



## **Selected Reference Materials**

### **Rescue at Sea, Maritime Interception and Stowaways**

*November 2006*

## **Introduction**

Legal issues arising from the involvement of refugees and other persons of concern to UNHCR in maritime incidents such as rescue at sea, maritime interception or stowaway cases, are complex and subject to different areas of international law. Apart from international refugee and human rights laws, maritime obligations, especially, need to be considered.

This binder compiles applicable provisions of the international law of the sea, refugee, human rights and criminal law to assist UNHCR colleagues and other interested professionals to better understand the inter-relationship between these different areas of law. The compilation is not comprehensive, only key provisions have been chosen. Since refugee and human rights law provisions have been collected elsewhere, the references included from these areas of law are restricted to existing *refoulement* prohibitions and a few add provisions, recommendations and guidelines specifically relevant for maritime migration. The binder originally was prepared for a conference on rescue at sea and maritime interception in the Mediterranean. Recommendations adopted by the Parliamentary Assembly of the Council of Europe have therefore been included. It also contains background material of relevant conferences convened by UNHCR during the past years.

Apart from the reference to the UN Treaty Series, whenever possible, a website link has been added to enable easy access to the complete texts. For most texts, the reference refers to an official UN website. Where this was not possible, another website has been provided. Although such external websites have been carefully chosen, a guarantee about their content and quality cannot be made.

The publishers are grateful for any comments on the compilation or recommendation for the inclusion of further material in the next edition.

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<sup>1</sup> UNHCR (publisher): Collection of international instruments and other legal texts concerning refugees and displaced persons, Geneva 1995.

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<sup>2</sup> UNHCR (publisher): Collection of international instruments and other legal texts concerning refugees and displaced persons, Geneva 1995.

Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002 (excerpts) 123

### **INTERNATIONAL CRIMINAL LAW<sup>3</sup>**

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### **RELEVANT CONFERENCE MATERIALS**

Meeting of State Representatives on Rescue at Sea and Maritime Interception in the Mediterranean, Madrid, 23 -24 May, 2006, Background Discussion Paper and Summary Proceedings 153

Expert meeting on Interception and Rescue in the Mediterranean – Cooperative Responses, 12 – 13 September 2005, Athens: Summary of discussions and recommendations 169

Expert Roundtable on Rescue-at- Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees, 25 – 26 March, 2002 Lisbon: Summary of Discussion 177

Expert roundtable Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees, held in Lisbon, Portugal on 25-26 March, 2002. Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea 181

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<sup>3</sup> UNODC: Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, New York 2004.

# **INTERNATIONAL LAW OF THE SEA**

**United Nations Convention on the Law of the Sea (UNCLOS)<sup>4</sup>**  
*Opened for signature 10 December 1982*  
*Entered into force 16 November 1994*

UNCLOS defines the rights and obligations of governments, including flag states, in the various maritime zones under national jurisdiction and beyond areas of national jurisdiction, such as the high seas. As such, some of the provisions of the Convention are relevant to the treatment of refugees and asylum seekers at sea.

***Selected Provisions***

Article 17 - Right of innocent passage

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

Article 18 - Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 19 - Meaning of innocent passage

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

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

.....

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

.....

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

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<sup>4</sup> 1833 United Nations Treaty Series 397 electronically available at [www.un.org/Depts/los](http://www.un.org/Depts/los).

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

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

.....

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

.....

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

Article 25 - Rights of protection of the coastal State

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

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

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

Article 27 - Criminal jurisdiction on board a foreign ship

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

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

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

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

.....



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

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

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

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

#### Article 33 - Contiguous zone

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

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

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

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

#### Article 38 – Right of transit passage

1. In straits referred to in article 37<sup>5</sup>, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

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

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<sup>5</sup> Article 37 limits the application of Section 2 (articles 37-44) of UNCLOS to “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”

leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

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

Article 39 - Duties of ships and aircraft during transit passage

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

.....

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

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

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

2. Ships in transit passage shall:

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

.....

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

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

.....

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

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

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

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

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

#### Article 44 - Duties of States bordering straits

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

#### Article 52 - Right of innocent passage

1. Subject to article 53<sup>6</sup> and without prejudice to article 50<sup>7</sup>, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3.

.....

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

Articles 39, 40<sup>8</sup>, 42 and 44<sup>9</sup> apply *mutatis mutandis* to archipelagic sea lanes passage.

#### Article 87- Freedom of the high seas

1. The high seas are open to all States, whether coastal or land locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. ....

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

#### Article 92 - Status of ships

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

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

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<sup>6</sup> Article 53 defines the “right of archipelagic sea lanes passage.”

<sup>7</sup> Article 50 provides archipelagic States with the rights to the “delimitation of internal waters” within a State’s archipelagic waters.

<sup>8</sup> Article 40 subjects “research and survey activities” during transit passage to authorization by States bordering straits.

<sup>9</sup> Article 44 sets forth the “duties of States bordering straits”.

#### Article 98 - Duty to render assistance

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

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

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

#### Article 110 - Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96<sup>10</sup>, is not justified in boarding it unless there is reasonable ground for suspecting that:

.....

(b) the ship is engaged in the slave trade;

.....

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

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

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

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<sup>10</sup> Articles 95 and 96 set forth the rules for "immunity of warships on the high seas" and "immunity of ships used only on government non-commercial service".

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

#### Article 111 - Right of hot pursuit

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

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

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

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

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

6. Where hot pursuit is effected by an aircraft:

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

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

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

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

#### Article 311 - Relation to other conventions and international agreements

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

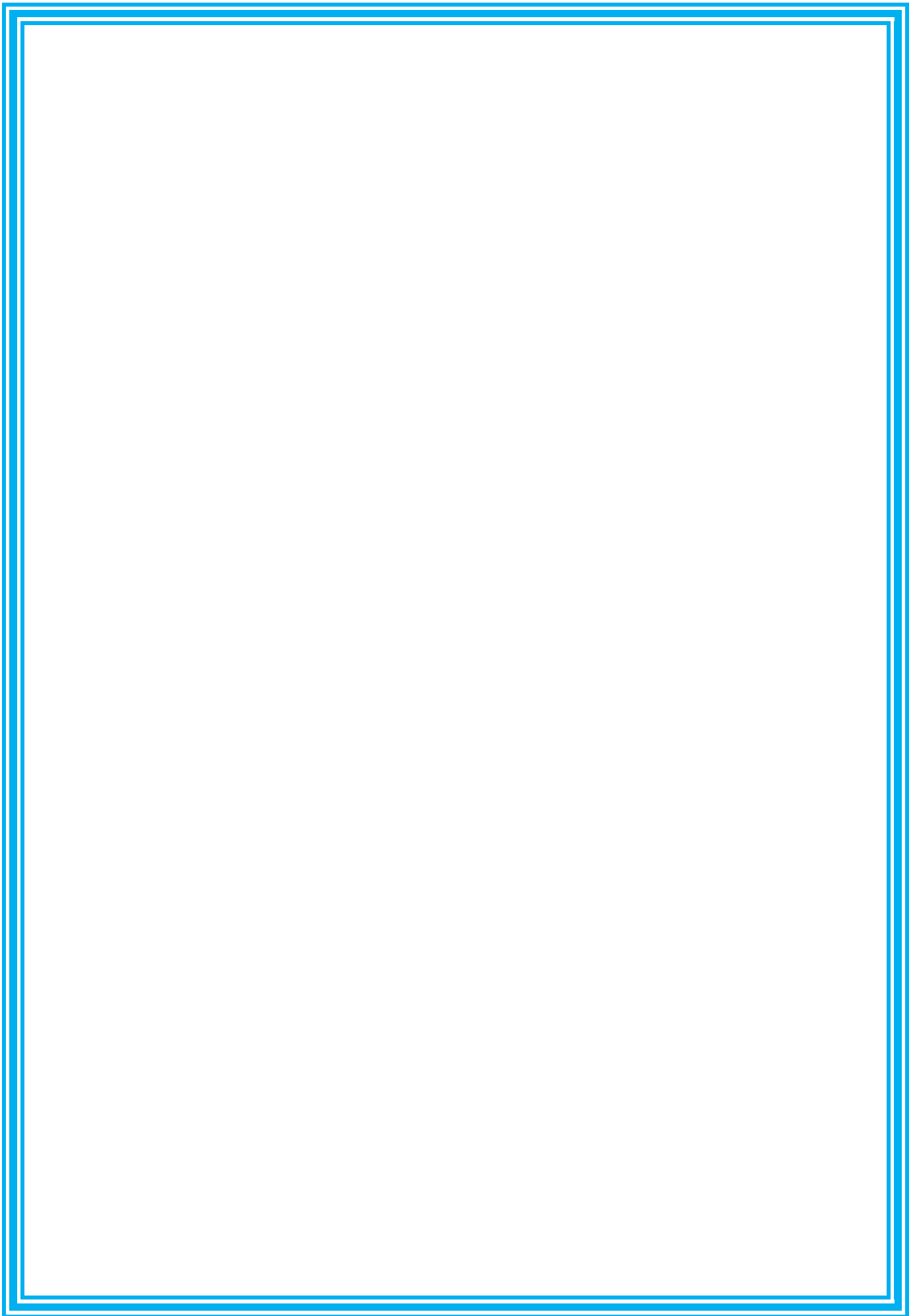
2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

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

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

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

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



**Convention on the High Seas, 1958<sup>11</sup>**  
*Adopted on 29 April 1958*  
*Entered into force 30 September 1962*

This Convention defines the high seas and codifies generally accepted rules of international law dealing with navigation, piracy, smuggling, collision, the protection of cables and fishery. The Convention is superseded by the Convention on Law of the Sea (UNCLOS), although it remains in force for those States which are not a party to UNCLOS. It inter alia provides rules concerning rescue at sea.

***Selected Provision***

Article 12

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

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

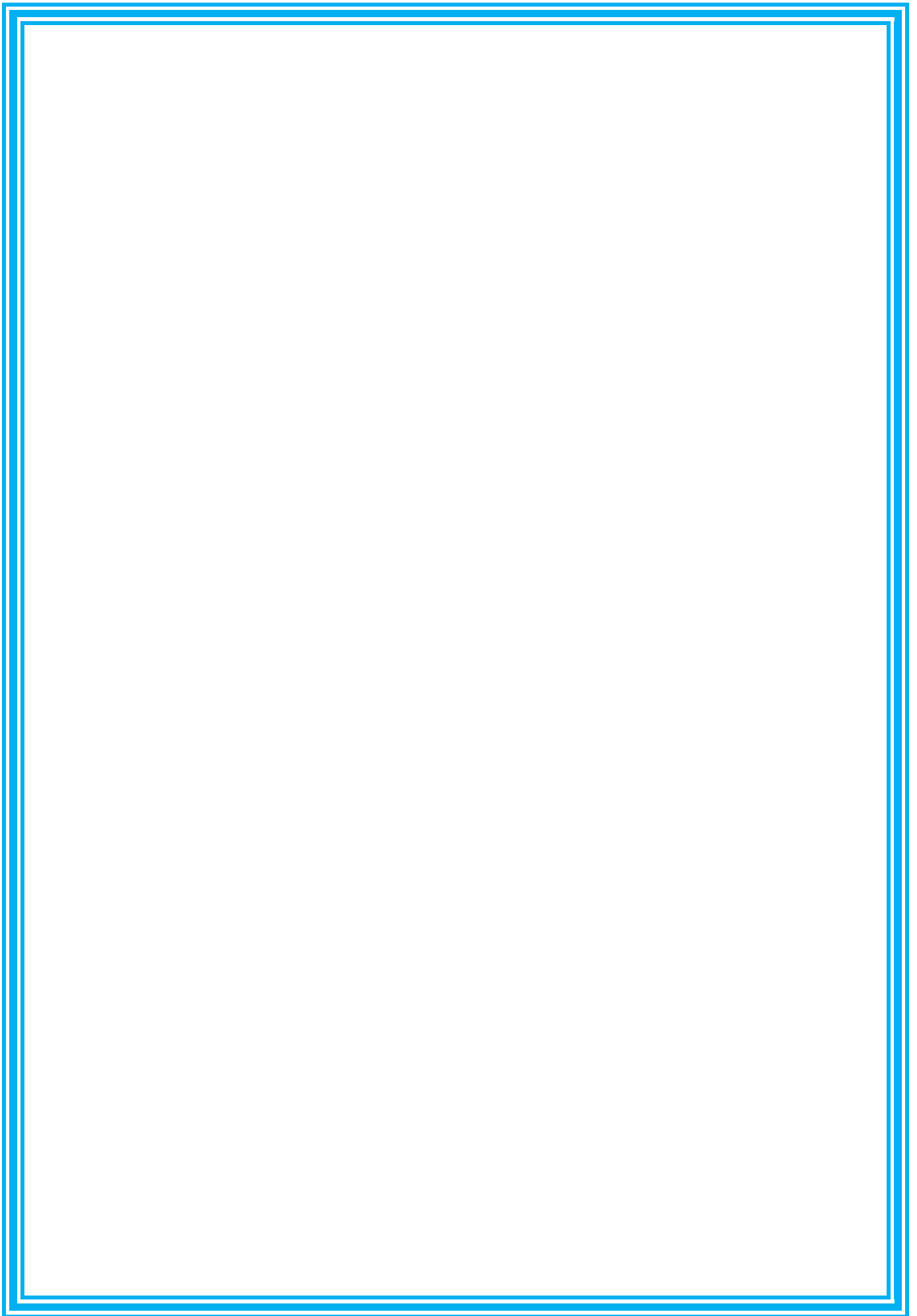
2. Every coastal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and--where circumstances so require--by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

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<sup>11</sup>450 United Nations Treaty Series 397.

[http://untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_high\\_seas.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf).





**International Convention on Salvage<sup>12</sup>**  
*Adoption: 28 April 1989*  
*Entry into force: 14 July 1996*

The Convention defines the duties of the salvor, owner and ship master when assisting a vessel or a person in distress at sea.

***Selected Provisions***

Chapter I – General provisions

Article 1 – Definitions

For the purpose of this Convention:

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

....

Chapter II – Performance of Salvage operations

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

1. The salvor shall owe a duty to the owner of the vessel or other property in danger:
  - (a) to carry out salvage operations with due care;
  - (b) in performing the duty specified in paragraph (a), to exercise due care to prevent and minimize damage to the environment;
  - (c) whenever circumstances reasonably require, to seek assistance from other salvors; and
  - (d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.
  
2. The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:
  - (a) to co-operate fully with him during the course of the salvage operations;
  - (b) in so doing, to exercise due care to prevent or minimize damage to the environment; and
  - (c) when the vessel or other property has been brought to a place of safety, to accept redelivery when reasonably requested by the salvor to do so.

Article 10 - Duty to render assistance

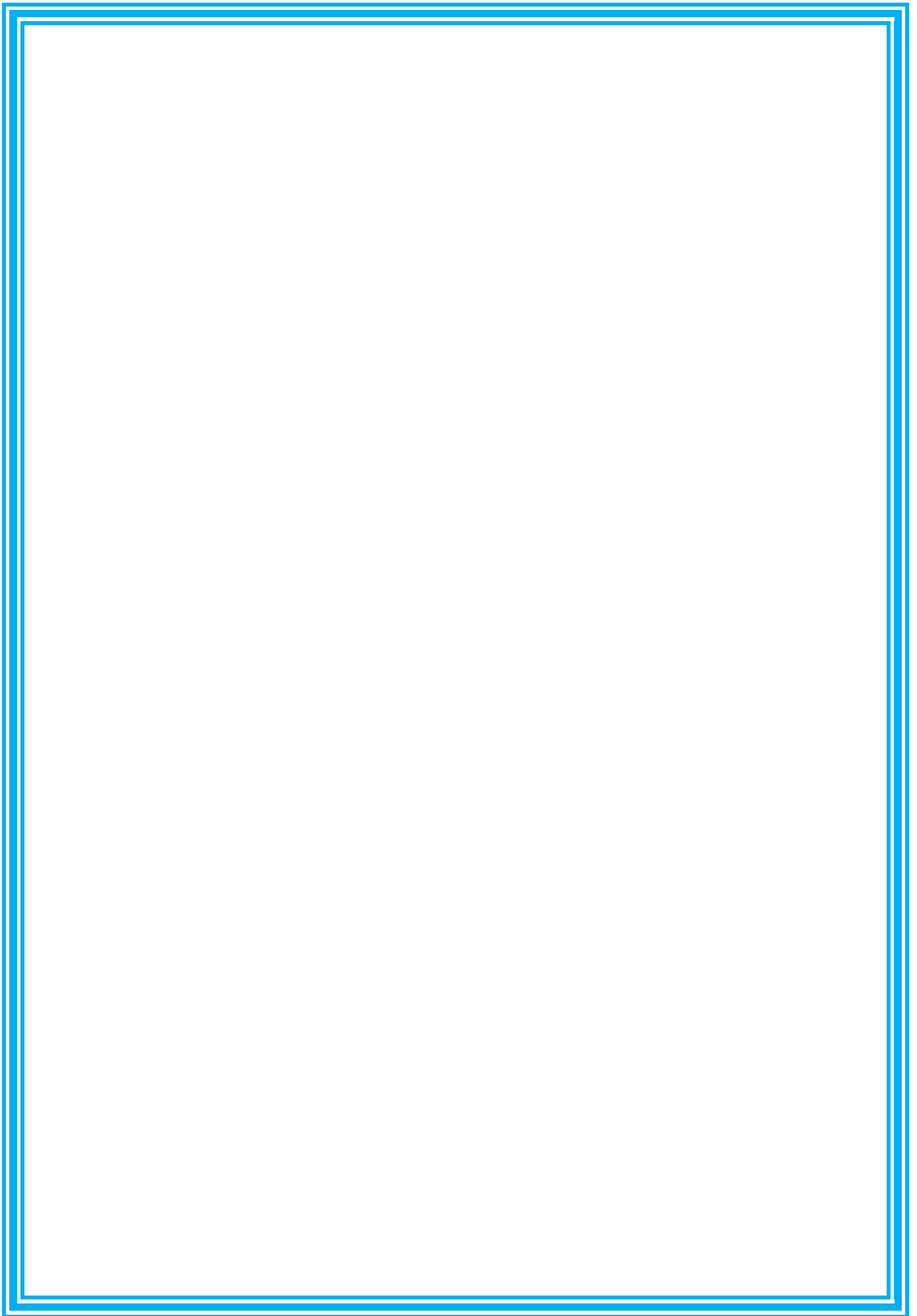
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<sup>12</sup> 1953 United Nations Treaty Series 194. [http://untreaty.un.org/English/UNEP/salvage\\_english.pdf](http://untreaty.un.org/English/UNEP/salvage_english.pdf).

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

#### Article 11 - Co-operation

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



## **International Convention for the Safety of Life at Sea (SOLAS)<sup>13</sup>**

*Adoption: 1 November 1974*

*Entry into force: 25 May 1980*

SOLAS is regarded as the most important treaty concerning the safety of merchant ships. The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety. It obliges contracting States to establish Search and Rescue Services and ship masters to provide assistance to persons in distress at sea.

### ***Selected Provisions***

#### **Annex**

#### **Chapter V: Safety of Navigation**

##### **Regulation 7**

##### *Search and rescue services*

1. Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for rescue of persons in distress at sea around its coast. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers, and shall, so far as possible, provide adequate means of locating and rescuing such persons.
2. Each Contracting Government undertakes to make available information to the Organization concerning its existing search and rescue facilities and the plans for changes therein, if any.
3. Passenger ships to which chapter I applies shall have on board a plan for co-operation with appropriate search and rescue services in the event of an emergency. The plan shall be developed in co-operation between the ship, the company, as defined in regulation IX/1, and the search and rescue services. The plan shall include provisions for periodic exercises to be undertaken to test its effectiveness. The plan shall be developed based on the guidelines developed by the Organization.

##### **Regulation 33**

##### *Distress message: obligation and procedures*

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

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<sup>13</sup> 1184 United Nations Treaty Series 3. <http://www.austlii.edu.au/au/other/dfat/treaties/1983/22.html>.

assistance of the person in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.

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

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

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

5. The provision of this regulation do not prejudice the Convention for the Unification of Certain Rules of Law relating to the Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention.<sup>14</sup>

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<sup>14</sup> International Convention on Salvage, 1989, done at London on 28 April 1989, entered into force on 14 July 1996.

## AMENDMENTS TO THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974, AS AMENDED<sup>15</sup>

SOLAS amendments were proposed to address problems encountered by vessels attempting to fulfill their humanitarian obligations. As such the amendments complement the obligation of the ship's captain to render assistance by a corresponding obligation of states to cooperate in rescue situations. By the reinforcement of ship's captain obligation, the amendments provide better safety measures concerning persons in distress.

### *Selected Provisions*

#### CHAPTER V SAFETY OF NAVIGATION

##### **Regulation 2 – Definitions**

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

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

##### **Regulation 33 – Distress messages: obligations and procedure**

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

“Distress situations: obligations and procedures”

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

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

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

“1-1 Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from

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<sup>15</sup> IMO Doc. Resolution MSC. 153(78), Annex 3, adopted 20 May 2004.

the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.”

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

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

Regulation 34 – Safe navigation and avoidance of dangerous situations

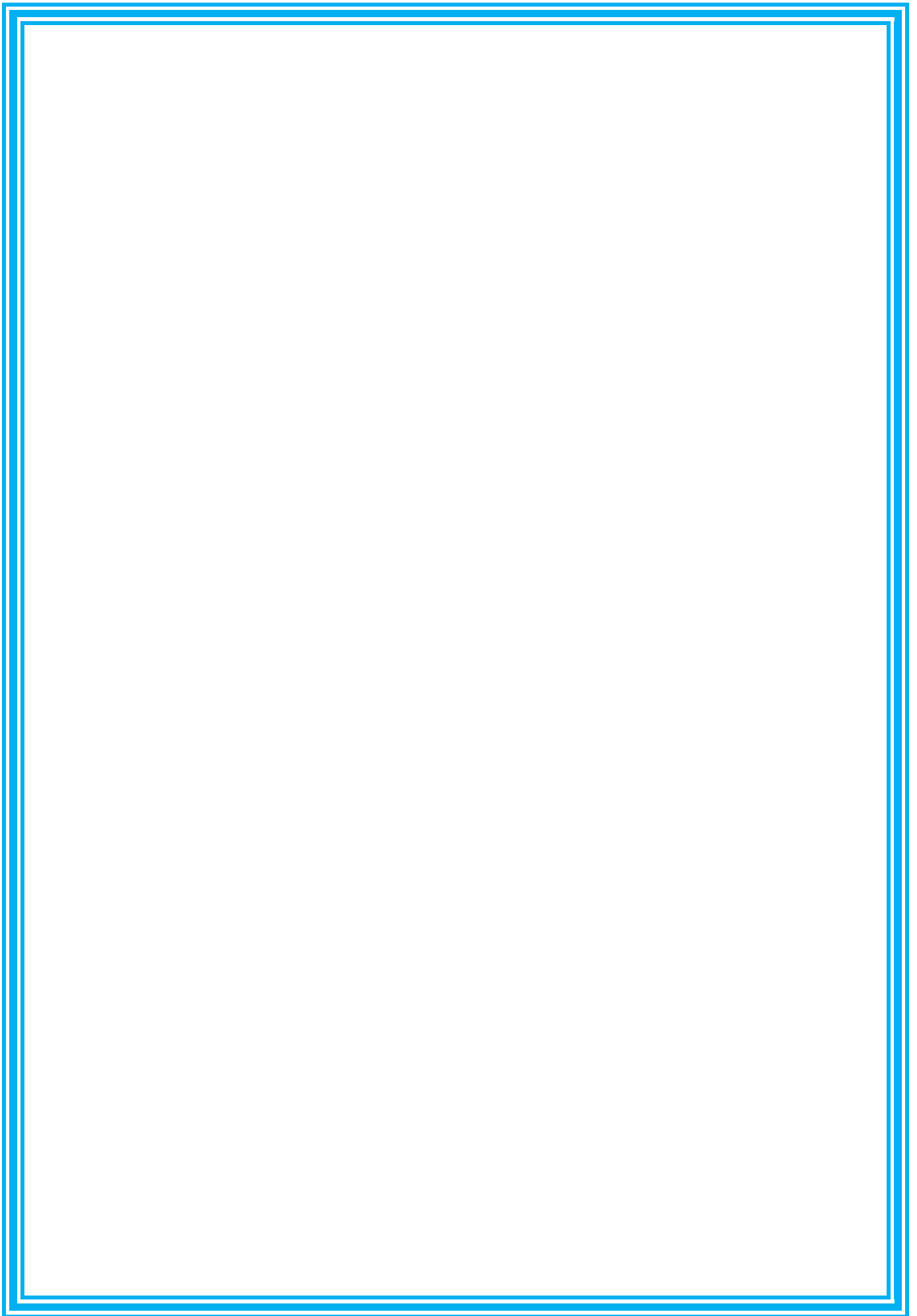
6 The existing paragraph 3 is deleted.

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

**Regulation 34-1**  
**Master’s discretion**

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





## **International Convention on Maritime Search and Rescue (SAR)<sup>16</sup>**

*Adopted: 27 April 1979*

*Entry into force: 25 March 1980*

Objective of the 1979 Convention is the development of an international Search and Rescue plan, so that, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organization and, when necessary, by co-operation between neighboring SAR organizations. Although the obligation of ships to go to the assistance of vessels in distress was enshrined both in tradition and in international treaties (such as the International Convention for the Safety of Life at Sea (SOLAS), 1974), there was, until the adoption of the SAR Convention, no international system covering search and rescue operations. The Convention furthermore relates to the maritime obligation to assist persons in distress at sea.

### ***Selected Provisions***

#### **Annex**

##### **Chapter 1**

###### ***Terms and definitions***

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

...

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

##### **Chapter 2**

###### ***Organization and co-ordination***

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

2.1.1 Parties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts.

....

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

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<sup>16</sup> 1403 United Nations Treaty Series. <http://www.admiraltylawguide.com/conven/searchrescue1979.html>.

## **AMENDMENTS TO THE INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE, 1979, AS AMENDED<sup>17</sup>**

The amendments to the Annex of the SAR Convention aim at enhancing the cooperation between States, and at maintaining the integrity of the SAR services, by ensuring that people in distress at sea are assisted while minimizing the inconvenience for the assisting ship.

### *Selected Provisions*

#### **CHAPTER 2 ORGANIZATION AND CO-ORDINATION**

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

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

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

#### **CHAPTER 3 CO-OPERATION BETWEEN STATES**

##### **3.1 Co-operation between States**

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

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

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

“3.1.9 Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In

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<sup>17</sup> IMO Doc. Resolution MSC.155(78), Annex 5, adopted 20 May, 2004, entered into force on 1 July, 2006.

these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.”

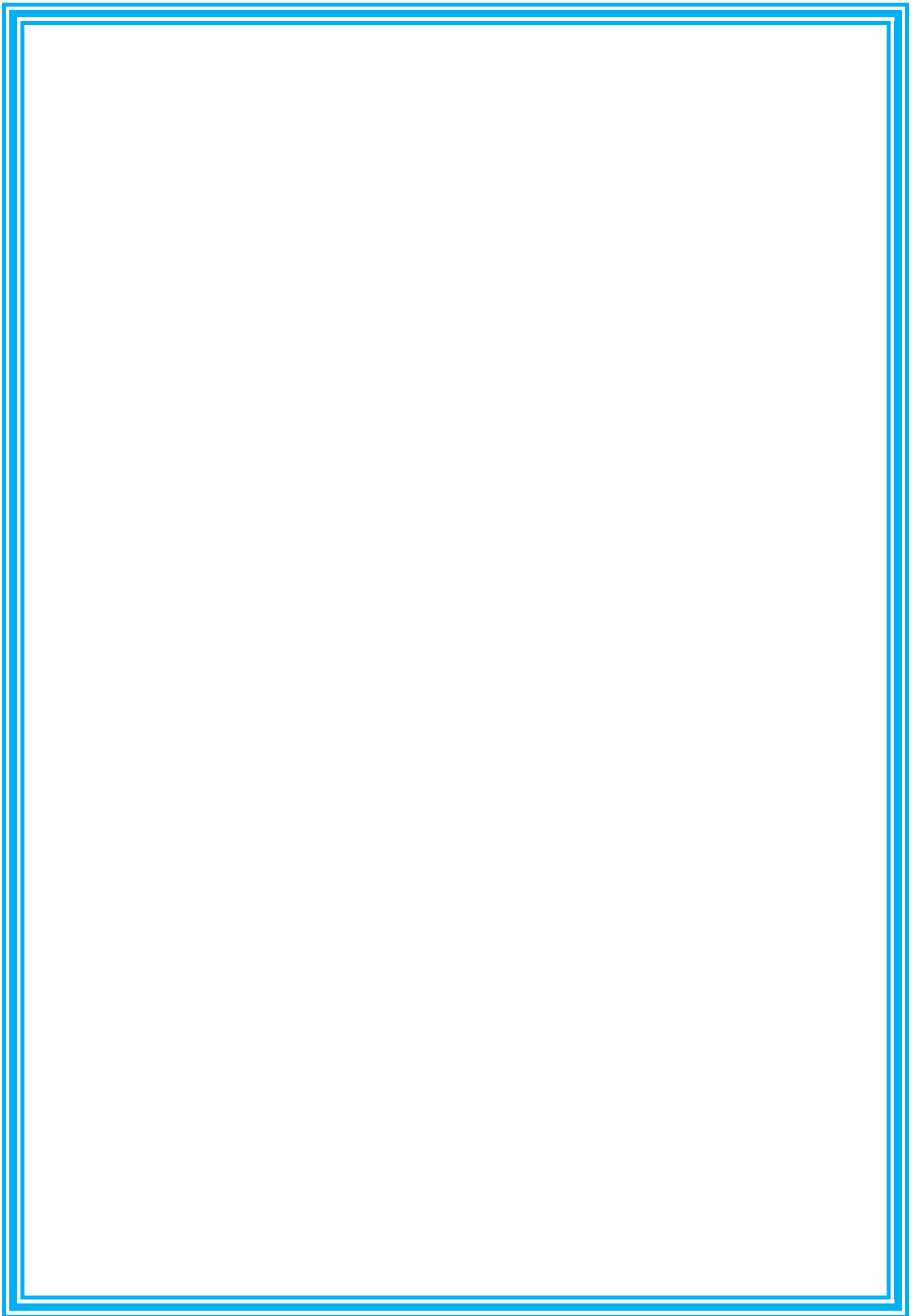
#### **CHAPTER 4 OPERATING PROCEDURES**

##### **4.8 Termination and suspension of search and rescue operations**

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

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

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## AMENDMENTS TO THE CONVENTION ON FACILITATION OF INTERNATIONAL MARITIME TRAFFIC (FAL), 1965, AS AMENDED<sup>18</sup>

The FAL Convention main objectives are to prevent unnecessary delays in maritime traffic, to facilitate co-operation between Governments, and to secure the highest possible level of uniformity in formalities and other procedures. The 2002 amendments were adopted to address the issues that arise in connection with stowaways. The amendments establish an obligate thorough search of ships for stowaways on leaving high-risk ports and tighten the measures for preventing stowaways from hiding on board. The new provisions also recognize and reinforce the rights of stowaways notably by requiring humanitarian principles to be applied when dealing with stowaway cases (provision 4.4). Although the text of an international convention on Stowaways was adopted in 1957, this Convention never entered into force due to the lack of a sufficient number of ratifications.

### *Selected Provisions*

#### **Section 1 - Definitions and general provisions**

##### **A. Definitions**

1 Add the following definitions:

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

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

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

.....

9 New Section 4 should be added as follows: "**Section 4 – Stowaways**

##### **A. General Principles**

**4.1 Standard.** The provisions in this section shall be applied in accordance with international protection principles as set out in international instruments, such as the UN

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<sup>18</sup> Resolution FAL.7.(29), adopted on 10 January 2002, entered into force on 1 May 2003  
<http://www.fco.gov.uk/Files/kfile/CM5893.PDF>.

Convention relating to the Status of Refugees of 28 July 1951 and the UN Protocol relating to the Status of Refugees of 31 January 1967, and relevant national legislation.<sup>19</sup>

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

## **B. Preventive measures**

### **4.3. Ship/Port preventive measures**

#### **4.3.1 Port/terminal authorities**

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

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

- a) regular patrolling of port areas;
- b) establishment of special storage facilities for cargo subject to high risk of access of stowaways, and continuous monitoring of both persons and cargo entering these areas;
- c) inspections of warehouses and cargo storage areas;
- d) search of cargo itself, when presence of stowaways is clearly indicated;
- e) co-operation between public authorities, shipowners, masters and relevant shore-side entities in developing operational arrangements;
- f) co-operation between port authorities and other relevant authorities (e.g. police, customs, immigration) in order to prevent smuggling of humans;
- g) developing and implementing agreements with stevedores and other shoreside entities operating in national ports to ensure that only personnel authorized by these entities participate in the stowing/unstowing or loading/unloading of ships or other functions related to the ships stay in port;

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<sup>19</sup> In addition, authorities may wish to consider the non-binding conclusion of the UNHCR Executive Committee on Stowaway Asylum-Seekers (1988, No. 53 (XXXIX)).

- h) developing and implementing agreements with stevedores and other shoreside entities to ensure that their personnel having access to the ship is easily identifiable, and a list of names of persons likely to need to board the ship in the course of their duties is provided; and
- i) encouragement of stevedores and other persons working in the port area to report to the port authorities, the presence of any persons apparently not authorised to be in the port area.

#### **4.3.2 Shipowner/Shipmaster**

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

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

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

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

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



### **4.3.3 National Sanctions**

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

### **C. Treatment of the stowaway while on board**

#### **4.4 General principles – Humane treatment**

**4.4.1 Standard.** Stowaway incidents shall be dealt with consistent with humanitarian principles, including those mentioned in Standard 4 .1. Due consideration must always be given to the operational safety of the ship and the safety and well being of the stowaway.

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

#### **4.5 Work on board**

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

#### **4.6 Questioning and notification by the shipmaster**

**4.6.1 Standard.** Contracting Governments shall require shipmasters to make every effort to establish the identity, including nationality/citizenship of the stowaway and the port of embarkation of the stowaway, and to notify the existence of the stowaway along with relevant details to the public authorities of the first planned port of call. This information shall also be provided to the shipowner, public authorities at the port of embarkation, the flag State and any subsequent ports of call if relevant.

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

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

#### **4.7 Notification of the International Maritime Organization**

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

**D. Deviation from the planned route**

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

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

**E. Disembarkation and return of a stowaway**

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

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

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

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

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

**4.10 Subsequent ports of call**

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

#### **4.11 State of Nationality or Right of Residence**

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

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

#### **4.12 State of Embarkation**

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

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

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

#### **4.13 The flag State**

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

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

#### **4.14 Return of stowaways**

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

the authorities, should be handed over to the operator affecting the removal of the stowaway. This letter will include information required by the authorities at transit points and/or the point of disembarkation.

