted unanimously by the committee on 1 June 2011.

C. Explanatory memorandum by Mr Díaz Tejera, rapporteur**Contents**

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1. Introduction⁴

1. The surveillance of Europe's southern borders has become a regional priority, as the southern European states feel overwhelmed by the arrival of large numbers of persons reaching their shores by sea in an irregular manner. Conducted individually, by a group of states or within the context of a joint operation coordinated by Frontex,⁵ border management activities are generally legitimately based on considerations prioritising national or regional security and stability, and also on attempts to reduce the loss of lives at sea. The maritime interception of vessels and persons is one of the measures resorted to by states to achieve these aims. Yet several aspects of maritime interception measures raise a series of human rights concerns, centred around the individual circumstances of the intercepted persons. In order to present these human rights concerns and propose measures for their resolution, an analysis of the relevant norms of international maritime law and international human rights is required.

2. This report's⁶ combined approach towards the two legal spheres is premised on a number of concrete queries, a process that facilitates an otherwise complex legal analysis. At a preliminary stage, a jurisdictional query is necessary, and the report needs to establish the extent to which, if at all, states are bound by their international human rights obligations when implementing interception measures at sea, particularly when such measures occur on the high seas. Having established this primary parameter, the degree of state responsibility for possible human rights violations as a consequence of maritime interception needs to be determined, either specifically or in relation to generic situational contexts.

3. It ought to be emphasised at the outset that it is not this report's intention or mandate to target and criticise specific countries for their past and/or present activities. Nonetheless, reference must inevitably be made to a number of maritime incidents and state policies insofar as they are the very core of the report's subject matter. The specific incidents and policies referred to are the situations off the West-African coast and in the central Mediterranean.

⁴ The rapporteur would like to thank Mr Neil Falzon, Human Rights Advocate and Academic, who acted as a consultant in the drafting process of the report. It should be noted that this report was prepared and drafted prior to the turmoils in North Africa, notably in Tunisia, Egypt and Libya. The report has been updated to reflect the new situation.

⁵ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was established by Council Regulation (EC) No 2007/2004 of 26 December 2004.

⁶ The preparation of the report also involved a conference organised by the Portuguese Parliament and the Service of Foreigners and Borders (SEF) of the Ministry of the Interior and the Parliamentary Assembly's Committee on Migration, Refugees and Population, the European Committee on Migration (CDMG) of the Council of Europe, with the participation of the United Nations Office of the High Commissioner for Human Rights (OHCHR) in Lisbon on 31 May and 1 June 2010, on "Human rights and migration: Realising a human rights based approach to the protection of migrants, refugees and asylum-seekers". An exchange of views was also organised by the Committee on Migration, Refugees and Population in Strasbourg on 7 October 2010, on "Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants". Views expressed and information provided during these two activities have been incorporated into this report.

2. General overview

4. This introductory section seeks to provide a short overview of the migratory patterns affecting Europe's southern borders and involving a number of African states. Following this overview, a definition of the notion of "interception" is provided. This introductory description is by no means a detailed account of the migration and asylum scenarios played out in the Mediterranean and off Africa's west coast, yet has the purpose of laying out the scenarios' main features and modalities.⁷

2.1. Mixed migration from Africa to Europe

5. In recent years the Mediterranean Sea has seen increasing numbers of persons leaving north African shores and travelling by sea in an attempt to reach Europe. Persons from various countries of origin board rickety vessels that are generally unfit for the dangerous journey, since they are usually unequipped to deal with the challenges presented by severe climatic conditions, over-crowdedness and the physical and mental state of the passengers.

6. For persons departing from North Africa, generally Libya but also Tunisia, Morocco and Algeria, Italy is the primary destination. Malta, being mid-way between North Africa and Italy, is in most cases not the intended destination. A similar scenario is that seen off the West African coast, where boats departing from Senegal and Mauritania target the Canary Islands as the access point to European territory.⁸

7. The journeys voyages are in all cases undertaken through irregular means. A vast majority of boats used in these situations are flagless, raising jurisdictional issues. This recourse to irregular means of travelling is primarily due to the fact that for most persons leaving Africa in this manner, regular and – more importantly – safer options are in fact not available. For many persons, especially refugees and persons in need of alternative forms of international protection, obtaining authentic and official personal documentation may be impossible due to governmental unwillingness to issue necessary documents, personal exposure and risks consequential to attempts at obtaining them or the sheer inexistence of the appropriate state entities. These limitations are further exacerbated by the stringent conditions imposed to be granted access to the European Union.

8. For these reasons, the only way for such persons to travel by sea across the Mediterranean or across the Atlantic stretch between West Africa and the Canary Islands, is to seek the assistance of smuggling networks or in some cases to fall prey to human traffickers.⁹ Together with the high risks associated with such perilous journeys, the resort to irregular means to access European territory triggers a number of state responses based on the premises of combating the crimes of smuggling and trafficking, maintaining maritime safety and security and border management and protection.

9. Yet despite the apparent novelty of these situations and their widespread media coverage – once again put in the spotlight following the ongoing events in the southern Mediterranean and the large scale of arrivals on the island of Lampedusa (Italy) – it ought to be mentioned that the phenomenon of "boat people" is certainly not a new one, and not one that is particular or exclusive to Europe.¹⁰

⁷ See Assembly Resolution 1637 (2008) and Recommendation 1850 (2008) "Europe's boat people: mixed migration flows by sea into southern Europe".

⁸ According to the Office of the United Nations High Commissioner for Refugees (UNHCR), the arrivals by sea from Africa are approximately as follows: Italy – 22 000 in 2006, 19 900 in 2007, 36 000 in 2008, 8 700 in 2009 and 390 in 2010; Malta – 1 800 in 2006, 1 800 in 2007, 2 700 in 2008, 1 470 in 2009 and 28 in 2010. The arrivals by sea from West Africa to Spain are approximately as follows: 32 000 in 2006; 18 000 in 2007; 13 400 in 2008; 7 285 in 2009 and 1 270 in 2010. See www.unhcr.org/pages/4a1d406060.html.

⁹ The distinction between human smuggling and human trafficking is an important one, especially in this context. "Smuggling" means "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person ...", whereas "trafficking" means "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat of use of force or other forms of coercion ... for the purpose of exploitation". See United Nations General Assembly Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (Smuggling Protocol), 15 November 2000, and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Trafficking Protocol), 15 November 2000. The two Protocols are generally referred to as the "Palermo Protocols".

¹⁰ See for example: Mathew P., Refugee Protection in the Wake of the Tampa, *The American Journal of International Law*, Vol. 96, No.3 (July 2002), pp. 661-676; Hathaway J. C., Labelling the "Boat People": The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees, *Human Rights Quarterly*, Vol. 15, No. 4 (November 1993), pp. 686-702; Stepick A., Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy, *Law and Contemporary Problems*, Vol. 45, No. 2, U.S. Immigration Policy (Spring, 1982), pp. 163-196; Willheim E., MV Tampa: The Australian Response, *International Journal of Refugee Law*, 2003, pp. 159-191.

10. Such boat arrivals are generally associated with a sudden influx of persons that places large burdens on the search and rescue capacities, reception modalities and asylum systems of the receiving state, also within the European context. Following a series of appeals for European solidarity by the southern European states, in January 2009 Cyprus, Greece, Italy and Malta detailed their concerns in a paper presented to the European Union institutions, in which they specified that “the influx of illegal immigrants is clearly a cause for concern, as it results in considerable strain on these countries’ admission resources and asylum systems”.¹¹ The paper made a clear appeal to the European Union to assist the four states in coping with the challenges of being the region’s southern border. The assistance requested by Cyprus, Greece, Italy and Malta included, *inter alia*, the conclusion of European Union Readmission Agreements with African and Middle-Eastern countries of origin and transit, the strengthening of Frontex and the establishment of an intra-European Union relocation scheme for persons recognised as being in need of international protection.

11. Another common feature of boat arrivals is the mixed composition of the persons aboard the vessels, their migratory movements being characterised as mixed migratory flows including asylum seekers, refugees and persons eligible for subsidiary or complementary protection, economic migrants, victims of trafficking or persons at risk of being trafficked and others. The coming together of all these persons is what defines these migratory flows as mixed, and ought to be the basis of any comprehensive and protection-sensitive border management strategy developed and implemented by the states involved at the departure, transit and arrival stages.

