

## General legal considerations of relevance to NATO's engagement with the refugee and migrant movements in the Aegean Sea

### Summary

Search-and-rescue and other interception activities at sea, including the apprehension of smugglers, and the subsequent disembarkation of rescued and/or intercepted people, needs to be undertaken in compliance with international human rights and refugee law standards, in particular the principle of *non-refoulement*, the right to family unity, the best interests of the child and the prohibition of inhuman or degrading treatment.

In accordance with international law of the sea as well as international refugee and human rights law, people in distress at sea must be assisted in a timely manner to prevent loss of life among those crossing the Aegean; they need to be disembarked at a place of safety and not be taken or returned to a place where their lives or freedoms would be threatened, or to a place from which they may risk subsequently being sent onwards to such a place; they need to be able to have access to fair and efficient asylum procedures, and to international protection if they require it; and they should be treated humanely and with due regard for their safety, security, and human rights.

### Background

The purpose of this note is to set out some general legal considerations relevant to any potential NATO engagement in the Aegean Sea. It is offered in follow-up to the discussion with the NATO Secretary General during a meeting with the UN High Commissioner for Refugees on 25 February 2016.

Whilst UNHCR is not privy to operational details, on the basis of public statements to date,<sup>1</sup> it is understood that:

- NATO's mission in the Aegean Sea ("Aegean Mission") currently involves NATO's Standing Maritime Group 2 ("SMG2"), which has been deployed to the Aegean Sea and has been tasked with reconnaissance, monitoring and surveillance activities.
- Participating assets will be able to deploy in the territorial waters of Greece and Turkey (though Greek and Turkish forces will not operate in each other's territorial waters or airspace).
- The Aegean Mission will entail cooperation with Frontex and national coastguards, notably by way of information sharing.
- NATO has acknowledged that participating vessels are obliged to meet their search-and-rescue obligations.
- The Aegean Mission does not encompass stopping or turning back boats. However, rescued migrants and refugees who have come from or via Turkey may be returned to Turkey in instances where it would be consistent with international and national law to do so.

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<sup>1</sup> At the time of writing, UNHCR does not have available to it specific details of the rules of engagement, standard operating procedures, or joint operations area of the Aegean Mission. See: Statement by the NATO Secretary General on NATO support to assist with the refugee and migrant crisis, 25 February 2016, [www.nato.int/cps/en/natohq/opinions\\_128372.htm](http://www.nato.int/cps/en/natohq/opinions_128372.htm); NATO and Europe's refugee and migrant crisis: Opinion piece by NATO Secretary General Jens Stoltenberg, 26 February 2016, [www.nato.int/cps/en/natohq/opinions\\_128645.htm](http://www.nato.int/cps/en/natohq/opinions_128645.htm).

UNHCR notes that a very substantial majority of those attempting dangerous sea crossings in the Aegean Sea are persons who may be in need of international protection. Of the approximately 124,000 arrivals to Greece in 2016 to date (as at 1 March), over 90% originated from the world's ten most significant refugee-producing countries.<sup>2</sup>

Against this background, this note sets out more specifically legal considerations in relation to the principle of *non-refoulement* in the context of maritime operations, search-and-rescue obligations, as well as combatting smuggling and trafficking. In UNHCR's view, these considerations are important when designing and implementing NATO activities in the Aegean Sea in the context of any rescue operations or measures taken at sea to apprehend smugglers or prevent unauthorized travel across international (sea) borders (including 'interception' operations).

Given the limited details of the specific modalities of the Aegean Mission available to UNHCR, the following considerations are general in nature and do not seek to provide concluded views on all possible scenarios.

