



**Office of the High Commissioner for Human Rights, in cooperation with the Global Alliance Against Traffic in Women**

**Expert consultation on**

**Human rights at international borders: exploring gaps in policy and practice  
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**Background Paper<sup>1</sup>**

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<sup>1</sup>This paper has been drafted to inform the OHCHR and GAATW expert consultation on Human Rights at International Borders: Exploring Gaps in Policy and Practice by Eleanor Taylor-Nicholson, Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley School of Law with Pia Oberoi, Migration Advisor, Office of the High Commissioner for Human Rights. We are grateful for comments received from a number of experts.

## 1. Introduction

Migration has climbed steadily up the international agenda in recent years as governments have recognised the necessity of multilateral engagement on an issue long thought of as solely a sovereign prerogative.<sup>2</sup> More slowly, these discussions have encompassed the normative framework on migrants' rights.<sup>3</sup> Migrants<sup>4</sup> have been recognized as a group that can be vulnerable to human rights violations and in need of clearly defined protections – they are separated from their country of citizenship and may also face additional social, cultural and political barriers.<sup>5</sup>

This paper addresses a particular aspect of migrant rights that has not yet received in depth attention – human rights at international borders. With some exceptions, much academic and policy work on migrants' rights to date has focused either on the situation and treatment of migrants within the interior of the state, or in relation to claims of international refugee protection at borders. This overview seeks to fill some gaps by considering the treatment of all migrants, regardless of their legal status and including migrants in an irregular situation, before they have gained formal entry to another country<sup>6</sup>, during transit at borders or at the point of screening. It sets out the range of violations that can occur in this period, and then outlines relevant legal frameworks. The aim of this analysis is to identify gaps in law, policy and practice that, if addressed, could protect migrants en route and at borders. To frame the discussion of violations of specific human rights, the paper begins by setting out some of the larger contextual issues that affect the implementation of human rights protections in border regions, and general human rights principles that should govern all state action at international borders.

In most cases the discussion focuses on the treatment of migrants who are undocumented or in an irregular situation. This is not always the case though – individuals who arrive at borders with documents may also experience human rights violations, including arbitrary detention, discrimination and harassment at official entry-points.

Finally, although international law does provide particularly defined standards of protection for certain categories of migrants, such as asylum seekers or trafficked persons, this paper will not

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<sup>2</sup> See UN Department of Economic and Social Affairs, Population Division, *International Migration and Development at the United Nations*, available at <http://www.un.org/esa/population/meetings/tenthcoord2012/International%20migration%20and%20development%20at%20the%20UN.pdf>

<sup>3</sup> In 2003 the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families came into force after more than a decade in limbo, the United Nations General Assembly held a High-Level Dialogue on international migration and development in 2006 (and another is scheduled for 2013), and the inter-governmental Global Forum on Migration and Development (GFMD) will shortly hold its sixth meeting in Mauritius, where the issue of human rights has been a cross-cutting theme in the discussion for the last few years.

<sup>4</sup> For the purposes of this paper, the term “migrant” is defined broadly to mean persons who are outside the territory of the State of which they are nationals or citizens. This could include particular categories of persons who have a more specific definition in international law, including refugees, trafficked persons and others. Where particular categories of people are being considered, this will be made clear in the paper.

<sup>5</sup> See, for instance, the Global Migration Group Joint Principals Statement on the Human Rights of Migrants in an Irregular Situation, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10396&LangID=E>

<sup>6</sup> As the paper will discuss later, the externalisation of international borders has meant that increasingly, migrants are being intercepted or prevented from moving even before they have left their country of origin or transit.

dwell in any detail on categories of persons who are entitled to particular regimes of protection. This is based primarily on the realities of human mobility today and the varied and intricate motivations for movement. Arriving at the border will typically be a wide spectrum of legal categories of people, ranging from asylum seekers and refugees, to trafficked persons, irregular migrants, and regular migrants. Given that migrants will often “shape-change” as they move, passing through varying legal categories during their journey, and sometimes inhabiting multiple spaces at the same time, focusing in detail on any particular category of people would be too limiting for the purposes of this paper.

## **2. Background and Context**

### **A. The notion of the border**

Traditionally understood as lines on a map, borders today are increasingly perceived as regions or zones in their own right. Much writing has been done about borders and border-zones in recent years noting that they have particular cultures, dynamics, trading relationships and contested areas. Individuals who enter a ‘border zone’ – whether migrants or state actors - are said to enter a liminal space, a space between places, where the usual rules of behaviour may or may not apply, and individuals are transformed. At the same time, borders are conceived as frontlines in the wars on irregular migration, and dividing lines between cultures, nationalities and legal systems. Bigo describes the border as a “site of control”, a place where the founding myths of the nation-state are invoked and reified.<sup>7</sup>

The implications of the ‘border-zone’ for human rights policy and implementation are real. Many states have instituted border zones in law. Some such zones, for instance, consist of a 100km area in which procedural rights for migrants are limited. In airports or on islands off the coast of the mainland, spaces have been created in which rights are more restricted than in the interior of the state. It is in these spaces between states, or spaces between legal regimes, that much of the activity of border control – screening, decisions on entry, access to services, or return – takes place.

Where the border zone begins and ends may be as much conceptual as a matter of law or geography. Many destination states have stretched the notion of the border outside of their territory by conducting border patrols in the high seas or establishing immigration control outposts in airports in other states. Others have even described the entire state of Italy as a ‘border-zone’ for Europe.<sup>8</sup>

For the purposes of this paper, therefore, ‘the border’ does not refer strictly to the territorial border, but rather to all activities that take place in the border region or transit-zone, or even further afield, as part of ‘border protection’ measures.

### **B. Border security and border management**

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<sup>7</sup> Didier Bigo, Criminalization of “immigrants”: The side effect of the will to control the frontiers and the sovereign illusion, in B Bogusz et al (ed.) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martin Nijhof, 2004, p. 98.

<sup>8</sup> Francesca Bertin and Elena Fontinari, “Militaryizing the Mediterranean: Enforcing Europe’s Borders has meant Abandoning Some of its Principles”, *IP Journal*, (July 2011), <https://ip-journal.dgap.org/en/ip-journal/regions/militarizing-mediterranean>

"There can be no compromises on border security. In a dangerous world, our border is one of our main protections." (UK Immigration Minister, Damien Green, 14 March 2012)

The special character given to border regions by states is heightened by the larger backdrop of public and political concern about the border as a key front in the fight against irregular migration and the war on terrorism. Discourses of national security, immigration control, and migration management arguably dominate state approaches to international borders, at the same time as migration continues to increase.<sup>9</sup>As Chalfin notes in relation to Ghana's northeast borders, such regions are uniquely "characterized by the extreme mobility of persons and things on the one hand, and extreme state surveillance on the other."<sup>10</sup>

While these concerns may have always been present to some extent, border protection and surveillance has escalated dramatically in recent years spurred by concerns about uncontrolled migration overwhelming destination states, transnational crime, and international terrorism.<sup>11</sup> This has brought not only new interactions between states and non-citizens, but also new technologies, operations and international and bilateral agreements in the name of combating smuggling as well as fighting "illegal immigration". Increasing efforts to control the movement of irregular migrants have led to a plethora of visa restrictions, readmission treaties, carrier sanctions, airline liaison officers, and efforts to link development assistance to promises of controlling the movement of people.