12. In the specific context of the Mediterranean arrivals, statistics indicate a large presence of persons potentially eligible for international protection, linked primarily to the fact that the countries of origin of a substantial percentage of persons are refugee-producing countries or countries currently involved in armed conflict as well as source countries for human trafficking and smuggling. Official figures reveal that of the 1 475 persons arriving in Malta by boat in 2009,¹² 1 308 persons applied for asylum (89% of arrivals). Of these, 852 persons were recognised as being in need of international protection,¹³ notably 65% of all asylum seekers for that year and 58% of all arrivals by boat. In 2008,¹⁴ approximately 36 000 persons arrived in Italy by sea and 75% of these applied for asylum. Additionally, around 70% of all asylum applications received by Italy were presented by persons arriving by boat. Considering that, as in previous years, international protection needs were recognised in around half of all asylum cases processed in Italy,¹⁵ it may be said that over 20% of all persons reaching Italy by boat were either refugees or persons otherwise in need of international protection.¹⁶

13. Figures for the Canary Islands are somewhat different, revealing a smaller asylum component amongst the persons reaching the Island. In 2008, 356 asylum applications were presented in the Canary Islands, with the total number of arrivals being about 2 300.¹⁷ Furthermore, a steady annual decrease in the number of arrivals is evident in relation to Spain, with the consequential reduction in the number of asylum applications received from persons leaving West Africa by boat.¹⁸ In 2006, almost 32 000 persons arrived by sea; there were only 12 000 persons in 2007.¹⁹

14. In the aftermath of the still ongoing events in the southern Mediterranean, according to UNHCR between mid-January and 10 May 2011, nearly 34 500 persons arrived by boat in Lampedusa, leading to massive overcrowding at the migrant reception centre. Among them, there were 23 000 Tunisians (mainly

¹¹ www.interno.it/mininterno/export/sites/default/it/assets/files/16/0970_Final_paper_Versione_firmata.pdf, p. 1.

¹² The two largest population groups amongst the 1 475 persons were Somalia, with 898 persons, and Eritrea with 156 persons.

¹³ Of these, seven persons were recognised as being refugees, whilst 845 were granted subsidiary protection. See Office of Prime Minister (Malta), Annual Reports of Government Departments 2009, July 2010: <https://opm.gov.mt/file.aspx?f=2626>.

¹⁴ Figures relative to 2009 for Italy are not given here due to the anomalous situation created by the implementation by the Italian government of the push-back policy.

¹⁵ The highest protection rates relate to Somali asylum-seekers: 352 recognised as refugees and 3 173 granted subsidiary protection.

¹⁶ UNHCR, Refugee protection and international migration: a review of UNHCR’s operational role in southern Italy – Pre-publication edition, September 2009, at p. 4: www.unhcr.org/4ac35c600.html. See also information from the Italian Ministry of the Interior: www.interno.it/mininterno/export/sites/default/it/temi/asilo/sottotema009.html.

¹⁷ It should be noted that of these 356 applications, 140 were presented at official border points.

¹⁸ This is primarily due to the HERA series of Frontex co-ordinated joint operations, the main aim of which is “to tackle illegal migration flows coming from West Africa countries heading to Canary Islands”. Taken from Frontex, HERA 2008 and NAUTILUS 2008 Statistics, News Releases, 17 February 2009, www.frontex.europa.eu/newsroom/news_releases/art40.html. The HERA projects are further examined below.

¹⁹ Refugee protection and international migration: a review of UNHCR’s role in the Canary Islands, Spain, UNHCR, April 2009, www.unhcr.org/4a1d2d7d6.html.

irregular migrants) and 11 000 persons of other nationalities (mainly refugees and asylum seekers fleeing the conflicts in Libya). Malta has received 1 100 asylum applications since the start of the North African uprisings.

15. Acknowledging the mixed composition of any group of persons reaching the shores of a European state is certainly the first step towards ensuring the most appropriate response to the various categories of persons. This is especially relevant in the context of the interception of boats and the actions taken thereafter.

2.2. A working definition of "interception"

16. As a corollary to the principle of state sovereignty, it is the legitimate interest of states to ensure their territorial integrity. It is therefore the sovereign right of all states to exercise control over their borders and to take measures deemed necessary to prevent unlawful entry into their territory. The interception of persons is one of these entry-management tools adopted by states.

17. Whilst international law does not provide a comprehensive definition of "interception", the UNHCR has sought to define the term as follows:

"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 of persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner."²⁰

18. The above definition clearly includes within its scope measures and activities not related to interception at sea yet having the similar aim and effect of impeding irregular entries into the destination country. Such non-maritime measures include the extraterritorial out-posting of immigration officers and airline liaison officers at airports and other border points, and the provision of financial and technical capacity to countries of origin and transit countries. In relation to maritime interception measures, the interception of boatloads of persons leaving African shores attempting to reach European territory essentially involves a combination of the elements contained in the UNHCR definition, albeit to varying degrees depending on general and specific contextual features.

19. Many situations do in fact entail the assertion of control by a state over a vessel and many subsequently result in the prevention of the vessel's onward journey. Whilst the rescue by non-state actors of persons in distress at sea, such as by fishermen or cargo ships, does not necessarily include a state asserting or exercising control over the rescued persons, it could nonetheless result in the prevention of the rescued persons' onward journey.

3. Analysis

20. This section identifies the legal instruments applicable in the context of interception of irregular immigrants, asylum seekers and refugees, with the aim of clarifying and emphasising states' legal obligations when undertaking maritime interception. It will be noted that the discussion necessarily entails an appreciation of the meeting points between international maritime law and international human rights law. Any recommendation or proposal for future action must consequently also rely on the principles enshrined in these fields.

21. The mixed flow of persons travelling by sea is not a straightforward situation. By its very nature, as a situation occurring at sea, it triggers the application of various aspects of international maritime law, such as jurisdiction, the right of innocent passage and smuggling and trafficking. International human rights and refugee law is also triggered since the interception of such persons has a definite effect on the level of enjoyment by the intercepted persons of their fundamental human rights, such as the right to life, to be free

²⁰ Conclusion on Protection Safeguards in Interception Measures, 2003, No. 97 (LIV), UNHCR Executive Committee, 9 June 2000, Also in UNHCR, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*: www.unhcr.org/refworld/docid/49997afa1a.html.

from torture, to access to an effective remedy, to seek and enjoy asylum, to be protected against *refoulement* to a place of persecution and ill-treatment and to be free from collective expulsions. Furthermore, this report's principal interest in interception also requires attention to be paid to relevant instruments in the Community *acquis* of the European Union.

3.1. UNCLOS and jurisdictional issues

22. From the international maritime law perspective, the 1982 United Nations Convention on the Law of the Sea (UNCLOS)²¹ is the major international convention on maritime affairs insofar as it codifies states' rights and responsibilities at sea, whilst also providing for key concepts such as the territorial sea, exclusive economic zones, the right of innocent passage and the freedom of the high seas.²² In delimiting the various stretches of water in terms of their distance from a coastal state, the UNCLOS provides details on the nature of a state's rights within these stretches, particularly by establishing the extent to which a state exercises jurisdiction over persons and vessels within these waters. These details provide the international maritime law contribution to the discussion below on the extent to which, if at all, a state's international human rights obligations, particularly the absolute prohibition of *refoulement*, are applicable within these waters.

23. The most straightforward concept in this regard, in Article 2 of the UNCLOS, is that a state's sovereignty extends into its territorial waters, although such waters are not technically a state's territory. This article is the basis for several subsequent UNCLOS provisions dealing with, *inter alia*, the manifestation by states of their sovereignty through the exercise of jurisdictional authority. Therefore, by virtue of these provisions, it is clear that a state enjoys full and extensive jurisdictional authority when acting in its own territorial waters – a *de jure* jurisdiction.