### **The principle of *non-refoulement***

1. All NATO member states are states parties to one or both of the 1951 Refugee Convention and its 1967 Protocol (together, "1951 Convention").<sup>3</sup> Accordingly, all member states whose assets are participating in the Aegean Mission are bound by the provisions of the 1951 Convention. In addition, they are bound by other applicable international and regional human rights law instruments, when acting in furtherance of the objectives of the Mission, including the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child, to which all NATO member states are parties, as well as the European Convention on Human Rights and Fundamental Freedoms, to which all European NATO member states are a state party.
2. Flag states of participating vessels are bound by these instruments whether those vessels act under NATO or national command.
3. The principle of *non-refoulement* is a cardinal principle of international refugee law, most prominently expressed in Article 33 of the 1951 Convention, prohibiting any state conduct leading to the return of a refugee 'in any manner whatsoever', including by way of interceptions of various kinds on land or at sea (whether in territorial waters, the contiguous zone, or the high seas),<sup>4</sup> to a country where she or he would be at risk of persecution based on a Convention ground or other serious violation of human rights. The principle of *non-refoulement* applies wherever the state in question exercises jurisdiction over a person requesting or in need of international protection, including where acting outside its territory or territorial waters in the context of maritime search-and-rescue or other forms of interception at sea.<sup>5</sup>

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<sup>2</sup> See <http://data.unhcr.org/mediterranean>.

<sup>3</sup> Turkey is a state party to both the 1951 Convention and the 1967 Protocol, subject to the 'geographical limitation': in acceding to the 1967 Protocol, Turkey stipulated that it maintained the provisions of its declaration under Article 1B of the 1951 Convention, according to which it applies the 1951 Convention only to persons who have become refugees as a result of events occurring in Europe.

<sup>4</sup> ExCom Conclusion No. 97 (LIV), 2003, para (a)(iv).

<sup>5</sup> UNHCR, *UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy*, 22 June 2011, Application No. 27765/09, [www.refworld.org/docid/4e0356d42.html](http://www.refworld.org/docid/4e0356d42.html); UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras 24, 26, 32-43, [www.refworld.org/docid/45f17a1a4.html](http://www.refworld.org/docid/45f17a1a4.html); UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy*, March 2010, paras. 4.1.1-4.2.3, [www.refworld.org/docid/4b97778d2.html](http://www.refworld.org/docid/4b97778d2.html); UNHCR, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by*

4. UNHCR's Executive Committee (hereafter ExCom) has emphasized the fundamental importance of fully respecting the principle of *non-refoulement* for people at sea, underlining that:

‘interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.’<sup>6</sup>

5. To give effect in good faith to their obligations<sup>7</sup> under the 1951 Convention and relevant international human rights instruments, including the prohibition against *refoulement*, states are obliged, inter alia, not to hand over those concerned to the control of a state where they would be at risk of persecution (direct *refoulement*), or from which they would be returned to another country where such a risk exists (indirect *refoulement*).<sup>8</sup>
6. Moreover, states parties are required to make independent inquiries as to the need for international protection of persons seeking asylum,<sup>9</sup> a duty recognized by a wide range of national and regional courts.<sup>10</sup> Flag states of vessels undertaking relevant sea operations must have in place arrangements that would, as necessary, be able to undertake independent inquiries into possible international protection needs and the risks that may be faced by persons so returned. Courts, as well as ExCom, have also underlined the obligation to provide persons seeking asylum access to fair and efficient procedures for determining status and protection needs.<sup>11</sup>

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MERCOSUR, 17 February 2012, para. 2(4), [www.refworld.org/docid/4f4c959f2.html](http://www.refworld.org/docid/4f4c959f2.html). UN Human Rights Committee General Comment No. 31, Nature of the General Legal Obligations Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para 10, [www.refworld.org/docid/478b26ae2.html](http://www.refworld.org/docid/478b26ae2.html). The extraterritorial applicability of human rights obligations, including the principle of *non-refoulement*, is firmly established in international human rights law. See Judgment of the International Court of Justice in *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, (2005) ICJ Gen. List No. 116, 19 December 2005, para. 180, <http://www.icj-cij.org/docket/files/116/10455.pdf>. Also, Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, <http://www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6&case=131&k=5a>, para. 111, and International Court of Justice, *Order on the Request for the indication of provisional measures, Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, (2008), ICJ Gen. List No. 140, 15 October 2008, para. 109, <http://www.icj-cij.org/docket/files/140/14809.pdf>.

<sup>6</sup> ExCom Conclusion No. 97 (LIV), 2003, para. (a)(iv).

<sup>7</sup> *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 UNTS 331, Article 26.

<sup>8</sup> UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, para. 4.

<sup>9</sup> UNHCR, *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, at para. 74-75.