The result is that more migrants take extreme risks to obtain entry, and increasing numbers are dying in the attempt. The Office of the High Commissioner for Human Rights has reported that in the first eight months of 2011, more than 1400 people lost their lives in the sea between North Africa and Europe.<sup>12</sup>Since 1988, one NGO estimates that an astonishing 14,000 or more people have died trying to enter the European Union alone.<sup>13</sup>In other parts of the world, too, from Asia to the Americas, migrants are literally dying to enter other countries. A recent Europol report noted that increasingly tough controls at Europe's external borders have escalated the risks and raised the stakes of movement, forcing migrants into dangerous modes of travel, sometimes in conditions that violate human rights.<sup>14</sup> Insufficient legal opportunities to migrate add to the compulsion of migrants to rely on smugglers to facilitate their journey. Opaque and onerous

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<sup>9</sup> The International Organization for Migration estimates the number of migrants worldwide as 214 million in 2010, up from 150 million in 2000. *IOM Facts and Figures*, <http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en>.

<sup>10</sup> Brenda Chalfin, "Borderzone Trade and the Economic Boundaries of the State in North-East Ghana", *Africa* 71(2), 2001.

<sup>11</sup> The United States for example has increased the number of people patrolling the border between 1990 and 2010 by more than fivefold. In 1992 the figure was just 3,555 agents, whereas in 2010 it was more than 20,000. Spending on border enforcement was \$5 billion in 2002, and by 2010 had more than doubled to almost \$12 billion. A border fence along the entire 652 miles of the border has also been virtually completed. The pattern is similar around the EU, and to some extent Australia and Canada.

<sup>12</sup> See UN Human Rights Council, The situation of migrants and asylum-seekers fleeing recent events in North Africa: Report of the United Nations High Commissioner for Human Rights, 1 September 2011, A/HRC/18/54, available at: <http://www.unhcr.org/refworld/docid/4e7335392.html>.

<sup>13</sup> <http://owni.eu/2011/03/04/app-fortress-europe-a-deadly-exodus/>

<sup>14</sup> "[I]ncreasing control of external borders, the introduction of higher quality travel documents and other protective measures implemented by destination countries are making illegal immigration more difficult for individual migrants, forcing them to seek the services of organised crime groups ... [T]ransiting migrants are frequently exploited in illicit labour, thus marking a point of contact between illegal immigration and trafficking in human beings." Europol, *EU organized crime threat assessment*, The Hague, 28 April 2011.

migration procedures also create the conditions and incentives for migrant to turn to facilitated movement and the services of smugglers.

On the Mexico-US border, tough controls and punitive sanctions against both smugglers and migrants have also made travelling much more dangerous for migrants. One source notes that “Smuggling in decades past was the business of small independent operators who helped migrants cross once they reached the US border. But evading US authorities has become much more difficult with increased border enforcement in recent years. At the same time, Mexico’s migrant routes have become much more dangerous, controlled by drug gangs that see new moneymaking opportunities in kidnapping and extorting those who cross their territory.”<sup>15</sup>

In addition to escalating the risk of movement, the security and border management discourses may have other less tangible impacts on human rights protections. Placing border control within the national security framework allows states to undertake actions that normally would not be countenanced, such as random searches and seizures, highly intrusive physical searches of travellers, surveillance and intelligence operations, collection of personal information and other activities. Harms that result from these measures, directly or indirectly, may be viewed as an unfortunate side effect to national security, rather than a significant human rights concern in their own right. Further, national security concerns limit scrutiny of government operations, the availability of data and other transparency and oversight measures. In this context, the need for implementation and enforcement of human rights obligations and specific guidance in this regard is all the more important.

### 3. Human rights protection of migrants at borders

Very few examples of jurisprudence or expert opinion discuss borders, or human rights in the context of border protection, generally. Among treaty bodies, for example, only the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child have addressed the issue directly.<sup>16</sup> As emerges in the discussion on specific violations in Section 3, however, other guidance from the human rights mechanisms and other expert bodies on relevant aspects of international law, such as detention and *refoulement*, may be applicable to borders.

Further, human rights law has established an overarching framework for discussion of all state action, including human rights at international borders. Human rights law does not generally regulate the immigration policy of states in general, particularly decisions about entry and stay.<sup>17</sup> Nevertheless, the sovereign right of States to control their borders is subject to the

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<sup>15</sup> Associated Press, In Mexico, X-Ray machines expose the growing business of migrant smuggling, 20 May 2011.

<sup>16</sup> CEDAW notes in its General Recommendation on Women Migrant Workers, that “while States are entitled to control their borders and regulate migration, they must do so in full compliance with their obligations as parties to the human rights treaties they have ratified or acceded to. That includes the promotion of safe migration procedures and the obligation to respect, protect and fulfil the human rights of women throughout the migration cycle.” Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 26 on Women Migrant Workers*, CEDAW/C/2009/WP.1/R, 5 (December 2008). See also the Committee on the Rights of the Child, General Comment No. 6, para. 12 (2005), which guarantees protection to children in transit zones or while seeking entry, discussed below.

<sup>17</sup> The Human Rights Committee in General Comment 15 for example, notes, “The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for

obligations voluntarily assumed by States under international human rights law, and other related branches of law such as refugee law, as applicable. There is, for example, a well-established right of all persons to leave any country, including their own, and to return to their own country.<sup>18</sup>

In late 2010 the Global Migration Group, an inter-agency coordination body comprised of 16 UN agencies and other bodies such as IOM and the World Bank, issued a landmark statement that acknowledged the tensions in a human rights approach to borders:

*Too often, States have addressed irregular migration solely through the lens of sovereignty, border security or law enforcement, sometimes driven by hostile domestic constituencies. Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns cannot, and indeed, as a matter of international law do not, trump the obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfil the rights necessary for them to enjoy a life of dignity and security.*<sup>19</sup>

The Human Rights Council and the General Assembly (GA) have also recognized on numerous occasions in recent years the specific vulnerability of irregular migrants, asylum seekers and others and their need for human rights protection.<sup>20</sup>

In 2009, the Durban Review Conference Outcome Document specifically urged States to “prevent the manifestations of racism, racial discrimination, xenophobia and related intolerance in country border areas, in particular vis-à-vis immigrants, refugees and asylum seekers” and in this context encouraged States to implement training for “law enforcement, immigration and border officials, prosecutors and service providers”.<sup>21</sup>

In 2012, the GA resolution on the Protection of Migrants requested States to “adopt concrete measures to prevent the violations of human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, to train public officials who work in those facilities and in border areas to treat migrants respectfully and in accordance with the law, and to prosecute, in conformity with applicable law, any act of violation of the human rights of migrants.”<sup>22</sup>

### **A. Non-discrimination**

A core principle established by international human rights law is that of non-discrimination. The international bill of human rights is unequivocal in extending human rights protection to “all” and

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the State to decide who it will admit to its territory.” ICCPR General Comment 15 (Twenty-seventh session, 1986): The Position of Aliens under the Covenant, A/41/40 (1986) 117.

<sup>18</sup> ICCPR, Article 12(2) and 12(4)

<sup>19</sup> *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation*, Geneva, 30 September 2010, available at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10396&LangID=E>

<sup>20</sup> See for example UN General Assembly, *Resolution, 63/184 Protection of Migrants*, 63rd session, (March 2009); UN General Assembly, *Resolution, 64/166 Protection of Migrants*, 64th session, (March 2010), and UNGA Resolution 65/170 on International Migration and Development, 65<sup>th</sup> Session, (March 2011);

<sup>21</sup> Outcome Document of the Durban Review Conference, para. 75

<sup>22</sup> UN General Assembly, *Resolution, Protection of Migrants*, 66th session, A/RES/66/172, para 4(e)

to “everyone”, with narrow and limited exceptions, such as the enjoyment of political rights or in relation to freedom of movement into the territory of a State.<sup>23</sup> In its General Comment No. 15, the Human Rights Committee makes clear that a foreigner may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.<sup>24</sup> Similarly, the Committee on Economic, Social and Cultural Rights has noted that the ground of nationality is included within the prohibited grounds of discrimination (under “other status”), stating in its General Comment No. 20 that “The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”

Thus international human rights law provides that all persons, without discrimination, must have access to all fundamental human rights provided in the international bill of human rights. Where differential treatment is contemplated, between citizens and non-citizens or between different groups of non-citizens, this must be undertaken for a legitimate objective, and the course of action taken to achieve this objective must be proportionate and reasonable.<sup>25</sup> In other words, all migrants, including irregular migrants are human beings, and as human beings they are protected by international human rights law.