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

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

#### **4.15 Cost of return and maintenance of stowaways**

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

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

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

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

APPENDIX 3

**Form of Stowaway Details referred to in Recommended Practice 4.6.2**

<p style="text-align: center;"><b>SHIP DETAILS</b></p> <p><i>Name of ship:</i>  <i>IMO number:</i>  <i>Flag:</i>  <i>Company:</i>  <i>Company address:</i></p> <p><i>Agent in next port:</i>  <i>Agent address:</i></p> <p><i>IRCS:</i>  <i>Inmarsat number:</i>  <i>Port of registry:</i>  <i>Name of the Master:</i></p> <p style="text-align: center;"><b>STOWAWAY DETAILS</b></p> <p><i>Date/time found on board:</i>  <i>Place of boarding:</i>  <i>Country of boarding:</i>  <i>Date/time of boarding:</i>  <i>Intended final destination:</i>  <i>Stated reasons for boarding the ship<sup>20</sup>:</i></p> <p><i>Surname:</i>  <i>Given name:</i>  <i>Name by which known:</i>  <i>Gender:</i>  <i>Date of birth:</i></p>	<p><i>ID-document type, e.g. Passport No.,  ID Card No. or Seaman's book No.:</i>  <i>If yes,</i>  <i>When issued:</i>  <i>Where issued:</i>  <i>Date of expiry:</i>  <i>Issued by:</i></p> <p><i>Photograph of the stowaway:</i></p> <p><i>General physical description of the stowaway:</i></p> <p><i>First language:</i></p>
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<sup>20</sup> If the Stowaway declares himself to be a refugee or an asylum seeker, this information shall be treated as confidential to the extent necessary to the security of the Stowaway.

<i>Place of birth:</i> <i>Claimed nationality:</i> <i>Home address:</i>  <i>Country of domicile:</i>	<i>Spoken:</i> <i>Read:</i> <i>Written:</i>  <i>Other languages:</i> <i>Spoken:</i> <i>Read:</i> <i>Written:</i>
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**Other details:**

- 1) Method of boarding, including other persons involved (e.g. crew, port workers, etc.), and whether the stowaway was secreted in cargo/container or hidden in the shop:
  
- 2) Inventory of the Stowaway's possessions:
  
- 3) Statement made by the Stowaway:
  
- 4) Statement made by the Master (including any observations on the credibility of the information provided by the Stowaway).

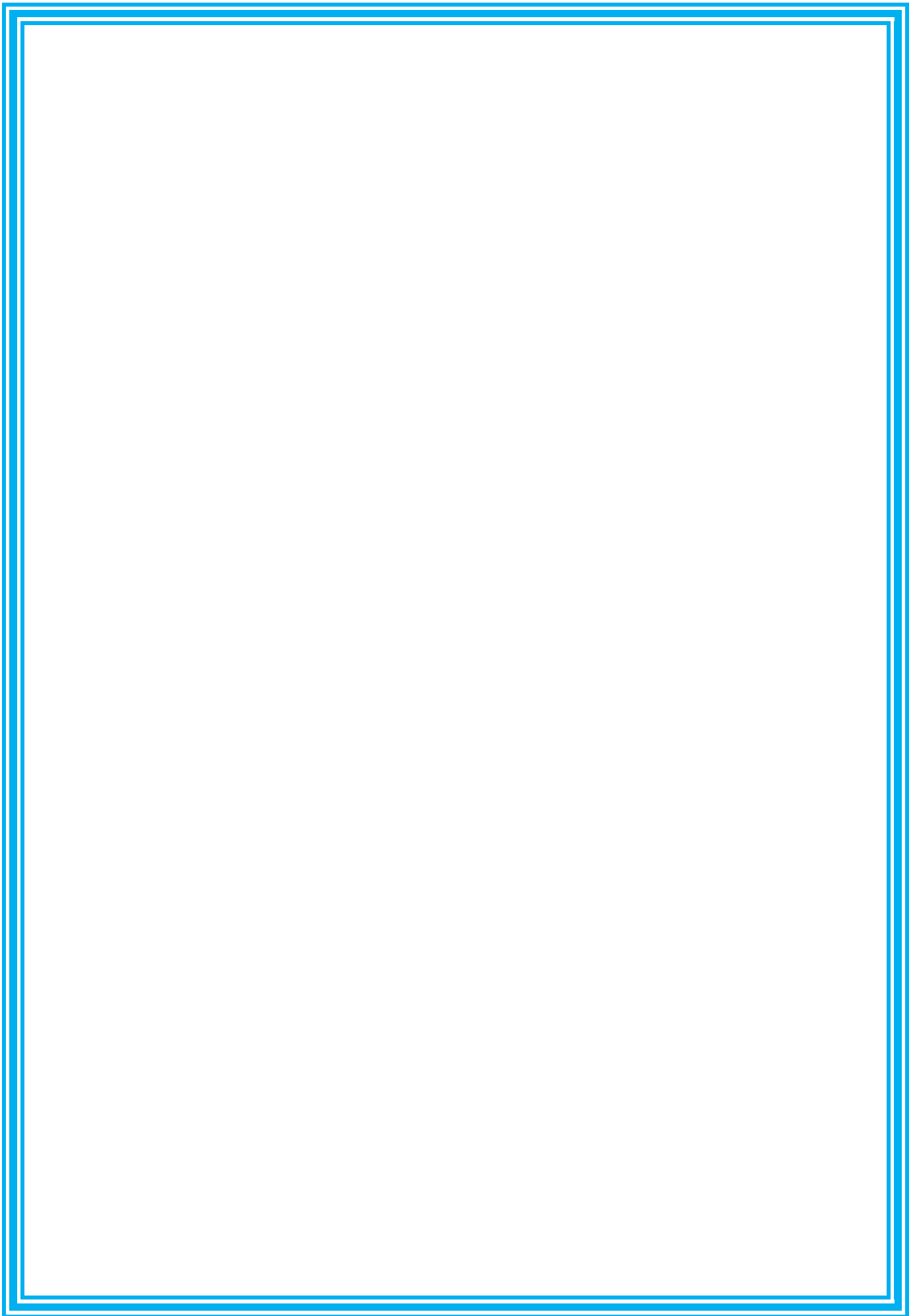
Date(s) of Interview(s):

Stowaway's signature:

Date:

Master's signature:

Date:



## **IMO guidelines**

### **GUIDELINES ON THE TREATMENT OF PERSONS RESCUED AT SEA<sup>21</sup>**

THE MARITIME SAFETY COMMITTEE,

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

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

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

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

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

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

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

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

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

REALIZING FURTHER that the intent of the new paragraph 1-1 of SOLAS regulation V/33, as adopted by resolution MSC.153(78) and paragraph 3.1.9 of the Annex to the SAR Convention as adopted by resolution MSC.155(78), is to ensure that in every case a place of

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<sup>21</sup> Annex 34, Resolution MSC.167(78), adopted on 20 May 2004. MSC 78/26/Add.2.  
[http://www.navcen.uscg.gov/marcomms/imo/msc\\_resolutions/MS167\(78\).pdf](http://www.navcen.uscg.gov/marcomms/imo/msc_resolutions/MS167(78).pdf).



safety is provided within a reasonable time. It is further intended that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Contracting Government/Party responsible for the SAR region in which the survivors were recovered,

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

## ANNEX

### **GUIDELINES ON THE TREATMENT OF PERSONS RESCUED AT SEA<sup>22</sup>**

#### **1 PURPOSE**

1.1 The purposes of these Guidelines are to provide guidance to Governments<sup>23</sup> and to shipmasters with regard to humanitarian obligations and obligations under the relevant international law relating to treatment of persons rescued at sea.

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

#### **2 BACKGROUND**

##### **IMO Assembly resolution A.920(22)**

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

.1 survivors of distress incidents are provided assistance regardless of nationality or status or the circumstances in which they are found;

.2 ships, which have retrieved persons in distress at sea, are able to deliver the survivors to a place of safety; and

.3 survivors, regardless of nationality or status, including undocumented migrants, asylum seekers and refugees, and stowaways, are treated, while on board, in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions.

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

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<sup>22</sup> IMO Doc. Resolution MSC. 167(78), Annex 34, adopted by the Maritime Safety Committee on 20 May 2004.

<sup>23</sup> Where the term Government is used in these Guidelines, it should be read to mean Contracting Government to the International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended, or Party to the International Convention on Maritime Search and Rescue, 1979, as amended, respectively.

## **SOLAS and SAR Convention amendments**

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

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

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

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

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

## **3 PRIORITIES**

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

### *Lifesaving*

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

### *Preservation of the integrity and effectiveness of SAR services*

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

### *Relieving masters of obligations after assisting persons*

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

## **4 INTERNATIONAL AERONAUTICAL AND MARITIME SEARCH AND RESCUE MANUAL**

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

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

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

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

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

## **5 SHIPMASTERS**

### **General guidance**

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

.1 understand and heed obligations under international law to assist persons in distress at sea (such assistance should always be carried out without regard to the nationality or status of the persons in distress, or to the circumstances in which they are found);

.2 do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs;

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

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

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

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

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

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

## **6 GOVERNMENTS AND RESCUE CO-ORDINATION CENTRES**

### **Responsibilities and preparedness**

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

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

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

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

6.5 Each RCC should have effective plans of operation and arrangements (interagency or international plans and agreements if appropriate) in place for responding to all types of SAR

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

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

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

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

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

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

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

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

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

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

### **Place of safety**

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

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

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

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

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

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

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

### **Non-SAR considerations**

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

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

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

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



## APPENDIX

### SOME COMMENTS ON RELEVANT INTERNATIONAL LAW

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

2 The SAR Convention defines *rescue* as "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety."

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

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

4 The SOLAS Convention regulation V/33.1 provides that the "master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so." Comparable obligations are contained in other international instruments. Nothing in these guidelines is intended in any way to affect those obligations. Compliance with this obligation is essential in order to preserve the integrity of search and rescue services. The SOLAS Convention, Article IV (cases of *force majeure*) protects the shipmaster insofar as the existence of persons on board the ship by reason of *force majeure* or due to the obligation for the master to carry shipwrecked or other persons, will not be a basis for determining application of the Convention's provisions to the ship. The SOLAS Convention also addresses in chapter V, regulation 7, the responsibility of Governments to arrange rescue services.

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

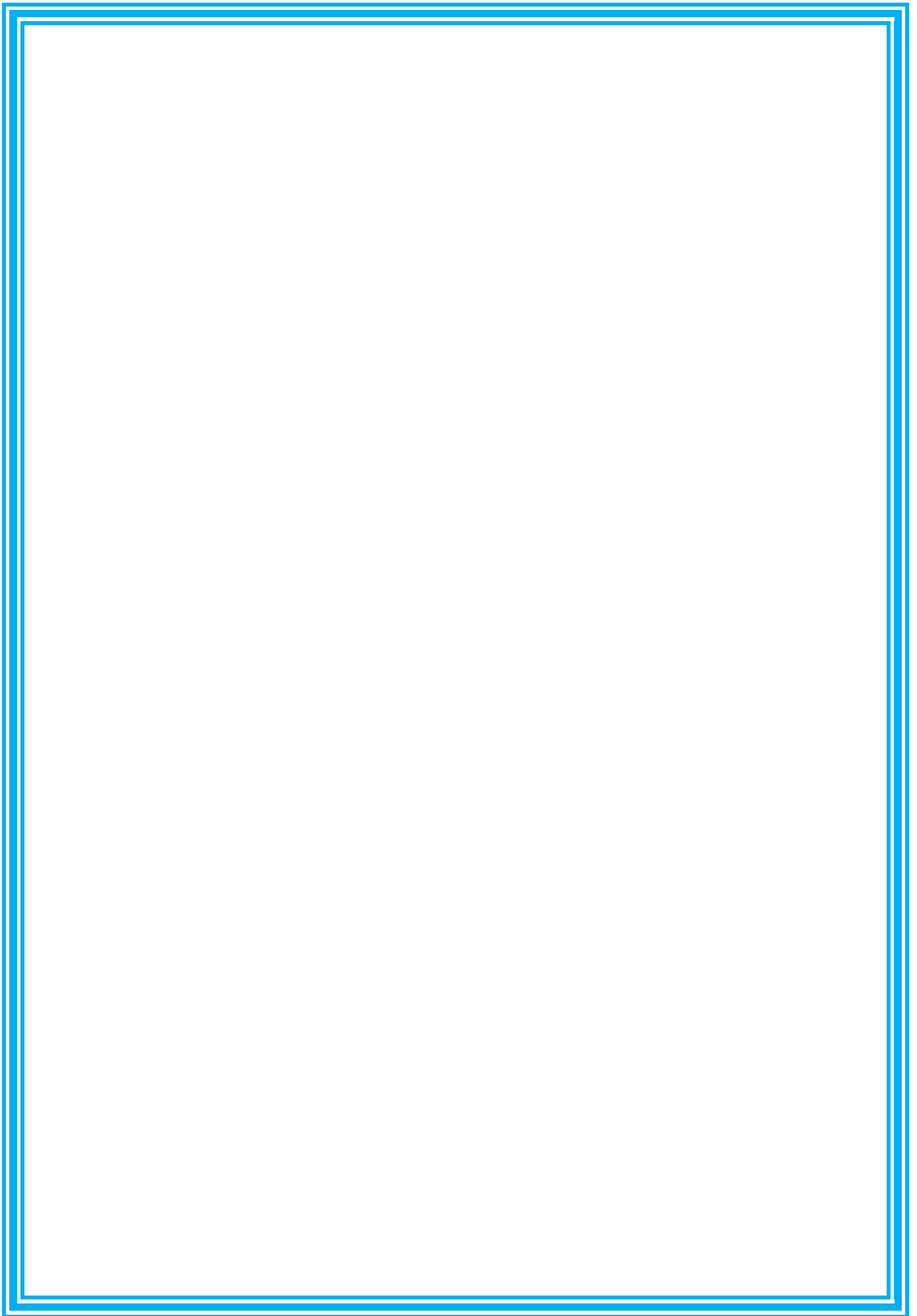
6 Pursuant to Article 18 of UNCLOS, a ship exercising innocent passage may stop or anchor in the coastal State's territorial sea "only in so far as the same are incidental to ordinary navigation or are rendered by *force majeure* or distress or for the purpose of rendering assistance to persons, ships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

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

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

- International Convention on Maritime Search and Rescue, 1979, as amended, in entirety
- International Convention for the Safety of Life at Sea, 1974, as amended, chapter V, regulation 33
- Convention on Facilitation of International Maritime Traffic, 1965, in particular Section 6.C, Standards 6.8-6.10 International Convention on Salvage, 1983, Article 11
- United Nations Convention on the Law of the Sea, 1982, Article 98
- Resolution A.871(20) on Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases

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



## REVIEW OF SAFETY MEASURES AND PROCEDURES FOR THE TREATMENT OF PERSONS RESCUED AT SEA<sup>24</sup>

*THE ASSEMBLY,*

RECALLING Articles 1 and 15(j) of the Convention on the International Maritime Organization concerning the purposes of the Organization and the functions of the Assembly in relation to regulations and guidelines concerning maritime safety; and also the general purpose of the Convention on Facilitation of International Maritime Traffic, 1965,

**DESIRING to ensure that the life of persons on board ships, including small craft, whether underway or at anchor, is safeguarded at any time pending their delivery to a place of safety,**

RECALLING the provisions of the United Nations Convention on the Law of the Sea, in particular article 98 thereof relating to the duty to render assistance,

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

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

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

FURTHER RECALLING the provisions of the Convention on Facilitation of International Maritime Traffic, 1965, as amended, relating to the facilitation of, *inter alia*, the arrival and departure of ships engaged in emergency operations necessary to ensure maritime safety,

FURTHER RECALLING the provisions of the International Convention on Salvage, 1989, relating to the master's duty to render assistance to any person in danger of being lost at sea and to the need for co-operation between parties and public authorities in order to ensure the successful saving of lives in danger,

RECALLING FINALLY the provisions of:

- (a) resolution A.773(18) on Enhancement of safety of life at sea by the prevention and suppression of unsafe practices associated with alien smuggling by ships,

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<sup>24</sup> IOM Doc. A 22/Res.920, 22 January 2002, adopted by the Assembly on 29 November 2001, agenda item 8.

- (b) resolution A.871(20) on Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases;
- (c) resolution A.867(20) on Combating unsafe practices associated with the trafficking or transport of migrants by sea; and
- (d) MSC/Circ.896/Rev.1 on Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea,

AFFIRMING that matters not regulated by the international conventions referred to above should continue to be governed, *inter alia*, by the rules and principles of customary international law,

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

RECOGNIZING the need for the Organization to consider whether international measures, additional to those already agreed to, are necessary to improve safety at sea and reduce the risk to the lives of persons on board ships, in particular in rescue operations,

1. REQUESTS the Maritime Safety Committee, the Legal Committee and the Facilitation Committee, under the direction of the Council, to review on a priority basis the international conventions referred to above and any other IMO instruments under their scope, for the purpose of identifying any existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies and, in the light of such review, to take action as appropriate, so that:

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

2. REQUESTS ALSO the Committees referred to above, when taking action as requested in operative paragraph 1, to take account of the rules and principles of general international law with respect to the duty to render assistance to persons in distress at sea, and to identify possible needs for codification and progressive development of these rules and principles;

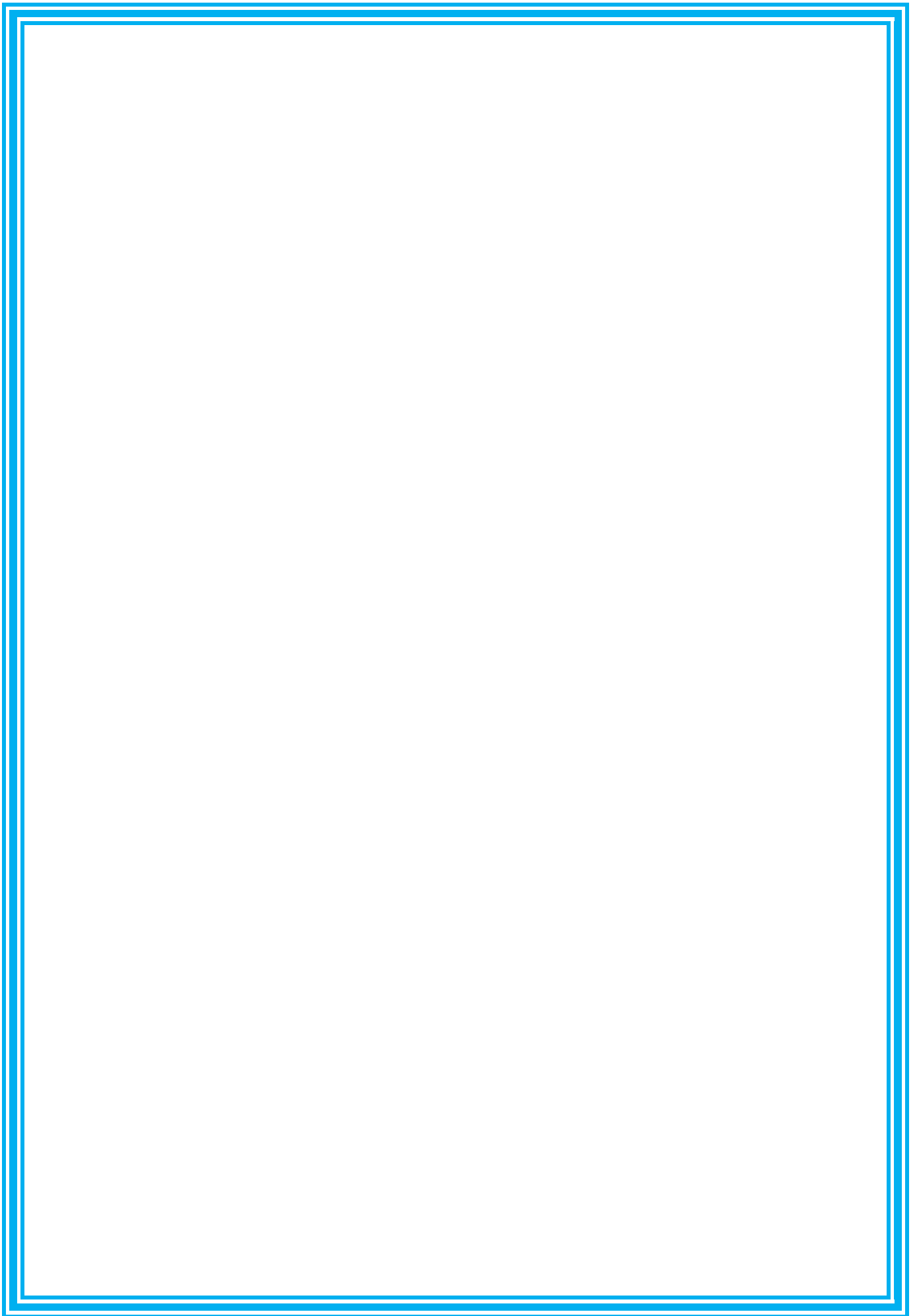
3. REQUESTS FURTHER the Committees referred to above, when taking action as requested in operative paragraphs 1 and 2, to take account of the work of, and consult as appropriate with, other international organizations, including industry organizations, relating

to the search and rescue of persons in distress or in danger at sea, including persons who may be undocumented migrants or stowaways;

4. FURTHER REQUESTS the Secretary-General to pursue his initiative as referred to in the tenth preambular paragraph, and to inform the competent IMO bodies of developments in due course;

5. FINALLY REQUESTS the Secretary-General to submit a report to the twenty-third session of the Assembly on progress made in the interim.

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## **INTERIM MEASURES FOR COMBATING UNSAFE PRACTICES ASSOCIATED WITH THE TRAFFICKING OR TRANSPORT OF MIGRANTS BY SEA<sup>25</sup>**

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

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

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

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

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

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

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

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<sup>25</sup> IMO Circular MSC/Circ.896/Rev.1, adopted on 12 June 2001  
[http://www.imo.org/includes/blastDataOnly.asp/data\\_id=3881/896REV1.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id=3881/896REV1.pdf).

## ANNEX

### INTERIM MEASURES FOR COMBATING UNSAFE PRACTICES ASSOCIATED WITH THE TRAFFICKING OR TRANSPORT OF MIGRANTS BY SEA

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

#### Definitions

2 For purposes of this circular:

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

2.2 "Organization" means the International Maritime Organization; and

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

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

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

#### Purpose

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

#### Recommended actions by States

##### *Compliance with international obligations.*

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

- 1 ensuring compliance with the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS)<sup>26</sup>;
- .2 collecting and disseminating information on ships believed to be engaged in unsafe practices associated with trafficking or transporting migrants;
- .3 taking appropriate action against masters, officers and crew members engaged in such unsafe practices; and
- 4 preventing any such ship:
  - .1 from again engaging in unsafe practices; and
  - .2 if in port, from sailing.

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

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

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

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

*Co-operation.*

8 States should co-operate to the fullest extent possible to prevent and suppress unsafe practices associated with the trafficking or transport of migrants by sea, in conformity with the

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<sup>26</sup> It is recalled that:

- regulation 1 of chapter I of SOLAS Convention provides that SOLAS applies to ships engaged on international voyages;
- regulation 2 of the same chapter defines as:
  - international voyage*, a voyage from a country to which the present Convention applies to a port outside such country, or conversely.
  - passenger ship*, a ship which carries more than twelve passengers.
  - cargo ship*, any ship which is not a passenger ship.

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

international law of the sea and all generally accepted relevant international instruments. It is consistent with international law for a flag State to authorize a vessel flying its flag to be boarded and inspected by a warship of another State, as described in paragraphs 12 and 20 below.

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

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

*Measures and Procedures.*

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

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

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

12 A State which has reasonable grounds to suspect that a ship exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another State is engaged in unsafe practices associated with the trafficking or transport of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed<sup>27</sup>, request authorization from the flag State to take appropriate measures in regard to that ship. The flag State may authorize the requesting State to, *inter alia*:

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

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

13 A flag State may, consistent with paragraph 8, subject its authorization to conditions to be mutually agreed between it and the requesting State, including conditions relating to

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<sup>27</sup> If registry is refuted, the situation is that described in paragraph 11.2 above.

responsibility and to the extent of effective measures to be taken including the use of force. A State shall take no additional actions without the express authorization of the flag State, except those necessary to relieve imminent danger or those that follow from relevant bilateral or multilateral agreements.

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

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

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

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

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

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

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

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

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

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

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

### **Reports**

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

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

**APPENDIX**

**REPORT ON UNSAFE PRACTICE ASSOCIATED WITH THE TRAFFICKING OR TRANSPORT OF MIGRANTS BY SEA**

Date: \_\_\_\_\_ Time: \_\_\_\_\_

Ship Name: \_\_\_\_\_ Name on Hull? Y/N

Official/Document Number: \_\_\_\_\_

Flag: \_\_\_\_\_ International Call Sign: \_\_\_\_\_

Homeport: \_\_\_\_\_ Homeport on Hull? Y/N

Description: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Type of Propulsion/Horsepower: \_\_\_\_\_ Gross Tonnage: \_\_\_\_\_

Location: \_\_\_\_\_ N/S \_\_\_\_\_ E/W \_\_\_\_\_

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

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

Owner/Charterer: \_\_\_\_\_  
\_\_\_\_\_

Master: \_\_\_\_\_ Nationality: \_\_\_\_\_ Date of Birth: \_\_\_\_\_

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

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

Number of Male Adults: \_\_\_\_\_ Number of Female Adults: \_\_\_\_\_  
Number of Male Minors: \_\_\_\_\_ Number of Female Minors: \_\_\_\_\_

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

Additional comments and recommendations (if any): \_\_\_\_\_

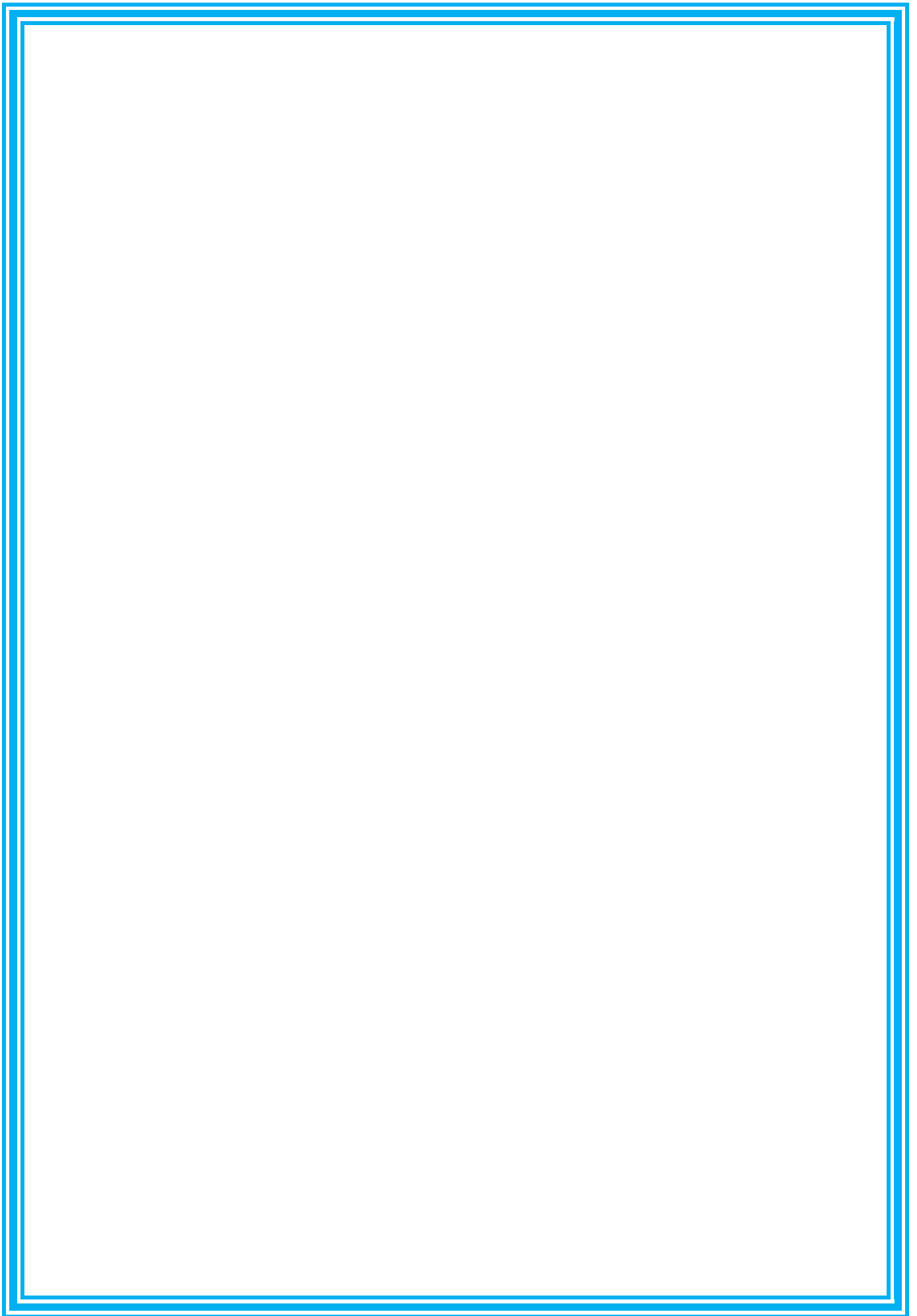
\_\_\_\_\_

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Maritime Authority: \_\_\_\_\_





## **GUIDELINES ON THE ALLOCATION OF RESPONSIBILITIES TO SEEK THE SUCCESSFUL RESOLUTION OF STOWAWAY CASES<sup>28</sup>**

THE ASSEMBLY,

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

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

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

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

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

BEING AWARE that, in the absence of an internationally agreed procedure for dealing with stowaways, considerable difficulties are being encountered by shipmasters and shipping companies, shipowners and ship operators in disembarking stowaways from ships into the care of the appropriate authorities,

APPRECIATING Member Governments' difficulties in accepting stowaways for examination pending repatriation and then allowing the vessels concerned to sail,

RECOGNIZING, therefore, the need to establish practical and comprehensive guidance on procedures to be followed by all the authorities and persons concerned in order that the return or repatriation of a stowaway may be achieved in an acceptable and humane manner,

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

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

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<sup>28</sup> IMO Resolution A.871(20), adopted on 27 November 1997  
[http://www.pmaesa.org/Maritime/Res%20A.871\(20\).doc](http://www.pmaesa.org/Maritime/Res%20A.871(20).doc).

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

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

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

HAVING CONSIDERED the recommendations made by the Facilitation Committee at its twenty-fifth session,

1. ADOPTS the Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases, set out in the Annex to the present resolution;
2. URGES Governments to implement in their national policies and practices the procedures recommended in the annexed Guidelines;
3. URGES ALSO Governments to deal with stowaway cases in a spirit of co-operation with other parties concerned, on the basis of the allocation of responsibilities set out in the annexed Guidelines;
4. INVITES shipping companies, shipowners and ship operators to take on the relevant responsibilities set out in the annexed Guidelines and to guide their masters and crews as to their respective responsibilities in stowaway cases;
5. INVITES Governments to develop, in co-operation with the industry, comprehensive strategies to prevent intending stowaways from gaining access to ships;
6. REQUESTS the Facilitation Committee to continue to monitor the effectiveness of the annexed Guidelines on the basis of information provided by Governments and the industry, to keep them under review and to take such further action, including the development of a relevant binding instrument, as may be considered necessary in the light of developments;
7. REVOKES FAL.2/Circ.

## ANNEX

### **GUIDELINES ON THE ALLOCATION OF RESPONSIBILITIES TO SEEK THE SUCCESSFUL RESOLUTION OF STOWAWAY CASES**

1 Masters, shipowners<sup>29</sup>, port authorities, national administrations, and other bodies including security operators all have a responsibility to cooperate to prevent illegal access to a vessel while it is in port. However, no matter how effective routine port and ship security is, there will still be occasions when stowaways gain access to vessels, either secreted in the cargo or by surreptitious boarding.

2 For the purposes of the Guidelines a stowaway is defined as a person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person, and who is detected on board after the ship has departed from a port and reported as a stowaway by the master to the appropriate authorities.

3 The resolution of stowaway cases is difficult because of different national legislation in each of the potentially several countries involved: the country of embarkation, the country of disembarkation, the flag State of the vessel, the country of apparent, claimed or actual nationality/citizenship of the stowaway, and countries of transit during repatriation.

4 There are, however, some basic principles which can be applied generally. These are as follows:

- .1 A recognition that stowaways arriving at or entering a country without the required documents are, in general, illegal entrants. Decisions on dealing with such situations are the prerogative of the countries where such arrival or entry occurs.
- .2 Stowaway asylum-seekers should be treated in compliance with international protection principles as set out in international instruments<sup>30</sup> and relevant national legislation.
- .3 The shipowner and his representative on the spot, the master, as well as port authorities and national administrations, should cooperate as far as possible in dealing with stowaway cases.
- .4 Shipowners and their representatives on the spot, masters, port authorities and national administrations should have security arrangements in place which, as far as practicable, will prevent intending stowaways from getting aboard a ship or, if this fails, will detect them before a ship arrives at port. Where national legislation permits, national authorities should consider prosecution of stowaways for trespassing upon or damaging the property of the shipping company, or the cargo.
- .5 All Parties should be aware that an adequate search may minimize the risk of having to deal with a stowaway case and may also save the life of a stowaway who may, for example, be hiding in a place which is subsequently sealed and/or chemically treated.

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<sup>29</sup> Including any persons or party acting on behalf of the owner of the vessel.

<sup>30</sup> Reference is made to the provisions of the United Nations Convention relating to the Status of Refugees of 28 July 1951 and of the United Nations Protocol relating to the Status of Refugees of 31 January 1967.

- .6 Countries should admit returned stowaways with full nationality/citizenship status of that country or a right of residence.
- .7 The country of the original port of embarkation of a stowaway should normally accept the return of such a stowaway for examination pending final case disposition.
- .8 Every effort should be made to avoid situations where a stowaway has to be detained on board a ship indefinitely. In this regard countries should co-operate with the shipowner in arranging the return of a stowaway to an appropriate country.
- .9 Stowaway incidents should be dealt with humanely by all parties involved. Due consideration must always be given to the operational safety of the ship and to the well-being of the stowaway.

