

NGO Background paper on the Refugee and Migration Interface

Co-authored by Human Rights Watch, International Catholic Migration Committee, and the World Council of Churches, and in consultation with other NGOs.

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This paper presents the views of several NGOs on the asylum migration interface. We believe that the Global Consultations on International Protection should be used to:

- further the international human rights and protection of migrants, asylum seekers and refugees
- reaffirm the centrality of the 1951 Refugee Convention and 1967 Protocol and the institution of asylum
- promote a positive migration system that acknowledges the contribution that migrants and refugees make to communities and upholds their rights.

We are concerned by the heavy emphasis in the paper prepared by the International Organization on Migration and UNHCR for the Global Consultations discussion on the asylum/migration interface on migration *control* mechanisms, rather than *protection* strategies for refugees and migrants alike, from an international human rights perspective. In addition, we would welcome the inclusion of the Office of the High Commissioner for Human Rights, and in particular the Special Rapporteur on the Human Rights of Migrants, in any discussion on the rights of refugees, asylum seekers, and migrants.

Why Are People Moving?

According to the IOM's 2000 World Migration Report, 150 million international migrants were living outside their countries of birth last year. The report states that: "They came to their new countries to work, study, join family members, or escape persecution or violence in their home countries."

There are several key factors that drive people to move. These include:

- The growing inequalities in wealth between and within countries
- War, conflict and systemic persecution, discrimination and violence
- Environmental natural and man-made disasters and lack of access to natural resources
- Family reunification and joining diaspora communities
- Search for better economic prospects

Sometimes the motivations for migration are mixed. In countries like Afghanistan, Somalia, Iraq, Burma and Turkey, people have fled from situations of economic and social deprivation and discrimination, as well as abuses of their civil and political rights. Distinguishing between motivating factors for migration and flight can be very difficult in such cases. This Global Consultation discussion should focus on those groups who fall outside conventional migration/ refugee categories.

Over the past decades the nature and context of migration has changed. This is due to several factors including:

- Changes in geo-political alliances in the context of the post Cold War era
- Globalisation
- Increasing access to global communication and travel

While the cornerstone of globalisation has been the increased international flow of trade, capital, information, and services, the right to freedom of movement for many people – especially poor migrants, refugees and asylum seekers – has been severely curtailed.

Governments in both the North and South have become more active in trying to limit the movement of people into their territories. But in spite of governmental efforts to control migration, international migration – particularly irregular migration --continues to rise. Indications are that in our globalising world, the pressures for migration will further increase in the years to come.

People leaving their home countries because of violations of their economic and social rights have generally not been granted the same level of protection as those fleeing violations of their civil and political rights. The denial of civil and political rights is considered as a “violation”, while the denial of economic and social rights is generally viewed as an “injustice.”¹ It is important to recognize however that under the 1951 Refugee Convention, persons fleeing violations of their economic, social and cultural rights (for a Convention reason) are entitled to be recognized as refugees, where that treatment amounts to persecution.

Until the international community is prepared to tackle the fundamental causes of violence and inequality, migration will continue.

The conference room paper prepared by UNHCR and IOM for the Global Consultations discussion on the asylum/ migration interface, does not give sufficient recognition to the complex factors that cause the flight of migrants and refugees, or to the need to address root causes as part of a positive and comprehensive strategy to protect the rights of migrants and refugees.

All refugees and migrants have rights

The migration and asylum nexus interface needs to be addressed from a rights-based perspective. The basic human rights of people who leave their countries cannot be abrogated.

¹ See, “Composite Flows and the Relationship to Refugee Outflows, including Return of persons not in need of international protection, as well as facilitation of return in its global dimension,” in UNHCR Standing Committee, 12th meeting: (EC/48/SC/CRP.29).