### **B. *Non-refoulement***

The principle of *non-refoulement*, is key to assessing state decisions about entry and stay. This principle bars States from returning any person, regardless of nationality, status or other grounds, to a place where they would be at risk of torture (Article 3 of the Convention against Torture and, in the case of refugees, Article 33 of the 1951 Convention relating to the Status of Refugees). The ICCPR further provides that all migrants, regardless of their legal status, have the right to protection from arbitrary or unlawful expulsion.

Protection from *refoulement* must also be applied according to the principle of non-discrimination. It should be noted that the principle of *non-refoulement*, which widely is recognized as a rule of customary international law, is equally applicable to all places where the intercepting State exercises jurisdiction and control, including on the high seas.<sup>26</sup>

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<sup>23</sup> The ICCPR in article 25 reserves to citizens the right to vote and take part in public affairs, and in article 12 reserves the right to freedom of movement within a country to foreigners who are lawfully present within the country.

<sup>24</sup> Human Rights Committee, General Comment No. 15 at para. 5.

<sup>25</sup> For example, the Committee on the Elimination of Racial Discrimination has noted that under the ICERD, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

<sup>26</sup> The CCPR in its General Comment No. 31 has noted that “[T]he 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.” Similarly, the Committee against Torture has affirmed that the *non-refoulement* obligation contained in Article 3 of the Convention Against Torture applies in any territory under a State party’s jurisdiction. See, for example, Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, CAT/C/USA/CO/2, 25 July 2006. In the regional context, the European Court of Human Rights recently confirmed in the case of *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, Judgement of 23 February 2012, that the exercise of full and exclusive control on the high seas was tantamount to jurisdiction.

The concept of *non-refoulement* has been extended to encompass violations of the right to life, including extrajudicial execution.<sup>27</sup> There has also been some recognition in international and regional jurisprudence that removal of a person to a situation of arbitrary detention would constitute a violation of their human rights.<sup>28</sup> The European Court for Human Rights has also held that a State expelling a person to a country where he or she risks being subject to destitution which reaches the level of inhuman or degrading treatment would breach its obligations under the principle of *non-refoulement*.<sup>29</sup>

In regard to children, particularly unaccompanied and separated children, the Committee on the Rights of the Child has provided explicitly that return to the country of origin would not be an option if it would lead to a “reasonable risk” that such return would result in the violation of fundamental human rights of the child, and particularly if there was a risk of *refoulement*. The Committee has stipulated that an effective determination of the best interests of the child should precede any return decisions.<sup>30</sup>

Finally, all persons who have suffered human rights violations have the right to a remedy for those violations, regardless of nationality or legal status.<sup>31</sup>

#### 4. Specific human rights concerns and international responses

Given a global framework of increased border security measures, escalated risk-taking by migrants, a sense by states that border regions are somehow ‘different’, and human rights principles that extend to all migrants, the following section explores specific issues arising at international border. These issues include the criminalization of migrants, arbitrary decision making, detention at borders, data protection and privacy, interceptions and pushbacks, and assisting migrants in humanitarian distress.

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Also see UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007.

<sup>27</sup>No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country, Article 5, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

<sup>28</sup> See Human Rights Committee, *G.T v Australia*, Communication No. 706/1996, 4 December 1997, para. 8.4. Also see *Othman Abu Qatada v the United Kingdom*, ECtHR, Application no. 8139/09 where the Court accepted a violation of Article 5 if there had been a removal to a place where the person was at real risk of a flagrant breach of that Article.

<sup>29</sup>*M.S.S. v Belgium and Greece*, ECtHR Application No. 30696/09, Judgement of 21 January 2011.

<sup>30</sup> Committee on the Rights of the Child, General Comment No. 6 on the treatment of unaccompanied or separated children outside their country of origin, 2005, paras. 82-84.

<sup>31</sup> See in particular article 8 of the Universal Declaration of Human Rights, 1 article 2 of the International Covenant on Civil and Political Rights, 2 article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court



## A. Criminalization of irregular migration

According to authoritative human rights bodies, crossing borders without authorization should be considered an administrative rather than a criminal offence.<sup>32</sup> Nevertheless, numerous states have criminalized illegal entry, exposing migrants in an irregular situation to human rights violations, including unnecessary and prolonged detention and denial of other rights and privileges due to the alleged “criminal behaviour” of the migrant.

Criminalization of irregular migration may result in migrants being subject to discriminatory or inhumane treatment by border guards. For example, concerns have been raised about border guards shooting at boatloads of irregular migrants attempting to cross the Red Sea or of border guards being given orders to shoot irregular migrants attempting to cross land borders. Further, by framing irregular migration as a matter of crime control and national security, oversight of executive action against migrants or their smugglers is more difficult for both legislatures and civil society.

The Inter-American Court of Human Rights has identified and condemned the human rights violations that may occur through criminalization. It found that Panama had violated its obligations under the Inter-American Convention to guarantee humane treatment (Article 5), personal liberty (Article 7), judicial protection (Article 25), and fair trial (Article 8) when it detained and tortured a Honduran national for illegal entry. It also ruled that Article 67 of Panama’s 1960 Decree Law No. 16, which allows punitive sanctions for violation of migration laws, is incompatible with the Convention when used as a basis for arbitrary incarceration.<sup>33</sup>

The international community has agreed that facilitating irregular migration for profit should be criminalized, while acknowledging that migrants who have been smuggled should not be penalised for having been smuggled.<sup>34</sup> The Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol), supplementing the UN Convention against Transnational Organised Crime (UNTOC), which entered into force in 2004 requires, States Parties to criminalize migrant smuggling in their domestic law and actively prosecute smugglers.

Ironically, the strengthening of action against migrant smuggling, while often couched in the language of protecting vulnerable migrants, may have only served to make smugglers more organized and dangerous, and make migrants more vulnerable to abuse. Numerous reports of migrants being beaten, abused, robbed, raped and abandoned by smugglers reach the media,

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<sup>32</sup>The Working Group on Arbitrary Detention has stated that criminalizing irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular migration and leads to unnecessary detention. The Deputy High Commissioner for Human Rights, has also recently noted, “[C]rossing a border or residing in a country without the legal permission to do so should at most be considered an administrative offence. Simply put, irregular migration is not a crime.” Kyung-wha Kang, Keynote Address at the Fundamental Rights Conference 2011, Warsaw, (21 November 2011). The Commissioner for Human Rights of the Council of Europe has also expressed “increasing concern at the trend to criminalize the irregular entry and presence of migrants as part of a policy of ‘migration management’ . Such a method of controlling international movement corrodes established international law principles. It also causes many human tragedies without achieving its purpose of genuine control.” Thomas Hammarberg, “It is wrong to criminalize irregular migration”, 29 September 2008, [http://www.coe.int/t/commissioner/Viewpoints/080929\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/080929_en.asp);

<sup>33</sup>*Vélez Loor v. Panama*, Inter-American Court of Human Rights, November 2010.