<sup>10</sup> *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, paras. 146-148, [www.refworld.org/docid/4f4507942.html](http://www.refworld.org/docid/4f4507942.html); *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras. 286,298,315,321,359, [www.refworld.org/docid/4d39bc7f2.html](http://www.refworld.org/docid/4d39bc7f2.html); *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004, para. 26, [www.refworld.org/docid/41c17ebf4.html](http://www.refworld.org/docid/41c17ebf4.html); *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56, 64, [www.refworld.org/docid/515010a52.html](http://www.refworld.org/docid/515010a52.html).

<sup>11</sup> ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii) and (iii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q). *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, paras. 146-148, [www.refworld.org/docid/4f4507942.html](http://www.refworld.org/docid/4f4507942.html); *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras. 286, 298, 315, 321, 359, [www.refworld.org/docid/4d39bc7f2.html](http://www.refworld.org/docid/4d39bc7f2.html); *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56 and 64, [www.refworld.org/docid/515010a52.html](http://www.refworld.org/docid/515010a52.html). Procedures need to allow for an examination of the relevant facts and the application of the eligibility criteria of Article 1 of the 1951 Convention, in order to help a state determine who should

7. Persons rescued or intercepted at sea cannot be summarily turned back or otherwise returned to the country of departure, including in particular where to do so would deny a fair opportunity to seek asylum.<sup>12</sup> Although search and rescue operations and interceptions at sea operations are distinct, *non-refoulement* obligations are engaged equally in both circumstances. A person who is rescued or intercepted at sea need not expressly indicate a desire to seek asylum, or use any special form of words to express that desire, in order for the principle of *non-refoulement* to be engaged.<sup>13</sup> If the state concerned is aware or ought to be aware of facts about the profile of persons in respect of whom return is contemplated, or circumstances in the country to which return is contemplated, which indicate a risk that such return may itself constitute *refoulement*, these must be taken into account regardless of whether there has been an explicit and articulated request for asylum.<sup>14</sup>
8. Accordingly, a flag state should, before disembarking, transferring, or otherwise delivering or returning a person who may be in need of international protection to the territory or jurisdiction of another state, ensure that the person concerned:<sup>15</sup>
  - will be admitted and protected against *refoulement* there;
  - will have access to fair and efficient procedures for the determination of refugee status or, as applicable, other forms of international protection (including the ability to benefit from previous recognition of refugee or similar protective status, such as temporary protection);
  - will be treated in accordance with international refugee law and human rights standards, including appropriate reception arrangements and safeguards against arbitrary detention; and
  - if recognized as being in need of international protection, will be able to enjoy it in line with relevant standards.
9. Substantive assessment of the admissibility or merits of an international protection claim, should generally not take place at sea, as there can be no guarantee of reception arrangements and eligibility screening processes in line with international standards.<sup>16</sup> This holds *a fortiori* where a state involved in the rescue or interception operation is aware or ought to be aware that a proposed place of disembarkation may not meet relevant standards in respect of a particular individual or where any doubt subsists in that regard. International protection claims should ordinarily be processed on land in the territory of the state in which they have arrived or which otherwise has jurisdiction over them, including where they have arrived in

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benefit from refugee protection, and who should not: see UNHCR, *BO10 v. Minister of Public Safety and Emergency Preparedness: Factum of the Intervener* (UNHCR), 2 February 2015, para. 13, [www.refworld.org/docid/54d09bb44.html](http://www.refworld.org/docid/54d09bb44.html).

<sup>12</sup> When rescue or interception takes place with the territorial waters of an EU member state and the person(s) rescued or interception want(s) to make an asylum application, the EU asylum *acquis*, including the EU Reception Conditions Directive (recast) and the EU Asylum Procedures Directive (recast) are applicable.

<sup>13</sup> *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para. 133, [www.refworld.org/docid/4f4507942.html](http://www.refworld.org/docid/4f4507942.html). UNHCR, *UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 29 March 2011, Application no. 27765/09, para. 4.3.4, [www.refworld.org/docid/4d92d2c22.html](http://www.refworld.org/docid/4d92d2c22.html). UNHCR, *Oral intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, p. 4, [www.refworld.org/docid/4e0356d42.html](http://www.refworld.org/docid/4e0356d42.html).