24. The situation is somewhat different when a state acts within the territorial waters of another state, with the latter's express consent, as authorised by UNCLOS or through a bilateral treaty provision. This is in fact the scenario off the West African coast, with Spanish vessels patrolling the Senegalese and Mauritanian territorial waters. In such cases, the coastal state's authorisation effectively grants the patrolling state the right to exercise its own jurisdictional authority within the coastal state's territorial waters, conferring it with *de jure* jurisdiction. According to the agreement between Spain and Mauritania, for example, Spain is granted such jurisdictional authority and it is on this basis that, in the context of the Frontex joint operations conducted off the Mauritanian coast, Spanish vessels intercept flagless vessels and ensure their return to Mauritania.²³ It should be noted that Frontex's participation in joint operations in the framework of bilateral agreements with third countries is not foreseen in Frontex's founding regulation. Therefore, the regulation needs to be amended accordingly to define the role and competence of Frontex in this context.²⁴

25. In relation to the high seas, the UNCLOS establishes the principle of the freedom to navigate in Articles 89 and 90, specifying that “no State may validly purport to subject any part of the high seas to its jurisdiction” and reserving these waters for peaceful purposes.²⁵ From a jurisdictional perspective, ships sailing on the high seas are subject to the exclusive jurisdiction of their flag state with the express prohibition of boarding foreign ships, save in the exceptional circumstances listed in Article 110 (right of visit). Included in this list of exceptional circumstances is the reasonable ground for suspecting that a ship is without nationality.²⁶ The fact that boats carrying migrants, asylum seekers and refugees from Africa to Europe in an irregular manner are generally flagless, and therefore not subject to any state's exclusive jurisdiction, authorises the ships of any state to establish and exercise its jurisdiction over these boats. This is in fact the

²¹ For a general overview of the Convention, see Hollis D.J. and Rosen T., United Nations Convention on Law of the Sea (UNCLOS), 1982, at www.eoearth.org/article/United_Nations_Convention_on_Law_of_the_Sea_28UNCLOS%29_1982.

²² For the purposes of this report, some key terms ought to be defined. Article 3 states that the territorial sea shall not exceed 12 nautical miles from the baselines, whereas a state's internal waters are those waters on the landward side of the baseline (“baseline” defined in Article 5 as the “low-water line along the coast”). The contiguous zone (Article 33) is that stretch of water contiguous to the territorial sea but not extending beyond 24 nautical miles from the baselines, whilst the exclusive economic zone (Article 57) may stretch up to 200 nautical miles from the baselines. Finally, Article 86 provides that the high seas are those parts of the sea that essentially do not form part of the territorial sea or exclusive economic zone of any state. Also, in defining “innocent passage”, Article 19 includes “loading or unloading of any ... person contrary to the ... immigration ... regulations” as not being included in such a definition.

²³ Acuerdo entre el Reino de España y la República Islámica de Mauritania en material de inmigración, Madrid, 1 July 2003, *Boletín Oficial del Estado*, No. 185, 4 August 2003, 30050-30053.

²⁴ See AI/ECRE, Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) briefing to the European Commission, p. 27, www.ecre.be/files/ECRE_Amnesty_Briefing_Frontex_proposal_September_2010.pdf.

²⁵ Article 88.

²⁶ Article 110(1)(d).

legal basis upon which European Union member states exercise their jurisdictional authority during the interception activities carried out on the high seas off the Canary Islands and in the central Mediterranean.

26. Yet for the purposes of the present analysis, an appreciation of the concept of jurisdictional authority under international maritime law does not suffice for a more comprehensive discussion on interception at sea. Whilst international maritime law clarifies the nature and extent of a state's obligations at sea, in terms of exercise of its jurisdictional powers, international human rights law provides guidance as to how far such jurisdictional powers trigger the intercepting state's international human rights responsibilities. The question is essentially whether a state is bound by its human rights obligations when conducting interception measures at sea (depending on the *ratione loci* of the relevant human rights treaties).²⁷

27. The territorial application of treaty obligations is undisputed; a treaty entered into by a state binds the state in respect of its entire territory, unless of course the treaty specifies otherwise.²⁸ A state is therefore bound to respect, protect and fulfil the human rights of all persons within its territory. As stated above, a state exercises sovereign authority and jurisdiction within its own territorial waters, thereby also subject to its human rights obligations. Therefore interception measures conducted by a state in its own territorial waters ought to be carried out in conformity with the state's human rights obligations, requiring the state to safeguard the rights of all persons aboard the intercepted vessels and, in the case of asylum seekers and refugees, to ensure their access to its asylum procedures and not to be returned to their countries of origin, as also reiterated by UNHCR.²⁹

28. As indicated above, the *de jure* jurisdiction enjoyed by a state when acting within the territorial waters of another state, on the basis of the latter state's ad hoc express consent or acquiescence, leads to the same conclusion. This point was also reiterated by the European Court of Human Rights in the *Bankovic* case.³⁰ Thus, for example, Spanish activities within Mauritanian territorial waters on the basis of a bilateral agreement granting it jurisdictional authority to intercept boats of persons and return them to Mauritanian shores, trigger the application of the European Convention on Human Rights (ETS No. 5) ("the Convention") in respect of Spain.³¹

29. Moving further away from a state's coast and territorial waters, the interception on the high seas of boats of migrants, asylum seekers and refugees and potential victims of trafficking generally involves intercepted boats that are flagless, thereby authorising the intercepting state to exercise its jurisdiction over the vessels and the persons aboard them. Such clear *de jure* jurisdiction should also be considered a sufficient legal basis for the triggering of the intercepting state's international human rights obligations, therefore requiring the state to act towards the intercepted persons in the same manner as it would with

²⁷ See for example: Article 2(1) of the International Covenant on Civil, Political Rights (ICCPR); Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 2 of the Convention on the Rights of the Child (CRC). Also at the regional level: Article 2 of the European Convention on Human Rights; Article 1 of the American Convention on Human Rights.

²⁸ This principle is also enshrined in Article 29 of the Vienna Convention on the Law of Treaties, 1969.

²⁹ UNHCR Executive Committee, Conclusion No. 97 (LIV), see footnote 20, recommends at paragraph (a)(i) 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". See also UNHCR's paper on Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing, November 2010, at www.unhcr.org/refworld/docid/4cd12d3a2.html, paragraph 2.

³⁰ *Bankovic and Others v. Belgium and 16 other Contracting States*, Application No. 52207/99, judgment of 12 December 2001, paragraph 71, where the Court stated that a state may exercise jurisdiction when acting outside its own territory and on the territory, or within the jurisdictional authority of another state, "through the consent, invitation or acquiescence of the Government of that territory", in Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 2009, Oxford University Press (Second Edition), p. 805, and Klug A. and Howe T., *The concept of State jurisdiction and the applicability of the non-refoulement principle to extraterritorial interception measures*, in Ryan Bernard and Mitsilegas Valsamis (eds.), *Extraterritorial Immigration Control: Legal Challenges*, 2010, Martinus Nijhoff.

³¹ *Bankovic* is one in a series of cases where the Court examined the Convention's extraterritorial application. The Court's general conclusions in this regard are that once a state exercises effective control and authority over persons or property, then it exercises *de facto* jurisdiction and, consequently, is obliged to behave in a manner that is consistent with its human rights obligations. See *Cyprus v. Turkey* (First and Second Applications) Applications Nos. 6780/74 and 6950/75, 1975; the third inter-state case *Cyprus v. Turkey*, No. 8007/77, 1978; *Loizidu v. Turkey* (Preliminary Objections), 1995; the fourth inter-state case *Cyprus v. Turkey*, Application No. 25781/94, 2001; *Öcalan v. Turkey*, Application No. 46221/99, 2005; *Ilascu and Others v. Moldova and Russia*, Application No. 48787/99, 2004, and *Issa v. Turkey*, Application No. 31821/96, 2004. An evaluation of the cases, and the progressive development by the Court of the Convention's extraterritorial application may be found in Harris, O'Boyle and Warbrick, footnote 30 *supra*, pp. 804-807.

regard to persons present within its own territory. It should be noted that a state is also bound by its international human rights obligations when it exercises *de facto* jurisdiction.³²

30. Yet the latter conclusion is disputed in relation to the extraterritorial application of the principle of non-refoulement³³ since, it is argued, the prohibition of returning a person to the frontiers of territories where his life or freedom would be threatened applies to persons already within a state's territory and not to persons trying to enter such territory. On the basis of this argumentation, the practice of diverting boats of persons, including asylum seekers and refugees, from the high seas to territories where their lives would be at risk would not constitute a practice prohibited under international refugee and human rights law.³⁴ Yet the extraterritoriality of the non-refoulement principle is firmly supported by UNHCR, as clearly stated in the Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.³⁵

31. In the advisory opinion, UNHCR reiterates established principles and interpretations of states' obligations with regard to non-refoulement and considers these obligations from a geographical perspective. It concludes 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 at 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.”³⁶

32. UNHCR's approach also considers the protection vacuum that would be created if states were authorised to return refugees and asylum seekers to a country where they are at risk simply on the basis of the consideration that they are acting outside their territory, an approach deemed to be “inconsistent with the humanitarian object and purpose of the 1951 Convention and its 1967 Protocol.”³⁷ The opinion draws extensively on cases and statements of international and regional human rights bodies in order to underline an interpretation of the prohibition of *refoulement* that extends to state actions beyond their territory and on the high seas.³⁸

33. Furthermore, as will be discussed below, international maritime law relating to the prevention of smuggling and trafficking and European Union legislation also make specific reference to the obligation of states to respect the principle of non-refoulement, including during activities on the high seas.