5 As a first step in addressing the issue, a framework of the various responsibilities, rights and liabilities of the parties involved needs to be identified and agreed. The following allocation of responsibility is suggested:

**.1 The master**

- .1.1 to make every effort to determine immediately the port of embarkation of the stowaway;
- .1.2 to make every effort to establish the identity, including the nationality/citizenship of the stowaway;
- .1.3 to prepare a statement containing all information relevant to the stowaway, in accordance with information specified in the standard document annexed to these Guidelines, for presentation to the appropriate authorities;
- .1.4 to notify the existence of a stowaway and any relevant details to his shipowner and appropriate authorities at the port of embarkation, the next port of call and the flag State;
- .1.5 not to depart from his planned voyage to seek the disembarkation of a stowaway to any country unless repatriation has been arranged with sufficient documentation and permission given for disembarkation, or unless there are extenuating security or compassionate reasons;
- .1.6 to ensure that the stowaway is presented to the appropriate authorities at the next port of call in accordance with their requirements;
- .1.7 to take appropriate measures to ensure the security, general health, welfare and safety of the stowaway until disembarkation;

**.2 The shipowner or operator**

- .2.1 to ensure that the existence of, and any relevant information on, the stowaway has been notified to the appropriate authorities at the port of embarkation, the next port of call and the flag State;

- .2.2 to comply with any removal directions made by the competent national authorities at the port of disembarkation;
- .3 Country of first scheduled port of call after discovery of the stowaway (port of disembarkation)**
  - .3.1 to accept the stowaway for examination in accordance with the national laws of that country and, where the competent national authority considers that it would facilitate matters, to allow the shipowner and his named representative and the competent or appointed P&I Club correspondent to have access to the stowaway;
  - .3.2 to consider allowing disembarkation and provide, as necessary and in accordance with national law, secure accommodation which may be at the expense of the shipowner or agents, where:
    - .3.2.1 a case under .3.1 is unresolved at the time of sailing, or
    - .3.2.2 national authorities are satisfied that arrangements have been made and will be effected for the early return or repatriation of the stowaway by other means (which may be at the expense of the shipowner or agents), or
    - .3.2.3 a stowaway's presence on board would endanger the safe operation of the vessel;
  - .3.3 to assist, as necessary, in the identification of the stowaway and the establishment of his or her nationality/citizenship;
  - .3.4 to assist, as necessary, in establishing the validity and authenticity of a stowaway's documents;
  - .3.5 to give directions for the removal of the stowaway to the port of embarkation, country of nationality/citizenship or to some other country to which lawful directions may be made, in co-operation with the shipowner and his nominated representative;
  - .3.6 in co-operation with the shipowner and his and his nominated representatives to discuss repatriation or removal arrangements or directions with the master/shipowner or their appointed representatives, keeping them informed, as far as practicable, of the level of detention costs, while keeping these to a minimum;
  - .3.7 to consider mitigation of charges that might otherwise be applicable when shipowners have cooperated with the control authorities to the satisfaction of those authorities in measures designed to prevent the transportation of stowaways;
  - .3.8 to issue, if necessary, in the event that the stowaway has no identification and/or travel documents, a document attesting to the circumstances of embarkation and arrival to enable the return of the stowaway either to his

country of origin, to the country of the port of embarkation, or to any other country to which lawful directions can be made, by any means of transport;

- .3.9 to hand over the document to the transport operator effecting the removal of the stowaway;
- .3.10 to take proper account of the interests of, and implications for, the shipowner or agent when directing detention and setting removal directions, so far as is consistent with the maintenance of control, their duties or obligations to the stowaway under the law, and the cost to public funds.

**.4 The country of the original port of embarkation of the stowaway (i.e. the country where the stowaway first boarded the ship)**

- .4.1 to accept any returned stowaway having nationality/citizenship or right of residence;
- .4.2 to accept, in normal circumstances, a stowaway back for examination where the port of embarkation is identified to the satisfaction of the authorities of the receiving country;
- .4.3 to apprehend and detain the stowaway, where permitted by national legislation, if the stowaway is discovered before sailing either on the vessel or in cargo due to be loaded; to refer the intended stowaway to local authorities for prosecution, and/or, where applicable, to the immigration authorities for examination and possible removal: no charge to be imposed on the shipowner in respect of detention or removal costs, and no penalty to be imposed;
- .4.4 to apprehend and detain the stowaway, where permitted by national legislation, if the stowaway is discovered while the vessel is still in the territorial waters of the country of the port of his embarkation, or in another port in the same country (not having called at a port in another country in the meantime) no charge to be imposed on the shipowner in respect of detention or removal costs, and no penalty to be imposed.

**.5 The apparent or claimed country of nationality/citizenship of the stowaway**

- .5.1 to make every effort to assist in determining the identity and nationality/citizenship of the stowaway and to document the stowaway, accordingly once satisfied that he or she holds the nationality/citizenship claimed;
- .5.2 to accept the stowaway where nationality/citizenship is established.

**.6 The flag State of the vessel**

- .6.1 to be willing, if practicable, to assist the master/shipowner or the appropriate authority at the port of disembarkation in identifying the stowaway and determining his or her nationality/citizenship;
- .6.2 to be prepared to make representations to the relevant authority to assist in the removal of the stowaway from the vessel at the first available opportunity;

- .6.3 to be prepared to assist the master/shipowner or the authority at the port of disembarkation in making arrangements for the removal or repatriation of the stowaway.

**.7 Any countries of transit during repatriation**

to allow, subject to normal visa requirements, the transit through their ports and airports of stowaways travelling under the removal instructions or directions of the country of the port of disembarkation.



## APPENDIX

### STOWAWAY DETAILS

#### SHIP DETAILS

Name of Ship:  
IMO Number:  
Flag:  
Company:  
Company address:  
Agent in next port:  
Agent address:  
IRCS:  
Inmarsat Number:  
Port of registry:  
Name of master:

Photograph of stowaway

#### STOWAWAY DETAILS

Date/time found on board:  
Place of boarding:  
Country of boarding:  
Time spent in country of boarding:  
Date/time of boarding:  
Intended port of destination:  
Intended final destination (if different):  
Stated reasons for boarding the ship:

Emergency passport No:  
When issued:  
Where issued:  
Date of expiry:  
Issued by:

Home address:

Home town:  
Country of domicile:  
Profession(s):  
Employer(s): [names and addresses]

Address in country of boarding:

Surname:  
Given name:  
Name by which known:  
Religion:  
Gender:  
Date of birth:  
Place of birth:  
Claimed nationality:  
ID document type:

Height (cm):  
Weight (kg):  
Complexion:  
Colour of eyes:  
Colour of hair:  
Form of head/face:  
Marks/characteristics: [e.g. scars, tattoos, etc.]

Passport No:  
When issued:  
Where issued:  
Date of expiry:  
Issued by:

First language:  
Spoken            Read            Written

ID Card No:  
When issued:  
Where issued:  
Date of expiry:  
Issued by:

Other languages:  
Spoken            Read            Written

Seaman's Book No:  
When issued:  
Where issued:  
Date of expiry:  
Issued by:

Marital status:  
Name of spouse:  
Nationality of spouse:  
Address of spouse:

Names of parents:  
Nationality of parents:  
Address of parents:

**OTHER DETAILS**

Method of boarding, including other persons involved (e.g. crew, port workers, etc.), and whether they were secreted in cargo/container or hidden in the vessel:

Inventory of stowaway's possessions:

Was the stowaway assisted in boarding the vessel, or assisted by any member of the crew? If so, was any payment made for this assistance?

Other information (e.g. names and addresses of colleagues, community leader, e.g. mayor, tribal chief, contacts in other parts of the world):

Statement made by stowaway:

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

Date(s) of interview(s):

Stowaway's signature

Master's signature

Date:

Date:

# **INTERNATIONAL REFUGEE LAW**

**Convention Relating to the Status of Refugees and its 1967 Protocol<sup>31</sup>**  
*Adopted 28 July 1951*  
*Entered into force 22 April 1954*

The 1951 Convention defines who is a refugee, and sets out the rights of refugees in the host country. The most important of these rights is the right to be protected against *refoulement*. The convention also obliges States Parties to co-operate with UNHCR. Its 1967 protocol withdraws the time and geographical limits of the Convention.

Article 1 - Definition of the term "refugee"

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

...

(2) [As a result of events occurring before 1 January 1951]<sup>32</sup> owing to 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 or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

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

.....

Article 31 - Refugees unlawfully in the country of refuge

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

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<sup>31</sup> 189 United Nations Treaty Series 150 and 606 United Nations Treaty Series 267. <http://www.ohchr.org/english/law/refugees.htm>. <http://www.ohchr.org/english/law/protocolrefugees.htm>.

<sup>32</sup> State Parties to the 1967 Protocol relating to the Status of Refugees accepted to lift the time limitation of the 1951 Convention. Art. 1(2) of the Protocol reads as follows: For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in Article 1 A (2) were omitted.

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

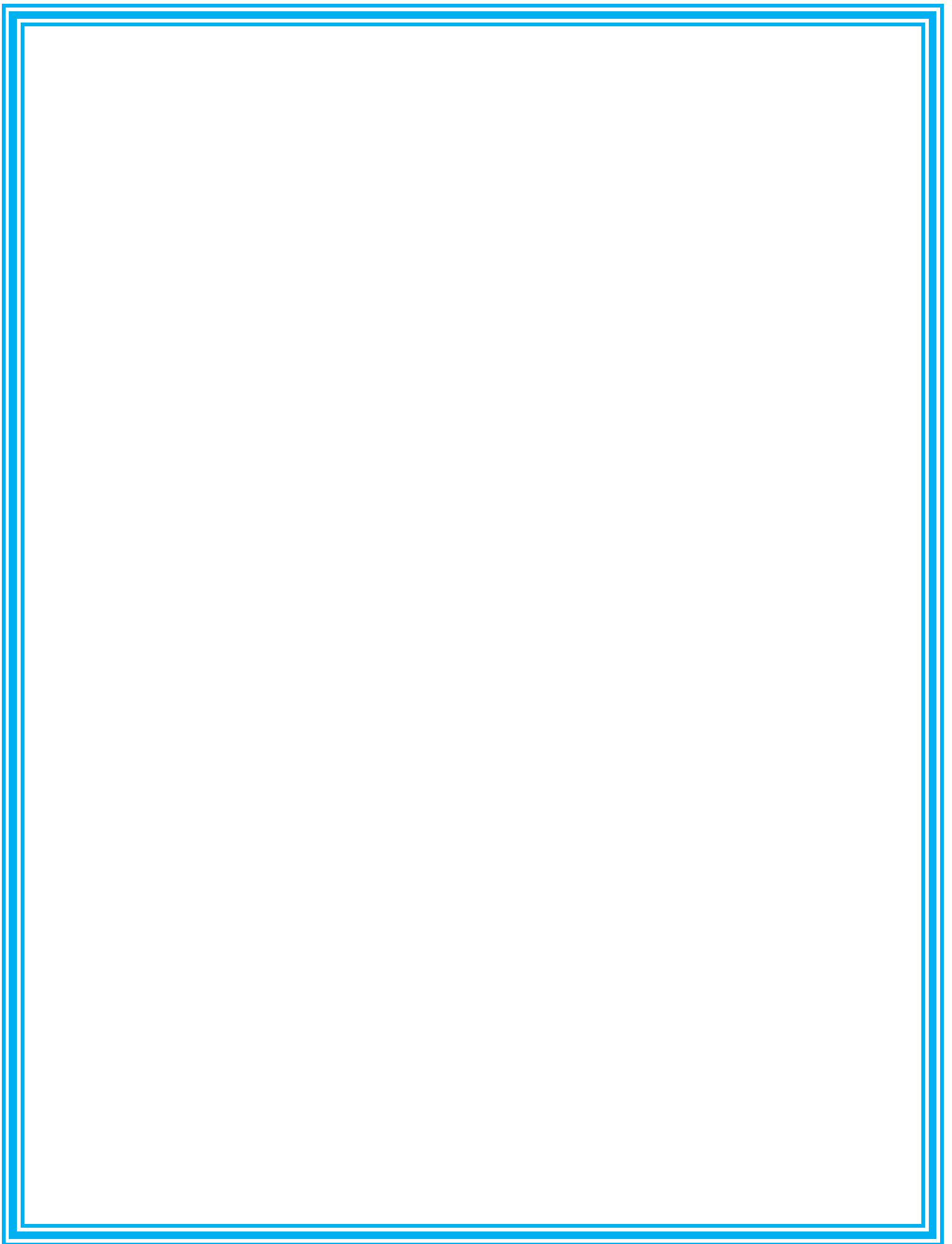
Article 33 - Prohibition of expulsion or return ("*refoulement*")

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

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

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

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



**Convention Governing the Specific Aspects of Refugee Problems in Africa**  
*Adopted 10 September 1969*  
*Entered into force 20 June 1974*<sup>33</sup>

This regional instrument complements the 1951 Convention. It extends the refugee definition to people who may not be covered by the 1951 Convention but who are forced to move for a complex range of reasons including widespread human rights abuses, armed conflict and generalized violence.

***Selected Provisions***

Article I - Definition of the term "Refugee"

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to 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 or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

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

.....

6. For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee.

Article II - Asylum

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees

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<sup>33</sup> 1001 United Nations Treaty Series 45. [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Refugee\\_Convention.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf).

who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.

3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

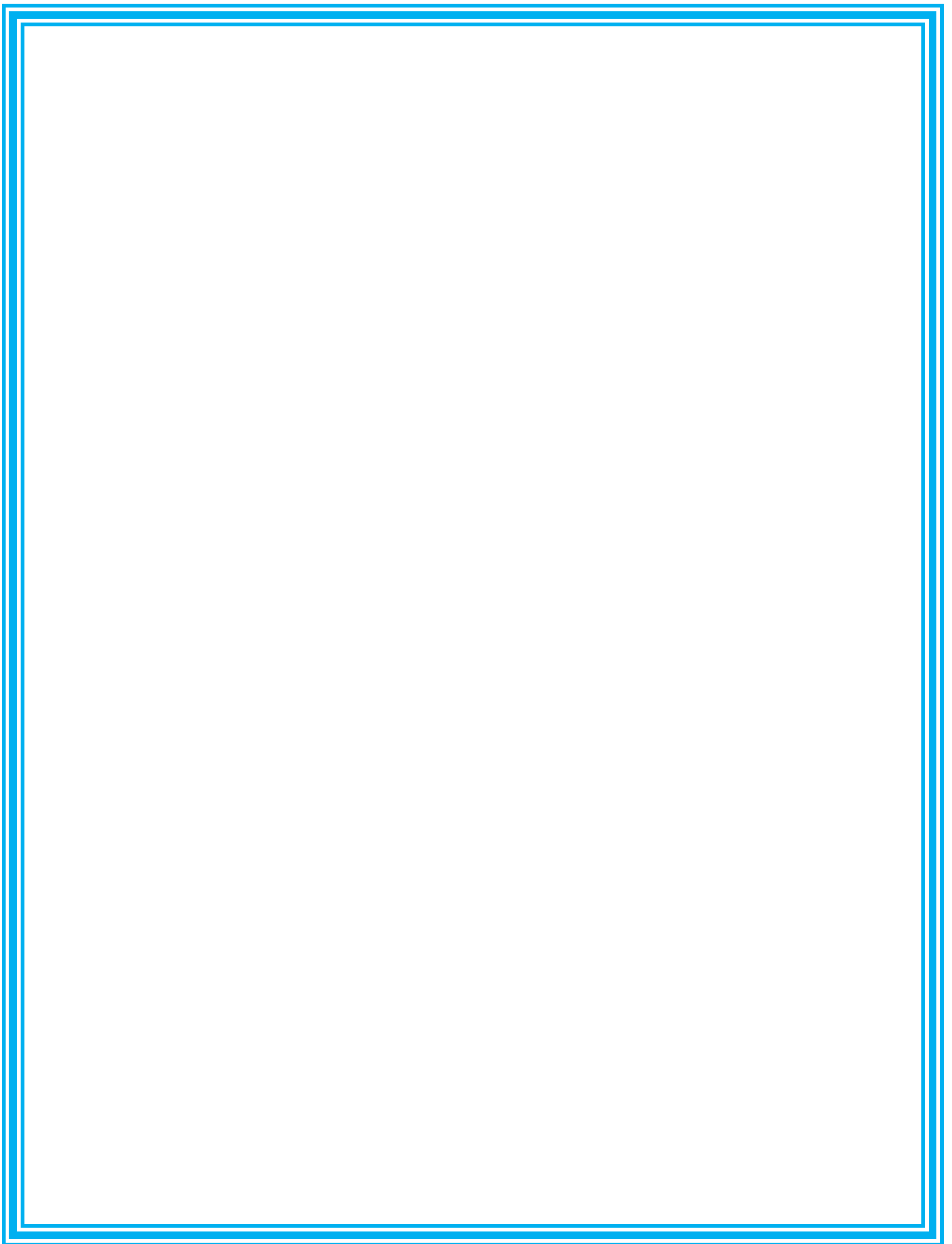
6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

#### Article VIII - Cooperation with the Office of the United Nations High Commissioner for Refugees

1. Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees.

2. The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.





## **Conclusion adopted by the Executive Committee on International Protection**

### **Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV)<sup>34</sup>**

*The Executive Committee,*

*Noting* the discussions which took place on interception measures at the Standing Committee<sup>35</sup> as well as in the context of the Global Consultations on International Protection;<sup>36</sup>

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

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

*Recalling* the emerging legal framework<sup>37</sup> for combating criminal and organized smuggling and trafficking of persons, in particular the Protocol Against the Smuggling of Migrants by Land, Sea and Air, which, inter alia, contemplates the interception of vessels enjoying freedom of navigation in accordance with international law, on the basis of consultations between the flag State and the intercepting State in accordance with international maritime law, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea;

*Noting* the saving clauses contained in each of the Protocols<sup>38</sup> and the reference to the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the principle of non-refoulement;

*Recalling* also the duty of States and shipmasters to ensure the safety of life at sea and to

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<sup>34</sup> Conclusion adopted by the Executive Committee on international Protection of Refugees, 233.  
<http://www.unhcr.org/excom/EXCOM/3f93b2894.html>.

<sup>35</sup> EC/50/SC/CRP17, 9 June 2000.

<sup>36</sup> EC/GC/O1/13, 31 May 2001, Regional Workshops in Ottawa, Canada and in Macau.

<sup>37</sup> The United Nations Convention Against Transnational Organized Crime, 2000 and its Supplementary Protocols Against the Smuggling of Migrants by Land, Sea and Air; and to Suppress and Punish Trafficking in Persons, Especially Women and Children.

<sup>38</sup> Article 19 of the Smuggling Protocol and Article 14 of the Trafficking Protocol.

come to the aid of those in distress or in danger of being lost at sea, as contained in numerous instruments of the codified system of international maritime law<sup>39</sup>; recalling also Conclusions of the Executive Committee of relevance to the particular needs of asylum-seekers and refugees in distress at sea<sup>40</sup> and affirming that when vessels respond to persons in distress at sea, they are not engaged in interception;

*Recognizing* also that States have international obligations regarding the security of civilian air transportation and that persons whose identities are unknown represent a potential threat to the security of air transportation as contained in numerous instruments of the codified system on international aviation law;<sup>41</sup>

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

- i. prevent embarkation of persons on an international journey;
- ii. prevent further onward international travel by persons who have commenced their journey; or
- iii. assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;

where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the traveling public as well as persons being smuggled or transported in an irregular manner;

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

- i. The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons;
- ii. All intercepted persons should be treated, at all times, in a humane manner respectful of their human rights. State authorities and agents acting on behalf of the intercepting State should take, consistent with their obligations under international law, all appropriate

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<sup>39</sup> Including *inter alia* the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, 1974, as amended and the International Convention on Maritime Search and Rescue, 1979, as amended.

<sup>40</sup> In particular No. 15(XXX), No. 20(XXXI), No. 23(XXXII), No. 26 (XXXIII), No. 31 (XXXIV), No. 34 (XXXV) and No. 38 (XXXVI).

<sup>41</sup> Including, *inter alia*, the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

steps in the implementation of interception measures to preserve and protect the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment of persons intercepted;

iii. Interception measures should take into account the fundamental difference, under international law, between those who seek and are in need of international protection, and those who can resort to the protection of their country of nationality or of another country;

iv. Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions;

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

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

vii. Intercepted persons who do not seek or who are determined not to be in need of international protection should be returned swiftly to their respective countries of origin or other country of nationality or habitual residence and States are encouraged to cooperate in facilitating this process;<sup>42</sup>

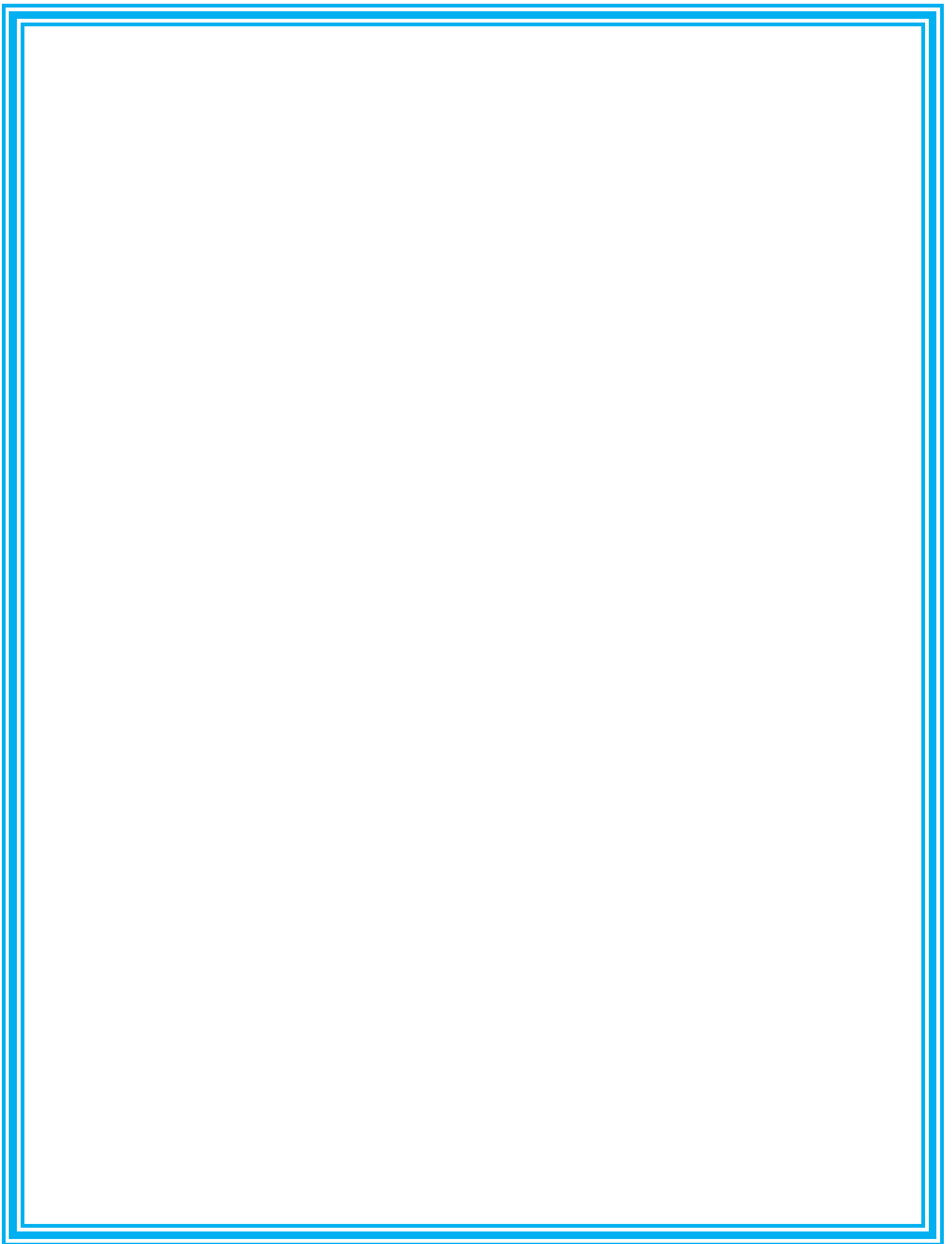
viii. All persons, including officials of a State, and employees of a commercial entity, implementing interception measures should receive specialized training, including available means to direct intercepted persons expressing international protection needs to the appropriate authorities in the State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

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

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

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<sup>42</sup> See Conclusion on the return of persons found not to be in need of international protection. (A/AC.96/987, para. 21).



## No. 53 (XXXIX) Stowaway Asylum-Seekers<sup>43</sup>

*The Executive Committee,*

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

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

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

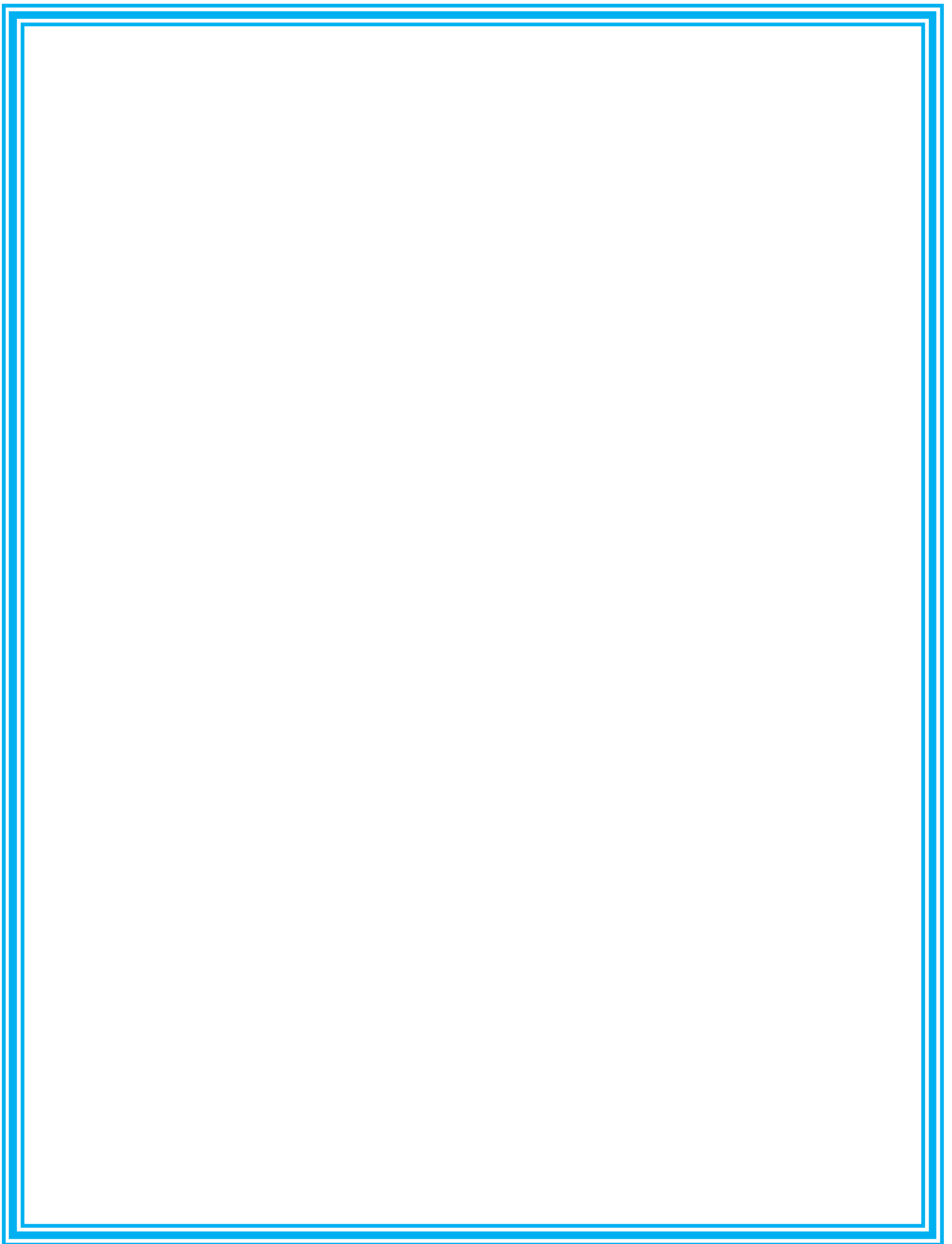
*Noting* that there are at present no general and internationally recognized rules dealing specifically with stowaway asylum-seekers and at the same time recognizing that asylum-seekers should be given the special consideration that their situation demands;

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

1. Like other asylum-seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.
2. Without prejudice to any responsibilities of the flag State, stowaway asylum-seekers should, whenever possible, be allowed to disembark at the first port of call and given the opportunity of having their refugee status determined by the authorities, provided that this does not necessarily imply durable solution in the country of the port of disembarkation.
3. Normally UNHCR would be requested to assist in finding a durable solution for those found to be refugees, based on all relevant aspects of the case.

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<sup>43</sup> Conclusion adopted by the Executive Committee on International Protection of Refugees, 99. <http://www.unhcr.org/excom/EXCOM/3ae68c4374.html>.



**No. 23 (XXXII) PROBLEMS RELATED TO THE RESCUE OF ASYLUM-SEEKERS IN DISTRESS AT SEA<sup>44</sup>**

*The Executive Committee,*

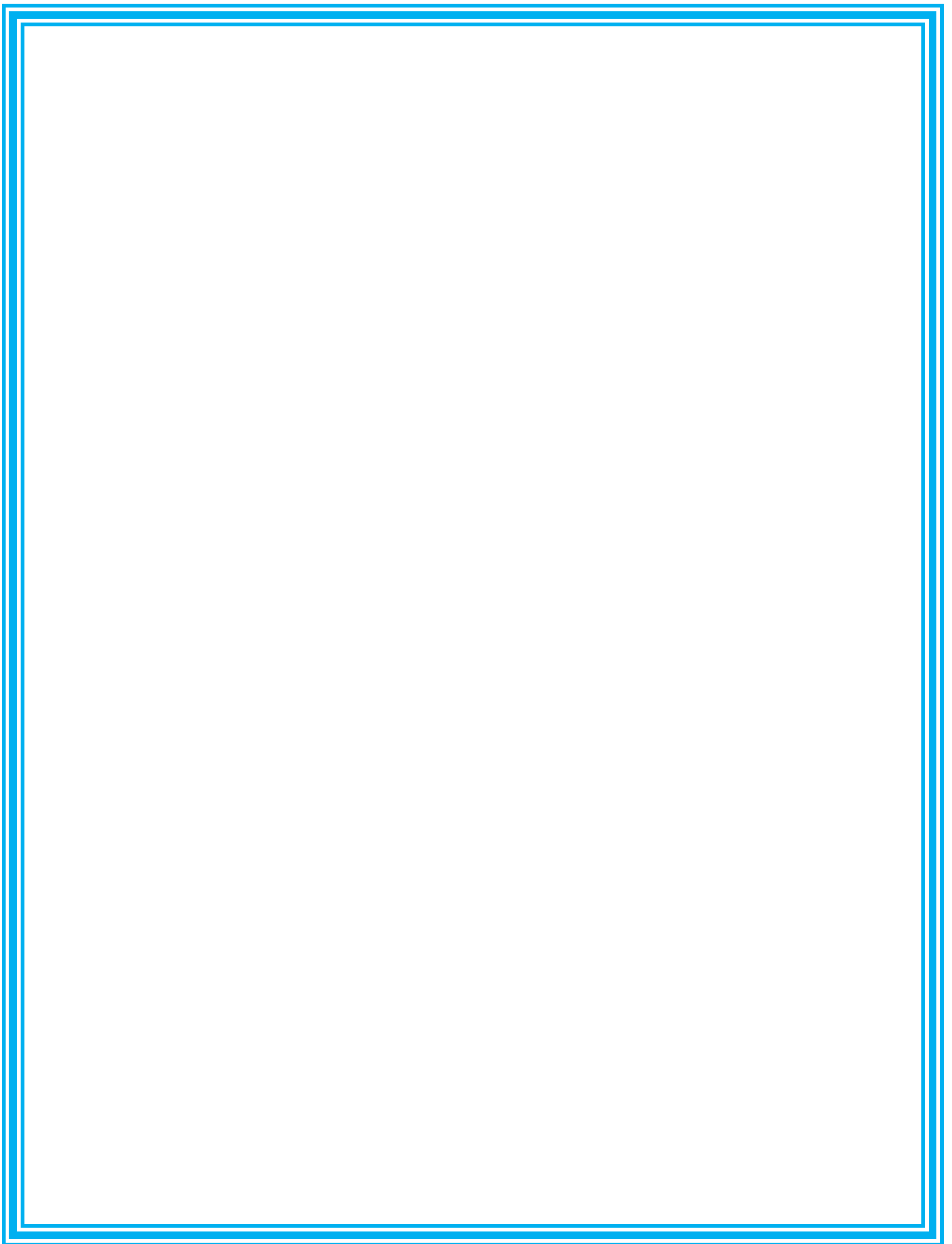
*Adopted* the following conclusions on problems related to the rescue of asylum-seekers in distress at sea.

1. It is recalled that there is a fundamental obligation under international law for ships' masters to rescue any persons in distress at sea, including asylum-seekers, and to render them all necessary assistance. Seafaring States should take all appropriate measures to ensure that masters of vessels observe this obligation strictly.
2. Rescue of asylum-seekers in distress at sea has been facilitated by the willingness of the flag States of rescuing ships to provide guarantees of resettlement required by certain coastal States as a condition for disembarkation. It has also been facilitated by the agreement of these and other States to contribute to a pool of resettlement guarantees under the DISERO scheme which should be further encouraged. All countries should continue to provide durable solutions for asylum-seekers rescued at sea.
3. In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities.
4. As a result of concerted efforts by many countries, large numbers of resettlement opportunities have been, and continue to be, provided for boat people. In view of this development, the question arises as to whether the first port of call countries might wish to examine their present policy of requiring resettlement guarantees as a precondition for disembarkation. Pending a review of practice by coastal States, it is of course desirable that present arrangements for facilitating disembarkation be continued.
5. In view of the complexity of the problems arising from the rescue, disembarkation and resettlement of asylum-seekers at sea, the High Commissioner is requested to convene at an early opportunity a working group comprising representatives of the maritime States and the coastal States most concerned, potential countries of resettlement, and representatives of international bodies competent in this field. The working group should study the various problems mentioned and elaborate principles and measures which would provide a solution and should submit a report on the matter to the Executive Committee at its thirty-third session.

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<sup>44</sup> Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the Recommendation of the Sub-Committee of the Whole on International Protection of Refugees <http://www.unhcr.org/excom/EXCOM/3ae68c4344.html>.