All human beings have inalienable rights, provided for in internationally recognized human rights standards, irrespective of their status, nationality, or country they find themselves in. These include:

- right to life
- not to be subject to torture
- not to be held in slavery or servitude
- right to liberty and not to be arbitrarily detained
- security of persons

In addition, foreigners enjoy a number of rights enjoyed by nationals,² including the right to move, to leave one's country, to return to one's country. Basic rights guarantees apply to all persons no matter where they are.

Once inside a country, undocumented migrants enjoy a certain level of human rights protection, including.

- right to compensation for human rights and labour violations
- right to emergency health care
- right to education for children

Migrants legally residing in a country often enjoy the same rights as nationals in every respect with the exception of political participation (ICCPR Art. 15.) These rights include:

- equality before the courts
- protection against discrimination
- protection against arbitrary expulsion
- the right to a fair trial
- the right to family reunion
- the right to work
- the rights to freedom of expression, association and peaceful assembly

- the right to marry
- the right to housing
- the right to a nationality
- the right to education.

The one over-arching human rights instrument specifically focusing on migrants -- the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families -- has yet to come into force.³

In addition to the rights afforded to all migrants, those in need of protection from persecution or well-founded persecution because of race, religion, nationality, membership in a social group or political opinion are given additional rights by the international community. The 1948 Universal Declaration of Human Rights says, “everyone has the right to seek and to enjoy in other countries asylum from persecution” (art. 14). Signatories to the 1951 Geneva Convention on the Status of Refugees have agreed to the principle of *non-refoulement* - that is to uphold the right of people not to be returned to countries where their lives may be in danger. Governments that are party to other instruments, such as the 1966 International Covenant on Civil and Political Rights and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, also agree to this principle under Article 7 and 3 respectively. The prohibition against torture is a peremptory norm of international law and applies to all states. The right to seek and obtain asylum is a fundamental right. It must take precedence over State concern about migration control.

There is no consolidated international regime or designated agency to protect the rights of migrants, neither is there an international consensus on the responsibility of states to respond to migration in an agreed-upon and rights-respecting manner. The International Organization for Migration has a mandate to facilitate orderly migration, but it does not have a mandate to protect the rights of migrants. Given the complex interface between asylum and migration both in terms of the mixed movements of people, and the impact of governmental migration and

² See Human Rights Committee General Comment 15: The position of Aliens under the Covenant.

³ The Convention has been ratified or acceded to by 16 States: Azerbaijan, Bolivia, Bosnia and Herzegovina, Cape Verde, Colombia, Egypt, Ghana, Guinea, Mexico, Morocco, the Philippines, Senegal, Seychelles, Sri Lanka, Uganda and Uruguay. In addition it had been signed by Bangladesh, Chile, Comoros, Guatemala, Guinea-Bissau, Paraguay, Sao Tome and Principe, Sierra Leone, Tajikistan and Turkey. The Convention needs 20 ratifications to come into force.

asylum policies, this is a gap that should be addressed in the context of the Global Consultations.

Asylum seekers and migrants: the "grey areas"

The paper prepared by UNHCR and the International Organization for Migration (IOM) for the Global Consultations discussion on asylum and migration states that "persons who do not qualify for international protection may resort to asylum channels in the hope of gaining either temporary or permanent stay abroad." It is useful to note that UNHCR itself has recognized that "an orderly migration programme that meets the interests of receiving States and the migrants could ease the current pressure placed on asylum systems by persons not in need of international protection"⁴

In addition, however, the UNHCR/ IOM paper does not give sufficient attention to the fact that large numbers of individuals considered to be "undocumented migrants", or persons not in need of international protection, may in fact have valid asylum claims but are choosing not to avail themselves of existing asylum determination procedures or do not have access to file an asylum claim. The reasons for this are various and include:

- they may fear making themselves known to the authorities;
- they may be denied access to determination procedures, usually by untrained border police or as a matter of policy;
- they may not understand the asylum procedures and lack access to legal counsel;
- the countries in which they reside may lack a refugee legal regime and effective refugee status determination procedures;
- they know that generally only a fraction of all asylum applications are granted and decide they have a better chance of remaining in-country if they remain outside the official system;
- they may not be able to abide extended determination procedures (lasting several months up to several years in some countries);
- they may fear being detained pending determination and treated like criminals in police stations, local jails, prisons or "special" detention facilities for asylum-seekers;

⁴ Discussion paper: reconciling migration control and refugee protection in the European Union -

- they may find themselves in a situation where the only way out of detention is to return to their country of origin;
- they may have disabilities and fear that they will not be considered as admissible;
- they may have passed through a so-called “safe third country” and know that they will be required to apply in that country;
- they may know or believe that a particular country does not favour – usually for political reasons – granting refugee status to nationals from their country;
- they may be rejected asylum-seekers who have not had access to a fair and efficient determination proceeding or have been rejected based on restrictive interpretations of the 1951 Refugee Convention.

In these instances, persons with valid asylum claims and in need of protection from persecution are at risk of being detained and deported without due consideration of their asylum claims.

Trafficking in persons and smuggling of migrants⁵

The convergence of growing economic disparity, continuing civil conflict and human rights violations and increased access to global communications and transport networks over the past two decades has led to a significant increase in the numbers of migrants and asylum seekers coming in industrialized countries. At the same time, in response to domestic labour market trends, Western European governments have closed all legal migration channels. For many people, the only legal way to enter a European country has been via the asylum system.

In response to the perceived abuse of the asylum system by those not in need of protection from persecution, Western governments began to introduce a barrage of restrictive

A UNHCR perspective, October 2000, p. 6.

⁵ The distinction between trafficking and smuggling is an important one. In the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted in November 2000, trafficking in persons is defined as 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. Whereas in the Protocol against Smuggling of Migrants by Land, Air and Sea, smuggling of migrants “shall mean the procurement, in

immigration policies and practices making it increasingly difficult for any migrant or asylum seeker to legally enter their borders. These included:

- visa controls (often imposed for nationals of countries where there is documented systematic persecution and human rights violations, or where there is ongoing civil conflict)
- carrier sanctions imposed on airlines and other carriers
- immigration controls in countries of origin
- interdiction and interceptions policies

In many cases, it is impossible for people fearing persecution from their government to obtain a passport from that government or to approach embassies in search of a visa. Even when people do approach embassies, persons from a growing number of countries will never be able to obtain a visa for the purpose of fleeing persecution. Desperate people will resort to desperate measures. With all other options closed, migrants and asylum seekers have been forced to make use of illegal and dangerous means of entry via sophisticated trafficking and smuggling rings.⁶ Numerous studies, including a recent UNHCR report, have concluded that restrictive entry policies have themselves contributed to the rise in trafficking and smuggling of persons.⁷ The paper prepared by UNHCR and IOM for this session of the Global Consultations does not give due recognition to these findings.

The commentator Jeremy Harding writes that: “Human traffickers are simply vectors of the contempt which exists at the two poles of the asylum seeker’s journey; they take their cue from the attitude of warlords and dictators, on the one hand, and, on the other, of wealthy states whose citizens have come to see generosity as a vice.”⁸

In its study on trafficking and smuggling of refugees, UNHCR also reported that the main nationalities smuggled and trafficked to Europe also have the highest refugee recognition rates by European countries. It states that if the objective of anti-trafficking and anti-smuggling

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.”

⁶ Susan F. Martin, “Global migration trends and asylum,” UNHCR, Working Paper No. 41, April 2001, p. 20.

⁷ Working Paper No. 39: The trafficking and smuggling of refugees: the end game in European asylum policy? John Morrison and Beth Crosland (April 2001)

⁸ Jeremy Harding, The Uninvited: Refugees at the Rich Man’s Gate, 2000.

initiatives is purely to stop such activity without providing other alternatives for refugees to safely reach countries of asylum, states are de facto undermining the very institution of asylum.⁹

Furthermore, the growth of trafficking and smuggling gives rise in the public's mind to a link between illegal behavior and migrants and refugees. This in turn can have a negative impact on asylum determination. Asylum officers may be more likely to reject an asylum application on the basis of means of entry rather than on the substance of the case, without considering the merits of the asylum case.