<sup>34</sup> See Article 5 of the Smuggling Protocol. Note however that Article 6(4) of the Protocol does allow States to “take measures against a person whose conduct constitutes an offence in domestic law”, such as in relation to immigration law.

making smuggled migrants also victims of crime. Violence against migrants by smugglers and traffickers, while not directly a state responsibility, nevertheless places obligations on the state to prevent, investigate and punish the perpetrators. In addition, human rights organisations have reported violence against migrants (including torture and cruel and inhuman treatment) by border officials trying to obtain information about their smuggler.<sup>35</sup>

Taking into account the object and purpose of the UNOTC which is to combat transnational organised crime, its supplementing Protocol against the Smuggling of Migrants aims to prevent and combat the smuggling of migrants, promote cooperation to this end, while protecting the rights of migrants who have been smuggled. In practice, there is a need for better implementation of the objectives of the Protocol, especially in regard to the protection of the rights of migrants. The Protocol specifically addresses protection and assistance issues (art. 16), requesting States to take the necessary measures to protect migrants from violence, protect their right to life and not to be subjected to torture or other cruel, inhuman and degrading treatment or punishment. In addition, in its Article 19, the Smuggling Protocol affirms that efforts to address migrant smuggling cannot operate to affect existing state obligations under human rights and refugee law including the obligation of *non-refoulement*.<sup>36</sup>

A distinct and yet related question relates to the status of ‘smuggled migrants’ in human rights law. This classification, essentially created by default in the Smuggling of Migrants Protocol, may cut across numerous other categories of human rights protection including refugees or victims of trafficking. Smuggled migrants may, however, face other unique vulnerabilities at the hands of abusive smugglers or at the hands of state authorities due to their (perceived) participation or collusion in a criminal enterprise. This vulnerability is often exacerbated by the fact that their interaction with the authorities often only takes place within the border space as many migrants who are smuggled will be stopped at the border and deported for violations of immigration rules without any further questions being asked about their situation or need for human rights protection.

## **B. Discrimination and arbitrary decision making**

Authorities at border checkpoints determine the admissibility of individuals presenting themselves for entry, and also screen applicants for protection purposes. Reports have documented physical and sexual abuse and arbitrary detention (considered below), as well as discrimination in making entry decisions. There have also been reports of the disproportionate use of violence against migrants seeking to enter the territory of the State. For example, the Committee against Torture has noted allegations against Greece “of excessive use of force and firearms, including cases of killings and reports of sexual abuse, by the police and, in particular, border guards. Many of the victims are reportedly Albanian citizens or members of other socially disadvantaged groups.”<sup>37</sup> Human rights groups have repeatedly raised concerns about the death

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<sup>35</sup> Human Rights Watch, EU must stop returning migrants to Ukraine, 15 January 2011, available at <http://www.hrw.org/news/2011/01/15/eu-must-stop-returning-migrants-ukraine>

<sup>36</sup>United Nations Office on Drugs and Crime, Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2004, and United Nations Office on Drugs and Crime, *International Framework for Action to Implement the Smuggling of Migrants Protocol*, Vienna, January 2012, available at [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework\\_for\\_Action\\_Smuggling\\_of\\_Migrants.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_Smuggling_of_Migrants.pdf). For more on this issue, see also International Council on Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, Geneva, 2010, available at: [http://www.ichrp.org/files/reports/56/122\\_report\\_en.pdf](http://www.ichrp.org/files/reports/56/122_report_en.pdf)

<sup>37</sup>Greece, CAT, A/60/44 (2004) 20 at paras. 47

toll of migrants, particularly those from sub-Saharan Africa, on the border between Egypt and Israel, with allegations that border guards have used excessive force to prevent irregular migration.<sup>38</sup>

Children may be at a particular disadvantage at borders. As a study of the Office of the High Commissioner for Human Rights noted, “The border can be a dangerous place for migrant children, including separated and unaccompanied children. They can be subject to high levels of violence by border guards and arbitrary and prolonged detention, and can be denied the right to seek asylum. Children at borders are often regarded with suspicion by officials who cast doubt on their age and motivations for movement.”<sup>39</sup> A particular issue of concern for children at international borders is that of age assessments, with a “culture of disbelief” pervading official determinations of age, particularly in the case of adolescent migrants. Concerns have also been raised about inappropriate and highly intrusive age assessment techniques being applied to children.

Particular attention has been given to racial and ethnic profiling since the ‘War on Terror’ in 2001.<sup>40</sup> Such profiling has affected many travellers of Muslim or Middle Eastern ethnicity or origin seeking to enter Europe or North America, but ethnic profiling of other groups such as Roma seeking to travel within Europe has also been documented. While this is also a concern in the interior, individuals at border checkpoints often lack avenues of appeal or challenge to arbitrary decisions made about their admissibility.

Similarly, arbitrary decision-making can occur in the screening process. Border checkpoints not only facilitate the admission of non-citizens, but also are one of the designated locations for individuals in need of protection to make their situation known and be given the opportunity to make a claim for asylum or protection as a victim of trafficking. Yet some states have been accused of not accepting claims for asylum at the border, only accepting certain claims, or of making otherwise arbitrary decision-making not in accordance with law.<sup>41</sup> Anti-trafficking organizations, for example, have noted how people who may fit the definition of trafficking are viewed simply as ‘smuggled’ or as irregular migrants who lack human rights protection needs, and so placed in detention pending deportation.<sup>42</sup> Others have questioned the capacity of border guards, because of lack of training or an absence of adequate technical tools, to identify adequately the human rights protection needs of those who arrive at borders. Again, these decisions are difficult to challenge and the numbers of people with legitimate claims who are denied the right to lodge these claims is unknown.

Human rights law, including general protections of non-discrimination and *non-refoulement*, protects migrants at borders from physical and psychological violence by border guards or other authorities, including disproportionate violence in the context of apprehension, and protection

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<sup>38</sup>UN human rights chief deplores killing of some 60 migrants by Egyptian forces in Sinai since mid 2007, 2 March 2010.

<sup>39</sup>*Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration*, Human Rights Council 15th Session, A/HRC/15/29, (5 July 2010).

<sup>40</sup> See e.g. Amnesty International USA, *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States* (2004), at [www.amnestyusa.org/pdfs/rp\\_report.pdf](http://www.amnestyusa.org/pdfs/rp_report.pdf)

<sup>41</sup> Lithuania for example reportedly prevented individuals from certain countries from requesting asylum at the border. See Lithuania, ICCPR, A/59/40 vol. I (2004) 52 at para.71(15).

<sup>42</sup> Global Alliance Against Traffic in Women, Working Paper, *Smuggling and Trafficking: Rights and intersections*, Bangkok, forthcoming.

from excessive and inappropriate body searches. The prohibition of discrimination also protects migrants from being subject to compulsory medical testing at borders.<sup>43</sup>

The Committee on the Elimination of Racial Discrimination has emphasized the application of non-discrimination principles to immigration policies and racial profiling. It notes that states must, “ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin” and that “any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.”<sup>44</sup>

The Council of Europe Commissioner for Human Rights issued a more prescriptive recommendation in 2001, “concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders”. This includes, *inter alia*:

*“1. Everyone has the right, on arrival at the border of a member State, to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud.*

*2. On arrival, everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where appropriate, to lodge a request for asylum. This must entail the right to open a file after having being duly informed, in a language which he or she understands, about the procedure to be followed. The practice of refoulement “at the arrival gate” thus becomes unacceptable.”<sup>45</sup>*

*3. As a rule there should be no restrictions on freedom of movement. Wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures. Should detention remain the only way of guaranteeing an alien's physical presence, it must not take place, systematically, at a police station or in a prison, unless there is no practical alternative, and in such case must last no longer than is strictly necessary for organising a transfer to a specialised centre.*

*... 9. On no account must holding centres be viewed as prisons.*

### **C. Data protection and privacy**

Also related to border controls and administrative procedures are concerns about personal data sharing and data control. Immigration procedures require intensive gathering of personal information for purposes of deciding on entry and stay, or determining applications for particular visa categories.

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<sup>43</sup>International Commission of Jurists, Migration and international human rights law, Practitioners Guide No. 6, Geneva, 2011, p. 45.