## No. 20 (XXXI) PROTECTION OF ASYLUM-SEEKERS AT SEA<sup>45</sup>

*The Executive Committee,*

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

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

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

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

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

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

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

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

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

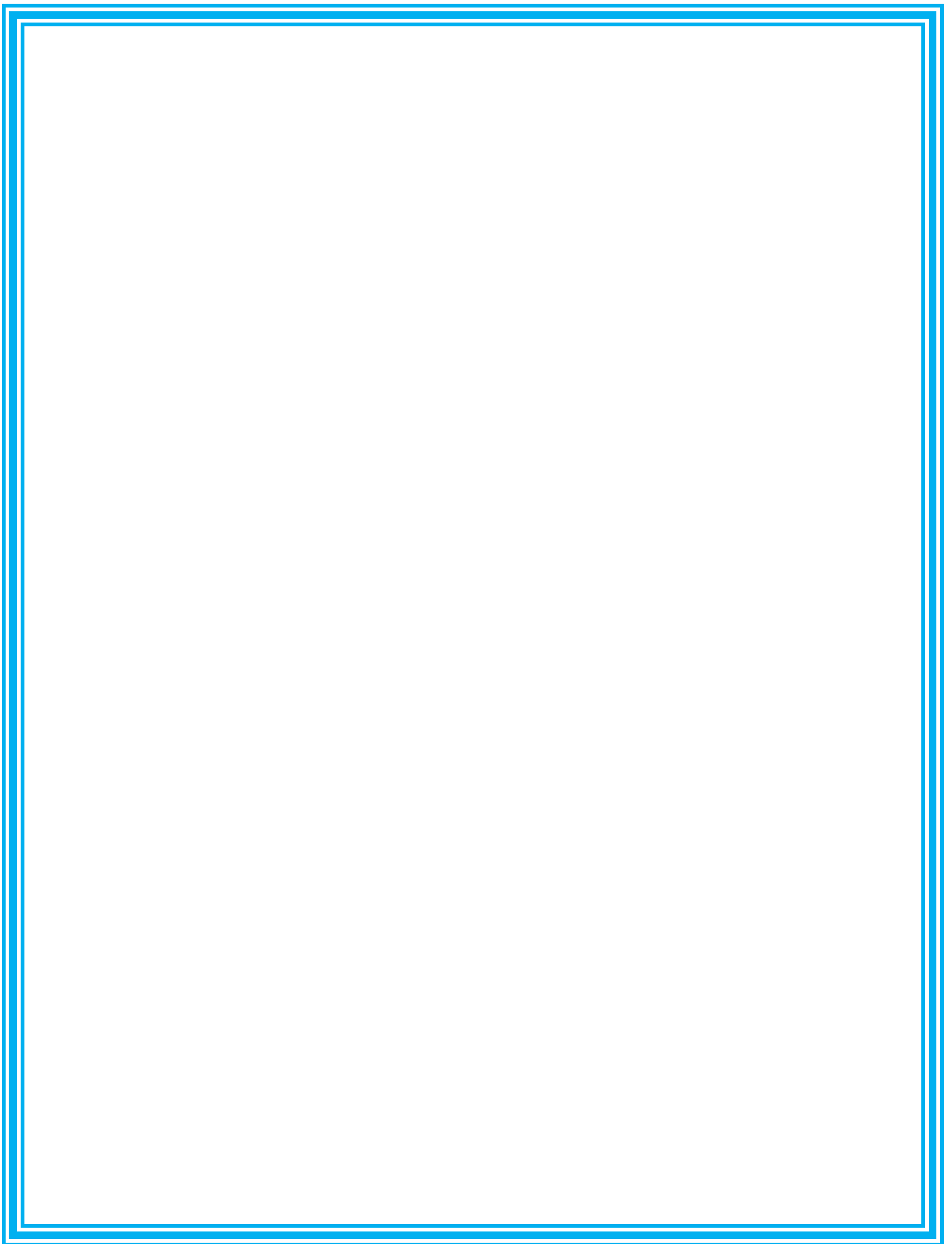
(f) *Urged* Governments to co-operate with each other and with UNHCR to ensure that all necessary assistance is provided to the victims of such criminal attacks;

(g) *Called* upon the United Nations High Commissioner for Refugees in co-operation with the International Committee of the Red Cross and other interested organizations

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<sup>45</sup> <http://www.unhcr.org/excom/EXCOM/3ae68c435c.html>.

actively to seek the co-operation of the international community to intensify efforts aimed at protecting refugees who are victims of acts of violence, particularly those at sea.



## No. 15 (XXX) REFUGEES WITHOUT AN ASYLUM COUNTRY<sup>46</sup>

*The Executive Committee,*

Considered that States should be guided by the following considerations:

### **General principles**

- (a) States should use their best endeavours to grant asylum to *bona fide* asylum-seekers;
- (b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of *non-refoulement*;
- (c) It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum;
- (d) Decisions by States with regard to the granting of asylum shall be made without discrimination as to race, religion, political opinion, nationality or country of origin;
- (e) In the interest of family reunification and for humanitarian reasons, States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted;

### **Situations involving a large-scale influx of asylum-seekers**

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

### **Situations involving individual asylum-seekers**

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

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<sup>46</sup> <http://www.unhcr.org/excom/EXCOM/3ae68c960.html>.

- (i) The criteria should make it possible to identify in a positive manner the country which is responsible for examining an asylum request and to whose authorities the asylum-seeker should have the possibility of addressing himself;
- (ii) The criteria should be of such a character as to avoid possible disagreement between States as to which of them should be responsible for examining an asylum request and should take into account the duration and nature of any sojourn of the asylum-seeker in other countries;
- (iii) The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account;
- (iv) Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State;
- (v) Reestablishment of criteria should be accompanied by arrangements for regular consultation between concerned Governments for dealing with cases for which no solution has been found and for consultation with the Office of the United Nations High Commissioner for Refugees as appropriate;
- (vi) Agreements providing for the return by States of persons who have entered their territory from another contracting State in an unlawful manner should be applied in respect of asylum-seekers with due regard to their special situation.

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

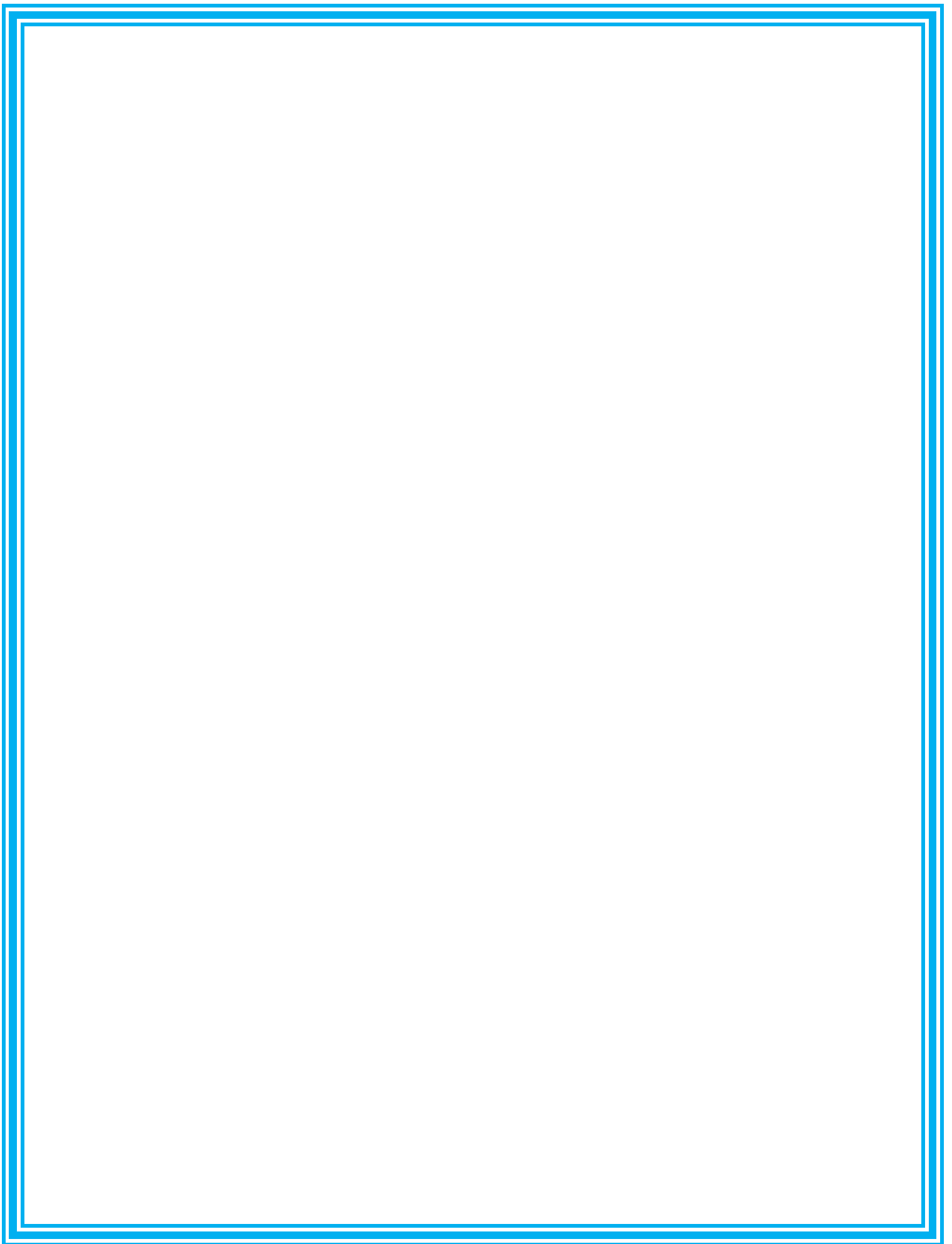
(j) In line with the recommendation adopted by the Executive Committee at its twenty eighth session (document A/AC.96/549, paragraph 53(6), (E) (i)), where an asylum-seeker addresses himself in the first instance to a frontier authority the latter should not reject his application without reference to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

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

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

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

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





## **UNHCR guidelines and Position Papers**

### **GUIDELINES ON INTERNATIONAL PROTECTION:**

#### **The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (excerpt)<sup>47</sup>**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees* in conjunction with Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of its 1967 *Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, re-edited, Geneva, January 1992). They should additionally be read in conjunction with UNHCR's Guidelines on International Protection on gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01) and on "membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02), both of 7 May 2002.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff carrying out refugee status determination in the field.

#### **The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked**

### **I. INTRODUCTION**

1. Trafficking in persons, the primary objective of which is to gain profit through the exploitation of human beings, is prohibited by international law and criminalized in the national legislation of a growing number of States. Although the range of acts falling within the definition of trafficking varies among national jurisdictions, States have a responsibility to combat trafficking and to protect and assist victims of trafficking.

2. The issue of trafficking has attracted substantial attention in recent years, but it is not a modern phenomenon. Numerous legal instruments dating from the late nineteenth century onwards have sought to address various forms and manifestations of trafficking.<sup>48</sup>

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<sup>47</sup> <http://www.unhcr.org/publ/PUBL/443b626b2.pdf>.

<sup>48</sup> It has been estimated that between 1815 and 1957 some 300 international agreements were adopted to suppress slavery in its various forms, including for example the 1910 International Convention for the Suppression of the White Slave Traffic, the 1915 Declaration Relative to the Universal Abolition of the

These instruments remain in force and are relevant to the contemporary understanding of trafficking and how best to combat it. The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the “Trafficking Protocol”)<sup>49</sup> supplementing the 2000 United Nations Convention against Transnational Organized Crime (hereinafter the “Convention against Transnational Crime”)<sup>50</sup> provides an international definition of trafficking. This represents a crucial step forward in efforts to combat trafficking and ensure full respect for the rights of individuals affected by trafficking.

3. Trafficking in the context of the sex trade is well documented and primarily affects women and children who are forced into prostitution and other forms of sexual exploitation.<sup>51</sup> Trafficking is not, however, limited to the sex trade or to women. It also includes, at a minimum, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>52</sup> Depending on the circumstances, trafficking may constitute a crime against humanity and, in armed conflict, a war crime.<sup>53</sup> A common characteristic of all forms of trafficking is that victims are treated as merchandise, “owned” by their traffickers, with scant regard for their human rights and dignity.

4. In some respects, trafficking in persons resembles the smuggling of migrants, which is the subject of another Protocol to the Convention against Transnational Crime.<sup>54</sup> As with trafficking, the smuggling of migrants often takes place in dangerous and/or degrading conditions involving human rights abuses. It is nevertheless essentially a voluntary act entailing the payment of a fee to the smuggler to provide a specific service. The relationship between the migrant and the smuggler normally ends either with the arrival at the migrant’s destination or with the individual being abandoned en route. Victims of trafficking are distinguished from migrants who have been smuggled by the protracted nature of the exploitation they endure, which includes serious and ongoing abuses of their human rights at the hands of their traffickers. Smuggling rings and trafficking rings are nevertheless often closely related, with both preying on the vulnerabilities of people seeking international protection or access to labour markets abroad. Irregular migrants relying on the services of smugglers whom they have willingly

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Slave Trade, the 1926 Slavery Convention, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

<sup>49</sup> Entered into force on 25 December 2003.

<sup>50</sup> Entered into force on 29 September 2003.

<sup>51</sup> Bearing in mind the prevalence of women and girls amongst the victims of trafficking, gender is a relevant factor in evaluating their claims for refugee status. See further, UNHCR, “Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (hereinafter “UNHCR Guidelines on Gender-Related Persecution”), HCR/GIP/02/01, 7 May 2002, paragraph 2.

<sup>52</sup> See Article 3(a) of the Trafficking Protocol cited in paragraph 8 below.

<sup>53</sup> See, for instance, Articles 7(1)(c), 7(1)(g), 7(2)(c) and 8(2)(xxii) of the 1998 Statute of the International Criminal Court, A/CONF.183/9, which specifically refer to “enslavement”, “sexual slavery” and “enforced prostitution” as crimes against humanity and war crimes.

<sup>54</sup> The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air (entered into force on 28 January 2004).

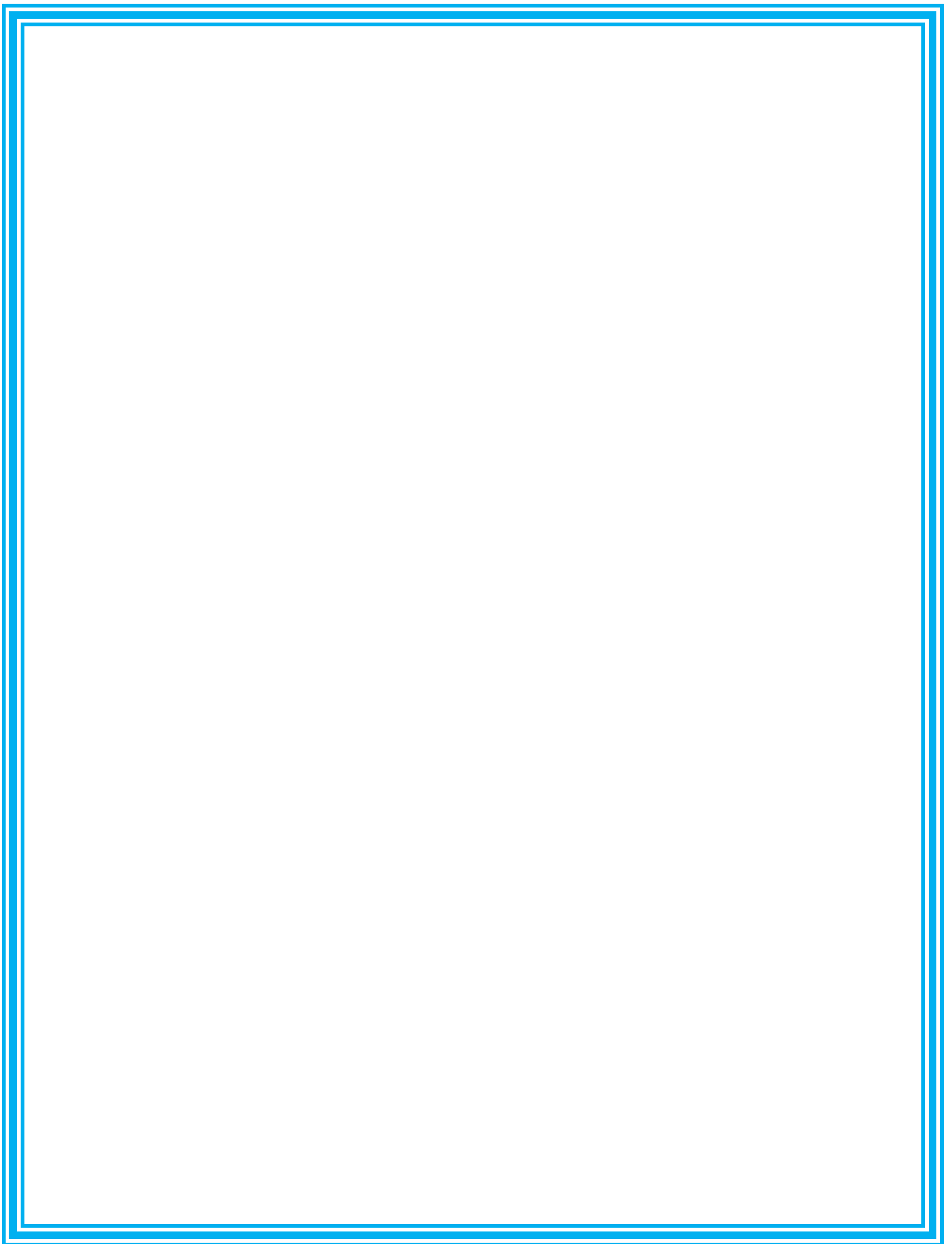
contracted may also end up as victims of trafficking, if the services they originally sought metamorphose into abusive and exploitative trafficking scenarios.

5. UNHCR's involvement with the issue of trafficking is essentially twofold. Firstly, the Office has a responsibility to ensure that refugees, asylum-seekers, internally displaced persons (IDPs), stateless persons and other persons of concern do not fall victim to trafficking. Secondly, the Office has a responsibility to ensure that individuals who have been trafficked and who fear being subjected to persecution upon a return to their country of origin, or individuals who fear being trafficked, whose claim to international protection falls within the refugee definition contained in the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (hereinafter "the 1951 Convention") are recognized as refugees and afforded the corresponding international protection.

6. Not all victims or potential victims of trafficking fall within the scope of the refugee definition. To be recognized as a refugee, all elements of the refugee definition have to be satisfied. These Guidelines are intended to provide guidance on the application of Article 1A(2) of the 1951 Convention to victims or potential victims of trafficking. They also cover issues concerning victims of trafficking arising in the context of the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The protection of victims or potential victims of trafficking as set out in these Guidelines is additional to and distinct from the protection contemplated by Part II of the Trafficking Protocol.<sup>55</sup>

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<sup>55</sup> Part II of the Trafficking Protocol concerns the protection of victims of trafficking. It covers areas such as ensuring the protection of privacy and identity of the victims; providing victims with information on relevant court and administrative proceedings, as well as assistance to enable them to present their views and concerns at appropriate stages of criminal proceedings against offenders; providing victims with support for physical, psychological and social recovery; permitting victims to remain in the territory temporarily or permanently; repatriating victims with due regard for their safety; and other measures.



# **INTERCEPTION OF ASYLUM-SEEKERS AND REFUGEES: THE INTERNATIONAL FRAMEWORK AND RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH<sup>56</sup>**

## I. INTRODUCTION

1. Irregular migration has become a major challenge for many States in different parts of the world. The increase in the number of arrivals without the required documentation has raised concerns about the ability of States to control borders and access to their territory. In recent years, Governments have renewed efforts to prevent irregular migration and to combat the smuggling and trafficking of persons, in particular when undertaken by organized criminal groups.<sup>57</sup>
2. Many of those who are being smuggled or trafficked are migrants in search of a better life, hoping to find employment opportunities and economic prosperity abroad. Others are asylum-seekers and refugees who flee from persecution, armed conflict, and other threats to their life and freedom. Both groups are exploited by criminal traffickers or smugglers who seek to make illicit profit from offering their services to the vulnerable and the disadvantaged.
3. In order to combat human smuggling and trafficking, States have adopted, *inter alia*, the practice of “intercepting” persons travelling without the required documentation - whether in the country of departure, in the transit country, within territorial waters or on the high seas, or just prior to the arrival in the country of destination. In some instances, interception has affected the ability of asylum-seekers and refugees to benefit from international protection.
4. Based on a working definition outlined below, this paper describes the current State practice on interception. It sets out the international legal and policy framework in which interception takes places, including its impact on asylum-seekers and refugees, and puts forward a number of recommendations for a comprehensive, protection-oriented approach.

## II. INTERCEPTION AND OTHER MEASURES AGAINST IRREGULAR MIGRATION

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<sup>56</sup> Executive Committee of the High Commissioner’s programme, 18<sup>th</sup> Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000.

<http://www.unhcr.org/excom/EXCOM/3ae68d144.pdf>.

<sup>57</sup> UNHCR supports the distinction made by the Vienna Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (created by the General Assembly in its resolution 53/111 of 9 December 1998) between smuggled migrants and trafficked persons. As currently defined in the two draft Protocols supplementing the main Draft Convention, trafficking concerns the recruitment and transportation of persons for a criminal purpose, such as prostitution or forced labour, and usually involves some level of coercion or deception. Smuggling, on the other hand, involves bringing a migrant illegally into another country, but normally without continued exploitation of the smuggled person after arrival.

5. The paragraphs that follow describe various types of interception as practised by States, the reasons for these measures and their impact on asylum-seekers and refugees. They are introduced by a brief summary of current discussions at international level that relate to irregular migration.

#### A. International Cooperation against smuggling and trafficking of persons

6. Interception has been discussed within the context of a number of processes and consultations, in particular at the regional level, with a focus *inter alia* on combating irregular migration. These include the Asia-Pacific Consultation (APC), the South Asian Association for Regional Cooperation (SAARC), the Inter-Governmental Consultations (IGC), the Budapest Process in Europe, and the Regional Conference on Migration (“Puebla Process”) in the Americas.

7. Initiated in 1991, the Budapest process created a structured framework between the European Union and Central and Eastern European countries for the prevention of irregular migration and related control issues. This process resulted in the adoption of recommendations *inter alia* relating to pre-entry and entry controls, return and readmission, information exchange, technical and financial assistance and measures to combat organized crime with regard to trafficking and smuggling of persons. In Latin America, within the framework of the Regional Conference on Migration, Member States have been discussing programmes for the return of undocumented migrants from outside the region to countries of origin with the assistance of the International Migration for Migration (IOM), in particular those intercepted on boats in international waters.

8. Other examples of a comprehensive approach are provided by the country-specific action plans of the European Union’s High Level Working Group on Asylum and Migration (HLWG). These plans address the phenomenon of composite flows and comprise a number of elements relating to the root causes of migratory and refugee movements. They also contain control measures to combat irregular migration, such as increasing the number and effectiveness of airline liaison officers and immigration officials posted abroad.

9. The issue of combating smuggling and trafficking of persons has also featured prominently on the agenda of the European Union and of several international organizations, including the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), the International Organization for Migration (IOM), the Inter-Parliamentary Union, and several United Nations agencies, such as the International Labour Organization (ILO)

#### B. Interception and State Practice

##### (i) Defining interception

10. An internationally accepted definition of interception does not exist. Its meaning has to be derived from an examination of past and current State practice. For the purpose of this paper, interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.

(ii) Description of interception practices

11. Interception of undocumented or improperly documented persons<sup>58</sup> has taken place for many years, in a variety of forms. Although interception frequently occurs in the context of large-scale smuggling or trafficking of persons, it is also applied to individuals who travel on their own, without the assistance of criminal smugglers and traffickers.

12. The practice can occur in the form of physical interception or - as it is sometimes called - interdiction of vessels suspected of carrying irregular migrants or asylum-seekers, either within territorial waters or on the high seas. Some countries try to intercept boats used for the purpose of smuggling migrants or asylum-seekers as far away as possible from their territorial waters. Following the interception, passengers are disembarked either on dependent territories of the intercepting country, or on the territory of a third country which approves their landing. In most instances, the aim after interception is return without delay of all irregular passengers to their country of origin.

13. Aside from the physical interdiction of vessels, many countries also put in place a number of administrative measures with the aim of intercepting undocumented migrants. At key locations abroad, such as the main transit hubs for global migratory movements, States have deployed extraterritorially their own immigration control officers in order to advise and assist the local authorities in identifying fraudulent documents. In addition, airline liaison officers, including from private companies, have been posted at major international airports both in countries of departure and in transit countries, to prevent the embarkation of improperly documented persons. A number of transit countries have received financial and other assistance from prospective destination countries in order to enable them to detect, detain and remove persons suspected of having the intention to enter the country of destination in an irregular manner.

(iii) Reasons for interception

14. Such interception practices have been adopted by States for a variety of reasons. Given their concern over a global increase in irregular migration and the number of spontaneous arrivals, interception is mostly practiced in order to disrupt major smuggling and trafficking routes. More specifically, in the case of smuggled asylum-seekers, States have expressed their apprehension as to undocumented arrivals who submit applications for asylum or refugee status on grounds which do not relate to any criteria justifying the granting of protection. These States consider that the smuggling of such persons will

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<sup>58</sup> In this paper, the term “undocumented” or “improperly documented” persons refers to those who are not in possession of the required documentation for travel to and entry into the country of intended destination.

lead, or indeed is already leading, to the misuse of established status determination procedures, and risks decreasing their ability to offer asylum and protection on the same terms as in the past.

15. Many of the undocumented asylum-seekers are found to be irregular movers, that is refugees who had already found protection in another country and for whom protection continues to be available.<sup>59</sup> The perception is spreading, especially among traditional resettlement countries, that such refugees are seeking to circumvent established resettlement channels by using the services of criminal smugglers.

16. Finally, States have pointed out that smuggling often endangers the lives of migrants, in particular those travelling in unseaworthy boats. Their interception contributes to the rescue of persons in distress at sea and can help to save lives.

### C. Impact on asylum-seekers and refugees

17. States have a legitimate interest in controlling irregular migration. Unfortunately, existing control tools, such as visa requirements and the imposition of carrier sanctions, as well as interception measures, often do not differentiate between genuine asylum-seekers and economic migrants. National authorities, including immigration and airline officials posted abroad, are frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection.

18. Immigration control measures, although aimed principally at combating irregular migration, can seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum. As pointed out by UNHCR in the past, the exclusive resort to measures to combat abuse, without balancing them by adequate means to identify genuine cases, may result in the *refoulement* of refugees.<sup>60</sup>

19. Recent bilateral arrangements for intercepting and arresting asylum-seekers in a transit country, including women and children, have given rise to particular protection concerns. In the absence of an effective protection regime in the transit country, intercepted asylum-seekers are at risk of possible *refoulement* or prolonged detention. The refusal of the first country of asylum to readmit irregular movers may also put refugees “in orbit”, without any country ultimately assuming responsibility for examining their claim. Current efforts to increase cooperation between States for the purposes of intercepting and returning irregular migrants also fail to provide adequate safeguards for the protection of asylum-seekers and refugees. In UNHCR’s view, it is therefore crucial to ensure that interception measures are implemented with due regard to the international legal framework and States’ international obligations.

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<sup>59</sup> See Conclusion No. 58 (XL) of 1989 (A/AC.96/737, para.25) concerning the problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection.

<sup>60</sup> See Note on International Protection of 3 July 1998 (A/AC.96/898), para. 16.



### III. THE INTERNATIONAL LEGAL FRAMEWORK

20. International law provides important parameters for States undertaking interception as a means to combat irregular migration. Reference to these parameters is to be found within a complex framework of existing and emerging international legal principles deriving from international maritime law, criminal law, the law of State responsibility, human rights law and, in particular, international refugee law.

#### A. International refugee law

##### (i) Interception and non-refoulement

21. The fundamental principle of *non-refoulement* reflects the commitment of the international community to ensure that those in need of international protection can exercise their right to seek and enjoy in other countries asylum from persecution, as proclaimed in Article 14 (1) of the Universal Declaration of Human Rights. It applies whenever a State or one of its agents contemplates the return of persons “in any manner whatsoever” to territories where they may be subjected to persecution, irrespective of whether or not they have been formally recognized as refugees.<sup>61</sup> The overriding importance of the observance of *non-refoulement* – both at the border and within the territory of a State - has been repeatedly reaffirmed by the Executive Committee which has also recognized that the principle is progressively acquiring the character of a peremptory rule of international law.<sup>62</sup>

22. The direct removal of a refugee or an asylum-seeker to a country where he or she fears persecution is not the only manifestation of *refoulement*. The removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution constitutes indirect *refoulement*, for which several countries may bear joint responsibility.

23. The principle of *non-refoulement* does not imply any geographical limitation. In UNHCR’s understanding, the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States’ agents abroad were free to act at variance with obligations under international refugee law and human rights law.

##### (ii) Interception and illegal entry

24. The indiscriminate application by States of interception measures to asylum-seekers derives from the assumption that genuine refugees should depart from their country of origin or from countries of first asylum in an orderly manner. However, some countries

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<sup>61</sup> Conclusion No. 6 (XXVIII) of 1977 (A/AC.96/549, para.53(4)).

<sup>62</sup> Conclusion No. 25 (XXXIII) of 1982 (A/AC.96/614, para.70(1)).

of origin impose strict exit control measures, which makes it difficult for refugees to leave their countries legally.

25. The fact that asylum-seekers and refugees may not be able to respect immigration procedures and to enter another country by legal means has been taken into account by the drafters of the 1951 Convention relating to the Status of Refugees. Article 31 (1) of the 1951 Convention prohibits the penalization of refugees for illegal entry or presence, provided they come directly from countries where their life was threatened and show “good cause” for violating applicable entry laws.

### (iii) Interception and irregular movement

26. Many intercepted asylum-seekers and refugees have moved from a country other than that of their origin. The phenomenon of refugees who move in an irregular manner from countries in which they had already found protection, in order to seek asylum or resettlement elsewhere, is a growing concern. The return of such refugees to countries of first asylum can be envisaged whenever the refugees will be protected there against *refoulement*; will be permitted to remain there and treated in accordance with recognized basic human standards until a durable solution has been found.<sup>63</sup>

27. However, in the absence of specific agreements to allow refugees who moved in an irregular manner to re-enter the country in which they had already found protection, efforts to return irregular movers have not always been successful. In addition, refugees who initially found protection in the country of first asylum, sometimes feel compelled to depart spontaneously, for instance due to a deterioration of protection standards in the country of first asylum. This may require concerted international efforts to address such problems, and to assist States in building their capacity to establish effective protection mechanisms, not least in an effort to promote international solidarity.

## B. The emerging legal framework for combating criminal and organized smuggling and trafficking of persons

28. In its resolution 53/111 of 9 December 1998, the General Assembly decided to establish an intergovernmental Ad Hoc Committee for the purpose of elaborating a comprehensive international convention against organized crime, including the drafting of international instruments addressing the trafficking in persons, especially women and children, and the smuggling in and transport of migrants.

29. UNHCR, along with other international organizations, has actively participated in the discussions of the Ad Hoc Committee in Vienna.<sup>64</sup> The Office shares the concerns raised

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<sup>63</sup> Conclusion No. 58 (XL) of 1989 (A/AC.96/737, para. 25).

<sup>64</sup> Note by the United Nations High Commissioner for Human Rights, International Organization for Migration, United Nations High Commissioner for Refugees, and the United Nations Children’s Fund on

by many States that the criminal and organized smuggling of migrants, on a large scale, may lead to the misuse or abuse of established national procedures for both regular immigrants and asylum-seekers.

30. The current draft Protocol against the Smuggling of Migrants by Land, Air and Sea,<sup>65</sup> prepared by the Ad Hoc Committee, includes a draft provision which would authorize States Parties to intercept vessels on the high seas, provided that there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea.<sup>66</sup>

31. It is encouraging that efforts in this context are directed to elaborating international instruments which not only serve the purpose of punishing criminal smugglers and traffickers, but which also provide proper protection to smuggled and trafficked persons, in particular asylum-seeking women and children. It is important that the current draft Protocols maintain explicit references to the 1951 Convention and the 1967 Protocol and, as regards the draft Protocol against Smuggling of Migrants, to the principle of *nonrefoulement*. UNHCR also appreciates that delegations in Vienna repeatedly stated that these instruments do not aim at punishing or criminalizing persons who are being smuggled or trafficked.

32. The safeguards contained in the current draft Protocols should be maintained and, where appropriate, further strengthened, through appropriate references to international refugee law and human rights law. In UNHCR's view, the elaboration of these two Protocols represents a unique opportunity to design an international framework which could provide a solid legal basis for reconciling measures to combat the smuggling and trafficking of persons, including through interception, with existing obligations under international law towards asylum-seekers and refugees.

#### IV. RECOMMENDATIONS FOR A COMPREHENSIVE APPROACH

33. In the absence of a comprehensive approach, the application of stringent measures alone for intercepting undocumented migrants is unlikely to be successful, and may well adversely affect refugees and asylum-seekers. The adoption of interception policies in certain regions, in isolation from other measures, risks diverting the smuggling and trafficking routes to other regions, thereby increasing the burden on other States.

34. Together with States and other international and national actors, UNHCR is prepared to contribute to the ongoing discussion on the problem of organized smuggling as it affects asylum-seekers and refugees. Further progress will require a protection-oriented approach which addresses the problem through a variety of measures. The following elements are intended as basis for a discussion within the Executive Committee on a

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the Protocol concerning migrant smuggling and trafficking in persons (A/AC.254/27) of 8 February 2000, and Corrigendum (A/AC.354/27/Corr.1) of 22 February 2000.

<sup>65</sup> A/AC.254/4/Add.1.Rev.5.

<sup>66</sup> See draft Article 7 *bis*.

comprehensive approach, with a view to the possible adoption of a conclusion on such an approach:<sup>67</sup>

(a) Interception and other enforcement measures should take into account the fundamental difference, under international law, between refugees and asylum-seekers who are entitled to international protection, and other migrants who can resort to the protection of their country of origin;

(b) Intercepted persons who present a claim for refugee status should enjoy the required protection, in particular from *refoulement*, until their status has been determined. For those found to be refugees, intercepting States, in cooperation with concerned international agencies and NGOs, should undertake all efforts to identify a durable solution, including, where appropriate, through the use of resettlement;

(c) Alternative channels for entering asylum countries in a legal and orderly manner should be kept open, in particular for the purpose of family reunion, in order to reduce the risk that asylum seekers and refugees will resort to using criminal smugglers. By adopting appropriate national legislation, States should enforce measures to punish organized criminal smugglers and to protect smuggled migrants, in particular women and children;

(d) States should, furthermore, examine the outcome of interception measures on asylum-seekers and refugees, and consider practical safeguards to ensure that these measures do not interfere with obligations under international law, for instance, through establishing an appropriate mechanism in transit countries to identify those in need of protection, and by training immigration officers and airline officials in international refugee law;

(e) In order to alleviate the burden of States that are disproportionately affected by large numbers of spontaneous and undocumented asylum-seekers and refugees, other States should give favourable consideration to assisting the concerned governments in providing international protection to such refugees, based on the principle of international solidarity and within a burden-sharing framework;

(f) In regions in which only a few countries have become party to the 1951 Convention and the 1967 Protocol, States Parties should actively promote a broader accession to the 1951 Convention and the 1967 Protocol throughout that region, including the establishment of fair and effective procedures for the determination of refugee status, in particular in transit countries, and the adoption of implementing legislation;

(g) In cases where refugees and asylum-seekers have moved in an irregular manner from a country in which they had already found protection,<sup>68</sup> enhanced efforts should be undertaken for their readmission including, where appropriate, through the assistance of

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<sup>67</sup> The desirability of a comprehensive approach by the international community to the problems of refugees has been already acknowledged in Conclusion No. 80 (XLVII) of 1996 (A/AC.96/878, para. 22).