The trafficking in persons is in and of itself a human rights violation and can create new forms of slavery. Women and children are often the victims of trafficking and their rights are seriously abused. In addition, many people fleeing persecution have been forced to make use of smugglers in their search for asylum. Governmental, regional and international measures to combat trafficking and smuggling have focused exclusively on crime control measures and have often resulted in criminalizing trafficked persons and asylum seekers.

Detention of asylum seekers and migrants

Trafficked persons are often apprehended, detained and deported without any attention to their status as victims of human rights violations. Asylum seekers who make use of smuggling rings to reach their country of destination, or who arrive without valid documents, are also frequently detained and/or punished for their irregular arrival. Governments' emphasis on "crime" and border control often criminalizes the victims while the traffickers and smugglers continue to operate with impunity.

The policy of detaining those who arrive without valid documents criminalizes the act of seeking asylum and entry and contributes to the public view of asylum seekers and migrants as criminals. This association has created a hostile environment for refugees and migrants. As a result, racism and xenophobia are increasingly on the rise in many regions, often fueled

⁹ Ibid.

by an array of anti-immigration and anti-refugee policies on the part of government and resulting negative stereotypes of migrants and refugees in the media.

The paper prepared by UNHCR and IOM for the Global Consultations discussion on asylum and migration does not give adequate attention to the use of administrative detention as a punitive and deterrent policy. As a general rule asylum seekers should not be detained. In this regard, we welcome the decision of the United States of America Supreme Court yesterday, against the indefinite detention of non-nationals who cannot be returned to their own country. In particular, the common practice of detaining asylum seekers who arrive without valid documentation and through irregular channels is in contravention of Article 31 of the 1951 Refugee Convention, which clearly states that refugees who arrive without valid documentation should not be penalized for their illegal entry or presence. The detention of migrants and asylum seekers is often arbitrary and sometimes indefinite without adequate procedural guarantees or opportunities to appeal the decision to detain. Asylum seekers and migrants lack access to legal counsel and representation or full and impartial information about their rights, and specifically about asylum determination procedures. Detention conditions often do not meet internationally accepted standards and asylum seekers and migrants are deprived of their fundamental rights. In some countries asylum seekers and migrants are held in high security detention facilities alongside convicted criminals. These problems affect migrants and asylum seekers alike, and should be addressed as a core part of the Global Consultations discussion on asylum and migration.

Interception and refugee protection safeguards

In the paper prepared for the Global Consultations discussion on asylum and migration, IOM states that “Many States which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic migration laws and policies.”

NGOs do not consider interception to be an effective or acceptable tool of migration policy. We fundamentally reject the practice of interception and interdiction, as it constitutes an arbitrary form of so-called responsibility sharing. Interception and interdiction policies can

result in the refoulement of persons in need of international protection. They can undermine the fundamental right of any individual to freely leave their country, to seek asylum in other countries, and to access full and fair asylum determination procedures. In addition, interception often takes place in areas where there is little or no outside access or monitoring, for example in restricted airport transit zones, on ships at sea, or in remote locations.

We are concerned that given IOM's active involvement in interception programmes – often in situations where UNHCR is not present - it does not have an explicit mandate nor the expertise to identify and protect those in need of international protection. Neither are there adequate safeguards in place to ensure that those in need of refugee protection have access to UNHCR, or the appropriate authorities, and to full and fair refugee status determination procedures.

The conclusions and recommendations and of the Regional Workshop on interception held in Ottawa in May 2001 provide a starting point for further discussion on safeguards for interception in the undesirable event that it does occur. We endorse UNHCR's position that resettlement can be an appropriate solution and effective responsibility mechanism for intercepted persons who are in need of international protection.