<sup>44</sup>CERD General Recommendation 30: Discrimination Against Non-Citizens, A/59/18 (2004) 93 at paras. 9 and 10.

<sup>45</sup>*Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders*, Council of Europe, Strasbourg, 19 September 2001, at <https://wcd.coe.int/ViewDoc.jsp?id=980219>

Data collection and sharing does not inherently violate human rights. However, intensive surveillance and sensitive data-collection from individuals may constitute an interference with their right to privacy. This is particularly so if information is shared with law enforcement agencies or consulates to make decisions for which the data was not originally obtained. A case in the United States, for examples, challenged airlines who shared passenger information with the Department of Defence as part of a study because passengers were not notified that their information could be used in this way.<sup>46</sup> This may also have implications for the right to freedom of movement and non-discrimination.<sup>47</sup> At least one European database is arguably discriminatory in data collection, in that it only collects information on persons who are from countries on a blacklist, in which “most of their nationals are (a) not white; (b) Muslim and/or (c) poor (in relation to the EU average).”<sup>48</sup>

In addition, databases specifically designed for gathering information on certain categories of migrants may exacerbate the criminalization of migrants. For example, concerns have been raised that the three databases operational in Europe, which record information on asylum applications or whether a person has been apprehended for illegal crossing, may play “a stigmatization function which is tantamount to criminalisation.”<sup>49</sup>

In this sphere, States can fall prey to what has been called “the technology fallacy”, in that as technology becomes more powerful and it is *possible* to collect more and more data about migrants and travellers, governments make the (often false) assumption that it is *necessary* to collect such data.<sup>50</sup>

Privacy is guaranteed as a fundamental human right in Article 12 of the Universal Declaration of Human Rights, as well as Article 17 of the International Covenant on Civil and Political Rights. Again, the principle of non-discrimination applies to privacy rights – it applies to all people, regardless of nationality or immigration or other status. The Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW) provides both regular and irregular migrant workers with a right to privacy under Article 14. Regional human rights conventions also guarantee the right to privacy for all people under the jurisdiction or control of a receiving state.

More specifically, the right to information privacy is assured through data protection mechanisms. The General Assembly has devised guidelines of “minimum guarantees” for the use of personal computerized data. The Council of Europe and the Organization for Economic Cooperation and Development (OECD) have similar guidelines for incorporation into domestic law. These instruments all set out four main principles: data must be obtained lawfully; it must be kept safely and securely; it must be accurate and up-to-date; and it must only be used for the original purpose specified. In addition, data protection ideally includes some type of enforcement

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<sup>46</sup>*In re: Jetblue Airways Corp. Privacy Litigation* 379 F.Supp.2d 299 (E.D.N.Y. 2005). The case failed for a number of technical and jurisdictional issues, and because the company was not a communications provider under the relevant US legislation.

<sup>47</sup>See e.g. Evelien Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System*, Martinus Nijhoff Publishers, 2008.

<sup>48</sup> Elspeth Guild, *Criminalisation of Migration in Europe: Human Rights Implications*, issue paper commissioned and published by the Council of Europe Commissioner for Human Rights, Strasbourg, (2010), <https://wcd.coe.int/ViewDoc.jsp?id=1579605>

<sup>49</sup> Id.

<sup>50</sup>We are grateful to Prof. Elspeth Guild for highlighting this point. See also Pia Oberoi, *The enemy at the gates and the enemy within: migrants, social control and human rights*, International Council on Human Rights Policy, 2009, p. 17, available at [http://www.ichrp.org/files/papers/171/migrants\\_and\\_social\\_control\\_pia\\_oberoi.pdf](http://www.ichrp.org/files/papers/171/migrants_and_social_control_pia_oberoi.pdf)

mechanism.<sup>51</sup> In *S and Marper v United Kingdom* [2008] ECHR 1581 the European Court of Human Rights held that holding DNA samples of individuals who had been arrested but who were later acquitted or had the charges against them dropped, is a violation of the right to privacy under the European Convention on Human Rights.

#### D. Detention at points of entry

Detention of non-citizens at ports of entry is a form of administrative detention or ‘holding’ of a person in order to confirm identity, investigate risks or facilitate removal. Within the interior of the State, detention centres will usually be subject to domestic law and detainees will usually have some access to judicial oversight.<sup>52</sup>

However, states often differentiate detention in border areas as detention in an “international zone” or “excised territory. Such areas include airports, land entry points, as well as islands off the coast of the mainland, which states have argued are outside the jurisdiction of national courts.<sup>53</sup> Individuals detained in these zones may have less access to legal advice, to translation and interpretation services, and may be denied, in law and/or in practice, the right to challenge their detention before a court. Research in France in 2008 found that migrant children in transit zones faced degrading treatment by police, detention with adults, and a rapid screening system. Many children were summarily returned to their home country or a third country, regardless of whether they had family or ties there.<sup>54</sup>

The risk of arbitrary detention at borders may also be increased, such as when a State indiscriminately detains certain groups of migrants without an individual assessment of their situation. In aftermath of September 2001, for example, the Committee on the Elimination of Racial Discrimination noted with concern that New Zealand had instituted a policy of detaining all asylum seekers upon arrival.<sup>55</sup>

Finally, detention in border regions, even if considered a regular detention facility under national law (ie. not in a transit zone) may nevertheless be unsuitable for holding irregular migrants and asylum applicants for long periods of time. Most such facilities have been constructed as short-term holding centers run by border guards at points of entry. States have been accused in these centers of providing inadequate food, water and medical care to individuals, as well as otherwise

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<sup>51</sup>Rebekah Tomas, Global Commission on International Migration, “Biometrics, Migrants and Human Rights”, Migration Policy Institute, (2005), at <http://www.migrationinformation.org/Feature/display.cfm?id=289>

<sup>52</sup>Note, however, that this is often not the case, and States have been criticised for extending to migrants subject to administrative detention less guarantees than are embedded in their criminal law, including systematic access to review mechanisms, to legal representation, to the content of the file, or to a meaningful opportunity to defend one self. Statement by François Crépeau, Special Rapporteur on the Human Rights of Migrants to the 66th session of the General Assembly, 21 October 2011.

<sup>53</sup>Christmas Island in Australia and Guantanamo Bay in the United States have both been used to hold irregular migrants and asylum seekers pending decisions on their admissibility. Concerns have been raised that in both these sites migrants are left without recourse to the range of protection mechanisms available in the interior of the State. See for example Amnesty International, *Christmas island proof the whole system is broken*, 21 March 2011.

<sup>54</sup>Human Rights Watch, *Lost in Transit: Insufficient Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle Airport*, October 2009.

<sup>55</sup>New Zealand, CERD, A/57/18 (2002) 69 at para. 427.

inappropriate conditions of detention.<sup>56</sup> A report on short-term border detention facilities in Greece, for example, found numerous problems including that women and children were being held with men and adults without special provision, lighting was poor, sanitary facilities were inadequate and filthy and food was insufficient and poor quality. The maximum period of detention prior to deportation had recently been increased to six months.<sup>57</sup>

These problems may be even more severe when temporary facilities are constructed for large influxes of migrants, but end up becoming semi-permanent because of political pressures or administrative delays.