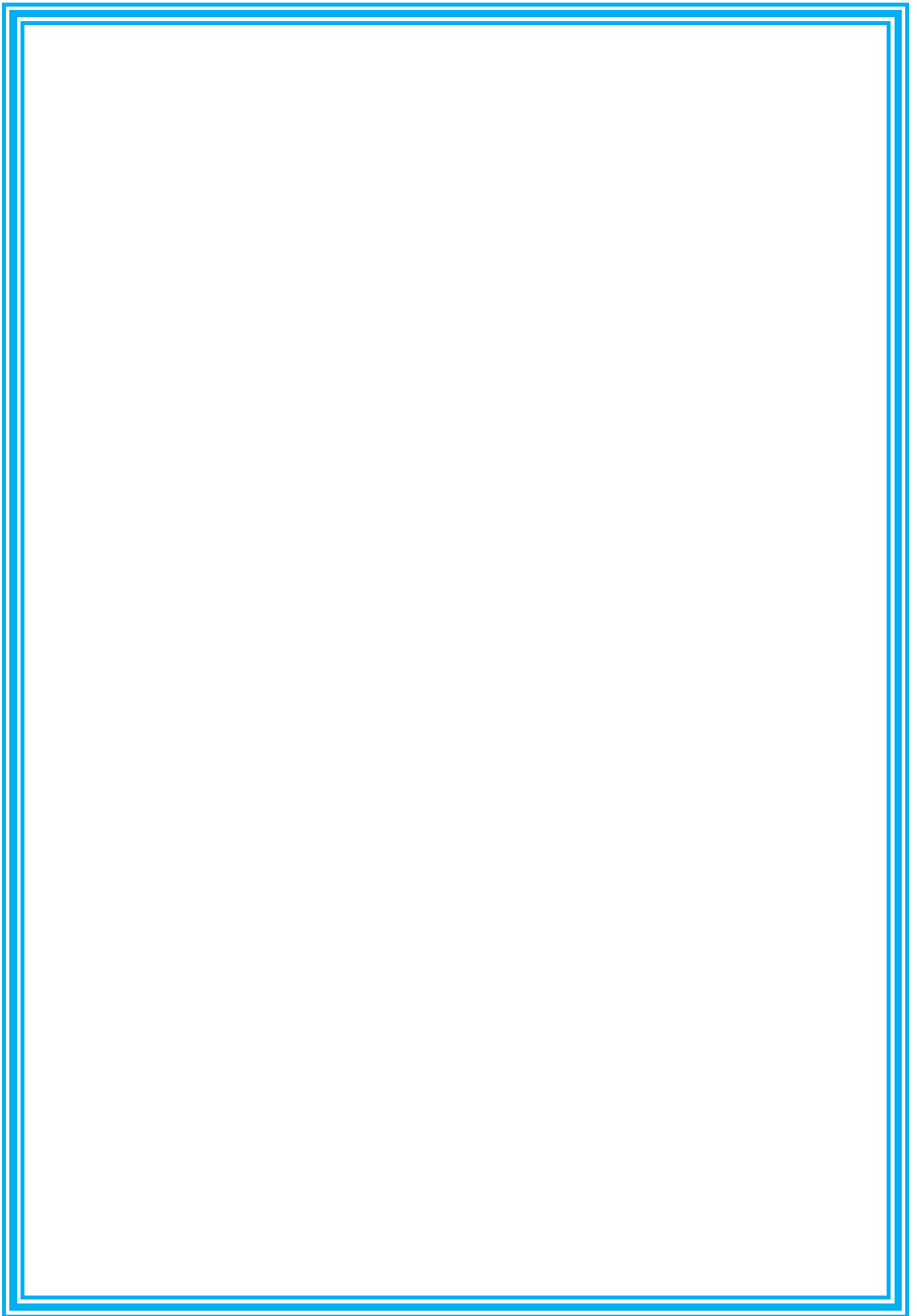
<sup>68</sup> Conclusion No. 58 (XL) (A/AC.96/737, para.25).

concerned international agencies. In this context, States and UNHCR should jointly analyze possible ways of strengthening the delivery of protection in countries of first asylum. There could also be more concerted efforts to raise awareness among refugees of the dangers linked to smuggling and irregular movements;

(h) In order to discourage the irregular arrival of persons with abusive claims, rejected cases which are clearly not deserving of international protection under applicable instruments should be returned as soon as possible to countries of origin, which should facilitate and accept the return of their own nationals. States should further explore proposals to enhance the use and effectiveness of voluntary return programmes, for instance with the assistance of IOM.

## V. CONCLUSION

35. Interception, whether implemented physically or administratively, represents one mechanism available to States to combat the criminal and organized smuggling and trafficking of migrants across international borders. UNHCR invites governments to examine possibilities to ensure, through the adoption of appropriate procedures and safeguards, that the application of interception measures will not obstruct the ability of asylum-seekers and refugees to benefit from international protection. Further analysis of the complex causes of irregular migration may be necessary, including their relationship with poverty and social development. Only a comprehensive approach, respecting principles of international refugee and human rights law, is likely to succeed in both combating irregular migration and in preserving the institution of asylum.



## **Recommendation of the Parliamentary Assembly of the Council of Europe**<sup>69</sup>

### **Recommendation 1645 (2004)**<sup>70</sup>:

#### **Access to assistance and protection for asylum-seekers at European seaports and coastal areas**

1. The Parliamentary Assembly is deeply concerned about the increasing number of people who put their life and safety at risk by attempting to enter the territory of Council of Europe member states on board unsafe and overcrowded boats or hiding on board ships, secreted in containers, trailer carriers or other facilities, travelling in conditions of extreme hardship which sometimes result in their death.
2. The Assembly recalls its Recommendation 1467 (2000) on clandestine immigration and the fight against traffickers, in which it voiced its shock at the death of fifty-eight Chinese clandestine passengers who were found in a container in the port of Dover, and affirms its dismay at the death of eight Turkish nationals of Kurdish origin, including three children, found in a container in the port of Wexford (Ireland) in 2001. To these dramatic deaths innumerable other persons should be added who have lost their lives drowning in the Strait of Gibraltar, the Adriatic, the Aegean and off the shores of Sicily, while fleeing from hardship, extreme poverty, discrimination and persecution.
3. The Assembly reaffirms its recommendations designed to improve the protection and treatment afforded to asylum-seekers, in particular its Recommendation 1163 (1991) on the arrival of asylum-seekers at European airports; Recommendation 1236 (1994) on the right of asylum; Recommendation 1309 (1996) on the training of officials receiving asylum-seekers at border points; Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe; Recommendation 1374 (1998) on the situation of refugee women in Europe; and Recommendation 1440 (2000) on the restrictions on asylum in the member states of the Council of Europe and the European Union.
4. Despite statistics gathered by the International Maritime Organisation (IMO), it is not possible to know how many people manage to gain clandestine entry into Council of Europe member states by travelling on board ships or unsafe craft, as shipping companies do not systematically report stowaway and rescue incidents. However, the increasing number of those who are apprehended while trying to do so, as well as the number of unfortunate victims, show that this is not a negligible phenomenon.
5. Aware that this manner of entry can be used by genuine asylum-seekers as well as other migrants, the Assembly reiterates that those in need of international protection should neither be punished nor deprived of the right to lodge an asylum application in

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<sup>69</sup> *Assembly debate* on 29 January 2004 (6th Sitting) (see Doc.10011, report of the Committee on Migration, Refugees and Population, rapporteur: Mr Danieli). *Text adopted by the Assembly* on 29 January 2004 (6th Sitting).

<sup>70</sup> <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/EREC1645.htm>.

compliance with the 1951 Geneva Convention on the Status of Refugees on account of their clandestine manner of entry or attempted entry.

6. The Assembly is concerned that effective access to the asylum procedure for those who arrive at European seaports or coastal areas may be hindered by legal and practical hurdles, including lack of independent legal advice, limited availability of professional interpreters and inadequate information on how to lodge an asylum application. In addition, in the case of clandestine passengers, there is a concern that their effective access to the asylum procedure may be impeded by an unclear and non-harmonised legal framework applying to them as well as by the concurrent responsibilities of several actors.

7. The Assembly regrets that often, especially in cases of large-scale arrivals in coastal areas, the only interviews taking place before the adoption of an expulsion order have the exclusive purpose of determining the identity and the nationality of the person concerned, with the result that a number of potential refugees may be returned in breach of the principle of *non-refoulement* risking their lives and safety. On the contrary, effective access to the asylum procedure should imply that every person seeking entry into a Council of Europe member state should have the possibility of expressing the reasons why he or she is trying to do so in full, in an individual interview with the relevant authorities of the country.

8. Similarly, the Assembly fears that the effective exercise of the right of appeal against the refusal to receive an asylum application, or against expulsion, may be nullified by expeditious or accelerated procedures that do not allow sufficient time to lodge an appeal, by inadequate information, lack of independent and free legal advice and representation and by the limited availability of professional interpreters.

9. The Assembly also notes with regret that, despite the large numbers of asylum-seekers and migrants arriving on European shores every year, permanent reception facilities in the areas concerned are still the exception, and that their material and humanitarian conditions are often below acceptable standards.

10. The Assembly therefore recommends that the Committee of Ministers:

i. instruct the relevant committees to review the law and practice of Council of Europe member states regarding access to the asylum procedure for people arriving at European coastal areas, especially in cases of group or mixed arrivals, and on this basis, to make appropriate recommendations to member states;

ii. instruct the relevant committees to review the law and practice of Council of Europe member states applicable to clandestine passengers who wish to lodge an asylum application, with a view to drafting a code of good practice and, on this basis, make appropriate recommendations to member states;

iii. call on member states to:

a. ensure that those who wish to apply for asylum at seaports and coastal areas are granted unimpeded access to the asylum procedure, including through interpretation in their language or, if this is not possible, in a language they understand, and to free and independent legal advice;



*b.* ensure that every person seeking entry at seaports or coastal areas be given the possibility of explaining in full the reasons why he or she is trying to do so, in an individual interview with the relevant authorities;

*c.* set up a system to ensure the permanent availability of independent and professional legal advice and representation in the field of asylum and migration at seaports and coastal areas, and monitor its quality;

*d.* take full responsibility for immigration control at seaports, including through the investment in methods of prevention and detection and, where necessary, the reinforcement of police and immigration staff, working in partnership with private actors involved in seaport activities;

*e.* improve international co-operation between police, judicial and immigration authorities through the exchange of intelligence and information with a view to dismantling networks of smugglers operating at European and international level;

*f.* introduce harmonised criminal legislation to punish the smuggling of migrants and the trafficking of human beings;

*g.* ensure that vulnerable persons, such as unaccompanied minors and separated children, the elderly, the sick and pregnant women who arrive at seaports or coastal areas, even if they do not apply for asylum, be given appropriate assistance and accommodation pending their being sent back or being granted legal status; in addition, unaccompanied minors and separated children should be provided with effective legal guardianship as soon as their presence comes to the attention of the authorities of a member state;

*h.* establish appropriate and permanent reception structures in coastal areas and near seaports, to provide accommodation for the new arrivals, whether they apply for asylum or not;

*i.* accept responsibility for processing asylum applications of clandestine passengers when the first port of call on the planned route of the ship is on their national territory;

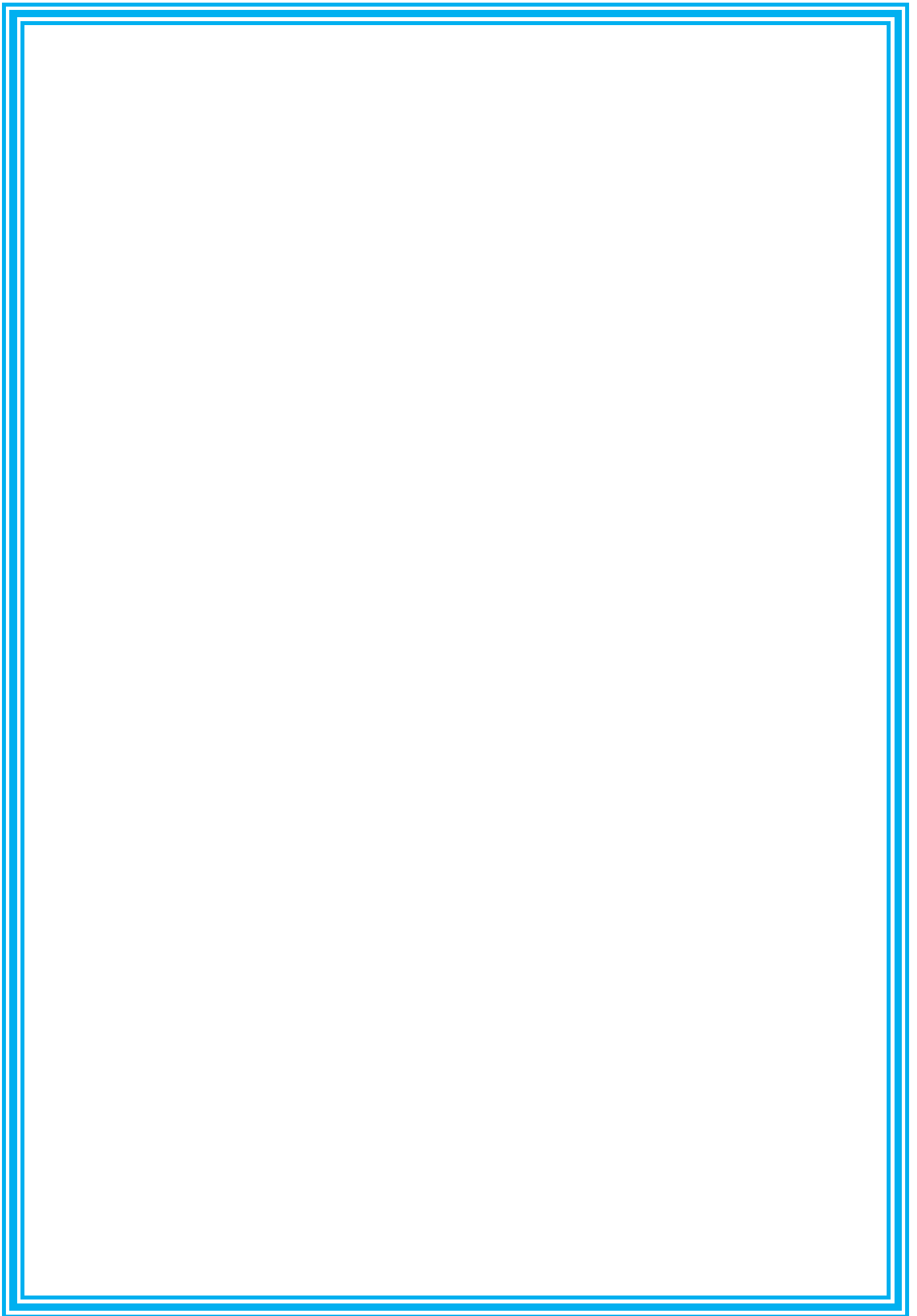
*j.* in the context of their responsibilities for immigration control, conduct sea patrolling operations in such a way as to fully comply with the 1951 Geneva Convention on the Status of Refugees and the 1950 European Convention on Human Rights, by avoiding sending people back to countries where they would be at risk of persecution or human rights violations;

*iv.* ask the Council of Europe Development Bank to give positive consideration to funding requests from member states to build such reception structures;

*v.* invite the United Nations High Commission for Refugees (UNHCR) to:

*a.* continue its work on the issue of clandestine passengers who are in need of international protection;

*b.* continue co-operation with the international community and, in particular, with the IMO and the European Union in the search for effective solutions for clandestine passengers, including consideration of the viability of a single legal instrument on the treatment of clandestine passengers seeking asylum, rules on the determination of the state responsible for processing their asylum applications, their treatment on board ship and the maximum duration of custody on board ship.



## **Recommendation of the Parliamentary Assembly of the Council of Europe<sup>71</sup>**

### **Recommendation 1449 (2000)<sup>72</sup>**

#### **Clandestine migration from the south of the Mediterranean into Europe**

1. The Parliamentary Assembly is deeply concerned at the number of victims of clandestine migration in the Mediterranean and by the extremely dangerous and inhuman conditions in which clandestine migrants, a large number of whom are women and minors, find themselves every day.
2. The Assembly notes the absence of exact figures and a shortage of reliable studies concerning clandestine migration from the south of the Mediterranean into Europe.
3. The Assembly believes that living under clandestine conditions invariably deprives people of their fundamental and social rights and their human dignity and exposes them to insecure living conditions for as long as they remain clandestine.
4. The Assembly recalls that emigration is a fundamental human right.
5. The Assembly considers that the complex problems caused by clandestine migration into and within the Council of Europe's member states require urgent solutions to which the Organisation can and must contribute in an active and specific manner.
6. The Assembly is convinced that this phenomenon, which is particularly pronounced in the Mediterranean, cannot be remedied without open and innovative dialogue and lasting co-operation between the countries on its northern and southern shores, and that the ever closer involvement in the Assembly's work of the states on the southern shore of the Mediterranean, such as Morocco, would be a decisive step in the battle against the true causes of clandestine migration.
7. The Assembly acknowledges that clandestine migration is not restricted to the Strait of Gibraltar alone and that illegal migrants also come from regions other than North Africa, in particular eastern Europe, South America and sub-Saharan Africa.
8. The Assembly recalls its earlier work on the strengthening of co-operation in the Mediterranean, for example its Recommendation 1359 (1998) on sustainable development in the Mediterranean and Black Sea basins, its Recommendation 1329 (1997) on the follow-up to the Mediterranean Conference on Population, Migration and Development (Palma de Mallorca, 15-17 October 1996), its Recommendation 1306 (1996) on migration from the developing countries to the European industrialised countries, its Recommendation 1249 (1994) on co-operation in the Mediterranean Basin, its Recommendation 1211 (1993) on clandestine migration: traffickers and employers of clandestine migrants, and its Recommendation 1154 (1991) on North African migrants in Europe.
9. The Assembly considers that promoting mobility and free circulation of people in Europe on the one hand and stepping up border controls on the other is somewhat contradictory and counter-productive for co-operation in the Mediterranean Basin.

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<sup>71</sup> Assembly debate on 28 January 2000 (8th Sitting) (see Doc. 8599, report of the Committee on Migration, Refugees and Demography, rapporteur: Mrs Guirado). Text adopted by the Assembly on 28 January 2000 (8th Sitting).

<sup>72</sup> <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/EREC1449.htm>.

10. The Assembly is convinced that the restrictions on lawful migration actually increase the likelihood of people entering Europe illegally and strengthen the image of a Fortress Europe, and that clandestine migration in the Mediterranean has increased since the early 1990s, suggesting that the action taken to date has been of limited effect.

11. The Assembly notes that these measures are an ever stronger incentive to those who exploit the hopes of others in what is in fact a cruel traffic in human beings, using increasingly sophisticated and inhuman means to make money out of clandestine migration.

12. The Assembly is alarmed at the increasing number of women, minors and other vulnerable persons among clandestine passengers.

13. The Assembly considers that restrictions of this kind have no humanitarian foundation and that the groups they hit worst are those most in need of practical solutions to the hardship and inequalities and development differentials they experience daily in their countries south of the Mediterranean.

14. The Assembly therefore recommends that the Committee of Ministers:

- i. invite the Spanish authorities to set up a permanent migration monitor in southern Spain (the most sensitive point of entry for Mediterranean-Europe emigration) in conjunction with the Council of Europe. Its chief objective would be to analyse the intrinsic dynamics of clandestine migration and the outlook for migration movements across the Mediterranean, and to conduct research into the number of clandestine migration victims as well as the causes and effects of clandestine migration in the Mediterranean and the impact and practices of trafficking in human beings and organised crime in the region;
- ii. establish or step up dialogue with the competent authorities, ministries and non-governmental organisations on the southern shores of the Mediterranean with a view to implementing on-going co-operation on the economic, political and sociological causes of the problem;
- iii. make this co-operation a reality, involving the International Organization for Migration (IOM), through new joint approaches to such sensitive issues as:
  - a. the possibility of temporary or seasonal work for migrants;
  - b. the role of consulates in the implementation of visa policies;
  - c. the readmittance of clandestine migrants;
  - d. police co-operation between the two shores of the Mediterranean;
  - e. the role of third party states and states of destination;
- iv. support the corresponding policies of decentralised co-operation, as promoted by the Congress of Local and Regional Authorities of Europe;
- v. support the "trans-Med", programme of the Council of Europe's North-South Centre in the fields of awareness-raising, information on the social and cultural phenomena linked to immigration and the role migrants can play in co-operation and development in both the country of arrival and the country of origin;

- vi. promote, in co-operation with the IOM, notably in the framework of its strategy on the western Mediterranean, an education and information policy on clandestine migration, both north and south of the Mediterranean;
- vii. consider the possibilities, at a forthcoming quadripartite meeting, of the MEDA programme financing projects and programmes designed to improve the humanitarian situation of clandestine migrants in the Mediterranean;
- viii. invite the member states, particularly those on the northern shore of the Mediterranean:
  - a. to step up bilateral co-operation with the southern shore of the Mediterranean in the field of illegal migration;
  - b. to set up independent structures to receive clandestine migrants and ensure that their fundamental rights are respected after their arrival;
- ix. invite the receiving states to develop, in co-operation with non-governmental organisations and local authorities, training and development aid programmes at local level in the migrants' countries of origin.

**INTERNATIONAL HUMAN RIGHTS  
LAW**

## INTERNATIONAL HUMAN RIGHTS LAW

Human rights law focuses on preserving the dignity and well-being of every individual. Acknowledging the complementary nature of international refugee and human rights law and considering the multifaceted linkages between refugee issues and human rights the following chapter offer a compilation of human rights norms and instruments which are of particular relevance for the protection of refugees, asylum-seekers and other persons of concern.

### **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>73</sup>**

*Adopted 10 December 1984  
Entered into force 26 June 1987*

#### *Selected Provision*

##### Article 3

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

### **International Covenant on Civil and Political Rights<sup>74</sup>**

*Adopted 16 December 1966  
Entered into force 23 March 1976*

#### *Selected Provisions*

##### Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance

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<sup>73</sup> 213 United Nations Treaty Series 221. <http://www.ohchr.org/english/law/cat.htm>.

<sup>74</sup> 999 United Nations Treaty Series 171. <http://www.ohchr.org/english/law/ccpr.htm>.



with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

#### Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

#### Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to

guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

#### Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

#### Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

#### Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to

apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

## **International Covenant on Economic, Social and Cultural Rights**

*Adopted on 16 December 1966*

*Entered into force on 3 January 1976<sup>75</sup>*

### Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

### Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

### Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

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<sup>75</sup> 993 United Nations Treaty Series 14531 <http://www.ohchr.org/english/law/cescr.htm>.

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

#### Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

#### Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

### Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

**Human Rights Committee, General Comment 31<sup>76</sup>**  
**Nature of the General Legal Obligation on States Parties to the Covenant<sup>77</sup>**  
*Adopted 29 March 2004*

***Selected Paragraphs***

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

**Convention on the Rights of the Child<sup>78</sup>**  
***Adopted 20 November 1989***  
***Entered into force 2 September 1990***

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

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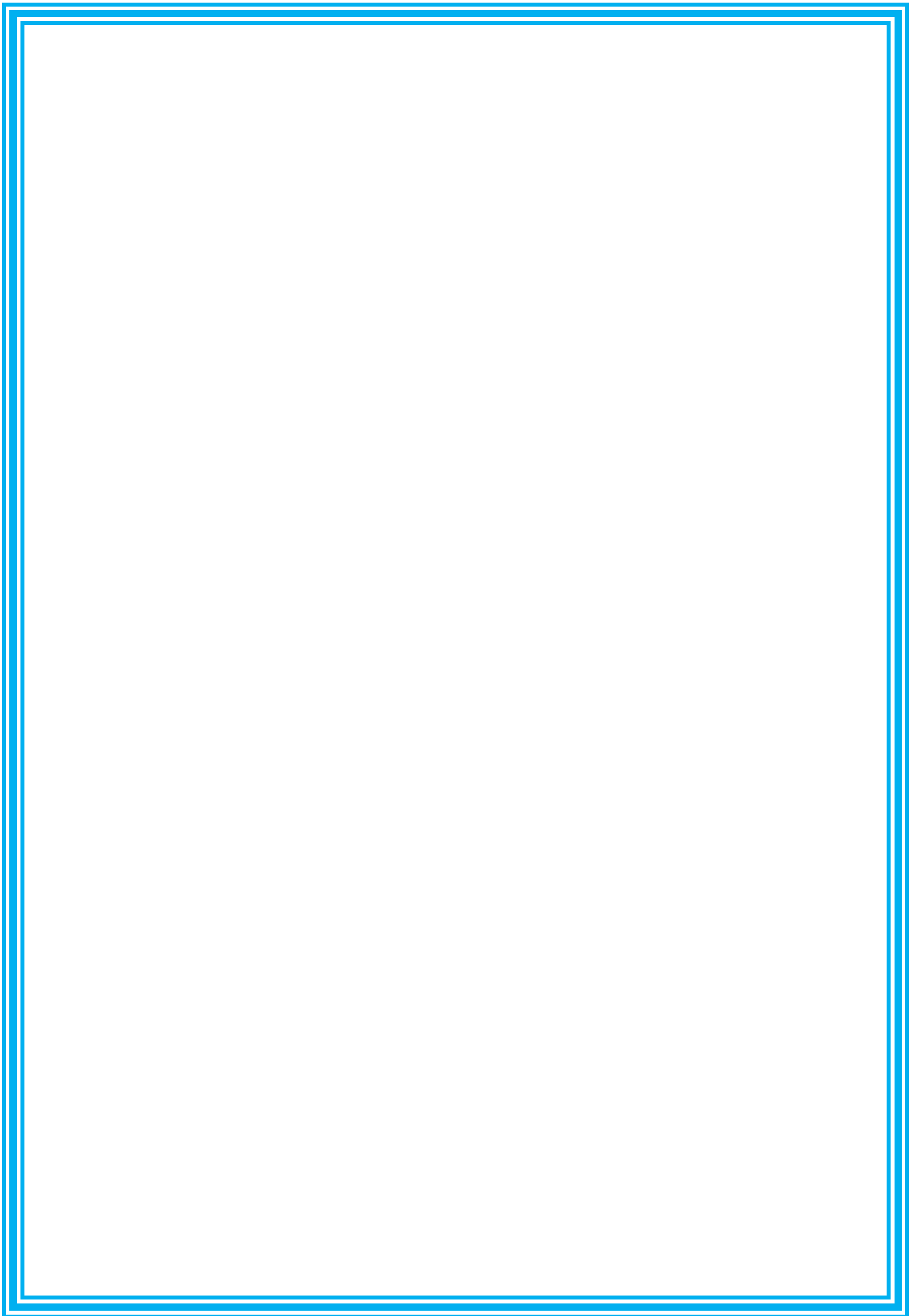
<sup>76</sup> <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument).

<sup>77</sup> International Covenant on Civil and Political Rights.

<sup>78</sup> 1577 UNTS 27531 <http://www.ohchr.org/english/law/crc.htm>.





**International Convention on the Protection of the Rights of All Migrant Workers  
and Members of Their Families<sup>79</sup>**

*Adopted 18 December 1990  
Entered into force 1 July 2003*

The Convention, also known as the Migrants Rights Convention, is the most comprehensive international treaty on the rights of all migrants and members of their families. It sets forth international standards for the treatment, welfare and rights of migrant workers regardless of their status, as well as setting out the obligations of the states who host them.

***Selected Provisions***

Article 8

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.
2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

Article 10

No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 17

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.
2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.
4. During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or

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<sup>79</sup> 2220 UNTS 39481 <http://www.ohchr.org/english/law/cmw.htm>.

her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.

5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.

7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

#### Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

#### Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

#### Article 35

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration as provided in part VI<sup>80</sup> of the present Convention.

#### Article 68

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

(b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

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<sup>80</sup> Part VI of the Convention addresses “Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families”.

(c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

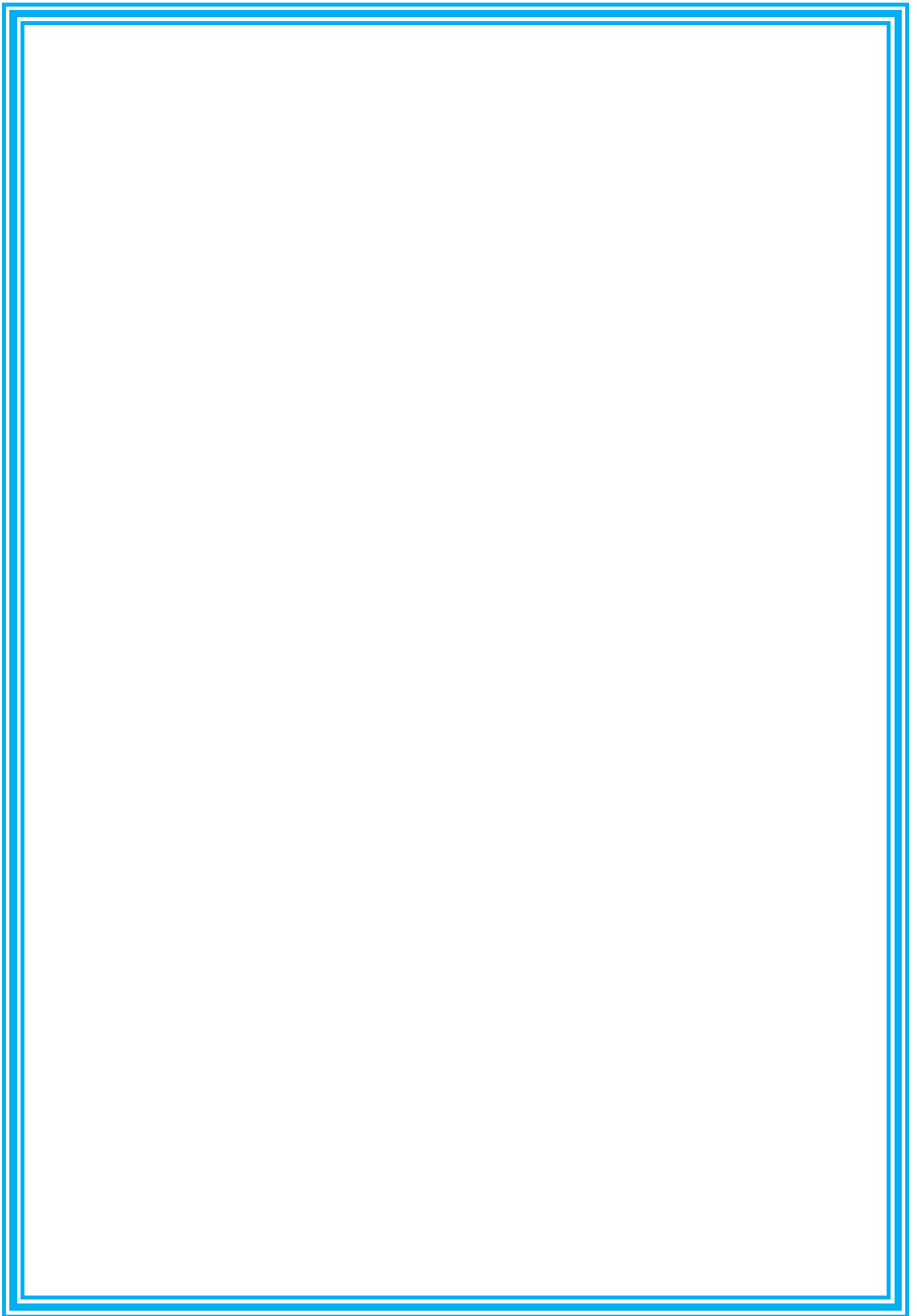
#### Article 70

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

#### Article 71

1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.

2. As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.



## **Recommended Principles and Guidelines on Human Rights and Human Trafficking (excerpt)<sup>81</sup>**

### **Recommended Principles on Human Rights and Human Trafficking<sup>82</sup>**

#### **The primacy of human rights**

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.
2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.
3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

#### **Preventing trafficking**

4. Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.
5. States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.
6. States shall exercise due diligence in identifying and eradicating public-sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking shall be investigated, tried and, if convicted, appropriately punished.

#### **Protection and assistance**

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.
8. States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.

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<sup>81</sup> Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1).

[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument).

<sup>82</sup> The term “trafficking”, as used in the present Principles and Guidelines, refers to the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (article 3 (a)).

9. Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.
10. Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.
11. Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

### **Criminalization, punishment and redress**

12. States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts<sup>83</sup> and related conduct.<sup>84</sup>
13. States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.
14. States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.
15. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.
16. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.
17. States shall ensure that trafficked persons are given access to effective and appropriate legal remedies.

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<sup>83</sup> For the purposes of the present Principles and Guidelines, the “component acts” and “component offences” of trafficking are understood to include the recruitment, transportation, transfer, harbouring or receipt of persons over eighteen years of age by means of threat, force, coercion or deception for the purpose of exploitation. The recruitment, transportation, transfer, harbouring or receipt of a person under eighteen years of age constitute component acts and component offences of trafficking in children. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, articles 3 (a) and 3 (c).

<sup>84</sup> For the purposes of the present Principles and Guidelines, conduct and offences “related to” trafficking are understood to include: exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, article 3 (a).



## **Selected Recommended Guidelines on Human Rights and Human Trafficking**

### **Guideline 1: Promotion and protection of human rights**

**Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.
2. Consulting with judicial and legislative bodies, national human rights institutions and relevant sectors of civil society in the development, adoption, implementation and review of anti-trafficking legislation, policies and programmes.
3. Developing national plans of action to end trafficking. This process should be used to build links and partnerships between governmental institutions involved in combating trafficking and/or assisting trafficked persons and relevant sectors of civil society.
4. Taking particular care to ensure that the issue of gender-based discrimination is addressed systematically when anti-trafficking measures are proposed with a view to ensuring that such measures are not applied in a discriminatory manner.
5. Protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.
6. Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.
7. Establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions. Consideration should be given to assigning this role to independent national human rights institutions where such bodies exist. Non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures.
8. Presenting detailed information concerning the measures that they have taken to prevent and combat trafficking in their periodic reports to the United Nations human rights treaty-monitoring bodies.<sup>85</sup>

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<sup>85</sup> The human rights treaty-monitoring bodies include the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against

9. Ensuring that bilateral, regional and international cooperation agreements and other laws and policies concerning trafficking in persons do not affect the rights, obligations or responsibilities of States under international law, including human rights law, humanitarian law and refugee law.
10. Offering technical and financial assistance to States and relevant sectors of civil society for the purpose of developing and implementing human rights-based anti-trafficking strategies.

## **Guideline 2: Identification of trafficked persons and traffickers**

**Trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process — such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place.**

**States are also obliged to exercise due diligence in identifying traffickers,<sup>86</sup> including those who are involved in controlling and exploiting trafficked persons.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.
2. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.
3. Ensuring cooperation between relevant authorities, officials and non-governmental organizations to facilitate the identification and provision of assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness.
4. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required.
5. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

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Women; the Committee on the Elimination of Racial Discrimination; the Committee against Torture; and the Committee on the Rights of the Child.

<sup>86</sup> The term “traffickers”, where it appears in the present Principles and Guidelines, is used to refer to: recruiters; transporters; those who exercise control over trafficked persons; those who transfer and/or maintain trafficked persons in exploitative situations; those involved in related crimes; and those who profit either directly or indirectly from trafficking, its component acts and related offences.

6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.
7. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

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#### **Guideline 6: Protection and support for trafficked persons**

**The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.
2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.
3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.
4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.
5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.
6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.
7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).

8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

### **Guideline 7: Preventing trafficking**

**Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information.**

**States, in partnership with intergovernmental and non-governmental organizations and where appropriate, using development cooperation policies and programmes, should consider:**

1. Analysing the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues.
2. Developing programmes that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups.
3. Improving children's access to educational opportunities and increasing the level of school attendance, in particular by girl children.
4. Ensuring that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage and health and security issues, including exposure to HIV/AIDS) as well as avenues available for legal, non-exploitative migration.
5. Developing information campaigns for the general public aimed at promoting awareness of the dangers associated with trafficking. Such campaigns should be informed by an understanding of the complexities surrounding trafficking and of the reasons why individuals may make potentially dangerous migration decisions.
6. Reviewing and modifying policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws.
7. Examining ways of increasing opportunities for legal, gainful and non-exploitative labour migration. The promotion of labour migration by the State should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrant workers.
8. Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations.
9. Adopting measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.