<sup>14</sup> *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para. 133 and concurring opinion Judge Albuquerque (p. 66), [www.refworld.org/docid/4f4507942.html](http://www.refworld.org/docid/4f4507942.html). UNHCR, *Oral intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, [www.refworld.org/docid/4e0356d42.html](http://www.refworld.org/docid/4e0356d42.html).

<sup>15</sup> For relevant standards, see generally UNHCR, *Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, [www.refworld.org/docid/51af82794.html](http://www.refworld.org/docid/51af82794.html) (“Transfer Note”).

<sup>16</sup> See for example, UN High Commissioner for Refugees (UNHCR), *High Commissioner's Dialogue on Protection Challenges: Protection at Sea - Background Paper*, 11 November 2014, paras 6, 18 and 29, [www.refworld.org/docid/54b8fa5d4.html](http://www.refworld.org/docid/54b8fa5d4.html). UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, [www.refworld.org/docid/4cd12d3a2.html](http://www.refworld.org/docid/4cd12d3a2.html) (“Maritime Interceptions Paper”), at para 56 and *passim*.

its territorial waters or it has exercised effective control over them outside its territory. The primary responsibility to provide international protection rests with the state in whose territory or under whose jurisdiction it is sought.<sup>17</sup>

### **Distress situations and considerations around search-and-rescue under international law of the sea**

10. International law of the sea imposes clear duties on flag states, coastal states and ship masters with regard to assisting persons in distress at sea.<sup>18</sup> These duties, which reflect longstanding maritime tradition, are set out in a number of key international treaties, complemented by guidelines developed by the International Maritime Organization (“IMO”).<sup>19</sup>
11. Flag states shall require masters of a vessel, in so far as they can do so without serious danger to the ship, its crew or passengers, to:
  - render assistance to any person found at sea in danger of being lost; and
  - proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.<sup>20</sup>

Also, ‘the master of any ship which is in a position to provide assistance on receiving information *from any source* that persons are in distress at sea is bound to proceed with all speed to their assistance...’<sup>21</sup>

12. The obligation to come to the assistance of any person in distress at sea is binding on public vessels, including military vessels taking part in NATO operations, whether under NATO or national command.<sup>22</sup> In essence, a participating vessel must, if it can safely do so, render assistance to any person in distress at sea when:
  - (i) the participating vessel receives a distress communication or is otherwise informed of the need for assistance (for instance, by way of a request to assist

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<sup>17</sup> See, for example, UNHCR, Transfer Note, above n 15.

<sup>18</sup> See notably United Nations Convention on the Law of the Sea (“UNCLOS”) 1982, entered into force 16 November 1994, Article 98; International Convention for the Safety of Life at Sea (“SOLAS Convention”), 1974, entered into force 25 May 1980, Chapter V (as amended); International Convention on Maritime Search and Rescue (“SAR Convention”), 1979, entered into force 22 June 1985 (as amended). All NATO member states, except for Turkey and the United States of America, are a state party to UNCLOS, and all NATO member states, except for the Czech Republic and Slovakia, are a state party to the SAR Convention. However, the obligation to assist persons in distress at sea is generally considered to constitute a binding norm of international customary law. All NATO member states are a state party to the SOLAS Convention.

<sup>19</sup> IMO’s non-binding guidelines are relevantly set out notably in: IMO, Guidelines on the Treatment of Persons Rescued at Sea, 20 May 2004, MSC.167(78), [www.refworld.org/docid/432acb464.html](http://www.refworld.org/docid/432acb464.html) (“Rescue Guidelines”).

<sup>20</sup> UNCLOS, above n 18, Articles 98(a) and (b).

<sup>21</sup> SOLAS, above n 18, Annex, Chapter V, Regulation 33(1) (emphasis added). The SAR Convention, above n 18, which sets out the framework of the international search-and-rescue system, including with regard to the responsibilities of coastal states, sets out a range of similar and related obligations. Its Annex provides notably at paragraph 2.1.1 that on ‘receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided.’ UNCLOS, above n 18, and the SOLAS and SAR Conventions all contain provisions relating to the responsibilities of coastal states to establish, operate and maintain adequate search-and-rescue services, including arrangements for distress communication and coordination, and adequate means of locating and rescuing persons in distress: see See, for example, UNCLOS Art 98(2); SOLAS Annex, Chapter V, Regulation 7.1; SAR Annex Chapter 2 and generally.