34. The application of international human rights norms on the high seas, including the principle of non-refoulement, requires states to exercise their jurisdictional authority over the intercepted vessels and persons in a manner that is consistent with such norms. It ought to be emphasised that this requirement is not only limited to the prohibition of direct or indirect *refoulement*, but also to the broader spectrum of rights. Was excessive force resorted to by the states' naval officers during the interception measures? May the return to

³² See UNHCR amicus curiae in Hirsi at: www.unhcr.org/refworld/docid/4b97778d2.html, paragraph 4.2.

³³ The prohibition is enshrined in Article 33(1) of the 1951 Refugee Convention, Article 7 ICCPR and Article 3(1) CAT. At the regional level it may be found in Article 3 of the European Convention on Human Rights and Article 2(3) of the Organisation for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, and in Article 22(8) of the 1969 American Convention on Human Rights. For an extensive analysis of the principle under the 1951 Refugee Convention, the ICCPR, the European Convention on Human Rights and CAR, see Wouters K., *International Legal Standards for the Protection from Refoulement*, 2009, Intersentia.

³⁴ This is the viewpoint adopted by the United States Supreme Court in *Sale, Acting Commissioner, Immigration and Naturalisation Service, et al., Petitioners v Haitian Centres Council, Inc., et al.*, 21 June 1993, 509 US 155, and subsequently followed in a number of cases in Australia and in Britain. Also, in 2005 the German Federal Ministry of the Interior stated that “state practice and predominant legal opinion are that the principle of non-refoulement in the Geneva Refugee Convention does not apply on the high seas to persons alleging persecution, since the high seas are extraterritorial”, referred to in Fisher-Lescano A., Lohr T. and Tohidipur T., *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, *International Journal of Refugee Law*, Volume 21, Issue 2, pp. 256-295, at p. 265.

³⁵ 26 January 2007, at www.unhcr.org/refworld/docid/45f17a1a4.html.

³⁶ Paragraph 24.

³⁷ Paragraph 29. A similar argument, yet with reference to the broader extraterritorial application of the European Convention on Human Rights, was made by the Court in the fourth inter-state case involving Cyprus and Turkey, where the Court stated that a conclusion not recognising such an extraterritorial application of human rights norms “would result in a regrettable vacuum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court”, at paragraph 78.

³⁸ Reference is made to various Executive Committee Conclusions, the Court cases referred to above, the Human Rights Committee, the International Court of Justice and the Committee against Torture.

the country of departure be described as a collective expulsion as defined under Protocol No. 4 to the European Convention on Human Rights?³⁹ Could the intercepted persons challenge the decision to return them to the country of departure?⁴⁰

35. As concluded in the context of interception measures conducted within territorial waters, either by the intercepting state or by another state, ad hoc evaluations of the interception activities would be subsequently required in order to assess whether, in specific situations, the human rights of the intercepted persons were in fact violated and whether such a violation, or violations, could be attributed to the actions of the intercepting state.

3.2. Disembarkation at a "place of safety"

36. UNCLOS's contribution to the present discussion on maritime interception also includes its codification of the duty of all seafarers to render assistance to persons found to be in distress at sea.⁴¹ Together with this duty, UNCLOS further provides that all coastal states should establish and maintain adequate and effective search and rescue regimes.⁴² These duties are extensively complemented by two other major international instruments, namely the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Search and Rescue (SAR), with the latter convention providing the mechanisms and rules implementing the duty of states to rescue persons in distress at sea, irrespective of nationality, status or circumstances.⁴³ The SAR regime is essentially based on the principle of state co-operation within the context of an international maritime search and rescue plan that is targeted to meeting the rescue needs of persons in distress at sea. It is on the basis of this convention that the world's seas are divided into "area(s) of defined dimensions within which search and rescue services are provided",⁴⁴ commonly known as SAR zones.

37. Through the establishment of SAR zones, Rescue Co-ordination Centres (RCC) as the state units responsible for the organisation and co-ordination of search and rescue operations within these zones and defining the nature of SAR obligations, the convention also establishes the principle on the basis of which a state's SAR responsibilities are triggered. Whilst it is the duty of every seafarer, including state vessels, to assist and rescue any person in distress at sea, it is the location of the rescue operation that determines which RCC – and therefore which state – is responsible for overall co-ordination of the rescue operation as required by SAR. Rescue operations required and conducted in a particular state's SAR zone are the SAR responsibility of that state. This principle and also the precise nature of a state's obligations under the convention are at the heart of an important discussion having a strong bearing on the situation of persons aboard rescued or intercepted boats.

38. Following a number of maritime incidents that seemed to threaten the integrity of the tradition and obligation of seamen to provide assistance at sea, a process for the amendment of the SAR and SOLAS Conventions, amongst others, was initiated in 2001.⁴⁵ The International Maritime Organisation (IMO)⁴⁶ stressed the need to identify gaps and inconsistencies with a view to improving the search and rescue regime.

39. The amendments adopted in 2004 came into force in July 2006, essentially clarifying that a state's SAR obligations include the responsibility to co-ordinate all search and rescue operations within its SAR zone and to ensure that all rescued persons are disembarked at a place of safety within a reasonable time.⁴⁷

³⁹ Protocol No. 4 to the European Convention on Human Rights, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 1963. Article 4 states that "collective expulsion of aliens is prohibited".

⁴⁰ In the application to the Court brought by the first group of persons pushed back to Libya by Italy in 2009 (*Hirsi et al. v. Italy*, Application No. 27765/09), the applicants are in fact alleging violations of Articles 3 and 13 of the Convention and of Article 4 of Protocol No. 4.

⁴¹ Although it is acknowledged that interception at sea and search and rescue operations are distinct issues, rescue operations may in some situations fall under the definition of "interception".

⁴² Article 98.

⁴³ Chapter 2, 2.1.10.

⁴⁴ Annex, Chapter 1, 1.3.1.

⁴⁵ See IMO Assembly, Resolution A.920(22), Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, 29 November 2001, [www.imo.org/includes/blastDataOnly.asp/data_id%3D24573/A920\(22\).pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D24573/A920(22).pdf).

⁴⁶ IMO also expressed the need to ensure that rescuing vessels can disembark rescued persons at a place of safety.

⁴⁷ IMO Maritime Safety Committee (MSC), Resolution MSC.155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended, 20 May 2004, [www.imo.org/includes/blastData.asp/doc_id=6879/155\(78\).pdf](http://www.imo.org/includes/blastData.asp/doc_id=6879/155(78).pdf). The amendments to SOLAS were included in Resolution MSC.153(78), Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended, 20 May 2004, www.mardep.gov.hk/en/msnote/pdf/msin0656anx1.pdf. For a straightforward overview of the conventions'

Together with these amendments, the IMO also adopted the Guidelines on the Treatment of Persons rescued at Sea,⁴⁸ intended to provide an explanation to the competent state authorities of their international law obligations in a search and rescue context.⁴⁹

40. Some of the guidelines are directly relevant to the interception at sea of refugees, asylum seekers and other migrants. Yet the guidelines also seek to clarify the thorny issue of what may or may not be considered a "place of safety" for the purposes of disembarkation of rescued persons.