Article 3 and 9 of the UDHR, and article 9 of ICCPR provide that everyone has the right to liberty and security of person, and that no one shall be subjected to arbitrary arrest or detention. Therefore while international law allows that administrative immigration detention can legitimately be applied in certain individual cases, it is widely held that such a deprivation of liberty should be exceptional and strictly as a measure of last resort. The human rights legal framework governing detention is guided by the principles of necessity, reasonableness in all the circumstances, and proportionality. The Working Group on Arbitrary Detention considers, for example, as arbitrary deprivation of liberty “when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without possibility of administrative or judicial review or remedy”<sup>58</sup>

The Working Group on Arbitrary Detention has also noted, with respect to the detention of migrants in an irregular situation, that in cases where “the legal or practical obstacles for the removal of the detained migrants do not lie within their sphere of responsibility, the detainees should be released to avoid potentially indefinite detention from occurring, which would be arbitrary. The principle of proportionality requires that detention has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal”<sup>59</sup>

Several expert bodies have discussed ‘preventative detention’ of non-citizens or immigration detention, but generally in the context of detention, not border detention specifically. For example, the Human Rights Committee has elaborated on the meaning of Article 9 of the ICCPR, which deals with the liberty and security of the person. In its General Comment on article 9, it extends the scope of article 9 to cases of immigration control.<sup>60</sup> Specific obligations and rights include the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. States parties also have an obligation under article 2(3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

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<sup>56</sup>Ukraine, CRC, CRC/C/121 (2002) 70 at para. 355.

<sup>57</sup>Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 27 January 2011, CPT/Inf (2012) 1, Council of Europe, Strasbourg, January 2012, at <http://www.cpt.coe.int/documents/grc/2012-01-inf-eng.pdf>

<sup>58</sup> A/HRC/16/47, para. 8(d)

<sup>59</sup> A/HRC/13/30, para. 91

<sup>60</sup>Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994).

The European Court of Human Rights has considered specifically the applicable law in relation to administrative detention in *Amuur v. France* as well as more recently in *I.M v. France*.<sup>61</sup>

In addition to general human rights principles, the administrative detention of migrants and asylum-seekers is also the subject of specific guidance. While such guidance is not in general aimed at the particular conditions of detention at the border, some principles do include airport detention or other specific instances related to the border. In its Deliberation No. 5, for example, the Working Group on Arbitrary Detention has enumerated a number of guarantees in regards to immigrants or asylum-seekers.<sup>62</sup> Principle 1 specifically addresses the situation of migrants who are held for questioning at the border, affording them particular procedural guarantees in this respect. In Resolution 63-184 (March 2009) the General Assembly made specific reference to detention at borders:

*“[The General Assembly]Requests States to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, to train public officials who work in those facilities and in border areas to treat migrants respectfully and in accordance with the law, and to prosecute, in conformity with applicable law, any act of violation of the human rights of migrants, inter alia, arbitrary detention, torture and violations of the right to life, including extrajudicial executions, during their transit from their country of origin to the country of destination and vice versa, including their transit through national borders.”*

Article 16 of the ICRMW provides that all migrant workers and members of their families have the right to liberty and security of the person, providing in addition extensive safeguards in relation to detention. This includes the right of all migrants in detention, if they so wish, to contact their consular or diplomatic authorities (Art. 16(7)(a)). The Smuggling of Migrants Protocol provides similar guarantees in its art. 16(5).

International law provides that the detention of children, including children in the context of migration, should generally be avoided.<sup>63</sup> The Committee on the Rights of the Child has made clear that children should never be detained based on their migratory status or irregular entry to the country.<sup>64</sup>

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<sup>61</sup> In the case of *Amuur v. France*, a group of Somali asylum seekers were detained on arrival in the international airport in Paris for 20 days for falsified documents. They were not given access to legal advice until four days before their deportation. The contention of the Government of France that the airport hotel in which the applicants were detained was outside the jurisdiction of France was rejected by the Court. *Amuur v. France*, European Court of Human Rights, (1996). In the later case, the Court found that for detained asylum seekers, the automatic classification of their cases as “fast track”, the difficulty of gathering evidence, and the restricted time period in which they could claim asylum (5 days) and appeal their deportation orders (48h) limited severely their access to domestic remedies. *I.M v. France*, EctHR, Application No. 9152/09, February 2012.

<sup>62</sup> WGAD, Annex II, E/CN.4/2000/4

<sup>63</sup> Convention on the Rights of the Child, art. 37. See also Committee on the Rights of the Child, general comment No. 10 on children’s rights in juvenile justice.

<sup>64</sup> Committee on the Rights of the Child, general comment No. 6, para. 61.



There has been considerable momentum in recent years calling on States to explore effective alternatives to immigration detention, based *inter alia* on the principle of proportionality in international law, which requires detention to be approached as a measure of last resort.<sup>65</sup>

### **E. Pushbacks and interceptions of migrants at sea, land and air**

In addition to securing borders at checkpoints or patrolling the border, states are increasingly relying on interception or pushback strategies that prevent migrants arriving at the border at all. Neither term is formally defined in international law, but is rather identified through state practice.<sup>66</sup> Interception tends to involve a more formal interruption of a migrant's journey and diversion to another location. Pushback, by contrast tends to refer to a more informal blocking of entry.

In the context of interception, the High Commissioner for Human Rights has noted that “overcrowded vessels and their passengers are sometimes endangered by the methods employed by governments and regional organizations to intercept and turn back boatloads of migrants and refugees.” She has stated that “There must be an unequivocal recognition that no persons, including asylum seekers and migrants, inhabit a human rights limbo while travelling or upon reaching a destination other than their country of origin.”<sup>67</sup>

In 2000, UNHCR's Executive Committee published its “recommendations for a comprehensive approach” toward interception of refugees and asylum seekers in which it noted that indiscriminate interception has raised a number of protection concerns for asylum seekers and refugees.<sup>68</sup>

#### **Interception of migrants at sea**

At sea, specifically, interception often results in naval or other maritime personnel apprehending a boat carrying migrants on the high seas, then transporting the boat to another port for disembarkation. Pushbacks, judged by state practice, appear to be less coordinated efforts to simply stop boats landing. Thailand, for example, has been accused of ‘pushing-back’ boats carrying migrants and asylum-seekers from Myanmar who were trying to land on the coast of Thailand.

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<sup>65</sup>WGAD, Report of the WGAD to the 15<sup>th</sup> session of the Human Rights Council, A/HRC/13/130, 15 January 2010. See also the proceedings and summary conclusions of the UNHCR-OHCHR Global Round Table on Alternatives to Detention, 10-11 May 2011, available at <http://www.ohchr.org/EN/Issues/Migration/Pages/Roundtable.aspx>

<sup>66</sup> UNHCR noted in 2000 that the meaning of ‘interception’ has to be derived from an examination of past and current State practice.” It adopted a working definition of: “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.”

<sup>67</sup>*Migrants at sea are not toxic cargo*, Opinion Editorial by Navi Pillay United Nations High Commissioner for Human Rights, 15 September 2009 at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=88&LangID=E>.

<sup>68</sup> See also UNHCR, *Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials*, December 2011, 2nd Edition, available at: <http://www.unhcr.org/refworld/docid/4ee087492.html>

Interception operations have led to, often significant, loss of life at times as a result of the actions of the State authorities conducting the interception. Some accounts also indicate that smugglers or even migrants themselves will at times destroy the vessel in which they are travelling in order to force a rescue.<sup>69</sup>

Concerns have been expressed that vessels are refusing to rescue migrants in distress at sea for fear of penalties (including in some jurisdictions criminal penalties) or lengthy and expensive diversions to their ships and cargo. In many regions, boats carrying rescued migrants have been unable to disembark migrants at the nearest place of safety for disembarkation. In 2011, UNHCR and OHCHR appealed to states to urgently put in place more reliable and effective mechanisms for rescue at sea on the Mediterranean. Ship masters were called on to continue to adhere to the longstanding maritime obligation, enshrined in international law at the level of both custom and treaty, of aiding people in distress. These actions raise concerns about *refoulement*. UNHCR has noted that interception at sea operations “do not always include sufficient protection safeguards to ensure that the principle of non-*refoulement* is upheld.”<sup>70</sup>

The Special Rapporteur on the Human Rights of Migrants has also drawn attention to the effect of pushback operations on future travellers. Migrants that follow tend to choose riskier routes to avoid interception and push-back, including by commencing their sea journey much further away from their intended destination and moving at night or in bad weather conditions.<sup>71</sup> Reports have indicated that increased surveillance compels migrants to seek out longer routes and more dangerous modes of transportation in order to evade detection.<sup>72</sup>

Customary international law and specific treaties on the law of the sea provides protection for migrants in distress on the high seas. The International Convention on Maritime Search and Rescue (SAR-Convention) of 1979 requires state parties to ‘. . . ensure that assistance be provided to any person in distress at sea . . . regardless of the nationality or status of such a person or the circumstances in which that person is found’ and to ‘[. . .] provide for their initial medical or other needs, and deliver them to a place of safety.’