<sup>22</sup> Although Chapter V of the SOLAS Convention, above n 18, Annex provides that it does not, except where expressly provided otherwise, apply to ‘warships, naval auxiliaries and other ships owned or operated by a Contracting Government and used only on Government non-commercial service’, such ships are ‘encouraged to act in a manner consistent, so far as reasonable and practicable with the obligations set out in Chapter V. The relevant provisions in UNCLOS, above n 18, contain no such exclusion, and the duty to assist persons in distress at sea is universally understood to apply to both private and public vessels.

from a Maritime Rescue Coordination Centre (“RCC”) or information derived from NATO’s own surveillance intelligence); or

(ii) the participating vessel in the course of its own surveillance or other activities encounters a vessel which may be in distress.

13. Importantly, the duty to assist persons in distress at sea ‘applies regardless of the nationality or status of such persons or the circumstances in which they are found.’<sup>23</sup> The duty to assist applies in respect of all migrants and refugees in distress at sea that NATO vessels become aware of, regardless of their particular status or circumstances, and regardless of whether or not it is suspected that the vessel in distress is operated by migrant smugglers. Given that migrants and refugees crossing the Aegean by boat in many or most cases travel in overcrowded, unseaworthy boats without a professional crew, UNHCR’s view is that a humanitarian and precautionary approach to identifying and responding to potential distress situations will be consistent with good-faith implementation of relevant obligations under international law of the sea, whose fundamental objective is to prevent loss of life at sea.
14. International law of the sea recalls that rescued refugees and migrants must be ‘treated with humanity, within the capabilities and limitations of the ship’.<sup>24</sup>
15. When persons in distress are embarked in the course of a rescue operation, states are obliged to ‘co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea.’<sup>25</sup> Although international law of the sea does not provide for specific obligations which would determine in all cases which state is responsible to allow disembarkation on its territory, international law of the sea provides that the state responsible for the search-and-rescue region in which the rescue takes place is required to ‘exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and relevant IMO guidelines.’<sup>26</sup> In the context of NATO operations in the Aegean, disembarkation arrangements should not be dictated by migration-management objectives alone; they must also be guided by the requirements of the international search-and-rescue regime, as well as international protection considerations.
16. ‘Place of safety’ is not defined in international law of the sea. The IMO’s 2004 Rescue Guidelines indicate that a place of safety is a ‘place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met...’<sup>27</sup>
17. Proposed arrangements for the disembarkation or transfer of rescued persons (whether disembarkation to land territory or transfer to another vessel) should *not* be considered as meeting the requirements of delivery to a ‘place of safety’ if there is reason to believe that

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<sup>23</sup> See in particular SOLAS, above n 18, Annex, Chapter V, Regulation 33(1) ; SAR, above n 18, Annex, paragraph 2.1.10.

<sup>24</sup> SOLAS, above n 18, Annex, Chapter V, Regulation 33(6); see also, for example, IMO, Rescue Guidelines, above n 19 at para 5.1.2. In addition, international and regional human rights instruments, such as the International Covenant on Civil and Political Rights (“ICCPR”), provide that states must respect, protect and promote a range of pertinent rights, including the right not to be subjected to cruel, inhuman or degrading treatment, or to arbitrary detention.

<sup>25</sup> SOLAS, above n 18, Annex, Chapter V, Regulation 33(1-1); SAR, above n 21, Annex, paragraph 3.1.9.

<sup>26</sup> *Ibid.* For relevant non-binding IMO guidelines, see in particular IMO, Rescue Guidelines, above n 19 and IMO, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, 22 January 2009, FAL.3/Circ.194, [www.refworld.org/docid/524be8244.htm](http://www.refworld.org/docid/524be8244.htm) (“Disembarkation Principles”).

<sup>27</sup> IMO, Rescue Guidelines, above n 19, para 6.12 ff.

they may entail a risk of violating *non-refoulement* obligations. IMO's relevant guidance notes that, in identifying a place of safety,

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‘[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.’<sup>28</sup>

In addition, identification of a place of safety for the delivery of rescued persons should take into account any risk that rescued asylum-seekers or refugees might subsequently be transferred or returned from that place to a place where they would be at risk.