41. A traditional approach to the term would be to bear in mind the convention drafters' intentions as a reflection of the pertaining maritime context. Such an interpretation would define a "place of safety" in relation to the maritime threats and perils giving rise to the very rescue. Thus the safety would include all ports where the rescued persons are safeguarded from imminent danger to their lives and where they have adequate access to food, shelter, medication, etc.

42. Yet for a contemporary understanding of the term to be relevant and, more importantly, useful to today's shipmasters it ought to be applicable in the scenarios faced by today's seafarers. The increased tendency of groups of persons, including asylum seekers and refugees, to embark on dangerous maritime journeys, possibly coupled with an increased understanding and awareness of the level of human rights protection in particular regions and countries, requires an interpretation of "safety" that goes beyond a mere protection from physical danger, but also considers the human rights perspective of the proposed disembarkation location. In fact, it would seem incongruous to accept a definition of "place of safety" that permits the disembarkation or persons by a rescuing ship, and under the co-ordination of an RCC state, at a port of a state where the fundamental human rights of the rescued persons could be at risk. Such disembarkation could be tantamount to *refoulement*.

43. The Guidelines embrace this interpretation of a "place of safety" and state that in situations involving asylum seekers and refugees rescued at sea, disembarkation in territories where their lives and freedoms would be threatened should be avoided.⁵⁰ In the list of international law references and principles set out in the Guidelines, specific reference is made to the principle of non-refoulement as codified in Article 33 of the 1951 Convention relating to the Status of Refugees.⁵¹

44. This interpretation was reiterated by the IMO Facilitation Committee in January 2009, when it issued a set of principles to states to consider with a view to harmonising their disembarkation procedures.⁵² The Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea⁵³ invite states to incorporate a number of priorities into their disembarkation administrative procedures. Importantly, the IMO indicated that states should not require shipmasters to conduct any procedures secondary to immediate assistance, saving procurement of basic identification information, aboard the rescuing vessel. States should ensure that asylum seekers are guaranteed utmost security and confidentiality of their identity, and that following disembarkation they are referred to the competent asylum authorities for their asylum applications to be processed. Finally, states are urged to ensure respect for the international protection principles enshrined in the 1951 Convention relating to the Status of Refugees and the United Nations Convention against Torture (CAT) throughout disembarkation procedures.

45. Beyond operational necessity, the relevance of establishing a comprehensive definition of "place of safety" that is recognised and implemented by states is evident in the context of evaluating whether the disembarkation of rescued or intercepted persons in a specific third country, such as for example Libya, Senegal and Mauritania, is deemed to be in conformity with a state's obligations under international human rights law. In the above analysis on the applicability of international rights norms on the high seas, particularly regarding the extraterritorial application of the non-refoulement principle, the conclusion was reached that once a state exercises jurisdiction over persons or vessels, it is required to ensure the protection of their fundamental human rights. This requirement entails protection from non-refoulement in the

present content, see the leaflet prepared by IMO in conjunction with UNHCR, Rescue at sea: A guide to principles and practice as applied to migrants and refugees, www5.imo.org/SharePoint/mainframe.aspx?topic_id=1437.

⁴⁸ IMO MSC, Resolution MSC.167(78), Guidelines on the Treatment of Persons rescued at Sea, 20 May 2004, www.imo.org/includes/blastDataOnly.asp/data_id%3D15540/167%2878%29.pdf.

⁴⁹ The Guidelines invite states, RCCs and shipmasters to establish their own procedures reflecting the Guidelines' content, the purpose of which is "to provide guidance ... with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea", Annex, paragraph 1.1.

⁵⁰ Annex, paragraph 6.17.

⁵¹ Appendix, paragraphs 7 and 8.

⁵² It is of course relevant that the IMO felt the need to issue such principles following the Guidelines.

⁵³ IMO Facilitation Committee, FAL.3/Circ.194, 22 January 2009, www.imo.org/includes/blastDataOnly.asp/data_id%3D24818/194.pdf.

sense of the 1951 Convention on the Status of Refugees, the European Convention on Human Rights, the ICCPR and CAT.⁵⁴ The evaluation as to whether an intended place of disembarkation is a safe one would therefore entail an extensive analysis into its general human rights situation, coupled with a more specific examination of the particular treatment reserved for the intercepted persons.

46. For example, concerns were raised in relation to Libya in the context of the push-back policy implemented by Italy throughout 2009 and a push-back incident involving Malta in July 2010.⁵⁵ Concerns included the fact that Libya is not a signatory to the 1951 Convention on the Status of Refugees and that it has not established asylum procedure or institutions responsible for asylum and refugee matters. Emphasis is also placed on the fact that conditions in Libya's detention facilities are particularly harsh and that sub-Saharan Africans are often victims of widespread discrimination and racial violence.⁵⁶ With the expulsion of UNHCR in mid-2010, it seems that the situation for asylum seekers and for the refugees previously recognised under UNHCR's mandate has been exacerbated.⁵⁷ Indeed, with the situation in Libya deteriorating following the civil war that broke out in February 2011, refugees and asylum seekers have found themselves in acute danger, prompting UNHCR to appeal to the international community for their urgent resettlement.

47. A similar analysis is required in relation to the Frontex joint operations hosted by Spain and conducted off the West African coast. According to Frontex statistics,⁵⁸ 5 969 persons were diverted back to the closest shore (Senegal or Mauritania) during the Joint Operation HERA 2008, yet the fate of the diverted persons remains unclear, particularly in terms of whether their human rights were protected by the Spanish, Senegalese or Mauritanian authorities. Since the interception modalities remain unclear, it is not possible to ascertain the precise manner in which boats were actually diverted from their original route and returned to the closest shore.⁵⁹ No information has been provided as to whether intercepted and diverted asylum seekers were given the opportunity to present their asylum claims and, generally, what treatment was reserved for the diverted persons. Despite Frontex's assertions that "a Mauritanian or Senegalese law enforcement officer is always present on board of deployed member states' assets and is always responsible for the diversion", the above analysis emphasised that Spain remains responsible to act according to its international human rights obligations. Furthermore, it is also interesting to note that since Frontex refers to the assets of member states participating in the joint operation, it is therefore not only Spain that is bound to adhere to its human rights responsibilities, but all the member states involved in Operation HERA 2008.⁶⁰

48. As outlined below, recent European Union efforts at harmonising search and rescue practices through the adoption of appropriate guidelines have also incorporated a definition of "place of safety" that takes into account the principle of non-refoulement, including to the extent that rescued persons should be given the opportunity to express their fear of being returned to the intended point of disembarkation.

⁵⁴ This was also noted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its annual report for 2008-2009, paragraph 93-95, at www.cpt.coe.int/en/annual/rep-19.pdf.

⁵⁵ Whilst the Malta incident was the result of a rescue mission, the Italian push-backs occurring in the summer of 2009 were either the result of rescue operations or of interception activities. For details of the incidents, see Tondini M., *Fishers of Men? The Interception of Migrants in the Mediterranean Sea and Their Forced Return to Libya*, October 2010, INEX Paper, available at www.inexproject.eu/index.php?option=com_docman&task=doc_download&gid=51&&Itemid=72 and *The Sunday Times*, "Right back where they left", 25 July 2010, at www.timesofmalta.com/articles/view/20100725/local/right-back-where-they-left.

⁵⁶ See, for example, UNHCR's submission to the *Hirsi* case, March 2010, pp. 4-8, at www.unhcr.org/refworld/docid/4b97778d2.html; CPT, Report to the Italian Government on the visit to Italy carried out by the CPT from 27 to 31 July 2009, April 2010, Chapter II(C); Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 21 September 2009, at www.hrw.org/en/node/85582/section/1 and Jesuit Refugee Service Malta, *Do they know? Asylum-seekers testify to life in Libya*, December 2009, at www.jrsmalta.org/Do%20They%20Know.pdf.

⁵⁷ "UNHCR says ordered to close office in Libya", UNHCR, 8 June 2010, at www.unhcr.org/4c0e79059.html.

⁵⁸ HERA 2008 and NAUTILUS 2008 Statistics, 17 February 2009, at www.frontex.europa.eu/newsroom/news_releases/art40.html.

⁵⁹ While the bilateral agreements between Spain and Senegal, and Spain and Mauritania are available, memoranda of understanding detailing the operational elements of the border patrols are not in the public domain. Frontex explained that intercepted persons "have either been convinced to turn back to safety or have been escorted back", *ibid*.