However, we do not support the view expressed by UNHCR that the movement of asylum seekers and refugees from countries of first arrival in the absence of “compelling reasons which endanger the physical safety or freedom of refugees” should be considered as “irregular” and should be curtailed. There are many valid reasons why refugees may choose or be compelled to move from their country of first asylum. These include:

- countries of first asylum may lack fair and effective refugee determination procedures and refugees may be at serious risk of either direct or chain refoulement;
- as well as threats to their physical safety and civil and political rights, refugees may also face severe economic and social deprivations in their countries of first asylum, including lack of access to adequate food, water and basic services, health care, education, work, and housing that compel them to move;
- refugees may move from countries of first asylum to join family members or members of their own community, with whom they share a cultural, linguistic and historical affinity. This can often facilitate social integration – a policy that many governments profess to support.

Finally, we support UNHCR's view that direct departure mechanisms, allowing individuals to submit asylum applications in their country of origin, are a complement to and not a substitute for seeking asylum abroad. Unfortunately, some industrialized states are currently proposing programmes that would replace asylum determination procedures for spontaneous arrivals with in-country and regional processing of asylum claims. We concur with UNHCR that such practices would fundamentally undermine the right of all individuals to freely leave their own countries and seek and enjoy asylum abroad. Asylum seekers should enjoy the right to a full and fair determination of their asylum claim, wherever they choose to submit their application.

The return of persons not in need of international protection

NGOs acknowledge that the credibility of the asylum regime does depend, to some extent, on the return of persons who, after a full and fair determination procedure, are found not to be in need of protection, to their countries of origin. Due attention should however be paid to the following concerns:

- the fundamental principle of non-refoulement must be upheld. As a recognized principle of international customary law, even those states that have not ratified the 1951 Refugee Convention are bound by obligations of non-refoulement. In addition, other international human rights instruments, including the 1984 Convention Against Torture, protect against refoulement;
- security conditions in countries of origin. Rejected asylum seekers should not be returned to situations of chronic instability, conflict and violence;
- the impact of large-scale returns on brittle states. Return of rejected asylum seekers should be sustainable. The return of large numbers of people may inadvertently trigger new flows of refugees;
- rejected asylum seekers whose countries of origin can not, or will not, take them back should not be held indefinitely in detention;
- the physical integrity and safety of rejected asylum seekers must be protected during deportation proceedings.

In addition, the return of migrants in an irregular situation should be carried out with due respect to international principles and standards. In light of recent incidents in some Western countries where migrants have suffered serious injuries, and even death, during deportation proceedings, particular attention should be paid to the physical integrity and safety of deported migrants.

We are concerned that given its central role in programmes to facilitate the return of rejected asylum seekers, the IOM should give sufficient attention to the above issues. In particular, we note with concern that in the conference room paper the IOM makes no reference to the fundamental principle of non-refoulement when discussing the factors that guide its involvement in return operations. In addition, there are no guidelines or criteria to indicate how the IOM would determine that return is truly voluntary and to ascertain that rejected asylum seekers have had access to full and fair asylum determination procedures.

Information activities

NGOs support the need for impartial and objective information on asylum and migration. NGOs have an important role to play in this regard. Information campaigns should not be used as deterrent strategies intended to dissuade people from exercising their fundamental rights to freedom of movement, to freely leave their own countries, and to seek and enjoy asylum. Neither should information activities be used to disseminate misleading information about conditions in countries of asylum, as has been observed recently in some industrialized states.