# **INTERNATIONAL CRIMINAL LAW**

**Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially  
Women and Children, supplementing the United Nations Convention against  
Transnational Organized Crime<sup>87</sup>**

*Adopted 15 November 2000  
Entered into force 25 December 2003*

The basic purpose of the Protocol is to prevent and combat trafficking, to protect and assist victims and to promote international cooperation. The protection of, and assistance to, victims is specified as a core purpose of the Protocol. The Protocol requires that particular attention be paid to combat and prevent trafficking in women and children, while maintaining the basic principle that all forms of trafficking should be covered by the Protocol. A definition of the term "trafficking in persons" is provided in the Protocol, as well as a number of mandatory requirements relating to protection of and assistance to trafficked persons that State Parties are obliged to fulfil. The savings clause in Article 14 ensures that the Protocol does not affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian, human rights and refugee law.

**Preamble**

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, *inter alia*, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and

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<sup>87</sup> <http://www.ohchr.org/english/law/protocoltraffic.htm>.

punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

## **I. General provisions**

### **Article 1**

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

### **Article 2**

Statement of purpose

The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

### **Article 3**

Use of terms

For the purposes of this Protocol:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph ( a ) of this article;

(d) "Child" shall mean any person under eighteen years of age.

#### **Article 4**

##### Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

#### **Article 5**

##### Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

## **II. Protection of victims of trafficking in persons**

#### **Article 6**

##### Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons,



including, *inter alia*, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

## **Article 7**

### Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

## **Article 8**

### Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.
2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.
3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.
4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.
5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.
6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

## **III. Prevention, cooperation and other measures**

### **Article 9**

#### Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:
  - (a) To prevent and combat trafficking in persons; and
  - (b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

## **Article 10**

### Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

## **Article 11**

### Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.
2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.
3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.
4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.
5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.
6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

## **Article 12**

### Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

- (a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and
- (b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

## **Article 13**

### Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

#### **IV. Final provisions**

##### **Article 14**

###### Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

##### **Article 15**

###### Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

##### **Article 16**

###### Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

#### **Article 17**

##### Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

#### **Article 18**

##### Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed

amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

## **Article 19**

### Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

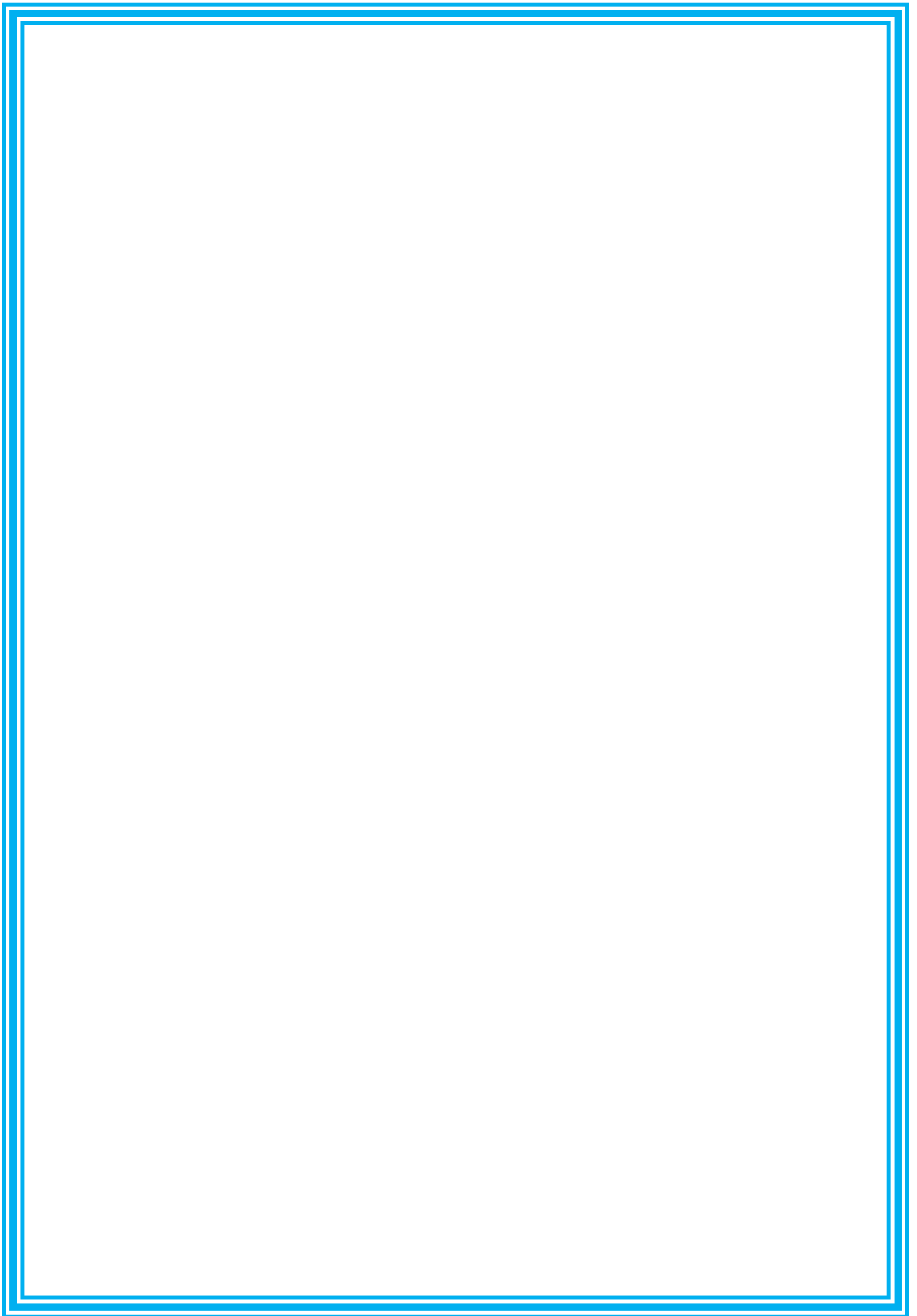
2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

## **Article 20**

### Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness whereof, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.





**Protocol Against the Smuggling of Migrants by Land, Sea and Air,  
supplementing the United Nations Convention Against Transnational Organized  
Crime<sup>88</sup>**

*Adopted 15 November 2000  
Entered into force 28 January 2004*

The protocol provides for a definition of “smuggling” and requires State Parties to make the smuggling of migrants for financial or other material benefit a criminal offence under their national laws. The fundamental policy set by the Protocol is that it focuses its strategy to combat smuggling on the act of smuggling and not on migration itself. The Protocol also contains safeguards in relation to the rights, legal status and safety of smuggled migrants and illegal residents, including those who are also asylum-seekers. One of the key safeguards is the reference to international law, including international humanitarian human rights and refugee law in the savings clause, Article 19 of the Protocol. The Protocol also contains provisions on prevention of smuggling of migrants, and on general and specific forms of cooperation and assistance for the prevention, investigation and prosecution of offences covered by the UN Convention on Transnational Organized Crime and the Protocol.

**Preamble**

*The States Parties to this Protocol,*

*Declaring* that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels,

*Recalling* General Assembly resolution 54/212 of 22 December 1999, in which the Assembly urged Member States and the United Nations system to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned, and encouraged, where relevant, interregional, regional and subregional mechanisms to continue to address the question of migration and development,

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<sup>88</sup> [www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_smug\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf).

The Protocol provides Contracting States with an effective tool to combat and prevent human smuggling. The Protocol is designed to fight cross-border crimes by obliging signatories to adopt national legislative measures, to open information channels and to promote cooperation in enforcement of international law. However, the new laws do not aim to dictate domestic migration policy and migration flow. They recognize that migration in itself is not a crime and therefore not liable to criminal prosecution. Migrants are victims in need of protection; therefore emphasis is placed on the criminalization of the smugglers and the organized criminal groups behind them. Chapter II of the Protocol reflects relevant provisions of IMO advisory Circular (MSC/Circ.896) *Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea*, which notes the unsafe conditions of the migrants voyages on ships that are not intended carrying passengers, and outlines measures to be taken by to eliminate these unsafe practices associated with the trafficking or transport of migrants by sea. The Circular remains an effective guideline for States that are not signatories to the Protocol.

*Convinced* of the need to provide migrants with humane treatment and full protection of their rights,

*Taking into account* the fact that, despite work undertaken in other international forums, there is no universal instrument that addresses all aspects of smuggling of migrants and other related issues,

*Concerned* at the significant increase in the activities of organized criminal groups in smuggling of migrants and other related criminal activities set forth in this Protocol, which bring great harm to the States concerned,

*Also concerned* that the smuggling of migrants can endanger the lives or security of the migrants involved,

*Recalling* General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing illegal trafficking in and transporting of migrants, including by sea,

*Convinced* that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument against the smuggling of migrants by land, sea and air will be useful in preventing and combating that crime,

*Have agreed as follows:*

## **I. General provisions**

### *Article 1*

#### *Relation with the United Nations Convention against Transnational Organized Crime*

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.

### *Article 2*

#### *Statement of purpose*

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

### *Article 3*

#### *Use of terms*

For the purposes of this Protocol:

(a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

(c) "Fraudulent travel or identity document" shall mean any travel or identity document:

(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

(ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder;

(d) "Vessel" shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

### *Article 4*

#### *Scope of application*

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

### *Article 5*

#### *Criminal liability of migrants*

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

*Article 6*

*Criminalization*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (a) The smuggling of migrants;
- (b) When committed for the purpose of enabling the smuggling of migrants:
  - (i) Producing a fraudulent travel or identity document;
  - (ii) Procuring, providing or possessing such a document;
- (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

- (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
- (b) Participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article;
- (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

- (a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or
- (b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

## **II. Smuggling of migrants by sea**

### *Article 7*

#### *Cooperation*

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

### *Article 8*

#### *Measures against the smuggling of migrants by sea*

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

(a) To board the vessel;

(b) To search the vessel; and

(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

#### *Article 9*

##### *Safeguard clauses*

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

- (a) Ensure the safety and humane treatment of the persons on board;
- (b) Take due account of the need not to endanger the security of the vessel or its cargo;
- (c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;
- (d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

- (a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
- (b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

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

### **III. Prevention, cooperation and other measures**

#### *Article 10*

##### *Information*

1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;

(b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;

(c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;

(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;

(e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and

(f) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.

2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

#### *Article 11*

##### *Border measures*

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

#### *Article 12*

##### *Security and control of documents*

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

#### *Article 13*

##### *Legitimacy and validity of documents*

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.

#### *Article 14*

##### *Training and technical cooperation*



1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

2. States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct. Such training shall include:

(a) Improving the security and quality of travel documents;

(b) Recognizing and detecting fraudulent travel or identity documents;

(c) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;

(d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and

(e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.

3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.

#### *Article 15*

##### *Other prevention measures*

1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

#### *Article 16*

##### *Protection and assistance measures*

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

#### *Article 17*

##### *Agreements and arrangements*

States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

(a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or

(b) Enhancing the provisions of this Protocol among themselves.

## *Article 18*

### *Return of smuggled migrants*

1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

6. States Parties may cooperate with relevant international organizations in the implementation of this article.

7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.

## **IV. Final provisions**

### *Article 19*

#### *Saving clause*

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

#### *Article 20*

##### *Settlement of disputes*

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

#### *Article 21*

##### *Signature, ratification, acceptance, approval and accession*

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

#### *Article 22*

##### *Entry into force*

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

#### *Article 23*

##### *Amendment*

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

#### *Article 24*

##### *Denunciation*

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

#### *Article 25*

##### *Depositary and languages*

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

**RELEVANT CONFERENCE  
MATERIALS**

**Meeting of State Representatives on Rescue at Sea and Maritime Interception  
in the Mediterranean  
Madrid, 23 -24 May 2006**

**Background Discussion Paper<sup>89</sup>**

**Reconciling Protection Concerns with Migration Objectives**

**I. Introduction**

Migrant and refugee flows have long been a challenge to the States bordering the Mediterranean Sea. The perilous journey by sea, with the increasing involvement of criminal smuggling rings, is one undertaken by many, including from sub-Saharan Africa, wishing to reach Europe. All Mediterranean States are affected by these maritime movements to a greater or lesser degree, the main routes being through the Maghreb via the Spanish enclaves of Melilla and Ceuta or directly to the southern coast of Spain; through Libya and Tunisia, via Malta or the small island of Lampedusa to Sicily or the mainland of Italy; and from Turkey through the Dodecanese to Greece or Sicily. Due to increased patrols in the Mediterranean, a route through Mauritania to the Canary Islands has been frequently used of late. The human tragedy associated with the rising death toll at sea has brought an added dimension of “humanitarian crisis” to these maritime movements. Intense media coverage has highlighted the plight of the individuals concerned and pushed the issue high up the political agenda in many countries.

Quantifying the scale of the movement is problematic as, by definition, illegal migrants are clandestine and seek to avoid detection. Estimates of those who arrive safely and those who perish en route are, at best, grounded on the rather limited statistical information available on incidents of rescue and interception that are officially recorded. Despite this lack of hard data, there is no doubt that a significant number of people do attempt to enter Europe by sea, and that the very visible nature of the phenomenon places this mode of travel at the very centre of the political discourse on irregular migration.

Qualifying and characterizing the movement is equally challenging. The term “boat people” has now entered into common parlance and tends to be applied without distinction to migrants, asylum-seekers and refugees alike. Broad and indiscriminate usage of such a generic term is illustrative of an increased blurring of the distinctions which exist between different categories of migrants - those who travel in search of work, better living conditions, educational opportunities and a brighter future, and those who as asylum-seekers and refugees may be pursuing similar goals, but whose initial flight is motivated by a fear of persecution, and who are therefore in need of international protection. Those pursuing the Mediterranean route include people in an asylum-seeking situation, as well as others who seek to use the asylum channel as the only viable means of accessing Europe. These mixed flows create complex challenges for States and international organizations alike, generating scenarios which cannot be

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<sup>89</sup> This paper is based on a discussion paper prepared for the Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean, that took place in Athens, 12-13 September 2005.



resolved from within the narrow confines of international maritime law, but which demand comprehensive solutions drawing upon a number of cross-cutting and interconnected policy concerns.

At issue are:

- the legitimate security interests of States, including the necessity to maintain effective border and immigration controls and to prevent and combat transnational organized crimes such as smuggling and trafficking;
- the need to maintain security and stability in international shipping, and above all to preserve the integrity and effectiveness of the international search and rescue regime, including the vital role of commercial shipping in responding quickly and decisively to distress calls and incidents involving small vessels encountered in distress at sea;
- the obligation to respect the rights and dignity of all persons rescued at sea regardless of their status and, in the particular case of asylum-seekers and refugees, to meet their specific protection needs in accordance with international refugee law, notably to ensure prompt access to fair and efficient status determination procedures, in full compliance with the principle of *non-refoulement*;
- the need to organize, in a safe and human manner, the prompt return to their countries of origin or other countries where they could be readmitted, of those irregular migrants, who are not in need of international protection or have compelling reasons to stay.

In March 2002, UNHCR convened an Expert Round Table in Lisbon on the topic of Rescue-at-Sea; Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees. The summary of discussions emerging from that meeting highlights the main challenges involved in adequately responding to maritime scenarios involving asylum-seekers and refugees. Since then, UNHCR has been working closely with key partners, especially the International Maritime Organization (IMO), to help ensure that the proposals put forward at the Lisbon Roundtable have been shared with States in their discussions on their obligations in responding to such scenarios. These collaborative efforts have contributed to the endorsement by IMO Member States of crucial legislative amendments and accompanying guidelines to strengthen certain practical and operational aspects of the international search and rescue regime. Notwithstanding this progress, maritime migration continues to pose complex challenges, as graphically illustrated by current realities in the Mediterranean, which test the ability of States and international organizations to respond adequately.

Building upon the Lisbon Expert Roundtable and related achievements, UNHCR has secured EU funds in order to further explore the challenges of maritime migration in a specific geographical setting. This objective is part of a broader EU-funded project which aims at strengthening the asylum space in North Africa through the implementation of a range of capacity-building activities, the mobilization of governments in the region, and the formulation of a comprehensive migration management strategy responding in a balanced manner to the asylum and migration concerns at stake. Two conferences on rescue and interception at sea have been scheduled for this purpose, one of experts and one of States.

The expert meeting took place in Athens in September 2005. The discussions and recommendations that emerged from that meeting have provided the framework for the forthcoming meeting of States representatives in Madrid.<sup>90</sup> They touched on a broad range of subjects such as the new developments in maritime law, strengthening the existing search and rescue regime, the importance of preserving the integrity of this regime, practical problems facing ship masters, and disembarkation procedures. They also contained a series of proposals on improving information gathering and exchange, strengthening international cooperation, and developing more comprehensive responses to the deeper problems underlying the irregular movements by sea and the distress of those resorting to such means.

This paper aims to review and revalidate the key themes of the discussions that took place both in Lisbon and in Athens. It briefly examines provisions from the different strands of international law that bear on the question of rescue at sea and maritime interception, particularly in the case of asylum-seekers and refugees. It also touches upon collective efforts that have been either proposed or actively pursued to tackle the phenomenon of maritime migration in the Mediterranean, and suggests elements that should be further explored to address the current situation more effectively within a regional cooperative framework. In doing so, it aims to provide a catalyst for discussion between States in order to build consensus on a cooperative, responsibility sharing approach to the protection needs of persons of concern to UNHCR, caught up in mixed flows across the Mediterranean.

## **II. The legal framework**

The broad policy and legal framework governing rescue-at-sea and the interception of asylum-seekers and refugees rests on the applicable provisions of international maritime law and on general principles of international law, in interaction with international refugee law. Aspects of international human rights law - and, especially in the Mediterranean context, the jurisprudence of the European Court on Human Rights - are also of importance. The international legal regime and related States' policies and practices for combating transnational organized crime are additional factors which must be taken into consideration in defining policy priorities which underpin responses to the issue of irregular migration.

Clandestine migrants, asylum-seekers and refugees at sea may be encountered in a variety of contexts: interception by coastal state patrols; relief operations involving commercial vessels; or as stowaways aboard commercial vessels. Each scenario raises specific challenges and the law (primarily international maritime law in interaction with other bodies of law as specified above) has therefore developed distinct but complementary regimes to provide an appropriate framework in response to each scenario:

- the search and rescue regime, understood as relief operations undertaken by vessels coming to the aid of persons in distress at sea;

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<sup>90</sup> Expert meeting on Interception and Rescue in the Mediterranean; Cooperative Responses, 12-13 September 2005, Athens, Greece - Summary of Discussions and Recommendations.

- the stowaway regime;
- interception practices for the purpose of migration control.

### A. The search and rescue regime

Aiding those in peril at sea is an age-old maritime tradition, also enshrined in contemporary maritime law as codified in several Conventions:

- the 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>91</sup>
- the 1958 Convention on the High Seas<sup>92</sup>
- the 1974 International Convention for the Safety of Life at sea (SOLAS)<sup>93</sup>
- the 1979 International Convention on Maritime Search and Rescue (SAR).<sup>94</sup>

The SOLAS and SAR Conventions are central to the integrity of the global search and rescue regime. The IMO is responsible for ensuring that the Conventions are kept up to date and are fully respected by States and other maritime actors. The IMO Maritime Safety Committee (MSC) and its Sub Committee on Radio-communications and Search and Rescue (COMSAR) are key fora within which these instruments are debated and monitored by the maritime community.

The term “rescue at sea” has been defined in the SAR Convention as: “*an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.*”<sup>95</sup>

To this end, the system of international maritime law foresees different sets of responsibilities: the **responsibility of the master** to provide assistance; and the **responsibility of States** to promote the establishment, operation and maintenance of an adequate and effective search and rescue service. Responding to a call from IMO’s Assembly for a review of the relevant provisions of international maritime law in the wake of the Tampa incident, intensive discussions have taken place within IMO in recent years to clarify the practical interrelationship between the roles and responsibilities that come into play in a rescue scenario, and to address the practical challenges that have arisen in the implementation of the search and rescue regime. The focus of discussion within IMO has concentrated on the contentious issue of disembarkation.

One concrete outcome of the legislative review undertaken by IMO has been the adoption by the maritime safety committee (MSC) of new amendments to the SOLAS and SAR Conventions and the drafting of accompanying guidelines which set out in detail the complementary roles, obligations and procedures for commercial vessels responding to distress situations. These amendments<sup>96</sup> impose upon governments an obligation to coordinate and cooperate, to ensure *inter alia* that:

<sup>91</sup> 1982 UNCLOS, Article 98.

<sup>92</sup> 1958 Convention on the High Seas, Article 12.

<sup>93</sup> Annex to the 1974, SOLAS Convention, Chapter V, Regulation 7 and Regulation 33.

<sup>94</sup> Annex to the 1979 SAR Convention, Chapter 1.3.2. and Chapter 2.1.10.

<sup>95</sup> Annex to the 1979 SAR Convention, Chapter 1.3.2.

<sup>96</sup> Entry into force scheduled for 1 July 2006.

- Masters of ships providing assistance by embarking persons at sea are released from their obligations with minimum further deviation from the ship's intended voyage.
- Survivors assisted are disembarked from the assisting ship and delivered to a place of safety as soon as reasonably practicable.

Effective implementation of the regime outlined by IMO is premised upon the full cooperation of States. This is has proven elusive in some cases, not least because the practical realities of disembarkation touch upon a key area in which the interaction between international maritime law and concerns about migration control and refugee protection have resulted in tensions. Recognizing that such issues cannot be adequately resolved by reference to maritime law alone, IMO has convened an inter-agency working group involving sister agencies with specific competence in related areas of law and practice, namely the Office of Legal Affairs (OLA) /Division for Ocean Affairs and the Law of the Sea; UNHCR with reference to international refugee law; the Office of the High Commissioner for Human Rights; the United Nations Office on Drugs and Crime/ODC, with respect to questions of transnational organized crime; and the International Organization for Migration, with respect to issues relating to irregular migration in general. The inter-agency working group has been effective in ensuring a broad based and holistic examination of the issues, but has proved to have only limited sway in securing the kind of practical solutions which remain within the realm of States.

## **B. The stowaway regime**

Stowaways tend to be less visible than those rescued under dramatic circumstances, but the treatment of stowaway cases remains an important component of any overall response to maritime migration. States periodically provide IMO with statistics on stowaway cases<sup>97</sup>. However, there are gaps in the global data available on the number of stowaways annually, particularly those who subsequently apply for asylum. UNHCR itself has compiled some limited statistical data, based on the small number of stowaway cases brought to its attention.

The UNHCR Executive Committee has considered stowaways on a number of occasions, and produced a series of non-binding guidelines relating to the protection needs of refugee and asylum-seeking stowaways. ExCom Conclusion N.53 (XXXIX) of 1988 on Stowaway Asylum-seekers provides *inter alia* that stowaway asylum-seekers must be protected against forcible return to their country of origin and should, whenever possible, be allowed to disembark at the first port of call for their asylum application to be determined by the local authorities.

The text of an International Convention relating to Stowaways was adopted by the Diplomatic Conference on Maritime Law at its session in 1957. The Convention has, however, failed to attract a sufficient number of ratifications needed to bring it into force. In the absence of an internationally binding instrument dealing with stowaways, IMO has sought to provide solutions to the problem of stowaways by addressing this

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<sup>97</sup> IMO Circulars on stowaway incidents are issued quarterly (also available through the IMO website - [www.imo.org](http://www.imo.org)).

matter through the IMO committee system, principally through the Facilitation Committee which is responsible for a broad range of issues underpinning the effective functioning of maritime traffic. The January 2002 session of the Facilitation Committee considered some provisions on stowaways which have subsequently been incorporated into the Convention on Facilitation of International Maritime Traffic (FAL Convention) of 1965.

According to the definition contained in the annex to the FAL Convention a stowaway is,

*“a person who is secreted on a ship, or in a cargo which is subsequently loaded into a ship, without the consent of the ship owner or the master or any responsible person and who is detected on board after the ship has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities.”*<sup>98</sup>

The focus of the FAL regime remains to ensure that stowaways incidents are resolved *“expeditiously and secure that an early return or repatriation of the stowaway will take place”*.<sup>99</sup> However, reflecting refugee protection concerns, the General Principles endorsed by the Facilitation Committee make specific reference to the 1951 Convention relating to the Status of refugee, stating that *“the provisions in this section shall be applied in accordance with international protection principles as set out in international instruments, such as the UN Convention relating to the Status of Refugee of 28 July 1951 and the UN Protocol of 31 January 1967, and any relevant national legislation”*.<sup>100</sup>

On the issue of stowaways, the Council of Europe has commended IMO for their work on the FAL Convention provisions on stowaways. It has, however, expressed the view that the international community should go further in the search for effective solutions for stowaway cases, including *“consideration of the viability of a single legal instrument on the treatment of stowaway asylum-seekers, including rules on the determination of the State responsible for processing the asylum application of stowaways, their treatment on board ship and the maximum duration of custody on board ship”*.<sup>101</sup>

In UNHCR’s experience, disembarkation of stowaway asylum-seekers can be extremely difficult to achieve. As a result, stowaway asylum-seekers remain on board for lengthy periods of time, whilst negotiations are pursued ashore in search of a State willing to permit disembarkation. A successful outcome depends largely on the nationality of the stowaway, the availability of identifying documentation, the vessel’s future schedule and, most importantly, cooperation of the immigration authorities and port officials at the vessel’s future ports of call.

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<sup>98</sup> 1965 Convention on Facilitation of International Maritime Traffic, as amended, 10 January 2002, IMO Resolution FAL.7 (29), Section 1.1.

<sup>99</sup> Ibid. Section 4.2.

<sup>100</sup> Ibid. Section 4.1.

<sup>101</sup> Report of the Committee on Migration, Refugees and Population, Doc. 100115, December 2003; see also Council of Europe Parliamentary Assembly, Recommendation 1645 (2004) on Access to assistance and protection of asylum-seekers at European seaports and coastal areas.

### C. The interception regime

An internationally accepted definition of the term “interception” does not exist. However within the context of the international protection of refugees, the Executive Committee of the United Nations High Commission for Refugees has provided the following authoritative guidance:

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

- (i) prevent embarkation of persons on an international journey;*
- (ii) prevent further onward international travel by persons who have commenced their journey; or*
- (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law.”<sup>102</sup>*

A wide range of concerns and objectives motivate States to engage in interception practices. Concerned with a global increase in irregular migration, States try to disrupt major smuggling and trafficking networks by intercepting people en route. In the context of maritime movements, the humanitarian imperative to come to the aid of those travelling in unseaworthy vessels constitutes an added element of interception practices. Maritime interception may take place either in the territorial waters of the intercepting State, in the contiguous waters or on the high seas.

As a general principle of international law, the control of external borders, restrictions on the right of aliens to access national territory and laws governing the entry of aliens, all constitute the valid exercise of State sovereignty. However, such activities must always be exercised in compliance with the fundamental principles of international human rights law, which embodies clear standards with respect to the rights of individuals, regardless of their status. State action is also framed within the context of international refugee law, including the obligation to respect the right to seek and enjoy asylum so that those people who risk persecution can leave their home country and seek protection in another. The 1951 Convention relating to the Status of Refugees, and its 1967 Protocol, which constitute the core instruments of international refugee law, provide a definition of those entitled to benefit from its protections and establishes key principles such as non-penalization for illegal entry and *non-refoulement*.<sup>103</sup>

#### Protection safeguards in interception measures

The prohibition with regard to the *refoulement* of refugees contained in Article 33 of the 1951 Convention obliges States to consider the risk posed to an individual asylum-seeker or refugee before taking steps to remove them. This principle underpins the exercise of the right to seek and enjoy in other countries asylum from persecution, as proclaimed in Article 14 (1) of the Universal Declaration of Human Rights. The principle of *non-refoulement* is broadly acknowledged as being embedded in customary international law<sup>104</sup> and is applicable by all States even if they are not party

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<sup>102</sup> Conclusion on Protection Safeguards in Interception Measures (No. 97 (LIV) – 2003).

<sup>103</sup> See 1951 Convention, Articles 1, 31 and 33.

<sup>104</sup> The continuing relevance and resilience of the principle of *non-refoulement* and its applicability as embedded in customary international Law have been acknowledged in the Preamble of the Declaration of States Parties adopted unanimously at the Ministerial meeting of States Parties, organized jointly by

to the 1951 Convention. In UNHCR's understanding, the principle of *non refoulement* does not contain any geographical restrictions and the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Likewise the human rights norms recognized as peremptory, such as the prohibition of return to States where the person may be at risk of torture or inhumane or degrading treatment, are to be implemented by all States.

States' authorities have an obligation to identify asylum-seekers and refugees among those intercepted. The question remains, however, as to the most appropriate location at which to undertake the determination of status. Processing aboard ship is one option. However the limited facilities on board, combined with the possible trauma of those intercepted may not offer optimal conditions and standard requirements (such as confidentiality, access to information and to the competent authority, presence of an interpreter). It is important to note that the State of disembarkation will generally be the State whose refugee protection responsibilities are first engaged. However, the transfer of responsibility for determining refugee status to another State is permissible under conditions of appropriate safeguards.

### **III. Regional policies – Elements for a cooperative framework**

#### **A. An overview of recent policies and practices**

##### Towards coordinated policies

The challenges posed by illegal immigration across the maritime borders of the EU Member States have placed this issue prominently on the political agenda of the European Union. Recognizing that “*insufficiently managed migration can result in humanitarian disaster*”<sup>105</sup>, the EU is committed to intensifying cooperation in order to prevent further loss of life at sea. The Hague Programme, adopted at the European Council of November 2004, identified, among the policy priorities to be pursued up to 2010, the necessity to ensure a more orderly and managed entry into the EU of persons in need of international protection. This objective complements earlier efforts, adopted in 2003, to develop a coordinated and effective management of the maritime borders.<sup>106</sup>

In December 2005, the European Council adopted a conclusion on a global approach to migration putting a specific focus on Africa and the Mediterranean. The conclusion recognized the increasing importance of migration in the EU's relations to third countries, particularly neighbouring countries. The EU aims at further strengthening the dialogue and cooperation with those countries on migration issues, including return management and the tackling of root causes of migration. The conclusion was accompanied by a concrete work program, setting out priorities in the initiatives relating to the dialogue between the EU and Africa.<sup>107</sup>

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Switzerland and UNHCR on 12-13 December 2001, to commemorate the Convention's 50<sup>th</sup> anniversary. See the UNHCR “Agenda for Protection” - Declaration of States parties, United Nations General Assembly Doc. A/57/12/Add.1.

<sup>105</sup> The Hague Program, Presidency Conclusion, adopted on 5 November 2004, Council Doc. 14292/04, Annex 1, OJ C53/1, 3 March 2005.

<sup>106</sup> Feasibility Study on the control of the European Union's maritime borders - Final Report, Council Doc. 11490/1/03, Rev. 1, Annex, 19 September 2003.

<sup>107</sup> Global approach to migration: Priority actions focusing on Africa and the Mediterranean, Presidency Conclusion, adopted 17 December 2005, Council Doc. 15914/05.

In parallel with these efforts towards coordinated policies at the EU level, a number of other initiatives have sought to facilitate consultations and cooperation among Mediterranean countries. They include, for example, the “5+5” Regional Migration Dialogue, the Dialogue on Mediterranean Transit Migration (OSCE contact group) as well as certain aspects of the “Barcelona Process”.

#### Cooperation at an operational level

The Program of measures to combat illegal immigration across the maritime borders of the Member States of the European Union<sup>108</sup> adopted by the European Council in November 2003, has led to intensified operational cooperation among EU members, in the form of joint operations and pilot projects. Under a regulation adopted in October 2004 by the European Council<sup>109</sup>, a European Agency for the Management of the External Borders (FRONTEX) was set up in Warsaw, to help Member States in implementing community legislation on the control and surveillance of EU borders, including maritime borders, and to coordinate their operational cooperation.

Specific operations to monitor and control sea borders have been launched. Recently, a EU financed “Project Seahorse” is planning to control irregular migration *inter alia* through joint patrols in the Mediterranean as well as the Atlantic. Under the operational lead of Spain, patrols involving Morocco, Mauritania, Senegal, Cape Verde, Italy, Germany, Portugal, France and Belgium will cooperate to promote an effective policy to prevent illegal migration, including efforts to stop human trafficking. This project also foresees the creation of three Regional Maritime Surveillance Centres on Spain’s Atlantic and Mediterranean coasts. The project is scheduled to operate from 2006 to 2008.

Cooperative maritime interception initiatives are undertaken cooperatively by EU Member States. They take place primarily in the territorial waters of the various States concerned – those of EU members as well as of non-EU members - with disembarkation in EU States. Agreement has been reached, for example, between Italy and Albania as part of their co-operative response to the movement of clandestine migrants across the Adriatic.

#### Cooperation with North-African States (Libya)

The recent large-scale and recurrent flows of irregular migrants, crossing from Libya to the islands of Malta and Lampedusa (Italy), and from the coasts of Morocco and Mauritania to Spain, the European Union have highlighted the need for cooperation on illegal immigration with North African countries. The most advanced cooperation has been achieved with Libya.

At the beginning of June 2005, the European Council adopted Conclusions on initiating dialogue and cooperation with Libya on migration issues and launched an *ad hoc* cooperation process on migration issues with Libyan authorities, to identify practical measures to tackle illegal immigration such as training, reinforcement of

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<sup>108</sup> Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union, Council Doc. 15445/03, 28 November 2003.

<sup>109</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L349/1 of 25 November 2004.



institution building, asylum issues and increasing public awareness of the dangers of illegal migration.<sup>110</sup> A plan has been elaborated which considers joint action with Libya to prevent deaths at sea and to promote operational projects involving Egypt, Libya and Niger.<sup>111</sup> It also provides concrete and immediate actions to strengthen border control measures.

Furthermore, a seminar organized by the European Commission and Malta was held on 20 July, 2005, bringing together 15 European States, Libya, the European Commission and Frontex. Under the title “*Action Plan for Saving Life at Sea and in the Desert*” discussions resulted in the endorsement of a seven point set of conclusions geared towards improving cooperation in the Mediterranean region, in particular with Libya.

#### The broader approach

EU policy on irregular migration across the Mediterranean is not restricted only to border control measures. Both the Commission, in its Communication of 30 November 2005,<sup>112</sup> and the Presidency Conclusions of December 2005<sup>113</sup>, take a broader approach, based on dialogue and cooperation with countries of origin and transit and including assistance to develop capacities for refugee protection. EU funding has already started to strengthen the migration management capacities of North African countries, including facilities for the identification of persons in need of international protection.

Building on these efforts, UNHCR has submitted a follow-up project proposal for EU funding of which the main objective is to develop and implement a comprehensive strategy aimed at the creation of an effective asylum space in the region, through (i) reinforcing UNHCR's own presence and role in North Africa, including by deployment of roving teams to address emergency situations, to establish a fair and efficient asylum process (ii) adopting a national legislative framework in asylum and refugee matters for each of the countries in the region, (iii) building the capacity of competent Government and non-Government institutions through training and technical assistance, (iv) promoting the admission and stay of refugees by establishing burden-sharing arrangements which would entail the stay/self-reliance of those refugees who are in a position to do so, the resettlement of a fixed quota by third countries, and the voluntary return for those that are able to avail themselves of this option, and, (v) the safe and dignified return of rejected asylum-seekers to their countries of origin.

EU funding is also supporting projects to improve the capacities of EU Member States in the case of the arrival of large groups of irregular arrivals. An example has been the strengthening of reception capacity in Lampedusa. Likewise, the Communication on Strengthened Practical Cooperation, issued by the Commission in February 2006, proposes to set up rapid-reaction migration units to better respond to the particular

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<sup>110</sup> Council Conclusion: Cooperation with Libya on immigration issues, 2664<sup>th</sup> Council Meeting, Justice and Home Affairs, 2-3 June 2005, Council Doc. 8849/05, Press 114, p.15-20.

<sup>111</sup> Signed by the Ministers of Interior and Justice of the EU, then ratified by the European Council in June 2005.

<sup>112</sup> Communication from the Commission: Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, COM(2005)621 final, 30 November 2005.

<sup>113</sup> Global approach to migration: Priority actions focusing on Africa and the Mediterranean, Presidency Conclusion, adopted 17 December 2005, Council Doc. 15914/05.

pressure on the systems of Member states which face sudden influxes of irregular migrants.<sup>114</sup>

## **B. An overview of current challenges**

In addition to the overriding humanitarian imperative of preventing deaths and reducing suffering associated with irregular maritime migration, a number of key challenges arise from the perspective of the international protection of refugees.

**Adequate reception capacity and processing arrangements:** In recent years, countries receiving a high number of arrivals by sea have increased their reception capacity by building reception centres close to arrival points, along the coast. These reception centres are generally intended to provide temporary accommodation pending the outcome of an initial assessment of claims. However, with the large number of boat arrivals, offering adequate reception capacity structures has become a real challenge for receiving countries, especially when the intended destination of boat people are small Mediterranean islands like Malta and Lampedusa.

The report of the Council of Europe Committee on Migration, Refugees and Population<sup>115</sup>, recommends the Committee of Ministers to call on member states to *inter alia*: establish appropriate and permanent reception structures in coastal areas and near seaports, to provide accommodation to the newly-arrived, whether they apply for asylum or not; ensure that those who wish to apply for asylum at seaports and coastal areas are granted unimpeded access to the asylum procedure, including through interpretation services and independent legal advice; and accept responsibility for processing asylum applications of stowaways when they are the first port of call of the planned route of the ship.

**Access to the asylum procedure for people in need of international protection:** Ensuring access to an asylum procedure is the key condition for identifying people in need of international protection. It is linked with the *non-refoulement* principle mentioned earlier. Lack of capacity and the fear of attracting even greater numbers of applicants are often cited as justification for limiting or denying access to asylum procedures. UNHCR has, however, made proposals to States suggesting modalities to ensure efficient processing, in a manner that is consistent with international standards.

**Implementation of return measures:** The return of people not in need of international protection is essential to safeguarding respect for asylum and maintaining a functional asylum space. The efficient and expeditious return of persons found not in need of international protection and having no other compelling reasons justifying stay, is key to deterring smuggling and trafficking of persons. However, and as stated in Executive Committee Conclusion No.96, people should be returned, “*humanely and with full respect for their human rights and dignity to countries of origin.*”<sup>116</sup>

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<sup>114</sup> Communication from the Commission: Strengthened practical cooperation, COM(2006)67 final, 17 February 2006.

<sup>115</sup> See Council of Europe Parliamentary Assembly, Recommendation 1645 (2004) on Access to assistance and protection of asylum-seekers at European seaports and coastal areas; Report of the Committee on Migration, Refugees and Population, Doc. 100115, December 2003.

<sup>116</sup> Conclusion on the return of persons found not to be in need of international protection (No. 96 (LIV) - 2003).

#### **IV. Concluding observations**

Responding to the multiple challenges of irregular maritime migration in the Mediterranean, demands the full engagement and cooperation of States and international and regional organizations, each contributing their particular experience and expertise to the design of effective solutions. The phenomenon has profound causes that legal provisions alone cannot resolve. The degree to which strengthened provisions of international maritime law can effectively contribute to solutions will be determined by the willingness of States to implement them in good faith, and in combination with other measures addressing the root causes that compel people to take to the seas in the first instance. The problem is a shared one, and comprehensive solutions will remain elusive unless all actors are willing to share fully in applying effective and fair solutions, which avoid solving one aspect of the problem at the expense of others.

At the European level, recent policy measures show a clear willingness to develop common approaches and actions in border management, including maritime borders. What can be achieved in the Mediterranean region will depend upon the capacity of States to move forward in a spirit of international solidarity and responsibility sharing. The challenge is that of reconciling humanitarian tradition and obligations with immigration control imperatives, while ensuring coherence and consistency in the response to maritime and migration concerns.

**UNHCR**  
**8 May 2006**

**Meeting of State representatives  
on  
Rescue at sea and maritime interception in the Mediterranean<sup>117</sup>**

**UNWTO Headquarters, Capitán Hayan 42,  
Madrid,  
23-24 May 2006**

**Summary of proceedings**

1. The meeting brought together representatives of the following States: Albania, Algeria, Austria (EU Presidency), Cyprus, Egypt, France, Greece, Holy See, Italy, Lebanon, Libya, Malta, Mauritania, Morocco, the Netherlands, Norway, Spain, Syria, Tunisia, Turkey, and the United Kingdom.
2. The meeting was convened and chaired by the office of the United Nations High Commissioner for Refugees. It was also attended by the following intergovernmental institutions: European Commission, Frontex, League of Arab States, United Nations Office of Legal Affairs, Office of the United Nations High Commissioner for Human Rights, International Maritime Organization, International Organization for Migration, the Council of Europe, and the International Federation of Red Cross and Red Crescent Societies.<sup>118</sup>
3. A list of participants is provided in annex to this summary.
4. An earlier meeting of experts, convened by UNHCR in Athens in September 2005, had put forward a number of recommendations. These had been shared with participants ahead of the meeting, together with a background discussion paper. The latter provided information on the legal framework governing the search and rescue regime and the stowaway regime, as well as an overview of recent policies and practices in the Mediterranean region, and of current challenges.
5. These documents, together with a range of other relevant reference materials were made available to all participants at the meeting.

Opening address

6. The meeting was opened on behalf of the Spanish Government by H.E. Ambassador Pombo, who outlined a number of specific aspects of the maritime migratory movements being witnessed, and drew attention to the global context in which they were taking place.

Towards a cooperative response to irregular maritime movements in the Mediterranean

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<sup>117</sup> Meeting organized with funding from the EU.

<sup>118</sup> Apologies for absence were received from the United Nations Office on Drugs and Crime; the International Labour Office; the Organization for Security and Cooperation in Europe; and the International Centre for Migration Policy Development.

7. A keynote statement was delivered by Mrs. Feller, UNHCR's Assistant High Commissioner for Refugees. A brief summary of the main messages contained in this speech is provided in the Chairman's summary, of the meeting, to be found in Annex 1. This summary also contains the main features of discussions under the substantive items appearing below.

Responding to irregular maritime migration: key challenges facing the Mediterranean States.

8. Under this item, States shared their perspectives, as countries of departure, transit or destination around the Mediterranean, describing trends they had observed and the major challenges they faced. Those most frequently mentioned included the following:

- The growing pressure of immigration as a global phenomenon was prompted by growing economic disparities, and the desperation of those seeking to better their lives for themselves and their families. Measures of control were pushing the movements to open up new routes, both to the south and to the east, but were powerless to stem them. For some speakers, the real challenge lay in addressing their root causes, through a global approach based on international solidarity and burden sharing;
- Migration in the Mediterranean posed immense humanitarian challenges with estimates of a probable death toll in the thousands;
- The perception on the part of receiving countries was that governments were not in control of their borders. This perception was finding powerful and hostile echoes in the press and public opinion;
- Problems could not be solved by any one State, but needed to be addressed at a regional as well as international level. Cooperation among all countries involved was key: scarce resources should be pooled.
- There was a general lack of clarity as to when and how interception was justified. The fact that intercepted migrants frequently lacked documentation served to compound these problems. There was also no clear international legislation allocating responsibility for disembarkation.
- Information and training were inadequate. More needed to be done, together improvements to the technical capacity of receiving countries, often working in extremely difficult conditions;
- More vigorous and effective action needed to be taken against smugglers in order to bring them to justice.

Current practices in responding to irregular maritime migration

9. Discussions under this item included a series of presentations on the responses being developed by States, sometimes acting in cooperation with each other, and with international or regional organizations. Several States described the functioning of arrangements in place for rescue at sea and interception, including recent projects such as project Sea Horse being introduced by Spain, in cooperation with countries of departure. Others, such as Albania and Italy focused on arrangements for the reception of arrivals, including screening and the management of asylum claims. The presentations were followed by discussions in which participants were able to obtain

further information on various aspects of specific interest to them, and to learn from practices that were being applied in situations similar to their own.<sup>119</sup>

#### The role of international and regional organizations

10. Under the chairmanship of the International Maritime Organization (IMO), a series of presentations<sup>120</sup> provided information on the work being undertaken by organizations to assist States to respond to the challenges of irregular maritime migration. They were as follows:

- United Nations Office of Legal Affairs (Division for Ocean Affairs and the Law of the Sea) (DOALS) on existing maritime law and recent developments;
- IMO, including an update on amendments to the Conventions on Search and Rescue and on Safety of Life at Sea, and accompanying IMO guidelines;
- International Organization for Migration (IOM) on their cooperation with various countries around the Mediterranean (complementing information provided in earlier discussions on cooperative arrangements being applied in Lampedusa, Italy);
- Office of the United Nations High Commissioner for Human Rights (OHCHR) on relevant human rights conventions and remaining gaps in terms of ratifications, implementation and existing mechanisms;
- Council of Europe, on relevant activities, including recommendations put forward by the Parliamentary Committee on Migration, Refugees and Population;
- League of Arab States on issues of data collection and trends, as well the serious problems posed by human trafficking.

#### The European Union's response to irregular maritime migration

11. This session was chaired by Austria, holding the European Union Presidency, and referred to the global approach on migration to which the European Union was committed. Better management of migration was a key priority for Member States. The EU had taken numerous steps to respond to this phenomenon, taking into account the human rights of migrants with particular attention to persons in need of international protection. Cooperation with third countries was considered indispensable for the EU.

12. The representative of the European Commission gave details of the various initiatives taken at both policy and practical levels to address the challenges of irregular migration, including movements by sea. This was followed by a presentation by the representative of Frontex, who specified the objectives and activities of this agency to secure the external borders of the European Union, including its maritime borders. Such activities included measures to reduce loss of life and protect citizens.<sup>121</sup>

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<sup>119</sup> Texts of presentations by Albania and Spain are available, upon request.

<sup>120</sup> Idem for presentations by UNDOALS, IOM, OHCHR and the Council of Europe.

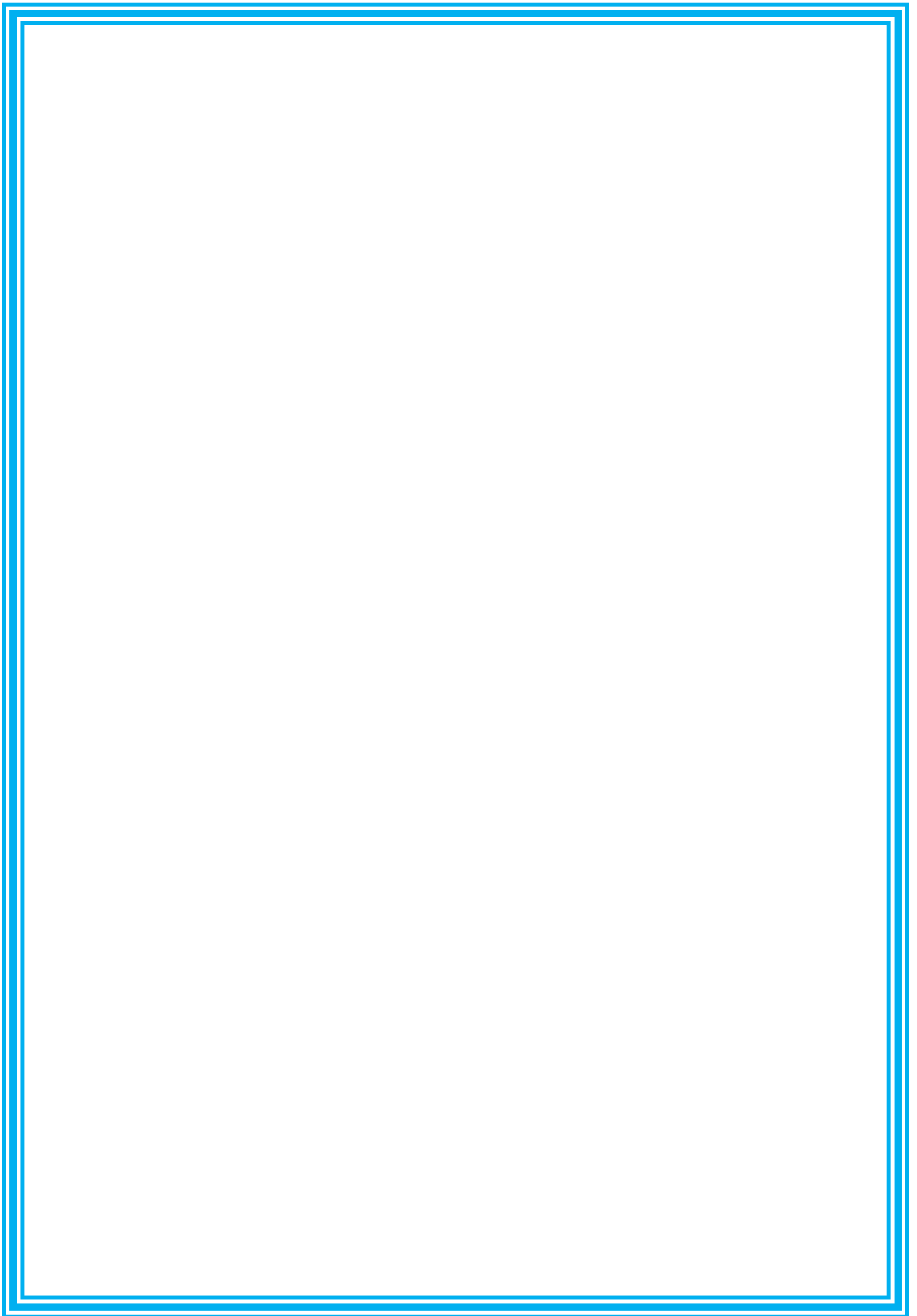
<sup>121</sup> Idem for presentation by Frontex.

### Summary of discussions

13. UNHCR presented a brief summary of the main features that had emerged from discussions during the meeting (see Annex 1). It concluded with three wishes on the part of UNHCR concerning possible follow-up to the work accomplished in Madrid.

### Closure of the meeting

H.E. Ambassador Pombo (Spain) observed that the meeting had provided an opportunity for a useful and informative exchange. He recalled the difficult balance that needed to be struck between necessary border control and meeting humanitarian needs. Migratory movements represented a major phenomenon that needed to be studied and understood, and approached responsibly in a cooperative and responsible manner. The meeting in Madrid had been a step in this direction.





**Expert meeting  
on  
Interception and Rescue in the Mediterranean;  
Cooperative Responses**

**12 – 13 September 2005, Athens, Greece.**

**Summary of discussions and recommendations**

The meeting brought together 35 participants, drawn from international organizations, academia, non-governmental organizations, the shipping industry and some national maritime and migration authorities, to discuss different aspects of irregular maritime migration in the Mediterranean with a view to compiling practical suggestions for the consideration of State representatives meeting in Madrid, 17-18 October 2005<sup>122</sup>. Taking as a starting point the summary of an earlier roundtable on *Rescue at sea: Specific Aspects relating to the Protection of Asylum seekers and Refugees*, discussions in Athens covered:

- Recent developments in the international legal framework in responding to situations of stowaways and rescue at sea;
- Review of current State, IGO and NGO initiatives relevant to the issues of stowaways, rescue at sea and interception;
- Reconciliation of protection obligations and migration control objectives – practical suggestions for States;
- Endorsement of a set of principles and recommendations for presentation to the meeting of State representatives.

Beside the plenary sessions, participants divided into working groups to consider: (1) issues around reconciling search and rescue obligations with migration objectives and protection concerns and; (2) identifying gaps and building capacity in the Mediterranean as far as mechanisms for co-ordination and cooperation are concerned.

The following propositions relate principally to the specific aspects considered by the working group. They do not represent the individual views of each participant, but broadly reflect the tenor of the general discussion.

### **1. IMO normative framework**

Participants welcomed the amendments<sup>123</sup> to the International Convention for the Safety of Life at Sea of 1974 (the SOLAS Convention) and to the International Convention on Maritime Search and Rescue of 1979 (the SAR Convention), as well as the related IMO Guidelines on the Treatment of Persons Rescued at Sea, recognizing their contribution to clarifying legal responsibilities in relation to disembarkation in rescue scenarios;

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<sup>122</sup> The meeting of States representatives was eventually postponed for logistical reasons and at time of writing a new date has yet to be fixed.

<sup>123</sup> Amendments were extensively discussed within the International Maritime Organization prior to endorsement by the Maritime Safety Committee (MSC) in May 2004 and are expected to enter into force on 1 July 2006.

- States should be encouraged to support the above mentioned Convention amendments, which in particular provide clarity on the responsibility of Contracting Governments/Parties to provide a place of safety, or to ensure that a place of safety is provided, under the coordination of the SAR region in which the survivors were recovered;
- States should avoid the categorization of interception operations in the Mediterranean Sea as SAR operations, as this might lead to confusion with respect to disembarkation responsibilities.

## **2. Preserving the integrity of the SAR regime**

In order to safeguard the basic premises of the SAR regime and the integrity of the legal framework and the humanitarian tradition upon which the regime has been elaborated:

- Ship masters should not be seen as part of the problem, rather their actions in saving lives should be recognized and supported by States;
- Shipping companies should not be penalized in any manner whatsoever for disembarking or attempting to disembark people rescued at sea;
- States should not impose, as a precondition for disembarkation, a requirement that shipping companies or their insurers cover the repatriation costs of stowaways or people rescued at sea;
- States should not impose penalties on shipping companies for the disembarkation of stowaways, when these people claim to be in need of international protection, (irrespective of the final outcome of their asylum request);
- Disembarkation formalities and Standard Operating Procedures should protect the interests of the shipping industry and the basic needs of individuals rescued at sea;
- Disembarkation procedures should be more harmonized, speedy, and more predictable on the Mediterranean shores to avoid recurrent case-by-case time consuming negotiation problems, which can endanger the lives of those rescued;
- As preventive measures, all States should strictly implement safety standards before authorizing any boat to move from their ports or shores.

## **3. Possible consequences of not addressing the practical problems faced by ship masters**

Experience along the Mediterranean shores over recent years suggests that States should be more attuned to the potentially negative consequences of imposing penalties and disproportionate burdens on private actors such as the shipping industry, including the following protection issues:

- Shipmasters may be reluctant or even refuse to respond to calls for support made by SAR authorities;
- Shipmasters may turn a blind eye to situations of distress at sea;
- Shipmasters may feel encouraged to attempt disembarkation of stowaways and illegal or clandestine persons rescued at sea, to avoid any risk of being accused of involvement in smuggling operations;
- Shipmasters may be tempted to seek irregular or illegal solutions, including the worst case scenario of people being throw overboard;
- Shipmasters may feel tempted to encourage persons rescued at sea to jump from their ships to reach nearby shores by swimming;
- Shipping companies and their insurers may be tempted to systematically commit themselves to paying repatriation related costs for stowaways and people rescued at sea in order to ensure the disembarkation, irrespective of individual protection needs or whether the place of disembarkation can be considered as safe.

It should be underlined that experts identified these potential consequences without wishing to suggest that they necessarily represent any practice amongst commercial shipping interests. However such risks and the negative consequences which can result from the pressures placed on masters and shipping companies, including the heavy financials costs borne, may undermine the effective functioning of the SAR regime and add to the rising number of casualties among the person trying to cross the Mediterranean Sea.

#### **4. Disembarkation procedures**

- The participants recognized that the problems related to rescue at sea and disembarkation cannot be isolated but are an essential component of a continuum of processes and procedures. The interlinkages between asylum and migration objectives may compound the difficulties of ensuring prompt disembarkation. However there was consensus that the maritime regime should govern disembarkation procedures;
- Within the objective of preserving the integrity of the SAR regime and of ensuring effective solutions to stowaway incidents, the consequences of the Dublin II Regulation as far as disembarkation at Mediterranean seaports is concerned should be carefully monitored to prevent placing a disproportionate burden on some States. Any such consequences should be considered under the European Commission's forthcoming report on the application of Dublin II Regulation in 2006 with a view to making any necessary changes to the Regulation;
- Greater predictability in terms of disembarkation could result from more harmonized practices in the Mediterranean, in accordance with what is foreseen in the IMO Guidelines;

- Procedures should additionally clarify basic reception standards applicable in ports of disembarkation in terms of assistance, access to independent interpreters and procedural safeguards, including information about seeking asylum and access to legal advice, applying to the identification and differentiation of those who claim to be in need of international protection;
- These procedures should also define the legal conditions, under which detention or other restrictions on freedom of movement can be applied, judicial review of such measures, and address the specific rights and needs of children and other vulnerable categories of persons;
- Those claiming to need international protection should be allowed to enter the asylum national procedure without delay or should be referred to UNHCR in countries where no asylum procedure exists. During the status determination procedure asylum seekers should have access to UNHCR as well as to relevant NGOs;
- Those not seeking asylum or found not be in need of international protection or have any other compelling humanitarian reasons to remain, should be returned to their country of origin in humane and safe conditions. IOM and other organization may offer support to States in implementing assisted voluntary return programmes.

## **5. Improving information management and fostering better cooperation**

Taking note of the lack of standardized information, on incidents of stowaways and rescue at sea, as well as on disembarkation and interception, which would enable the States and organizations concerned to quantify the problem and design a comprehensive strategy accordingly, the participants agreed that;

- Improved communication procedures and a better understanding and analysis of the challenges involved with disembarkation may facilitate the identification and realization of timely and fair solutions;
- In the specific case of rescue at sea, shipping and/or insurance companies should inform IMO, UNHCR and other relevant actors, in a timely manner, of any cases claiming protection needs to ensure the monitoring of disembarkation of the persons rescued and the effective observance of IMO guidelines 6.17 (i.e. protection from disembarkation in territories where the lives of the freedom of those alleging a need for protection would be threatened);
- Where disembarkation proves problematic, shipping and/or insurance companies should promptly inform IMO, UNHCR and other relevant actors in order to faster cooperation in finding a disembarkation solution, reducing the inconvenience caused to the shipping company and prolonged protection problems for the individuals concerned;
- Shipping and insurance companies should provide regular statistics to IMO on incidents of stowaways and people rescued at sea;

- States should try to compile and provide harmonized statistical information on the number and profile of persons intercepted and disembarked as stowaways or following a rescue. This would include at a minimum age, nationality, gender, place of interception and outcome in terms of subsequent procedural handling through migration control mechanisms or asylum processing<sup>124</sup>;
- Cases of refusal of disembarkation should be documented by shipping companies and reported to the IMO. This information would then be used by relevant inter-governmental organizations to better quantify the problem and devise solutions with the concerned States;
- With IMO and UNHCR support, shipping companies should ensure that shipmasters are made aware of the practical consequences resulting from the IMO guidelines on the treatment of persons rescued at sea through the provision of multilingual information material.

## **6. Comprehensive responses that go beyond interception operations**

- States in North Africa must be encouraged to accede to and comply with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. They must also be encouraged and supported in developing fair and effective asylum systems;
- While States have a sovereign prerogative to protect their borders, interception operations in isolation cannot be regarded as offering comprehensive solutions and some interception practices may in fact be incompatible with respect for fundamental human rights including the right to leave any country, return to one's own country and the right to seek and enjoy asylum safeguarded by articles 13 and 14 of the Universal Declaration on Human Rights;
- Interception measures which fail to consider protection needs may result in refoulement;
- There is a need to explore with States, relevant IGOs and non-governmental actors the feasibility of devising mass information campaigns to inform prospective clandestine passengers of the risks associated with irregular maritime migration. Such campaigns would need to encompass the various risks associated with overland travel en route to the prospective embarkation point;
- Information campaigns should target prospective passengers concentrated in specific areas in countries of transit and in North African States, as well as migrant populations on the move in Sub-Saharan countries;
- The information should include relevant contact details of competent authorities, NGOs, IGOs providing services in the field of asylum and migration management and information on locally accessible asylum or migration procedures.

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<sup>124</sup> . For the European Union States Members, this approach would be consistent with the EU Council "Regulation on Community statistics on migration and international protection" adopted on September 14<sup>th</sup>, 2005.

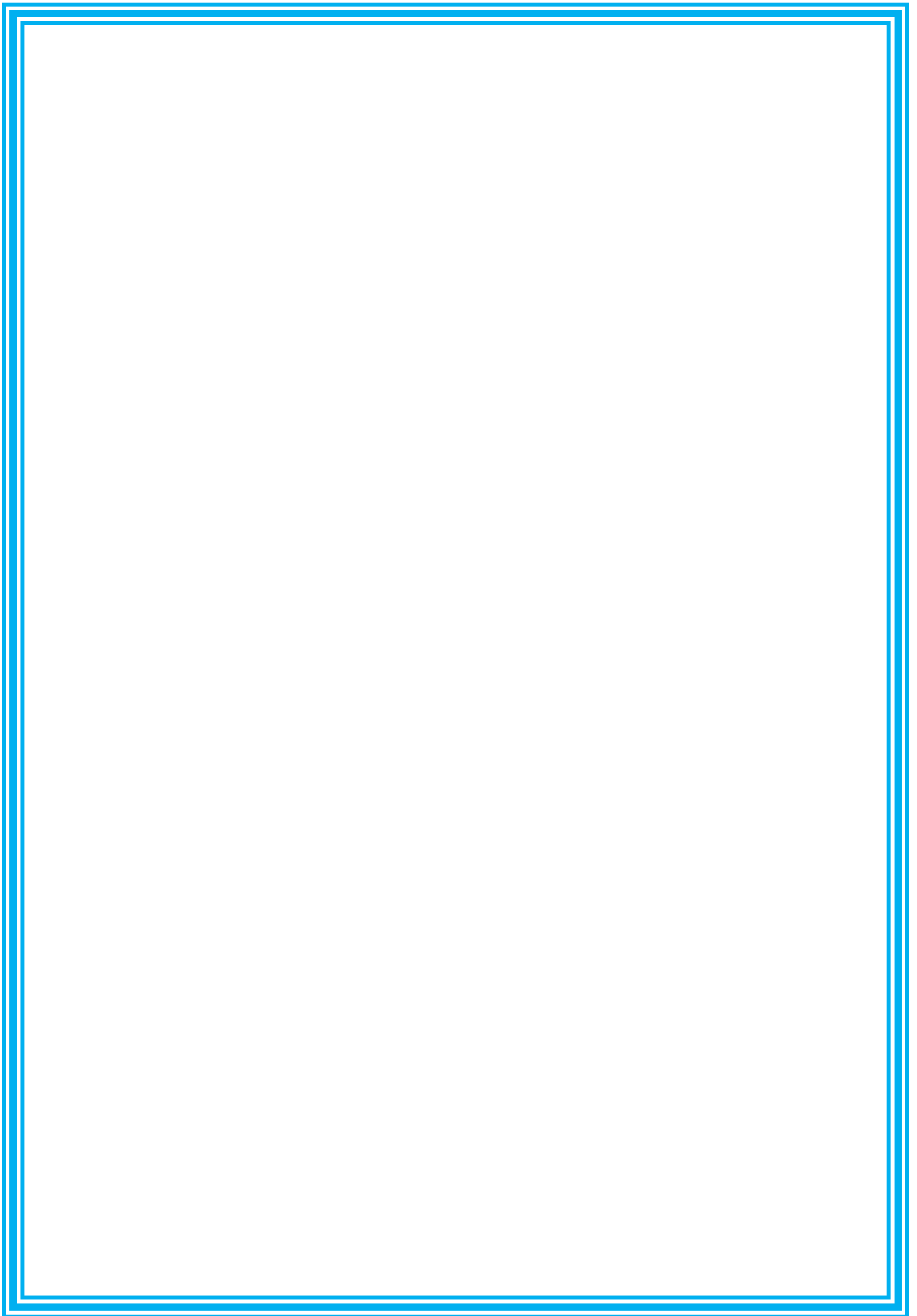
## **7. Burden and responsibility sharing**

- The participants recognized that unilateral and bilateral approaches do not necessarily create comprehensive solutions for the Mediterranean and may in fact result in shifting the problems on to neighboring countries;
- There is a need for States to develop a shared understanding of their respective responsibilities in responding to the protection needs of intercepted persons seeking asylum, especially in relation to interception operations on the High Seas;
- Burden and responsibility sharing efforts can contribute to the satisfactory resolution of rescue at sea situations, for example UNHCR could be encouraged to contact its partners to put in place adequate burden-sharing arrangements or standby resettlement programmes to assist;
- There is an urgent need for improved intra-European burden sharing as well as cross Mediterranean approaches;
- States in North Africa should be encouraged to cooperate in providing durable solution to persons recognized as refugees in their respective asylum procedures;
- States where stowaways and rescued persons are disembarked should ensure appropriate access to status determination procedures. Longer term responses including resettlement should be considered as burden and responsibility sharing measures, in particular in support of States with limited integration capacity and those disproportionately affected due to their geographical location.

## **8. Areas of renewed international cooperation**

- Recognizing and encouraging the work undertaken under existing multilateral fora such as the Barcelona Process, IOM *5+5 Regional Migration Dialogue* and the ICMPD's *Mediterranean Transit Migration* initiative, participants insisted on the necessity to further address the issues within a regional framework bringing together all the relevant actors;
- The participants noted the complexity of the push and pull factors affecting irregular maritime migration in the Mediterranean characterized by serious risk and various forms of exploitation affecting the "boat people", including during their land journey before arriving to a port of departure;
- The participants recognized the validity of States' efforts to take more decisive action against organized criminal rings on both sides of the Mediterranean shores, stemming their exploitation of desperate migrants who pay considerable sums only to be exposed to life threatening situations;
- The participants called for renewed cooperation, including protection for witnesses and victims who assist in identifying and bringing to justice the smugglers and traffickers;

- In line with the provisions of the United Nations Convention Against Transnational organized Crime and its supplementary Protocols Against smuggling and trafficking, the participants encouraged States to act transparently and to make public the full details of readmission agreements with countries of transit and origin. Such agreements should include adequate safeguards for those “boat people” in need of international protection;
- The participants encouraged the further development and better co-ordination of assisted voluntary return options;
- Multilateral cooperation in addressing the root causes of these movements should not be limited to the building of an asylum capacity in North African States or the establishment of migration policies aimed at detaining and returning “boat people” not in need of international protection, but should also include a proper review of options to create orderly migration and protection channels which would provide alternative opportunities for migrants. Measures to tackle onward movement from North Africa should be developed in the context of a broader, longer-term multilateral commitment to address the root causes of refugee movements in sub-Saharan Africa.





**Rescue-at- Sea**  
**Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees**

**Expert Roundtable, Lisbon 25 – 26 March 2002.**  
**Summary of Discussions**

This Expert Roundtable addressed the question of rescue-at-sea and specific aspects relating to the protection of asylum-seekers and refugees, basing the discussion on UNHCR's *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (March 2002). The roundtable was composed of 33 participants from governments, the shipping industry, international organisations, non-government organisations, and academia. The first day was organised around two expert panels, while the second day was divided into two working groups to consider (1) guidelines on rescue-at-sea and disembarkation and (2) an international cooperative framework.

The following propositions relate principally to specific aspects of rescue-at-sea by non-State vessels. They do not represent the individual views of each participant, but reflect broadly the tenor of the general discussion.

1. The integrity of the global search and rescue regime already in place and governed by the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) was fully recognised, and needs to be scrupulously protected.
2. Rescue-at-sea is first and foremost a humanitarian issue, with the fact of distress the priority defining feature, and rescue and alleviation of distress the first and absolute imperative, regardless of who the people are and how they came to be where they are.
3. The undertaking to rescue is an obligation of ships' masters, provided for under maritime law, and an old humanitarian tradition. The duty of the master begins with the actual rescue and ends when the rescue is complete which necessitates delivery to a place of safety.
4. The duty of the master does not entail other responsibilities, such as determining the character or status of the people rescued.
5. To ensure full and effective discharge of duties with respect to rescue, it is important that the professional judgment of the master is respected, with regard to the determination of when and where to land the persons rescued. Factors influencing the exercise of this judgment will be the safety and wellbeing of the ship and its crew, and the appropriateness of the place of landing, defined by one or a combination of factors, such as its safety, its closeness, and its location on the ship's schedule.
6. The master has the right to expect the assistance of coastal States with facilitation and completion of the rescue, which occurs only when the persons are landed somewhere or otherwise delivered to a safe place.
7. A non-State vessel, under a competent master and crew, is not an appropriate place in which to screen and categorize those rescued or devise solutions for them, whatever

these might be. Nor is it appropriate to use the ship as, in effect, a “floating detention centre”

8. On completion of the rescue, following delivery to a place of safety, other aspects of the matter come to the fore. These include screening for protection needs, conditions of stay and treatment, and realisation of solutions. Their resolution will depend variously on factors such as, or considerations relating to, the preceding situation of the persons concerned and their mode of transport, as well as on how best to achieve a balancing of responsibilities of all concerned.

9. International law does not prescribe how such additional aspects of the problem must be resolved, though certain provisions of international maritime law, considered as customary international law, are of great importance. The legal gaps concern where disembarkation should take place and which parties are responsible for follow-up action and effecting solutions. International law does, however, more generally give indicators of how they might be resolved. It offers a framework for resolution of the situation, albeit that there are important gaps to be filled by evolving practice together with further development of the law.

10. In terms of the law, human rights principles are an important point of first reference in handling the situation. This body of law requires certain rights to be respected regardless of the formal status of the persons concerned. The law also imposes some general constraints on how the people can be treated. In other words, human rights law prescribes that, wherever and by whomever, certain standards must be upheld and certain needs addressed. Refugee law is similarly prescriptive as regards the refugee component in the rescued caseload.

11. Practice and State policies help to fill the legal gaps, with the laws likely to follow rather than precede practice. The International Maritime Organisation is encouraged to undertake a legal gaps analysis (within its focal point structure), with a view to encouraging positive development of the law.

12. Policy makers are encouraged to recognise:

- The issue of “boat people” is best approached as a challenge, not a crisis.
- Signals are important and the wrong ones should not be sent either to States generally or to ships’ masters, which would have the effect of undermining the integrity of global search and rescue activities.
- Any measures to combat people smuggling must not undermine international refugee protection responsibilities.
- The issue is multi-disciplinary and must be approached as such.