⁶⁰ This point may raise complex international law issues since the legal basis for member states other than Spain to patrol Senegalese or Mauritanian territorial waters is unclear. In the absence of such a legal basis, the legitimacy of such activities is questionable. See Trevisanut S., *Maritime Border Control and the Protection of Asylum-Seekers in the European Union*, *Touro International Law Review*, Vol. 12, 2009, pp. 158-161.

3.3. Establishing disembarkation responsibility

49. With the amendments to the SAR and SOLAS Conventions, it was hoped that clarity could be brought to complex situations and that states would have the tools to harmonise their practices. Yet an indirect and definitely unintended consequence of the amendments was the creation of further disagreement, especially between Italy and Malta. Malta argued that it was not in its interests to accept the 2004 amendments and in fact refused them. The Maltese authorities argued that the amendments required the state responsible for the SAR zone within which persons are rescued to be also responsible for providing the safe disembarkation place. Malta's concern was that it would be obliged to assume responsibility for every person rescued within its SAR zone.⁶¹ This is primarily due to the fact that Malta's SAR zone is extremely large, ranging from close to Tunisia to Greece and covering an area of about 250 000 square kilometres.⁶² Malta's decision not to adopt the 2004 amendments has led to a situation whereby Malta remains bound by the SAR and SOLAS Conventions prior to the amendments and Italy, accepting the amendments, is bound by the new versions.

50. In substantive terms, this means that whereas Malta is bound to ensure the disembarkation of persons rescued within its SAR zone at the nearest safe port, Italy's understanding of disembarkation in the SAR regime is that this ought to occur in the state responsible for the SAR zone. The potential for conflict is clear, particularly in those cases where persons are rescued within Malta's SAR zone, but geographically closer to Lampedusa. This kind of disagreement was the basis for the diplomatic stand-off between Italy and Malta in April 2009, following the rescue of over 140 persons by the Turkish cargo ship *Pinar E* about 41 nautical miles off Lampedusa and about 114 nautical miles from Malta. Whilst Malta insisted the rescued persons be taken to the nearest port, an Italian port, Italy urged Malta to take responsibility for the persons in fulfilment of its SAR obligations.

51. After four days, Italy authorised the ship to enter Italian waters and to disembark the rescued persons.⁶³ The death of a pregnant woman aboard the ship, the rapid deterioration in the persons' physical and psychological conditions due to lack of sufficient water and food, increased security risks due to overcrowding and an alleged financial loss of over US\$350 000, emphasise the urgent need for states to more effectively co-ordinate their search and rescue efforts and prioritise the respect for human life in all their activities at sea.⁶⁴

52. These divergent approaches to the interpretation of states' SAR obligations were not limited to Italy and Malta, but also included other European Union member states to the extent that the organisation of Frontex joint operations had become problematic.⁶⁵ In response to this situation, in April 2010 the European Union adopted the "Frontex Guidelines" with a view to "provide for better co-ordination among the member states participating in the operations with regard to such situations and to facilitate the conduct of such

⁶¹ See the letter sent by the Maltese Permanent Representative to the European Union to the Chairperson of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs on 2 July 2007, at www.europarl.europa.eu/meetdocs/2004_2009/organes/libe/libe_20070703_0900_hearing.htm. For a detailed analysis see Aalberts T.E. and Gammeltoft-Hansen T., *Sovereignty at Sea: The law and politics of saving lives in the Mare Liberum*, DIIS Working Paper, 2010, at www.diis.dk/graphics/Publications/WP2010/WP201018_sovereignty_at_sea_mare_liberum_web.pdf.

⁶² It ought to be reiterated that the disembarkation of an asylum seeker onto a state's territory has long-term implications in terms of access to asylum procedures, reception modalities and durable solutions.

⁶³ See *The Sunday Times of Malta*, "Pregnant woman's funeral on stranded cargo vessel: Italy, Malta refuse to give ground", 19 April 2009, at www.timesofmalta.com/articles/view/20090419/local/pregnant-womans-funeral-on-stranded-cargo-vessel; *La Repubblica*, "Pina, le lacrime del comandante 'Non sono riuscito a salvare quella ragazza'" [Pinar, the master's tears "I was not able to save that girl"], 21 April 2009, at www.repubblica.it/2009/04/sezioni/cronaca/immigrati-5/reportage-21apr/reportage-21apr.html.

⁶⁴ Just a week after this incident, Italy and Malta were involved in a similar situation ending with the disembarkation of the rescued persons in Malta. See *The Times of Malta*, "Migrants rescued close to Lampedusa brought to Malta: Government keeps mum", 1 May 2009, at www.timesofmalta.com/articles/view/20090501/local/migrants-rescued-close-to-lampedusa-brought-to-malta. In retrospect, it is possible to argue that these two incidents heightened tensions between Italy and Malta, escalating to the decision by Italy to commence the implementation of the push-back policy in May 2009.

⁶⁵ "Go ahead for Nautilus 2008", Frontex, 7 May 2008, at www.frontex.europa.eu/newsroom/news_releases/art36.html and *The Times of Malta*, "Germany to accept migrant survivors", 29 June 2007, at www.immigrationwatchcanada.org/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=1844&MMN_position=92:90. See also the position announced on 3 September 2010 by the Dutch Government, wherein the Dutch Minister of Justice stated, summarily, that Dutch vessels are not Dutch territory and asylum requests made aboard Dutch vessels should be assessed by the state hosting the Frontex operation (reported on <http://migrantsatsea.wordpress.com/2010/09/14/dutch-govt-position-on-asylum-requests-made-at-sea/>).

operations".⁶⁶ In substantive terms, the Guidelines reiterate the principle of non-refoulement, particularly in relation to disembarkation responsibilities, and underline the duty to inform rescued persons of the intended place of disembarkation so as to give them the opportunity to express their possible fear of being returned to such place.⁶⁷ The Guidelines are controversial since they include a provision stating that when disembarkation at the country of departure is not possible, this should happen in the member states hosting the Frontex Operation.⁶⁸ The future of the Guidelines remains uncertain since they are currently being challenged before the European Court of Justice (ECJ), yet they remain valid pending the outcome of the case.⁶⁹

53. A further unresolved aspect of the SAR regime that raises serious human rights concerns relates to situations where the state responsible for the SAR zone is unresponsive to distress calls and fails to fulfil its obligation to co-ordinate search and rescue operations. Within the European context, such incidents have been seen in the central Mediterranean region where persons rescued within Libya's SAR zone were denied access to Maltese territorial waters on the basis that Libya was the state responsible for the SAR zone. The incident of the *Francisco y Catalina* in July 2006 is a clear example of the impact of such a scenario on the lives of the rescued, and rescuing, persons.⁷⁰ In fact, it seems that it is on the basis of the solution brokered by UNHCR during this incident that the southern European states included in their above-mentioned Paper the proposal to establish a responsibility-sharing scheme for persons rescued outside the SAR zone of a European Union member state.⁷¹

3.4. Combating trafficking and smuggling

54. Two other international maritime instruments requiring inclusion in this discussion are the so-called "Palermo Protocols".⁷² As protocols to the United Nations Convention against Transnational Organized Crime (2000), the two protocols embody international efforts to combat the crimes of smuggling and trafficking by providing a detailed definition of the two terms and establishing an international co-operative framework aimed at criminalising and preventing activities falling within the definitions' purview.⁷³

55. The Protocols require states parties to strengthen border controls in order to detect and prevent smuggling and trafficking.⁷⁴ In order to effectively fulfil these obligations, states are authorised to deny entry to persons implicated in these offences,⁷⁵ to suppress the use of the vessels used for such purposes and also to board and search them.⁷⁶ Thus the protocols grant states far-reaching authority over vessels with regard to which there are reasonable grounds to believe they are being used for the purposes of smuggling or trafficking of persons. Since, as noted above, the sea crossings made by migrants, asylum seekers and refugees are in the vast majority of cases made in an irregular manner through smuggling or trafficking networks, southern European states have the right to intercept such vessels in the interests of combating crime. Yet the protocols do not grant states the right to exercise this *de jure* jurisdiction in an absolute manner.