Statistics on migration – refugees, economic migrants, and irregular migrants – are notoriously difficult to collect and verify. Although migration from South to North has increased significantly, most of the world's migration occurs between developing countries. And yet much of the international policy debate focuses on controlling or managing migration from South to North. Moreover, migration is not static, economic migrants in particular may travel back and forth between their home country and their country of migration for work or family reasons. In the Mediterranean area, for example, people speak of “*citoyens des deux rives*” [citizens of both shores.] Often governments report the number of migrants arriving in their countries without reporting the number of departing migrants that leads to a false impression

that their country is being overrun by foreigners. Negative media portrayal of foreigners often is the result of haphazard collection and incomplete analysis of immigration data at the national level.

Recommendations

Causes

- More attention should be devoted to understanding and responding to the factors that force people to leave their communities and countries.
- Regional bodies such as the SADC, the OSCE and the Council of Europe should include root causes of migration in their study processes.
- In particular, the impact of international economic, trade, aid, development, environmental, and defence assistance on migration flows should be examined
- A better understanding of the reasons why people leave their own countries would enable the international community to design strategies to enable people to remain in their own countries, which is the preferred option for many of the world's migrants.

A rights-based perspective

- International organizations, including UNHCR, the International Organization for Migration, NGOs and others should adopt a rights-based approach to migration.
- A rights-based approach - in contrast to the prevailing border control approach – would put the rights of migrants, asylum seekers, and refugees at the centre of the discussion.
- Governments should comply with their obligations under the 1951 Refugee Convention and the 1967 Protocol and should adopt a full and inclusive application of these instruments. Those governments that have not yet done so should accede to and ratify the international and regional refugee protection instruments.
- Governments must protect the basic human rights of all migrants in compliance with their existing treaty obligations and regional commitments

- States should sign and ratify the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
- The Global Consultations should address the need for an effective international agency and regime to protect the rights of migrants.

The right to seek and enjoy asylum

- Asylum is the last resort when all other human rights protections have been exhausted. It can literally mean the difference between life and death. The Global Consultations should ensure that the institution of asylum is strengthened and upheld.
- Current state deterrence practices such as interdiction, interception, visa controls, carrier sanctions and immigration controls in countries of origin are seriously flawed and should be reviewed from the perspective of their impact on potential asylum claimants.

Open migration channels

- Opening legal migration channels protects the rights of migrants to freedom of movement and lessens the possibility that migrants will resort to dangerous means of migrating. Migration policies should be based on transparent and coherent assessments of labour and demographic needs.
- Governments should support the principle that migration plays a positive role in the economic, political, social and cultural development of countries and should develop policies in that framework.

Trafficking in persons and smuggling of migrants

- The link between deterrence policies and the increase in illegal human trafficking and smuggling rings should be seriously examined in the context of the Global Consultations.
- Particular attention should be paid to the gender dimensions of human trafficking and smuggling.
- Governmental, regional and international measures to combat trafficking and smuggling should not focus exclusively on crime control measures. They should also ensure that the

fundamental human rights of trafficked and smuggled persons are upheld, including the right to seek and enjoy asylum.

- Asylum seekers should not be penalized for the way in which they enter a territory. Offences related to having been trafficked or smuggled, including the lack of valid travel documents, should not adversely affect smuggled or trafficked persons' asylum claims.

Detention

- Asylum seekers should not be penalized for the way in which they enter a territory. Offences related to having been trafficked or smuggled, including the lack of valid travel documents, should not be grounds for detention or imprisonment. As a general rule asylum seekers should not be detained.
- In the event that migrants and asylum seekers are detained, it should be an exceptional measure that is imposed in a non-discriminatory manner, for a minimal period and for specified reasons prescribed by law and recognized under international standards.
- Detainees should be informed of the reasons for detention in a language that they understand and should have the opportunity to appeal decisions to detain. Detainees should have access to legal counsel, interpreters, UNHCR, and available NGOs. Detainees should be given full and objective information about asylum determination procedures.
- Detention conditions should meet internationally accepted standards and asylum seekers and migrants who are not criminally convicted or accused should not be detained in facilities alongside convicted criminals.
- The special needs of women and children in detention should be addressed

Interception and refugee protection standards

- One of the outcomes of the Global Consultations should be a clear mechanism to ensure that all actors involved in interception programmes, including states, international governmental organizations, and NGOs are held accountable to the Ottawa principles.