### **Migrant smuggling and trafficking in persons**

18. Migrants and refugees crossing the Aegean by boat are typically reliant upon the services of facilitators or smugglers to do so. For many, this places them at considerable risk of reckless endangerment, exploitation, or abuse. In some cases, the character and level of coercion and exploitation involved may be such that a smuggled migrant or refugee is in fact a victim of the distinct crime of trafficking in persons.

19. States have obligations under international law to cooperate to address the smuggling of migrants and refugees by sea,<sup>29</sup> to prevent and combat trafficking in persons,<sup>30</sup> and to assist and protect the rights of smuggled migrants and refugees, and victims of trafficking.<sup>31</sup>

20. Importantly, measures to address the smuggling and trafficking<sup>32</sup> must be undertaken in a manner that preserves other rights, obligations and responsibilities under international law, including international humanitarian, human rights, and refugee law.<sup>33</sup> Therefore, any ‘interception’<sup>34</sup> measures taken in the course of NATO’s operation in the Aegean or with its assistance in respect of vessels suspected on reasonable grounds of being engaged in migrant smuggling must be undertaken in full respect of the requirements of the 1951 Convention and the principle of *non-refoulement*.

21. ExCom has indicated a number of considerations which should guide ‘interception’ measures. These considerations include, among others, the need for human and human-rights compliant treatment of intercepted persons; the requirement that interception measures not result in asylum-seekers and refugees being denied access to international protection or result in their

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<sup>28</sup> IMO, Rescue Guidelines, above n 19, at para 6.17. See also IMO, Disembarkation Principles, above n 26, paragraph 2.5 and accompanying footnote, and *passim*.

<sup>29</sup> See notably Protocol against the Smuggling of Migrants by Land, Sea and Air (“Smuggling Protocol”) supplementing the United Nations Convention against Transnational Organized Crime, 2000, A/RES/55/2 (“Palermo Convention”), entered into force 28 January 2004, at Article 7 and generally.

<sup>30</sup> Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children (“Trafficking Protocol”), supplementing the Palermo Convention, entered into force 25 December 2003.

<sup>31</sup> See Smuggling Protocol, above n 29, Article 16 and *passim*; Trafficking Protocol, above n 29, Articles 2, Article 6, and *passim*.

<sup>32</sup> See, for example, Article 8 of the Smuggling Protocol above n 29.

<sup>33</sup> Article 19 of the Smuggling Protocol above n 29. The Trafficking Protocol, above n 30, contains a savings provision in similar terms at Article 14.

<sup>34</sup> ‘Interception’ is not a legal term of art and has no universally accepted definition. UNHCR’s Executive Committee has provided a working definition of ‘interception’ as including any measure 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. See ExCom, Conclusion 97 (LIV), 2003. The definition further stipulates that it is intended to relate to ‘person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner’, and clarify that it is provided ‘without prejudice to international law, particularly international human rights law and refugee law, with a view to providing protection safeguards to intercepted persons.’

return to territories where their life or freedom would be threatened; the need to take into account any special needs of women, children and vulnerable persons; and the recommendation that state officials involved in interception measures receive specialised training, including on responding to possible international protection needs of intercepted persons.<sup>35</sup>

22. Further, it should be noted that denying access to asylum procedures to those who have engaged people smugglers would not be consistent with international refugee law, in view notably of the object and purpose of relevant provisions of the 1951 Refugee Convention.<sup>36</sup>

**UNHCR**  
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<sup>35</sup> ExCom, Conclusion 97 (LIV), 2003.

<sup>36</sup> See notably Articles 31 and 33 of the 1951 Convention, and discussion in UNHCR, *B010 v. Minister of Public Safety and Emergency Preparedness: Factum of the Intervener (UNHCR)*, 2 February 2015, [www.refworld.org/docid/54d09bb44.html](http://www.refworld.org/docid/54d09bb44.html) at paragraphs 27-30 and passim. In this context, it is noted that, while summary rejection of asylum-seekers at borders or other points of entry (including at sea) is impermissible and may amount to unlawful *refoulement*, the 1951 Convention includes very clear mechanisms for addressing security concerns and for excluding persons who are responsible for serious crimes, following a proper factual and legal assessment: see UNHCR, *Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective*, 17 December 2015, Rev.2, [www.refworld.org/docid/5672aed34.html](http://www.refworld.org/docid/5672aed34.html).