56. Together with a number of provisions obliging states to ensure the protection and humane treatment of smuggled and trafficked persons,⁷⁷ both protocols include important saving clauses that effectively

⁶⁶ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational co-operation co-ordinated by the European Agency for the Management of Operation Cooperation at the External Borders of the Member States of the European Union, Preamble, paragraph 9. The Guidelines, in their entirety, are to form part of the operational plan drawn up for each Frontex co-ordinated project.

⁶⁷ Part I, Guideline 1.2.

⁶⁸ Part II, Guideline 2.1.

⁶⁹ European Parliament v. Council of the European Union, Case C-355/10.

⁷⁰ Having rescued 51 persons within Libya's SAR zone, the Spanish fishing trawler was prevented from entering Maltese waters. See the UNHCR press release "Malta: Spanish trawler waits offshore, UNHCR calls for EU burden-sharing", 18 July 2006, at www.unhcr.org/44bcbaec16.html.

⁷¹ See the Paper referred to above in footnote 10, pp. 3-4.

⁷² List of States Parties to the Trafficking Protocol at www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html, and for the Smuggling Protocol see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en.

⁷³ For definitions of the two terms, see above at footnote 8. Article 2 of each protocol states their purposes, essentially the prevention and combating of the two crimes, the protection of victims' rights and the promotion of state co-operation towards these ends.

⁷⁴ Article 11(1) in both protocols.

⁷⁵ Trafficking Protocol, Article 11(5).

⁷⁶ Smuggling Protocol, Articles 8(1) and 8(7) respectively.

⁷⁷ For example Article 9(1)(a) of the Smuggling Protocol obliges states to ensure the persons' protection and safety and Article 14, on training and technical co-operation, requires states to include "the humane treatment of migrants and the protection of their rights" in all training provided to personnel involved in combating smuggling. Under Article 16 states

incorporate the duty to respect the fundamental principle of non-refoulement in all measures adopted by states under the protocols. Article 14(1)⁷⁸ of the Trafficking Protocol states that:

“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.”

57. The effective impact of these saving clauses is that the fact that a vessel is flagless and engaging in smuggling or trafficking does not permit states to rely on the protocols in justification of interception measures that result in a breach of the principle of non-refoulement or of any other fundamental human right.⁷⁹ Together with the conclusions reached above regarding the extraterritorial application of international human rights obligations and of the principle of non-refoulement, the Palermo Protocols' saving clauses strengthen the view that interception at sea of asylum seekers, refugees and migrants must be conducted with a full adherence to international human rights standards.

3.5. The European Union

58. At a regional level, the principle of non-refoulement is also enshrined in one of the European Union's main instruments relating to maritime law. A necessary corollary of the creation of an area without internal borders in order to ensure the free movement of persons was the need for the European Union to ensure a common policy on its external borders.⁸⁰ Towards achieving these aims, the "Schengen Borders Code"⁸¹ was adopted as the main instrument through which member states would, on a common basis, take all necessary measures to manage the European Union's internal and external borders. Under the Code's Chapter II, member states are required to control external borders through, *inter alia*, checks of persons attempting to enter their territory and border surveillance activities, with Article 13 stipulating that third-country nationals who do not fulfil the established entry requirements are to be denied entry to European Union territory. This statement is nonetheless expressly qualified in the same article, providing that this obligation to refuse entry to third-country nationals not fulfilling entry requirements “shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection”.⁸² It should also be further reiterated that the right to seek asylum is included in the Charter of Fundamental Rights of the European Union.⁸³

59. The Schengen Borders Code is complemented by a handbook, intended for use by the national authorities involved in border controls and to be included in the member states' border management training programmes.⁸⁴ The relevance of the Schengen Handbook to the present analysis is its clarification of the principles and procedures to be followed by border officials in a number of scenarios, essentially:⁸⁵

- All persons wishing to seek international protection must be given the opportunity to do so;
- Persons are considered applicants for international protection when fear of serious harm is expressed in relation to return to his/her country of origin or former habitual residence;
- No particular form is required for this expression of fear as long as the key component – fear – is expressed;

are obliged to ensure that migrants are afforded appropriate protection against violence, in particular protection of their right to life and the right not to be subject to torture or other cruel, inhuman or degrading treatment or punishment. Furthermore, the special needs of women and children are to be given special attention.

⁷⁸ Replicated in Article 19(1) of the Smuggling Protocol.

⁷⁹ See Gallagher A., Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis, *Human Rights Quarterly*, Vol. 23, No. 4 (November 2001), pp. 975-1004.

⁸⁰ See, in particular, European Commission, Communication from the Commission to the Council and the European Parliament: Towards integrated management of the external borders of the Member States of the European Union, COM(2002) 233 final, 7 May 2002, at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2002&nu_doc=233.

⁸¹ Regulation (EC) no 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (*Schengen Borders Code*), at http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l14514_en.htm.

⁸² Article 13(1). This principle is also included in the Code's Preamble (paragraph 20), stating that the Code “should be applied in accordance with the Member States' obligations as regards international protection and non-refoulement”.

⁸³ Article 18. See www.europarl.europa.eu/charter/default_en.htm.

⁸⁴ European Commission, Commission Recommendation establishing a common “Practical Handbook for Border Guards (*Schengen Handbook*)” to be used by Member States' competent authorities when carrying out the border control of persons, C(2006) 5186 final, 2006, at www.statewatch.org/news/2006/dec/com-schengen-handbook-06.pdf.

⁸⁵ See Section 10, Asylum-seekers/applicants for international protection.

- In case of doubt, the decision as to whether a person is attempting to request international protection shall not be taken by the border official alone, but the official is obliged to consult the national authorities responsible for such applications;
- A number of procedural guarantees are clearly stipulated (use of interpreters where necessary, provision of relevant information, etc.).

3.6. Frontex

60. Whilst it is not the aim of this report to provide an evaluation of this European Union agency, attention must nonetheless be given to its present and potential role in the interception at sea of asylum seekers, refugees and migrants.

61. At present, the Joint Operation HERA is the only operation in which intercepted vessels are diverted back to the closest shore. Diversions were never included in the operational arrangements for the central Mediterranean joint operations, yet it is not sure whether this is due to a policy of the member states hosting or involved in the operations or whether it was due to the lack of support and agreement from the relevant North African states, particularly Libya. In this regard, although the recent announcement by the European Commission on the finalisation of a Migration Co-operation agenda with Libya does not include any reference to the role of Frontex, particularly in relation to diversions of intercepted vessels, it is yet to be seen what role will be allocated to Frontex and to its joint operations. This co-operation has however been temporarily suspended in the light of the ongoing events in Libya, with the European Union institutions acknowledging the need to re-evaluate their asylum policy in relation to their relations with third countries deemed to be "unsafe".⁸⁶

62. The above comments on HERA 2008 emphasised Spain's obligation to ensure that its interception measures are conducted in a manner that is in conformity with its international human rights obligations. This was also reiterated in relation to the other member states participating in the operation. Yet in this regard Frontex's responsibility and accountability remain elusive. In joint operations, Frontex co-ordinates member states' efforts and resources and provides technical expertise so as to maximise the operation's efficiency and success,⁸⁷ whilst the participating member states decide on the operational aspects including rules on disembarkation, the assumption of responsibility over rescued persons and also diversions. As an Agency of the European Union, Frontex is obliged to act in a manner that is consistent with the Union's stated fundamental values, as contained in the founding Treaties and widely reiterated in the European Union *acquis*. The nature, extent or import of Frontex's decision-making power or operational authority does not minimise or rule out these obligations to respect fundamental human rights in its own actions and to ensure their adherence in all the activities it co-ordinates and facilitates. This understanding is also confirmed in the Charter of Fundamental Rights of the European Union (Article 51).