- As well as training for government officials, UNHCR should also provide training for agencies, such as IOM, that are directly involved in interception programmes on applicable standards of international refugee and human rights law and required procedures.
- States should facilitate and encourage access by UNHCR, NGOs and others concerned with protection matters to locations where intercepted persons are held, including airport transit zones
- There is a need for independent and impartial case studies of interception programmes, such as the Indonesia Regional Cooperation Programme, to evaluate the respective roles and obligations of UNHCR and IOM from an international human rights perspective.
- UNHCR should revise its position on “irregular movers” under its Policy on Refugees in Urban Areas.
- Mechanisms that allow individuals to submit asylum applications in their country or region of origin should not be a substitute for the right of any individual to freely leave their own country and seek asylum abroad.

Return of persons not in need of international protection

- The IOM should clarify and publicize its guidelines and criteria for assessing the “voluntariness” of return of irregular migrants and rejected asylum seekers is truly voluntary.
- The IOM should also clarify and publicize its guidelines on how to ascertain that rejected asylum seekers have had access to full and fair asylum determination procedures.
- Rejected asylum seekers should be returned to their countries of origin and not to other countries.
- For security reasons, measures should be taken to avoid returned persons being identified as rejected asylum seekers.
- Returns should be reconsidered for persons with substantial links within the host country (e.g. children)
- Rejected asylum seekers and migrants whose countries of origin cannot, or will not, take them back should not be held indefinitely in detention.
- Blatantly illegal conduct in the context of forcible expulsion should be investigated.
- The guiding principle of non-refoulement must be observed in all return proceedings.

Information activities

- Governments should examine the way they keep statistics and the way their officials use existing statistics.
- Reliable information is needed on the number of migrants and asylum-seekers in detention and the conditions of detention and its duration; and on the number of asylum claims and their outcomes, and the return of rejected asylum seekers.
- States should also provide more comprehensive information and statistics on interception practices.
- Statistics on gender and age of migrants, refugees and asylum-seekers; and on the amount of GNP attributed to migrant labour, should also be collated.

Action group on asylum and migration

- The Action Group on Asylum and Migration, proposed in the UNHCR/ IOM paper, should include other actors involved in protecting the human rights of migrants and refugees, including the Office of the High Commissioner for Human Rights, especially the Special Rapporteur on the Human Rights of Migrants and the Working Group on Arbitrary Detention, national governments, and regional organizations. Given their expertise and involvement with these issues, NGOs, refugees, migrants and other representatives of civil society must be included in policy discussions and the development of programmes to help shape an international system which recognizes the rights and contributions of migrants.

This paper was drafted by: Human Rights Watch, the International Catholic Migration Commission, and the World Council of Churches

With input from:

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British Refugee Council

Churches Commission for Migrants in Europe

Disaster Mitigation Institute (Ahmedabad, India)

Inter-Church Committee for Refugees (Canada)

Jesuit Refugee Service

Lawyers Committee for Human Rights

Lawyers for Human Rights (South Africa)

Medical Foundation for the Care of Victims of Torture (UK)

Parinac West Africa Focal Point, OFADEC

Victoria Foundation for the Survivors of Torture (Australia)

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UNHCR Global Consultations on International Protection

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Annex

Case Studies

These examples raise difficult questions regarding the concept of “irregular movement” and the importance of both ensuring effective protection and preserving the right to seek asylum in whatever country.

Case Study I:

(The following is based on actual facts, although the names have been changed)

Mr. Mahmoud fled Somalia in 1996, seeking protection for himself and his family from inter-clan conflicts taking place in a country without a government. The family originally found their way to Kakuma refugee camp, where they were recognised as refugees, but continued to face inter-clan conflict, not to mention extremely difficult living conditions. During various inter-clan conflicts in the camp, Somali sections of the camp in Kakuma were burned down, incidents in which people were sometimes killed and women raped.