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<sup>69</sup> UNODC, Issue Paper : Smuggling of Migrants by Sea, June 2011.

<sup>70</sup>Id. p. 5

<sup>71</sup>Special Rapporteur on the Human Rights of Migrants, Mr. Jorge Bustamante, *Annual Report*, U.N. Doc.A/HRC/7/12, 25 February 2008, at para. 21. Note the position of the Inter-American Commission which has questioned the obligation of States to prevent indirect harm to migrants by changing their border control policies, even if such harm is essentially foreseeable. In 2001 a group of advocates in the United States submitted a petition to challenge Operation Gatekeeper, which sought to deter irregular immigration by pushing migrants into crossing in the desert regions of the Southwest. More than 100 migrants reportedly died attempting this passage. The Inter-American Commission noted that this action might create a moral obligation on the part of the United States, but not a legal one under the Article I of the American Declaration of the Rights and Duties of Man (which guarantees the right to life). The U.S., it argued, was merely taking advantage of natural geography and migrants themselves chose to make the hazardous journey. *Victor Nicolas Sanchez Et Al. (“Operation Gatekeeper”) V. United States*, Report No 104/05, Petition 65/99 Inadmissibility, Inter-American Commission on Human Rights, October 27, 2005

<sup>72</sup> One report has noted of the contemporary situation between Africa and Europe that “[A]fter controls increased in the Straits of Gibraltar, now many boats start for the Canary Islands from Mauritania, the coasts of Cape Verde, Senegal or even from the Gambia, Guinea or Guinea-Bissau.” The same report noted that because some surveillance systems are reportedly unreliable in tracking smaller boats, migrants seeking to enter Spain are travelling on dangerous and unseaworthy small boats. Ruth Weinzierl and Urzula Lisson, *Border management and human rights: a study of EU laws and the law of the sea*, German Institute for Human Rights, 2007, pp. 18-19.

Article 98 of the 1982 UN Convention on the Law of the Sea (UNCLOS) codifies the obligation of shipmasters to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance.<sup>73</sup> In addition, coastal States have an obligation to “promote the establishment, operation and maintenance of an adequate and effective search and rescue service.”<sup>74</sup>

The obligation of rescue is also provided in the International Convention for the Safety of Life at Sea (SOLAS). The 1979 International Convention on Maritime Search and Rescue (SAR) obliges States to “ensure that assistance be provided to any person in distress at sea ... regardless of the nationality or status of such a person or the circumstances in which the person is found” (Chapter 2.1.10). Amendments to the SAR and SOLAS Conventions in May 2004 clarified the obligations of states in whose search-and-rescue area persons or vessels in distress are found, which provide the obligation of States to “ensure that in every case a place of safety is provided within a reasonable time.”

Even so, disputes may occur between states in relation to obligations to rescue boats in distress, about what constitutes a place of safety, and over the meaning of distress, which are not defined in international law.<sup>75</sup>

In respect to interception in the high seas from a regional perspective, the Fifth Chamber of the European Court of Human Rights has emphasized in *Medvedyev v France* in 2008 that international human rights do not stop at the coastline, and individuals on boats in the high seas also enjoy protection of their fundamental human rights.

*‘Nevertheless, the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships’ crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a “safe haven”.’*

## Interception of migrants traveling by land or air

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<sup>73</sup> ‘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 . . .’ Article 98.1 UNCLOS

<sup>74</sup> Article 98.2 UNCLOS.

<sup>75</sup> For example, the International Maritime Organisation Guidelines on the Treatment of Persons Rescued at Sea define such a place of safety as 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.” However, others would argue that there should be respect for human rights and not merely “needs”, which would require at the least ratification of relevant human rights and refugee instruments by the receiving State. The Council of Europe is “clear that the notion of ‘place of safety’ should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights. Parliamentary Assembly of the Council of Europe, *The interception and rescue at sea of asylum-seekers, refugees and irregular migrants*, Doc. 12628, 1 June 2011. See also Silja Klepp, “A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea”, *International Journal of Refugee Law*, vol. 23(3), (2011).

Interception and pushback of migrants traveling by air or across land can be accomplished by a physical prevention of movement. For example, in the last few years, tens of thousands of Bangladeshi migrants who have attempted to cross into India have been almost literally pushed back from the border by the Border Security Forces. Interception may also be accomplished using administrative measures and cooperative relationships with other states and private actors, rather than direct physical interception on their own. UNHCR summarizes these other techniques as follows:

*“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.”<sup>76</sup>*

In certain cases, pushbacks or interceptions of migrants seeking to travel in an irregular manner may occur on the territory of third states, for example by immigration or embassy officials working out of airports in these countries. International borders thus become “virtual borders”, and movement is curtailed further and further away from the actual territorial border itself, often with a corresponding lack of access to remedies and avenues to appeal decisions on entry.

## **F. Collective expulsions and forced returns**

To the extent that pushbacks or interceptions amount to collective expulsion, they also raise serious human rights concerns. A fundamental principle of human rights law is that *everyone* is entitled to an individual consideration of their circumstances in the context of return, and the right effectively to be able to present a defence against their expulsion. Therefore, rather than constructing their border control policies based on assumptions about the motivations of migrants, which are themselves based on the migrant’s country of embarkation or mode of transport, their gender or age, their nationality or their ethnicity, international law requires that intercepting States ensure that all arriving migrants have access to an adequate process to determine their protection needs.

The absolute prohibition of collective expulsion is well established in international and regional human rights law.<sup>76</sup> Article 22(1) of the International Convention on the Rights of All Migrant

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<sup>76</sup> In its interpretation of article 13 of the ICCPR, the Committee on Civil and Political Rights (CCPR) has confirmed that “laws or decisions providing for collective or mass expulsions” would entail a violation of article 13 ICCPR. CCPR, General Comment 15, Position of aliens under the covenant, 11 April 1986. The Inter-American Commission has further elaborated that “[a]n expulsion becomes collective when the decision to expel is not based on individual cases but on group considerations, even if the group in question

Workers and Members of their Families provides that “[m]igrant 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.” Article 4 of Protocol 4 to the European Convention on Human Rights similarly provides that “[c]ollective expulsion of aliens is prohibited.”

The Grand Chamber of the European Court of Human Rights recently found a breach of the principle of collective expulsion in the case of *Hirsi Jamaa and others v Italy*. The Grand Chamber ruled that the transfer of the applicants to Libya had been carried out without any examination of each individual situation, which was in contravention of Article 4 of Protocol 4 of the ECHR, noting that collective expulsions could take place from outside the territory of the expelling State, at border areas and on the high seas where that State exercised jurisdiction or effective control.<sup>77</sup>

In its amicus curiae submission in the case, the Office of the High Commissioner for Human Rights noted that “each person in a group of non-nationals intercepted by a state vessel at sea also enjoys protection against rendering, without his or her consent, to *any* other State, without a prior reasonable and objective examination of the particular circumstances of that particular individual’s case. This due process right ensures that all applicable grounds under international law and national law that may negate the expulsion of that particular individual are duly considered, including, *but not limited to* the prohibition of *refoulement*.”<sup>78</sup>

When forced returns are carried out at the border, concerns have been raised about lack of due process in such returns. Particularly when migrants are expelled from detention places at the border, they may not have been granted an effective opportunity to challenge the expulsion decision as well as access to other procedural safeguards. Deportations can also be carried out with excessive and disproportionate force, causing injuries and mental distress to the migrants being deported, and in extreme cases can even lead to death. The Committee Against Torture has for example expressed concern about “insufficient measures of protection in cases of individuals under an order of deportation, which are not in conformity with Articles 3 and 11 of the Convention” in commenting on the death of the Nigerian national Marcus Omofuma during his deportation from Austria in May 1999.