63. Possibly in response to such concerns, the Commission's proposal to amend the Frontex Regulation, presented in February 2010, includes a number of provisions aimed at "strengthening the safeguards to guarantee full respect of fundamental rights."⁸⁸ It is proposed that all Frontex activities shall be conducted in accordance with fundamental rights and international protection obligations.⁸⁹ This is a general statement that reaffirms the above conclusions without adding any substantive element. It is nonetheless a welcome inclusion, the strength of which will only be evidenced in its application. The same may be said of the proposal to include in the evaluation of Frontex's activities, performed every five years, an assessment of the extent to which the Charter of Fundamental Rights was respected.⁹⁰ In spite of these affirmations, the proposal does not indicate what measures are to be taken to ensure compliance with these rules.⁹¹ In terms

⁸⁶ *Malta Today*, "Gaddafi's illegitimacy forces EU into asylum policy rethink, MEP says", 24 March 2011, www.maltatoday.com.mt/news/national/gaddafis-illegitimacy-forces-eu-into-asylum-policy-rethink-mep-says. See also the Press Release of the European Parliament of 16 March 2011, "Flight from north African unrest: a long-term solution needed", www.europarl.europa.eu/en/pressroom/content/20110314IPR15475/html/Flight-from-north-African-unrest-a-long-term-solution-needed.

⁸⁷ This is clearly specified in the Agency's establishing Regulation (Article 1), where it is also reiterated that the control and surveillance of the external borders is an obligation of the member states.

⁸⁸ Comments made by the European Union Home Affairs Commissioner, Cecilia Malmström, during the announcement of the proposals, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/184&type=HTML&aged=0&language=>. The Commission proposal: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0061:FIN:EN:PDF>.

⁸⁹ Amendment of Article 1.

⁹⁰ New paragraph in Article 33.

⁹¹ This is one of the points raised by Amnesty International and the European Council on Refugees and Exiles (ECRE) in their comments to the proposal. See Amnesty International and ECRE, Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of

of training, the European Commission proposes that all Frontex staff and member state border guards and other personnel concerned shall receive training in fundamental rights and access to international protection.⁹² It is worth noting in this context that on 31 March 2011, Frontex's Management Board endorsed the Agency's Fundamental Rights Strategy.⁹³

64. The proposal also gives Frontex a greater role in the design and conduct of joint operations by requiring that the project's operational plan be drawn up by Frontex's Executive Director and agreed upon jointly by the Executive Director and the host member state. According to the proposal, this operational plan should cover elements such as the project's *modus operandi*, its duration, geographical area of coverage and, specifically for sea operations, "specific requirements regarding the applicable jurisdiction and maritime law provisions concerning the geographical area where the joint operation takes place".⁹⁴ It is opportune to reiterate that the Frontex Guidelines discussed above form part of this operational plan, thereby incorporating the broader definition of "place of safety".⁹⁵

65. Following a formal request for assistance by the Italian Ministry of the Interior received by Frontex on 15 February 2011 regarding the extraordinary migratory situation in Lampedusa, Joint Operation HERMES 2011 started in February 2011 with the deployment of additional aerial and maritime assets from Italy and Malta. According to an official communication by Frontex "The Italian Government requested assistance in strengthening the surveillance of the European Union's external borders in the form of a Joint Operation. Additionally, Italy requested a targeted risk analysis on the possible future scenarios of the increased migratory pressure in the region in the light of recent political developments in North Africa and the possibility of the opening up of a further migratory front in the Central Mediterranean area".⁹⁶

66. In the context of this operation, European Commissioner Cecilia Malmström clearly stated that the Frontex mission would be governed by European legislation and that the interdiction and push-back of migrants encountered at sea was not permitted.⁹⁷ This Commission statement has the potential of having serious repercussions on the development of not only the European Union's asylum policy but also particularly on the relations of European Union member states with third countries that are unwilling or unable to guarantee the adequate respect and protection of the rights of migrants and asylum seekers. Specifically, the application of this statement to the above-mentioned Spanish and Italian maritime activities is yet to be established. It ought to be noted, however, that despite this statement, on 14 March 2011, the Italian authorities denied entry to about 1 800 persons aboard the ship *Mistral Express*. The vessel eventually made its way to Morocco.⁹⁸

4. Recommendations

67. The above analysis provides a summary of the main relevant parameters within which states may and should operate when implementing interception measures at sea. Obligations emerging from various international and regional maritime law instruments were highlighted and aligned with or against responsibilities imposed by international law, including international human rights and refugee law. This analysis was presented against the backdrop of mixed flows of persons leaving African shores and attempting to reach and access European territory.

68. It is necessary at this stage to draw a number of conclusions from the above observations and extract a set of recommendations. These are primarily addressed to states, but also indirectly to relevant international and regional institutions and other actors.

Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), September 2010, p. 14.

⁹² New paragraph 1(a) in Article 2 and the replacement of the first paragraph in Article 5.

⁹³ See www.frontex.europa.eu/newsroom/news_releases/art105.html.

⁹⁴ New paragraphs in Article 3.

⁹⁵ For a critical analysis of the proposal, see the briefing presented by Amnesty International and ECRE at footnote 91, and also UNHCR, UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), COM(2010)61 final, October 2010, at www.unhcr.org/refworld/docid/4cb881a02.html.

⁹⁶ www.frontex.europa.eu/newsroom/news_releases/art95.html.

⁹⁷ <http://migrantsatsea.wordpress.com/2011/02/19/frontex-operation-hermes-to-begin-on-sunday-20-feb-e2%80%93push-back-practice-prohibited/>, <http://migrantsatsea.wordpress.com/2011/02/19/frontex-operation-hermes-to-begin-on-sunday-20-feb-e2%80%93-push-back-practice-prohibited/>

⁹⁸ // *Messaggero*, "Viminale ferma nave con 1.800 migranti. PD all'attacco. Barroso: contate sulla Ue", 14 March 2011. See also, "Ferry with 1800 Evacuees from Libya, Blocked from Landing in Italy, Sails to Morocco", 20 March 2011.

68.1. States should ensure that their border management policies and activities, including interception measures, recognise the mixed composition of the flows of persons attempting to cross their maritime borders and ensure that all persons affected by these policies and activities are not deprived of their fundamental human rights. Interception measures must include clear guidelines on the identification and referral of persons who may need international protection, and on other measures potentially affecting rights, such as deprivation of liberty, restriction on freedom of movement, etc.

68.2. In all instances where states exercise their *de jure* or *de facto* jurisdiction over intercepted persons and vessels, they must adhere to their obligations under international law, including international human rights and refugee law, including protection from *refoulement*, whether the interception measures occur within their own territorial waters, in those of another state on the basis of an ad hoc bilateral agreement, or on the high seas. Standardised procedures must be developed to guarantee respect for fundamental rights and include a system of prompt, automatic, impartial and independent oversight of operations.

68.3. International agreements upon which interception operations are based must be publicly available and subject to democratic scrutiny. They must also be subject to independent supervision of their application.

68.4. All states or agencies involved or co-ordinating interception operations must keep records regarding nationality, age, personal circumstances and reasons for passage of those intercepted.

68.5. All states currently intercepting migrants, asylum seekers and refugees at sea should immediately refrain from such practices where these result in direct or indirect *refoulement*.

68.6. Disagreements over the responsibility for rescued persons endanger the lives, security and livelihood of the rescued and rescuing persons, and could discourage seafarers from rescuing persons in distress at sea. The prompt disembarkation of rescued persons at a place of safety should be a priority of all search and rescue regimes. Border operations at sea should contain clear guidance concerning the place of disembarkation.

68.7. Disembarkation of rescued persons should be made at a place that provides for their protection and assistance through national referral mechanisms or equivalent, including to asylum procedures, and for the assessment of immediate needs and that does not present a risk to their fundamental human rights. Persons in need of international protection should be granted access to a fair and effective asylum procedure where their claims can be properly determined.

68.8. In the conduct of border surveillance activities, whether in the context of prevention of smuggling or trafficking or of border management, all intercepted persons must be treated humanely and their human rights must be respected at all times, including the principle of non-*refoulement*.

68.9. The arrival by sea of mixed flows of persons – directly, following a search and rescue operation or in the context of border management activities – presents serious challenges to coastal states. The international community should provide assistance to these states in a spirit of solidarity and responsibility-sharing.

68.10. States should, within the context of the International Maritime Organisation, make concerted efforts to ensure a consistent and harmonised approach to international maritime law through, *inter alia*, agreement on the definition and content of the key terms and norms.

68.11. An Inter-agency group should be established with the aim of setting clear policy priorities, providing guidance to states and other relevant actors and monitoring and evaluating the use of maritime interception measures. The group should include the International Maritime Organisation, the United Nations High Commissioner for Refugees, the International Organisation for Migration, the Council of Europe, Frontex and the European Asylum Support Office.