Hearing that South Africa was extending asylum to Somalis, Mahmoud and his family managed to find themselves on a ship departing for Mozambique, and from there found their

way to Johannesburg, where they were soon after granted temporary permits on the basis that their fear of return to Somalia qualified them for refugee status. However, in South Africa Mahmoud became a victim of the rising xenophobia in South Africa, experiencing violent assaults against himself and his family by local people and frequent harassment by police officers identifying him as an *illegal alien*. It was impossible to find a job as a foreigner and the South African government could not provide social assistance, as it was struggling to meet the needs of South Africans. Mahmoud and his family took the decision to move again.

After saving up enough money, and likely using the 'services' of a smuggling operation, Mahmoud managed to make his way to the United States and applied, once again, for refugee status. As a *spontaneous arrival*, Mahmoud was put into an immigrant detention centre and after learning that he had obtained refugee status (and residence) in South Africa, proceedings were taken by the US Immigration Service to remove him to that country. Lawyers became involved, arguing that he was entitled to obtain refugee status in the United States on the grounds that he did not have permanent status elsewhere. An immigration court judge eventually granted Mahmoud and his family refugee status in the United States, where they finally settled.

Case Study 2:

In one country, which has not ratified the 1951 Convention, all persons without valid documents for being in the country are detained until they can be returned to their country of origin or to another country willing to take them. If, in addition, these persons, whether they are asylum seekers or migrants, have used false passports and visas to enter the country, they will be charged with illegal entry, which can lead to a prison sentence of up to three years. After serving the prison sentences, they will go back into detention until they can be returned to their country of origin or to another country willing to take them. In one case, a family with two children was held in detention for 9 years. Both children were born in detention and had never been outside the detention center until they were finally accepted for resettlement by a third country. For years, the government of that country and UNHCR had not been in favour of people being resettled as they considered this a pull factor. In a few cases asylum seekers

have been assisted by local lawyers. In their country cases they have managed to get the punishment significantly reduced by arguing that these persons should not be punished for illegal entry as they have been fleeing persecution in their country of origin. However, most of these people have no legal representation in the courts.

Case Study 3:

During a recent war in 1981 Miki, member of an ethnic minority was pushed across the border without any documents into the enemy country. There he never got permit to stay or to work, but nevertheless managed to survive for a long period of time until the security police tried to recruit him to work for them. He first accepted to work for the security forces, but immediately realised that he could not do such a job. After having declined to work for the security forces he got in trouble. He tried to work as a carpenter – his real profession – but each time he got employment the employer got in trouble for hiring him. In the end after 18 years in that country Miki was forced to leave. In 1998 he fled to his country of origin where he soon realised that without any documents he was not safe there. He purchased a fake passport with a visa for another neighbouring country and went to there, where he stayed for five days until he managed to get a ticket to a third country. Once there, he managed to get a new fake passport. He was arrested in that country on 1 November 1998. He was taken to the embassy of his country of in, which he stayed for 18 years. However, both rejected him – neither of the two countries recognises him as a citizen. He was not allowed to contact UNHCR while in detention in the third country. After four months in the airport in the third country, the immigration police took him to the border, where he was released into the neighbouring country. He managed to get to the capital by car without any documents. There he obtained another fake passport, but was caught for three days overstay on the visa – he was fined. Since he got caught he has been in the immigration detention centre for 8 months. He was told that he could not contact UNHCR – though UNHCR does have a desk in the centre. He tried making every attempt to get out including by writing several letters to UNHCR. Finally after 7 months he did manage to get in contact with UNHCR and has been interviewed with a view to having his status determined. He has been granted irregular mover status – apparently

UNHCR considers the original “enemy” country that he had been pushed into by war as the first country of asylum. However, this country does not accept him.