Article 6 of ICCPR protects the right to life of all persons, and protection against the arbitrary deprivation of life. In addition, the State carrying out the forced return is obliged to ensure that migrants are not subjected to physical or psychological treatment amounting to torture or cruel, inhuman or degrading treatment, including excessive physical restraint.

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is not large.” IACHR, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5, rev. 1 corr., 22 October 2002.

<sup>77</sup> The Grand Chamber noted that “The Court has already found that, according to the established case-law of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase.” *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, ECtHR, Feb. 23, 2012, para. 177.

<sup>78</sup> Intervener brief filed on behalf of the UN High Commissioner for Human Rights, *Hirsi et al v Italy*.

## G. Migrants in humanitarian distress

Migrants in an irregular situation may be compelled to take extreme physical risks to evade security measures and enter transit and destination states. Methods of travel include hiding in poorly ventilated spaces such as trucks, in bus luggage compartments or in shipping containers, walking through inhospitable desert landscapes or conflict zones, or taking to the seas in overcrowded and fragile vessels.

Thousands of migrants die each year en route to international borders and uncounted more suffer extreme physical deprivation, arriving at borders in urgent need of food, water, medical aid, or other assistance. Fundamental human rights, such as the right to life, are at stake in such perilous situations. In addition other rights, such as the right to health, and the right to adequate food, may be violated. The Special Rapporteur on the Rights of Migrants has noted, “The processes of migratory movement may ... have a significant negative impact on the health of migrants before they arrive in the host country.”<sup>79</sup>

The UDHR (article 25) and the ICESCR provide that “everyone” is entitled to enjoy the right to health (article 12)<sup>80</sup>, to housing and adequate food and water (article 11) and to education (article 13 and UDHR article 26). The Committee on Economic, Social and Cultural Rights (CESCR) has clarified that the prohibition of non-discrimination also includes discrimination against non-nationals on the grounds of nationality.<sup>81</sup>

The right to health is guaranteed under the Convention on Economic, Social and Cultural Rights in Article 12 which provides “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, while article 12.2 enumerates “steps to be taken by the States parties ... to achieve the full realization of this right.” The Convention provides that the right to health must be enjoyed by all without distinction as to race, colour, sex, language, religion, nationality, political or other opinion, national or social origin, property, birth or other status.

The full enjoyment of many human rights depends on the realization of the right to health. Likewise, the full realization of the right to health cannot be pursued without respect and fulfilment of several other rights, such as the right to an adequate standard of living. The right to adequate food is derived from the right to an adequate standard of living. The right to adequate food is realized when a person has physical and economic access to adequate food or means for its procurement. The right to water contains an entitlement to a minimum amount of safe drinking water to sustain life and health.

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<sup>79</sup> Report on the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Submitted to the Human Rights Council, 14<sup>th</sup> Session, A/HRC/14/30, (16 April 2010) at para. 25.

<sup>80</sup>In paragraph 34 of its general comment No. 14, the Committee on Economic, Social and Cultural Rights refers to the obligation of States “to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including ... asylum-seekers and illegal immigrants, to preventive, curative and palliative health services”.

<sup>81</sup> In its General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights, CESCR asserts that “The Covenant rights apply to everyone, including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status or documentation.”

The Committee on the Rights of the Child has, in the context of the prohibition of *refoulement*, requested states inter alia to ‘take into account the particularly serious consequences for children of the insufficient provision of food or health services.’<sup>82</sup>

It would be useful here to note provisions in the Smuggling Protocol where, in the specific context of smuggling at sea, it provides that States should “ensure the safety and humane treatment” of persons on board (Art. 9(1)). Ideally, this standard of treatment would be defined in the light of international human rights law as described above.

## 5. Gaps and ways forward

The human rights framework provides an extensive baseline of protection for all persons, regardless of their legal status. It guarantees minimum standards in respect of protection from arbitrary and unlawful treatment by state and non-state actors, and in respect of fundamental economic, social and cultural rights. It is relevant to the situation of migrants who are exploited or coerced in their movement (i.e. who are being trafficked or in a situation akin to trafficking) and migrants who are moving with the facilitation of third parties in an irregular manner, but with no attendant abuse emanating from the facilitator. As the above review demonstrates, specific guidance is provided by human rights law *inter alia* in respect of the detention of migrants in border areas, in relation to screening and profiling at borders, and in giving substance to the obligation of rescue at sea.

Yet gaps remain; whether in the authoritative interpretation of the legal framework or in the protection of migrants in practice. One broad but significant gap relates to the political will of States to protect and respect the human rights of all migrants who travel to their borders. There is widespread resistance to any initiative that could or could be seen to diminish the sovereign right of States to make and apply immigration policy. This resistance is bolstered by national, and also transnational, discourses of security, counter-terrorism and public safety. The deficit in political will is perhaps the hardest gap to fill, but advances can be made by advocacy and technical assistance at all levels, particularly to raise the awareness of governments, politicians, the media and the wider public of the rights, contributions and situation of all migrants.

This notwithstanding, the brief analysis above has identified a non-exhaustive number of specific areas in which normative and/or practical gaps remain in the protection of migrants at international borders, including:

- Definitions of humanitarian distress and specific obligations in respect to the rights of migrants in distress either on land or at sea. How can the right to health provide concrete guidance in relation to the specific needs of migrants at borders, including in relation to medical care, and the provision of water and food to migrants in distress?
- Specific guidance on detention at borders (such as in airports or other ‘transit-zones’) as well as guidance on how to apply adequate alternatives to detention in this regard.
- Guidance in regard to data protection in immigration control and the sharing of personal data by border security agencies of governments and regional organizations.

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<sup>82</sup>See Committee on the Rights of the Child, *General Comment No.6 on the Treatment of Unaccompanied or Separated Children outside their Country of Origin*, 1 September 2005, para.27.

- Guidance on screening processes and procedures as well as due process safeguards in order to identify the human rights needs of migrants at borders.
- More research and guidance on the human rights implications of the smuggling of migrants, and measures to assist States to better implement their obligations to protect the human rights of smuggled migrants under international human rights law.
- General and authoritative guidance on human rights at international borders, targeted at the full spectrum of State authorities as well as other stakeholders involved in service provision and activities at international borders.

The expert meeting on 22-23 March will examine the following questions

- What are some strategies that could be useful in filling such gaps?<sup>83</sup>
- Is there a need for authoritative human rights guidance in regard to international borders?
- If so, what form could or should such guidance take?

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<sup>83</sup>One helpful precedent could be the development of the “Recommended Principles and Guidelines on Human Rights and Human Trafficking” the Office of the High Commissioner for Human Rights following the adoption of the Convention on Transnational Organized Crime. The Principles and Guidelines have been widely used and cited and have helped to shape the development of international law and policy in this critical area. The document sets out clear principles that are firmly based in international law as well as providing more detailed guidelines to States and others on their implementation. Importantly, the Principles and Guidelines have recently been supplemented by comprehensive Commentary that situates them within broader developments in law, policy and practice of the past decade. See OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary, available at [http://www.ohchr.org/Documents/Publications/Commentary\\_Human\\_Trafficking\\_en.pdf](http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf)