

Questions for the Quiz

Protection Training Manual for European Border and Entry Officials

Session 2

The Legal Framework

Question 1

As the European Union has adopted its own asylum and immigration legislation, (e.g. the Asylum Procedures Directive) EU Member States should make sure that border control measures are in accordance with those norms. They are no longer bound by the more general 1951 Convention on the Status of Refugees.

- **Is this statement correct?**
- **Please justify your reply.**

Key messages for question 1:

This statement is not completely correct: One can take different approaches, though all of them lead to the same reply:

We can look at this question from the point of view of the so-called *EU acquis*. The EU acquis is the set of norms, standards and practices adopted by the EU as a whole. International Conventions and other binding international and regional instruments are part of the *EU acquis*, as they are inseparable from the attainment of the objectives of the Treaty on European Union. In the asylum field, the 1951 Convention and the 1967 Protocol, as well as as the European Convention on Human Rights (ECHR) are, for the same reason, part of the EU asylum acquis.

The EU *acquis* on asylum contains instruments relevant for the development of asylum systems in candidate countries. Candidate countries to the European Union must accede to these instruments without reservations, in order to honour the international obligations to which Member States are – and future ones should be- committed.

From the perspective of the individual Member States of the EU: the 1951 Convention has been ratified by all Member States, so they are bound by the rules of the Convention, independently of their membership to the European Union.

If there is any rule of the Convention that the EU States would decide not to abide by, then the member states would have had to make a reservation to the Convention at the moment of ratifying it, (which some have done). They could also derogate from the application of some articles through the specific procedures established thereto. They may do so, for instance, in situations of national emergency.

However, there are some articles of the 1951 Convention which cannot be subject to a reservation nor derogated from under any circumstances, as any such derogation would go against the purpose and the spirit of the Convention itself. These articles include the principle of non refoulement and the refugee definition.

Sometimes EU Member States have to incorporate EU law into their national legislation (the legal term used is “transpose”) in order to implement it. This is the case of the Directives (on asylum procedures, reception conditions, qualification, etc). When transposing the directive into national legislation, States who are party to the 1951 Convention must make sure that they do so without *de facto* derogating from any of the rights set forth in this Convention.

To ensure this, however, most EU instruments on asylum and migration issues have incorporated a general savings clause with regard to the international protection obligations of the Member States.

Other instruments are directly applicable by the Member States. The Schengen Borders Code, for instance, must be directly implemented, as it has the form of a regulation, so it does not need to be transposed and border guards are to apply it directly in the discharge of their functions. In such cases, most instruments include a general savings clause on to the need to apply them in accordance with the Member States international protection obligations and the principle of *non refoulement*. (In the case of the Schengen Borders Code, it is para. 20 of the declaratory part and art. 13).

To sum up, the 1951 Convention continues to be binding for all Member States that have ratified it. All EU instruments are to be applied in accordance with the obligations in the 1951 Convention.

Question 2

A person attempting to cross an EU external border by means of a false passport only applies for asylum at the point where he is stopped by the border authority. The person is refused entry to the territories of the Member States and may be sanctioned for fraudulent use of personal documentation, as established in national legislation.

- **Is this statement correct or incorrect?**
- **Which international legal provisions are relevant in this context?**

Key messages for question 2:

This question is much related to the previous one. This statement is incorrect— asylum seekers attempting to cross the border with false documents should be granted access to the asylum procedure and not penalized because of their illegal entry.

The Schengen Borders Code, (Art. 13), establishes that a *third-country national who does not fulfil all the entry conditions laid down in Art. 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be **without prejudice to the application of special provisions concerning the right of asylum and to international protection** or the issue of long-stay visas.*

According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognized as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory illegally.

The drafters of the Convention acknowledged that refugees may have justifiable reasons for using fraudulent documentation to travel abroad to seek asylum. UNHCR's Executive Committee has dealt with this issue in a similar manner and has stated that their reasons for such actions are mainly based in their fear of persecution as such, or danger to their safety or freedom-.

Art. 31 of the 1951 Convention states: *“The Contracting State shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, present themselves without delay to the authorities and show good cause for their illegal entry or presence”.*

This is called the **principle of non-penalization for illegal entry**. It applies not only to recognized refugees but also to asylum-seekers pending determination of their status, as recognition of refugee status does not make an individual a refugee but declares him to be one.

The fact that an asylum seeker may only apply for asylum when spotted by the authorities using fraudulent documents at the border, should not negatively affect the possibility to apply for asylum, nor the analysis of the asylum claim as such. The UNHCR Handbook underlines that the circumstances which lead asylum seekers to flee their country may also make them apprehensive about approaching persons in authority.

The reference to *penalties* appears to comprehend prosecution, fine and imprisonment. However, in some cases states may need to proceed to place the asylum seeker under *administrative detention*. There is a fine line between *imprisonment* and administrative detention. UNHCR has issued public guidelines to clarify what is considered to be non-discriminatory and lawful detention of asylum seekers. (The issues around the detention of asylum seekers will be dealt with in more depth later on in the workshop).

Question 3

- **What element is missing in the following refugee definition? Why is it important?**
- **In which legal instruments can it be found?**

A refugee is... “a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, owing to such fear, to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Key messages for question 3:

The missing element is (in bold): “...**or** owing to such fear, **unwilling** to avail himself of the protection of that country”. The text has been excerpted from Art. 1 of the 1951 Convention. The EU Qualification Directive also incorporates this element in the refugee definition.

The term “unwilling” points to the subjective element of the fear of persecution. Asylum seekers do not need to have already suffered serious violations of their rights or suffered persecution in any other way to qualify for refugee status.

At border points, this element can be relevant where an asylum seeker requests entry into the territory of a specific country without fulfilling the migratory provisions for entry. One way they could have to express that they are requesting asylum may be by stating “I don’t want to return to my country because I am afraid that I may be harmed”.

Authorities in the country of origin may seem very open to have asylum seekers return to their country. However, an asylum seeker may still not be willing to return on grounds of that fear and the 1951 Convention recognizes this possibility.

By contrast, the term “*unable* to avail himself of the protection of that country” implies circumstances that are beyond the civil war or other grave disturbance. This may, for example, be a state of war or even the denial of protection.

The facilitator should take the opportunity to introduce the Handbook on Procedures and Criteria for Determining Refugee Status. The Handbook constitutes an accessible and official interpretation of each element of the definition. as an ExCom approved document.

Question 4

A person found not be in need of international protection is someone who has been found not to qualify for refugee status after undergoing national asylum procedures. As any foreigner in an irregular migratory situation (i.e. no residence permit, pending expulsion order, etc) asylum-seekers whose applications have been rejected should be returned to their country of origin.

- **Is this statement true or false?**
- **Please, justify your reply**

Key messages for question 4

The principle of *non refoulement* is not only gathered in the 1951 Convention, but its application is wider than that. It is also part of other universal and regional instruments: the Convention against Torture (CAT) and the European Convention for Human Rights (ECHR).

The CAT (Art 3), for example, expressly prohibits States from removing an individual in any manner whatsoever where there are substantial grounds for believing that doing so would expose him or her to a danger of being subjected to torture.

The ECHR (Art 3), also contains a prohibition on torture or inhuman or degrading treatment or punishment. This precludes the removal of individuals who face a real risk of being exposed to those forms of harm.

A general principle of refuge, based on humanitarian law and human rights law, has also emerged in State practice, protecting those who flee civil war or generalized violence. Some regions, like Africa or the Americas, have incorporated such situations as grounds for granting refugee status in international treaties (such as the 1969 OAU Convention) or instruments of soft law (such as the Cartagena Declaration of 1984). Some Western states have called these other forms of the *non refoulement* principle “complementary forms of protection” or “subsidiary protection”.

In the EU, this matter is solved through the Qualification Directive, which states that a *‘Person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, (...) would face a real risk of suffering serious harm (...)and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;* (This definition, together with the refugee definition, will be seen in greater detail later on during the workshop).

To conclude, a person who undergoes refugee status determination and is found not to be a refugee, might still have the right not to be returned to his or her country of origin if that would be the cause for serious harm (torture, inhuman, cruel or degrading treatment, etc).

Question 5

A young woman working in a farm in Zimbabwe agrees to board a merchant ship which will take her to Europe, where she has agreed to work in a nightclub. An old friend of hers was the one who gave her the idea. He has been in contact with the owners of the nightclub in a European country and has received money in advance to make the necessary arrangements for her trip, including sorting out her travel documents. When she arrives, the nightclub turns out to be a brothel and she has to exercise prostitution to pay back for her travel costs.

- **Is this woman a victim of trafficking?**
- **Please justify your reply.**

Key messages for question 5:

In principle, looking at the few elements known, the woman could indeed be a victim of trafficking. What happens to her meets the definition of trafficking provided by Art. 3 of the Palermo Protocol; she was *recruited and transported by means of the abuse of a position of vulnerability or of the giving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes the exploitation of the prostitution of others.* The text in italics corresponds to an excerpt from the definition of trafficking in the Palermo Protocol on Trafficking.

The fact that the woman had agreed to travel to Europe to work in a nightclub can trigger some discussion with regard to the element of *consent* by the potential victim of trafficking; yet, in this context, there is one key consideration:

The Palermo Protocol states that “*the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph a) –the one providing the above definition of trafficking- shall be irrelevant where any of the means set forth in subparagraph a) have been used.*”

If we look at the country of origin information on Zimbabwe, we will see that the country’s political situation has resulted in a total breakdown of the national economy and the isolation from international aid, being most of the population affected by severe famine. Therefore, it is most likely that the woman was in a position of *vulnerability* that made her an easy target for trafficking networks.

Another element is the payment made to the woman’s “acquaintance” to talk her into doing the trip, organize her transportation and sort out her travel documents. Against the trafficking definition, this could fall under “by means of the giving of payments or benefits to achieve the consent of a person having control of another person.”

A thorough understanding of the phenomenon of trafficking in human beings among border police would lead to a higher identification of victims, as well as to adequate treatment following identification. Consequently, it would reduce the victims’ risk of remaining in the trafficking cycle. Awareness about the facets of human trafficking is the way to avoid that victims will be treated as illegal immigrants, criminalised and re-victimised, and immediately deported without being offered appropriate assistance and protection.