13. General responsibilities concerning rescue should be accepted as including that:

- Coastal States have a responsibility to facilitate rescue through ensuring that the necessary enabling arrangements are in place.
- Flag States are responsible for ensuring that ships’ masters come to the assistance of people in distress at sea.
- The international community as a whole must cooperate in such a way as to uphold the integrity of the search and rescue regime.

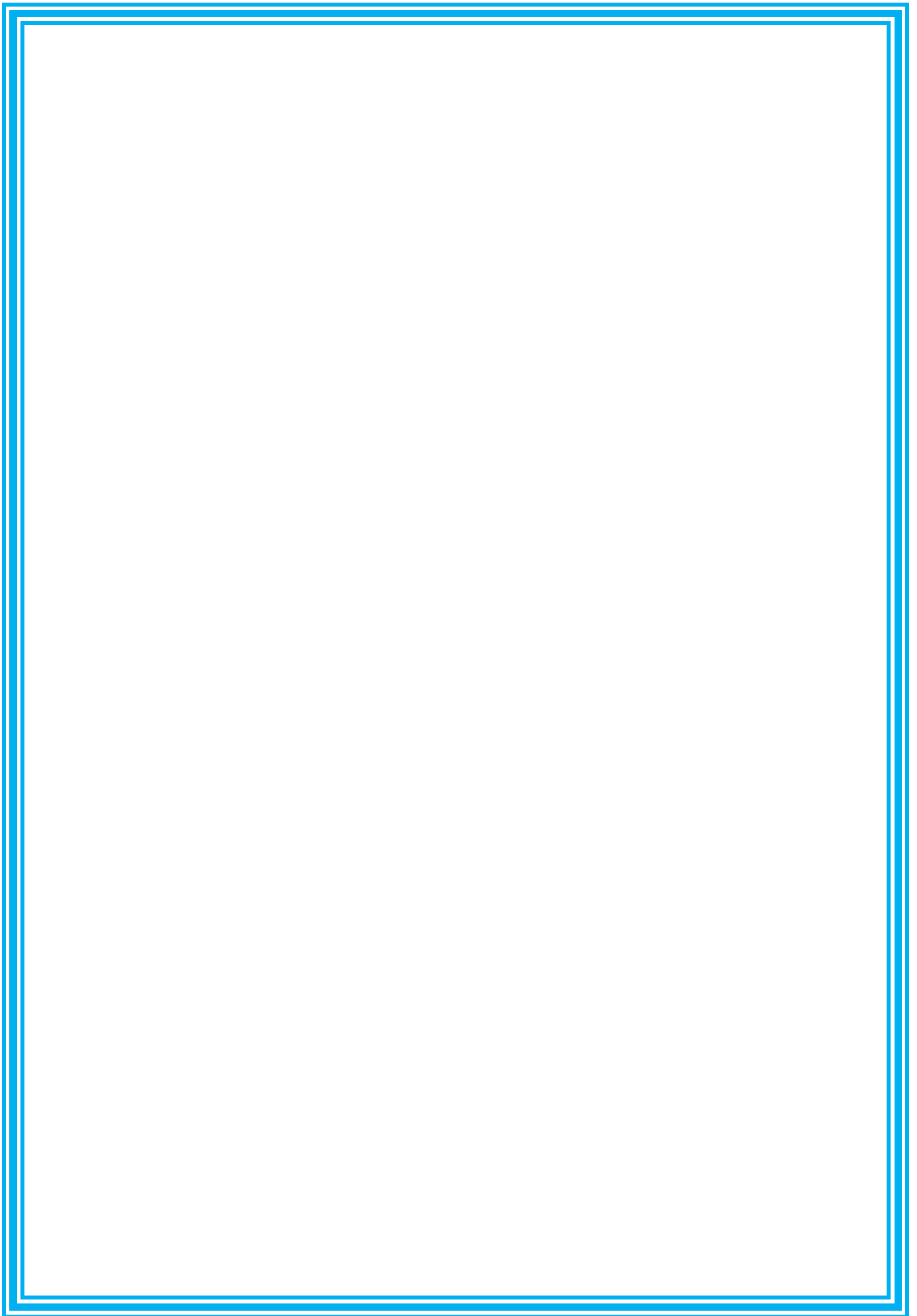
14. Determining the character or status of those rescued by non-State vessels must normally be undertaken on dry land. If asylum-seekers and refugees are found to be

among them, the State providing for disembarkation will generally be the State whose refugee protection responsibilities are first engaged. This entails in principle ensuring access to fair and efficient asylum procedures, and the provision of adequate conditions of reception. The transfer of responsibility for determining refugee status to another State is permissible under international law under certain conditions and provided that appropriate protection safeguards are in place. Furthermore, disembarkation, particularly when it involves large numbers of people rescued, does not necessarily mean the provision of durable solutions in the country of disembarkation.

15. International cooperative efforts to address complex rescue-at-sea situations should be built around burden-sharing arrangements. These arrangements could encompass the processing of asylum applications and/or the realization of durable solutions, such as resettlement. They should furthermore address, as appropriate, the issue of readmission to first countries of asylum and/or safe third countries, as well as return arrangements for those found not to be in need of international protection. Preventative action concerning people smuggling is another important aspect of any international cooperative framework.

16. In follow-up to this expert roundtable, there was support for the more systematic compiling of empirical data on the scale and the scope of the problem. This, coupled with an analysis of the data, should be done by the varying actors from their various perspectives. UNHCR, for its part, would consolidate guidance on rescue-at-sea involving asylum-seekers and refugees. The International Maritime Organisation's inter-agency initiative will be informed of the outcome of this Expert Roundtable and IMO is encouraged to utilise its existing mechanisms to address any inadequacies in the law. UNHCR's Executive Committee and the UNHCR, IOM consultative mechanism, Action Group on Asylum and Migration (AGAMI) were considered as other appropriate fora to take the discussion further.

**UNHCR**  
**11 April 2002**



**Expert roundtable Rescue-at-Sea: Specific Aspects Relating to  
the Protection of Asylum-Seekers and Refugees, held in Lisbon, Portugal  
on 25-26 March, 2002.**

**Background Note on the Protection of Asylum-Seekers and  
Refugees Rescued at Sea<sup>125</sup>**

**I. Introduction**

1. The phenomenon of people taking to the seas in search of safety, refuge, or simply better economic conditions is not new. The mass exodus of Vietnamese boat people throughout the 1980s was followed in the 1990s by large-scale departures from places such as Albania, Cuba and Haiti. The term “boat people” has now entered into common parlance, with asylum-seekers and migrants trying to reach the closest destination by boat, in the Mediterranean, the Caribbean and the Pacific regions. Since the vessels used are often overcrowded and un-seaworthy, rescue-at-sea, disembarkation and processing of those rescued has re-emerged as an important but difficult issue for States, international organisations, the shipping industry and, of course, the vulnerable boat people themselves. In an effort to stem the flow of boat people, destination States have increasingly resorted to interception measures within the broader context of migratory control measures, albeit that in some instances adequate protection safeguards have not been evident.

2. This paper examines provisions from different strands of international law that bear on the rescue-at-sea of asylum-seekers and refugees. It focuses on relevant norms, and highlights areas of law which require clarification. It also looks at institutional collective efforts to tackle this issue in the past and suggests elements that could be explored further to address the current situation more effectively within an international co-operative framework.

**II. General legal framework**

3. The legal framework governing rescue-at-sea and the treatment of asylum-seekers and refugees rests on the applicable provisions of international maritime law, in interaction with international refugee law. Aspects of international human rights law and the emerging regime for combating transnational crime are also relevant. The following paragraphs set out the more pertinent legal provisions and offer an interpretation, which would, though, benefit from analysis and further elaboration.

A. International maritime law

4. Aiding those in peril at sea is one of the oldest of maritime obligations. Its importance is attested by numerous references in the codified system of international maritime law as set out in several conventions, namely:

- the United Nations Convention on the Law of the Sea of 1982, (UNCLOS);
- the International Convention for the Safety of Life at Sea of 1974, as amended, (SOLAS);

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<sup>125</sup> <http://www.unhcr.org/protect/PROTECTION/3e5f35e94.pdf>.

- the International Convention on Maritime Search and Rescue of 1979, as amended, (SAR);
- the 1958 Convention on the High Seas (to the extent that it has not been superseded by UNCLOS).

### *Responsibilities of different actors*

5. These conventions explicitly contain the obligation to come to the assistance of persons in distress at sea.<sup>126</sup> This obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved. The legal framework also foresees different sets of responsibilities that need to be considered both independently and to the degree to which they inter-relate.

6. The responsibility of the ship master<sup>127</sup> – The ship master is responsible for providing assistance and/or rescue. International maritime law does, however, not elaborate on any continuing responsibility of the master once a rescue has been effected. Indicative of the nature of the responsibility assumed by the master is the fact that he or she may be criminally liable under national law for failing to uphold the duty to render assistance whilst commanding a vessel under the flag of certain States.<sup>128</sup> In addition, the master bears responsibilities not only to those rescued but also for the general safety of his vessel. Effecting a rescue may, under certain circumstances, result in danger to both, as for example when the number of persons rescued outnumbers those legally permitted to be aboard and exceeds the availability of lifejackets and other essential safety equipment.

7. The responsibility of coastal States - This is stipulated as the obligation to develop adequate search and rescue services. The relevant instruments do not expand on the responsibility of coastal States for disembarkation or landing of those rescued nor any consequent follow up actions.<sup>129</sup> Obviously, coastal States with particularly long

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<sup>126</sup> See for example, paragraph 2.1.10 of Chapter 2 of the Annex to SAR, 1979, which states, “Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found”. Regulation 15 of Chapter V of the Annex to SOLAS, obliges each State to “ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea around its coasts.” Article 98(1) of UNCLOS, 1982, states that every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers, *inter alia*, to render assistance to any person found at sea and in danger of becoming lost. Some of these provisions have become so universally recognised as to be considered customary international law.

<sup>127</sup> The obligation of ship masters to provide assistance is repeatedly articulated in international maritime law. First codified in 1910, it is incorporated in Article 98 of UNCLOS and Article 10 of the 1989 Salvage Convention. It is also explicitly mentioned in SOLAS (V/7). All three conventions require the master of a ship, so far as he can do without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea and to proceed with all possible speed to the rescue of persons in distress. It is again specifically mentioned in SOLAS (V/33) but is not referred to in SAR, the emphasis of which is more on the responsibilities of States Parties to that Convention.

<sup>128</sup> This is the case in the UK and in Germany, for example.

<sup>129</sup> The obligation of States to render assistance to persons in distress at sea is an enshrined principle of maritime law. Article 98 of UNCLOS requires every coastal State to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements, to co-operate with neighbouring states for this purpose. The detail of

coastlines, those with a large coverage area for search and rescue operations and those located on major shipping routes, would be otherwise particularly affected.

8. The responsibility of flag States – Flag States are of course bound by the dictates of international maritime law, but in practice responsibilities can be difficult to locate given the distinction between those vessels that have a clear relationship to the flag under which they sail and those operating under the open registry system - so called *flags of convenience*.<sup>130</sup> Flag State responsibility has been invoked partly on the basis of the vessel being considered a “floating extension” of the State in question, which is problematic as regards *flags of convenience*. While this position may not have a firm legal grounding, it seems to have contributed to the practice of attributing certain responsibilities to flag States and/or the commercial vessels operating under their authority. For example, with regard to the treatment of stowaways, a practice has evolved which holds ship owners largely responsible for any stowaways found aboard their vessels.<sup>131</sup>

9. The nature of flag State responsibility is also affected by the distinction between commercial vessels and vessels owned or operated by a government and used only on government non-commercial service. Such *State vessels* include, *inter alia*, naval vessels, coast guard vessels and national lifeboats specifically tasked with search and rescue operations. Where such vessels engage in rescue operations within territorial waters, the responsibility for those rescued would devolve on that State. This may arguably be the case even where such scenarios occur on the high seas, particularly if the rescue occurs in the context of interception measures.

10. The roles and responsibilities of international agencies and the international community as a whole – International agencies, such as the International Maritime Organisation (IMO), UNHCR and the International Organisation for Migration (IOM) have specific but differing responsibilities towards persons rescued-at-sea. IMO has the widest and most direct set of responsibilities. It oversees the development of international maritime law, with emphasis on safety aspects, providing technical advice and assistance to States to ensure that they respect their obligations. UNHCR

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search and rescue obligations is to be found in SAR, which defines rescue as involving not only the retrieving of persons in distress and the provision of initial medical care but also their delivery to a place of safety. The SAR Convention expands further on the technical obligations of States vis-à-vis rescue operations but without specifically mentioning the question of disembarkation or landing of those rescued.

<sup>130</sup> In relation to flag States, Article 6 of the Convention on the High Seas, 1958, states: “*Ships shall sail under the flag of one State only and save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.*” In addition and more specifically on the point of non-commercial vessels, Article 9 of the same Convention states that, “*Ships owned or operated by a State and used only on government non commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.*”

<sup>131</sup> Despite efforts to promote shared responsibilities for resolving the problem of stowaways, as exemplified by the development of IMO *Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases* (under the auspices of the FAL Committee/Convention of the Facilitation of Maritime Traffic), practice continues to focus on the responsibilities of the shipping companies, including to the extent of obliging them to re-assume responsibility for those stowaways disembarked and considered under national asylum systems but whose cases are ultimately rejected. It is worth noting that the Guidelines were developed to fill the gaps resulting from the fact that the 1957 International Convention Relating to Stowaways has yet to enter into force.

has a specific responsibility to guide and assist states and other actors on the treatment of asylum-seekers and refugees found at sea and to monitor compliance with refugee protection responsibilities in such scenarios.<sup>132</sup> IOM plays a specific role regarding the needs of migrants at sea, as part of its broader mandate to address issues related to migration. The international community as a whole has a responsibility in terms of developing appropriate responsibility-sharing mechanisms involving States and other actors in order to ensure appropriate responses to the array of scenarios involving migrants, asylum-seekers, refugees and others facing difficulties at sea. Responsibilities assumed by the international community extend not only to response measures but also include preventative actions.<sup>133</sup>

*Delivery to a place of safety*

11. The obligation to come to the aid of those in peril at sea is beyond doubt. There is however, a lack of clarity, and possibly lacunae, in international maritime law when it comes to determining the steps that follow once a vessel has taken people on board.

12. The SAR definition of rescue<sup>134</sup> implies disembarkation since the requirement of delivery to a place of safety cannot be considered to be met by maintaining people on board the rescuing vessel indefinitely. Neither SAR nor other international instruments elaborate, however, on the criteria for disembarkation. Recent discussions at IMO fora have also highlighted the lack of clarity on this issue. Faced with this gap in the law, UNHCR has consistently argued for prompt disembarkation at the next port of call.<sup>135</sup>

13. The effectiveness of the international search and rescue regime rests on the swift and predictable action of all actors. This however, poses a particular challenge where it transpires that there are asylum-seekers and refugees among those rescued. In such instances, States have questioned the extent of their responsibilities and have delayed, and even blocked, disembarkation, arguing that this would result in a strain on their asylum systems, encourage irregular movement and even contribute to smuggling operations. These concerns are valid and need to be fully reflected in the design of an international co-operative framework to deal with the situation of asylum-seekers rescued at sea.

14. From the perspective of the master, the security of his vessel and the health and safety of those aboard are of paramount concern. Existing guidelines and procedures

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<sup>132</sup> For further detail on the competence of UNHCR please refer to Annex 1, *Background Note; Concerning the Competence of the United Nations High Commissioner for Refugees (UNHCR), in relation to rescue-at-sea matters*, as distributed to the participants in COMSAR 6, Working Group 1, during the Committee session held in London, 18 to 20 February 2002.

<sup>133</sup> See for example the Preamble to the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, 2000*, which acknowledges the need to strengthen international co-operation in order to address the root causes of migration.

<sup>134</sup> Described in the Annex, Chapter 1, paragraph 1.3.2 as, “an operation to retrieve persons in distress, provide for their medical or other needs, and deliver them to a place of safety”.

<sup>135</sup> The term “next port of call” is nowhere mentioned in international maritime law in connection with rescue-at-sea but has been used in this context by UNHCR’s Executive Committee in a number of its Conclusions on the subject.



rarely take sufficient account of the potential for danger if the ship were prevented from proceeding immediately to the first appropriate port of call.

Health and safety concerns include:

- insufficient water and provisions for the number of people on board;
- insufficient medical care for the number of people on board;
- medical emergencies at sea;
- exceeding the number of persons legally permitted to be on board;
- insufficient life-saving equipment for the number of people on board;
- insufficient accommodation for the number of people on board;
- risk to the safety of both crew and passengers if the persons taken on board display aggressive or violent behaviour or threaten to do so.

15. From UNHCR's perspective, the pressing humanitarian challenge in any rescue situation is to ensure an immediate life-saving solution for the plight of severely traumatised persons, without an over-emphasis on legal and practical barriers. It is crucial that ship masters are actively facilitated in their efforts to save lives, confident that safe and timely disembarkation will be guaranteed.

16. In consequence, there are a number of factors, which come into play when considering the question of disembarkation or landing of rescued persons and in particular of asylum-seekers and refugees. These include; i) legal obligations; ii) practical, security and humanitarian concerns; and iii) commercial interests. On occasion, these differing considerations may be perceived as competing or conflicting interests and there is a need for a deeper analysis of the interplay between them. UNHCR believes that guidance on formulating the most appropriate responses can be found in an analysis of the interface between international maritime law and other relevant bodies of international law and practice, and in particular the dictates of international refugee law.

## B. International refugee law<sup>136</sup>

17. International maritime law assumes that the nationality and status of the individual are of no relevance vis-à-vis the obligation to rescue.<sup>137</sup> By contrast, international refugee law is premised on the understanding that a person has a well founded fear of persecution, on specific grounds, before he or she can avail of international protection. Clarification of status is therefore crucial in the refugee context to determine obligations owed to the refugee. It is clear that a ship master is not the competent authority to determine the status of those who fall under his temporary care after a rescue operation. Ensuring prompt access to fair and efficient asylum procedures is

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<sup>136</sup> The main body of international refugee law, comprised of the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and numerous Conclusions of the Executive Committee of UNHCR (EXCOM Conclusions), is further complemented by international human rights law. Much of the emphasis of international refugee law is placed on the identification of those who meet the definition of a refugee contained in Article 1 A(2) of the 1951 Convention and thus benefit from international protection. Please note that Article 11 of the 1951 Convention makes explicit reference to refugee seamen. See p. 82 of *Convention Relating to the Status of Refugees; Its History, Contents, and Interpretation, a Commentary by Nehemiah Robinson*, republished by UNHCR in 1997, for further information on the rationale behind this provision and the obligations it imposes on flag States. The 1957 Hague Agreement Relating to Refugee Seamen further elaborates on these specific obligations.

<sup>137</sup> As specified for example in the Annex, Chapter 2, paragraph 2.1.10 of the SAR Convention.

therefore key to ensuring the adequate protection of asylum-seekers and refugees amongst those rescued.

18. State responsibility under international refugee law, and in particular the 1951 Convention relating to the Status of Refugees, is activated once it becomes clear that there are asylum-seekers among those rescued. Consistent with the object and purpose of the 1951 Convention and its underlying regime, the responsibilities of States to ensure admission, at least on a temporary basis, and to provide for access to asylum procedures have been elaborated upon in a number of Executive Committee Conclusions of UNHCR's Programme (EXCOM Conclusions).

Whilst not exhaustive, these include:

- EXCOM Conclusion No. 22 (1981), Part II A, para. 2 states: "In all cases the fundamental principle of *non-refoulement*, including - non-rejection at the frontier - must be scrupulously observed."
- EXCOM Conclusion No. 82 (1997), para. d, (iii) reiterates: "The need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs"
- EXCOM Conclusion No. 85 (1998), para. q: "... reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining status and protection needs."

19. The 1951 Convention defines those on whom it confers protection and establishes key principles such as non-penalisation for illegal entry and *non-refoulement*.<sup>138</sup> It does not, however, set out specific procedures for the determination of refugee status as such. Despite this it is clearly understood and accepted by States that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention.<sup>139</sup> States require such procedures to identify those who should benefit from international protection under the 1951 Convention, and those who should not.

20. The principle of access to fair and efficient procedures is equally applicable in the case of asylum-seekers and refugees rescued at sea. The reasons motivating their flight and the circumstances of their rescue frequently result in severe trauma for the persons concerned. In UNHCR's view, this provides added impetus for prompt disembarkation followed by access to procedures to determine their status. Achieving this objective requires clarity on a number of key issues, including: i) the identification of asylum-seekers among those rescued, as well as, ii) the determination of the State responsible under international refugee law for admission and processing of the asylum-seekers.

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<sup>138</sup> 1951 Convention Relating to the Status of Refugees, Articles, 1, 31 and 33.

<sup>139</sup> See, EXCOM Conclusion No. 81 (XLVII) 1997, para. (F) (A/AC.96/895, para 18); EXCOM Conclusion No. 82 (XLVIII) 1997 para. (d)(iii) (A/AC/96/895); EXCOM Conclusion No 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3). It should be noted that in mass influx situations, access to individual procedures may not prove practicable and other responses may be required.

### *The identification of asylum-seekers*

21. As regards the first question, at a land border, the identification of an asylum-seeker usually occurs through the lodging of an asylum request with the competent State authorities. This may be done by a formal written application or verbally, to the border authorities at the point of entry. In the case of rescue-at-sea, the mechanism of lodging an asylum application is unclear.

22. While the legal regime applicable on board ship is that of the flag State, this does not mean that *all* administrative procedures of the flag State would be available and applicable in such situations. The master will not be aware of the nationality or status of the persons in distress and cannot reasonably be expected to assume any responsibilities beyond rescue. The identification of asylum-seekers and the determination of their status is the responsibility of State officials adequately trained for that task.

23. In UNHCR's view, the identification and subsequent processing of asylum-seekers is an activity most appropriately carried out on dry land. Onboard processing, both in the form of initial screening and more comprehensive determination, has been attempted in past refugee crises. It proved problematic in various respects, including *inter alia*, ensuring adequate access to translators, safeguarding the privacy of the interviews carried out under difficult conditions on board ship, ensuring access to appropriate counsel and providing appropriate appeal mechanisms.

24. Onboard processing may be appropriate in some limited instances depending on the number and conditions of the persons involved, the facilities on the vessel and its physical location. It would, however, be impractical for situations involving large numbers of people or where their physical and mental state is not conducive to immediate processing. Onboard processing is inappropriate where the rescued persons are aboard a commercial vessel. The first priority in most instances remains prompt and safe disembarkation followed by access to fair and efficient asylum procedures. An effective response to the challenge of properly identifying asylum seekers should therefore acknowledge that the status of the rescued persons is best determined by the appropriate authorities after disembarkation.

### *Determination of the State responsible under international refugee law*

25. This raises the question of determining the State responsible under international refugee law for admitting the asylum-seekers (at least on a temporary basis) and ensuring access to asylum procedures. International refugee law, read in conjunction with international maritime law, suggests that this is generally the State where disembarkation or landing occurs. This will normally be a coastal State in the immediate vicinity of the rescue.

26. The flag State could also have primary responsibility under certain circumstances. Where it is clear that those rescued intended to request asylum from the flag State, that State could be said to be responsible for responding to the request and providing access to its national asylum procedure. In the event that the number of persons rescued is small, it might be reasonable for them to remain on the vessel until they can be disembarked on the territory of the flag State. Alternatively, circumstances might

necessitate disembarkation in a third State as a transitional measure without that State assuming any responsibility to receive and process applications. Arguably, and even on the high seas, the responsibility accruing to the flag State would be stronger still, where the rescue operation occurs in the context of interception measures. The cumulative effect of the original intended destination and the deliberate intervention of the State to prevent the asylum-seeker from reaching the final destination underpins such an argument.<sup>140</sup>

27. The Executive Committee of UNHCR has formulated a number of Conclusions in relation to rescue-at-sea emphasising the question of disembarkation and admission. These Conclusions reflect the experience of the 1980s, which was characterised by serious concerns that refusals to permit disembarkation, especially if only requested on a temporary basis, would have the effect of discouraging rescue-at-sea and undermining other international obligations. Whilst the current situation is not as acute as that faced during the 1980s, there are similarities and now, as then, lives are at risk. The underlying need to uphold the obligation to rescue in full compliance with the consequent obligations that arise under international refugee law remains paramount.

28. The most salient guidance from EXCOM Conclusions includes the following:

- EXCOM Conclusion No. 14 (1979), para. c, notes as a matter of concern: “...that refugees had been rejected at the frontier... in disregard of the principle of *non-refoulement* and that refugees, arriving by sea had been refused even temporary asylum with resulting danger to their lives....”
- EXCOM Conclusion No. 15, (1979) para. c, states: “It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.”
- EXCOM Conclusion No.23, (1981) para. 3 states “In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities.”

29. In summary, the Executive Committee pronouncements, taken in conjunction with the obligation under international maritime law to ensure delivery to a place of safety, call upon coastal States to allow disembarkation of rescued asylum-seekers at the next port of call.<sup>141</sup>

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<sup>140</sup> EXCOM Conclusion No. 15 (XXX) of 1979 states, *inter alia*, “The intentions of the asylumseeker as regards the country in which he wishes to request asylum should as far as possible be taken into account.” This does not imply an unfettered right of asylum-seekers to pick and choose at will the country in which they intend to request asylum. Rather the reference is framed in the context of situations involving individual asylum-seekers and is but one of a number of criteria. It does, however, provide guidance as to how to address the problem of refugees without an asylum country.

<sup>141</sup> As previously noted, the term “next port of call” in connection with disembarkation or landing of rescued persons is unknown as such to maritime law but rather results from EXCOM Conclusions.

“Next port of call”

30. Since the “next port of call” with reference to the disembarkation of rescued persons is nowhere clearly defined, there are a number of possibilities, which would need to be further explored to clarify this concept. In many instances, especially when large numbers of rescued persons are involved, it will in effect be the nearest port in terms of geographical proximity given the overriding safety concerns. Under certain circumstances, it is also possible to conceive the port of embarkation as the appropriate place to effect disembarkation, arising from the responsibility of the country of embarkation to prevent un-seaworthy vessels from leaving its territory. Another option would be the next scheduled port of call. This would be appropriate, for instance, in cases where the number of people rescued is small and the safety of the vessel and those on board is not endangered nor likely to necessitate a deviation from its intended course. There may be instances where the next port of call may not be the closest one but rather the one best equipped for the purposes of receiving traumatised and injured victims and subsequently processing any asylum applications. In other situations, involving State vessels intercepting illegal migrants, the nearest port of that State could be regarded as the most appropriate port for disembarkation purposes. From a safety and humanitarian perspective, ensuring the safety and dignity of those rescued and of the crew, must be the overriding consideration in determining the point of disembarkation.

31. With due regard to all of these considerations the development of criteria that help to define the most appropriate port for disembarkation purposes will be informed by the following factors:

- the legal obligations of States under international maritime law and international refugee law;
- the pressing safety and humanitarian concerns of those rescued;
- the safety concerns of the rescuing vessel and the crew;
- the number of persons rescued and the consequent need to ensure prompt disembarkation;
- the technical suitability of the port in question to allow for disembarkation;
- the need to avoid disembarkation in the country of origin for those alleging a well founded fear of persecution;
- the financial implications and liability of shipping companies engaged in undertaking rescue operations.

### C. International human rights law

32. International human rights law also contains important standards in relation to those in distress and rescued at sea. The safe and humane treatment of all persons rescued regardless of their legal status or the circumstances in which they were rescued is of paramount importance. Basic principles such as the protection of the

right to life, freedom from cruel, inhuman or degrading treatment and respect for family unity by not separating those rescued must be upheld at all times.<sup>142</sup>

#### D. International criminal law

33. Questions of international criminal law arise where the rescue operation is necessitated as a consequence of smuggling operations. People smuggling may indeed be a factor when large numbers of persons are found on poorly equipped and unseaworthy vessels, flouting the basic standards of maritime safety. Combating this crime is a matter of concern for States world-wide, alarmed by its scale and scope and the huge profits generated from it.

34. The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, while not yet in force, constitutes the most comprehensive legal instrument, to date, covering smuggling of persons.<sup>143</sup> Under the Protocol, the fact that migrants, including asylum-seekers and refugees, were smuggled does not deprive them of any rights as regards access to protection and assistance measures. In the context of rescue-at-sea, it is crucial that the rights of those rescued are not unduly restricted as a result of actions designed to tackle the crime of people smuggling. Criminal liability falls squarely upon the smugglers and not on the unwitting users of their services.

35. With respect to the special circumstances of asylum-seekers and refugees, it should be noted that the Protocol contains a general saving clause in its Article 19 to ensure compatibility with obligations under international refugee law.<sup>144</sup> It is clear from the formulation of Article 19 that there is no inherent conflict between the standards set by the international law to combat crimes and those contained in international refugee law. Combating crime does not mean a diminution of the rights of asylum-seekers and refugees.

### III. The international co-operative framework

36. Given the complexity of rescue-at-sea situations, not least due to the involvement of different actors and sets of responsibilities, there is a need for an effective international co-operative framework in this area. The overriding objective of such a framework is to develop responses defining responsibilities in a manner that can be activated without undue delay.

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<sup>142</sup> For further discussion of the applicable human rights standards please see *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/01/17, the contents of which can be considered to apply *mutatis mutandis* in rescue situations.

<sup>143</sup> Article 16(1) obliges States to take “*all appropriate measures ... to preserve and protect the rights of persons*” who have been the object of smuggling, “*in particular the right to life and the right not to be subjected to torture or other cruel, inhuman, or degrading treatment, or punishment.*” In addition, according to Article 16(3), States should “*afford appropriate assistance to migrants whose lives and safety are endangered*” by reason of being smuggled. In applying the provisions of Article 16, States are required in its paragraph 4 to take into account the special needs of women and children.

<sup>144</sup> Article 19 states that “*nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.*”

## A. Past practice and current challenges

37. A brief examination of past practices provides some guidance as to the type of arrangements, which may be required to face current challenges.

- The crisis of the Vietnamese boat people prompted specialised response mechanisms to support rescue efforts and the subsequent search for durable solutions. The most important of these were the Disembarkation Resettlement Offers Scheme (DISERO) and the Rescue-at-Sea Resettlement Offers Scheme (RASRO).<sup>145</sup> Both schemes provide an indication of the level of State co-operation required to secure effective response mechanisms
- The constituent elements of both schemes included:
  - agreement of the coastal States to allow disembarkation
  - agreement of the coastal States to provide temporary refuge
  - open-ended guarantees from contributing third States that those rescued would be resettled elsewhere.

38. Eventually however, both DISERO and RASRO were terminated as the guarantee that any Vietnamese rescued at sea would be resettled within 90 days did not square with the 1989 Comprehensive Plan of Action guidelines. These required that all new arrivals undergo screening to determine their status. Countries in the region became increasingly unwilling to disembark rescued boat people, fearing that resettlement guarantees would not be forthcoming.

39. Any consideration of mechanisms akin to DISERO and RASRO in the current context will need to take account of the fact that the vast majority of those rescued were considered *prima facie* refugees, in direct flight from their place of origin. Today's situation is characterised by complex movements and mixed flows where the refugee status of those involved must be carefully determined.<sup>146</sup> The composite nature of today's movements, coupled with more restrictive asylum practices generally, compounds the difficulty of agreeing on policies and standards for the processing of asylum applications of persons rescued at sea.

## B. Elements of an international framework

40. Against this background, it is suggested here to explore an international framework, the goals of which would generally be the following:

- Support for the international search and rescue regime;
- Easing the burden on States of disembarkation;

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<sup>145</sup> Article 19 states that “*nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.*”

<sup>146</sup> Most of the migratory flows which have given rise to the current debate on rescue-at-sea are characterised as mixed. This should not, however, be taken to exclude the possibility of *prima facie* recognition in the event of a massive outflow by sea directly from a country of origin, similar to that of the Vietnamese in the 1980s. In such a scenario individual refugee status determination would be impractical and response mechanisms would need to be tailored accordingly.

- An equitable responsibility sharing approach to the determination of refugee status and international protection needs of those rescued;<sup>147</sup>
- An equitable responsibility sharing approach to the realisation of durable solutions to meet international protection needs;<sup>148</sup>
- Agreed re-admission and strengthened assistance, financial and otherwise, to first countries of asylum;
- Agreement by countries of origin to accept the return of their nationals determined, after access to fair and efficient asylum procedures, not to be in need of international protection.

41. In order to ensure the effectiveness of an international framework the roles and responsibilities of numerous actors would have to be clarified. The principal actors involved would include:

- The asylum-seekers and refugees;
- Countries of origin;
- Countries of first asylum;
- Countries of transit;
- Countries of embarkation;
- Countries of disembarkation;
- Flag States;
- Coastal States;
- Resettlement countries;
- The donor community;
- International organisations, notably UNHCR, IMO and IOM.

42. From UNHCR's perspective the main concerns at stake which involve issues of refugee law, include:

- The right to seek and enjoy asylum;
- *Non-refoulement*;
- Access to fair and efficient asylum procedures;
- Conditions of treatment;
- Appropriate balance between State responsibilities and that of international organisations;
- Safe return to first countries of asylum;
- Durable solutions for those recognised as refugees;
- Orderly and humane return of persons determined not to be in need of international protection.

43. A workable framework will also need to take due account of the broader context,

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<sup>147</sup> This could, for instance, include stand-by arrangements to assist states in processing asylum applications, when the number of rescued asylum-seekers overwhelms the capacity of the individual asylum system at the point of disembarkation. This could mean the dispatch of additional asylum officers from third countries, transfer arrangements for the processing of cases and capacity-building measures to strengthen protection and assistance. Potential distribution mechanisms in the immediately affected region, based on pre-arranged quotas and criteria, could play a positive role in facilitating such arrangements.

<sup>148</sup> Specific resettlement pools for rescue-at-sea situations could, for instance, be created. This would require the activation of emergency mechanisms to deal with especially pressing cases.



including the following factors:

- The impact on smuggling and irregular movement;
- Interception practices;
- The adverse impact of exporting condoned practices;
- Appropriate responsibility sharing vs. individual State responsibility;
- The impact on resettlement policy;
- The challenge of dealing with cases found not to be in need of international protection.

44. In addition, the importance of preventative measures should not be overlooked. Many concrete steps can be taken to discourage people from risking dangerous sea voyages. Public information campaigns, actions to prevent the departure of un-seaworthy vessels, and stringent criminal law enforcement measures directed against smugglers are features of such measures.

45. Finally, certain information needs need to be met. These include: i) measures to fill existing information gaps on the scale and scope of the problem; ii) measures to compile and analyse the existing legislative norms in a more detailed fashion, including recommendations for amendments where these prove necessary; iii) an open and transparent exchange of information on current practices in order to identify good state practice, and; iv) the development of a comprehensive information strategy designed to inform public opinion on problems related to rescue-at-sea, especially on the rights and obligations of those involved.

#### **IV. Concluding observations**

46. It is hoped that this Background Note helps to stimulate a discussion on how to address complex rescue-at-sea situations involving asylum-seekers and refugees.

**Office of the United Nations High Commissioner for Refugees (UNHCR)  
18 March 2002<sup>149</sup>**

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<sup>149</sup> Final version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, held in Lisbon, Portugal on 25-26 March, 2002.