CANADIAN COUNCIL FOR REFUGEES
INTERDICTION AND REFUGEE PROTECTION: BRIDGING THE GAP
INTERNATIONAL WORKSHOP, 29 MAY 2003, OTTAWA, CANADA

PROCEEDINGS

OBJECTIVES

This one-day workshop, held in the context of the CCR spring consultation, had the following objectives:

- To develop practical and principled policy and operational alternatives to current interdiction measures to protect the human rights of refugees
- To develop international links and joint strategies.

TABLE OF CONTENTS

Session I: OVERVIEW OF INTERDICTION BY SEA, LAND AND AIR:
François Crépeau, Université de Montréal[1]

Historical context:

- Interdiction is to be seen as a phenomenon in reaction to globalization. When there is circulation of goods and money, the movement of people invariably follows.
- Following the 1973 oil crisis, the borders of Europe began to close to migrant workers.
- In the ensuing decades, European governments developed their responses to those attempting to reach Europe.
- In an early such situation, Iranians trying to reach Europe were contained in Turkey.
- Following the introduction of visa-free travel within Europe in 1986, governments focused their attention on controlling the outside borders. The pressure was on to harmonize border policies.
- Countries within the European Union worked their neighbours outside to control the borders (e.g. Spain with Morocco, Germany with Poland).
- The rhetorical focus was always on "irregular migration", not the asylum seekers who were among these migrants. This legitimized interdiction activities in the public mind.
- However, in practice, the focus of interdiction activities tends to be on asylum seekers and refugees.
- In the early 1990s, irregular migration was associated with internal or domestic security issues, such as drug trafficking and other forms of criminality.
- Now irregular migrants (and asylum seekers and refugees) are associated with national defence and international security.

Interdiction measures:

- Governments know that when asylum seekers and other migrants reach the border, NGOs, lawyers, the media, politicians and public opinion can all intervene. The goal is therefore to keep asylum seekers and other migrants away from the border, since the ability of these players to expose the situation is then severely limited.
- Measures can be divided into those applied to migrants and asylum seekers after arrival on the state's territory and those used overseas to prevent migrants every arriving. (See chart below).

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[1] The following text is based on notes taken during the workshop. See also François Crépeau, *International cooperation on interdiction of asylum-seekers: a global perspective*, www.web.ca/~ccr/intercrepeau.htm

- Some measures can fall into both categories. For example, readmission agreements are used to remove migrants who arrive on state territory, and, when signed with countries on the periphery of the West (e.g. Germany with Poland), they can be used to ensure that the peripheral state takes on the job of preventing migrants travelling through its territory.

- There is an underlying problem of international law. Territorial sovereignty remains the basic principle. While there are laws and norms relating to refugees, there is next to nothing to protect the rights of those in the process of migrating.

Interdiction measures applied post-arrival	**Interdiction measures applied pre-arrival**
Rationalization and speeding up of refugee status determination procedures Elimination of / reduction in judicial assistance Elimination of / reduction in translation services Suppression of access to the labour market Reduction in social protection: - Emergency health care services, - In kind social benefits, - Mandatory collective housing, etc. "Manifestly unfounded claims" "Country of first asylum", "Safe third country" "Safe country of origin" International zones in ports and airports Increase in detentions Increase in expulsions/removals Creation of travel documents Removal by private security firms Asylum-sharing agreements: *Schengen/Dublin, Canada-US Agreement* Readmission agreements	Visas Carrier sanctions "Short-Stop operations" Training of airport or border police personnel Strengthening of border security systems Readmission agreements Border control cooperation agreements: *Schengen* Police cooperation: - Personal information data-banks: *SIS* - Exchange of immigration intelligence - Joint operations Criminalization of migrant smuggling Chapter on immigration in North-South economic cooperation agreements: *Puebla, Barcelona* Boarding and inspection of boats on the high seas: *Haitians, Tampa* Military operations: *CS 688, Pacific solution*

Session II: **A REVIEW OF STATE INTERDICTION PRACTICES IN DIFFERENT CONTEXTS AND DIFFERENT PARTS OF THE WORLD, AND ITS CONSEQUENCES.**

1. **The United States: Maritime Interdiction: Bill Frelick, Amnesty International USA**[2]

A. *Scope of the Problem*

The scope of the problem of maritime interdiction in the United States is relatively minor and the government's response has been exaggerated. For 2002, the US Coast Guard reports having interdicting 5142 people.[3] The largest group were Ecuadorans (1935 people), followed by Haitians (1237).[4] Other nationalities are Cubans (931), Dominican Republic (801) and Chinese (85).

B. *Interdiction Procedures*

Procedures employed by US officials depend upon the country of origin.

I. Pre-screening Procedures

Cuba: Interdicted persons are read a prepared statement that is essentially a sales pitch for in-country processing. They are told that they will suffer no reprisals on account of their unauthorized departure if they return to Cuba and that they may apply within Cuba.[5] They are also told that if they have any concerns about returning, they may come forward and they are given a chance to talk confidentially. Almost all Cubans do so.

China: Interdicted persons are given a questionnaire in Chinese about their home situation. Questions are framed elliptically and do not specifically ask whether the individual fears returning to China. The information is forwarded to headquarters in Washington DC, where a decision is taken as to whether the individual should be screened in (i.e. whether fear has been expressed).

Haiti (and other countries): There is no standard procedure. Individuals are repatriated unless they come forward themselves to express their concern.[6] Most people are automatically sent back.

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[2] The following text was drafted from notes taken during the workshop, and has been reviewed and corrected by Bill Frelick.

[3] http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#cy

[4] Over the last five years, there have been approximately 1287 Haitians interdicted each year.

[5] This is problematic in that the same person who is screening asylum seekers is also telling them it is safe to return, contrary to basic notions asylum. Also Cuba has only promised not to take reprisals for illegal departures.

[6] This has been called the "shout test".

II. Screening Procedures: Credible Fear Interview

The standard used at this interview is unclear and seems to vary according to where the interdiction takes place. "Credible fear" is supposed to be a lower test than the well-founded fear standard.[7] There is no review or appeal, or right to legal representation. Guidelines only exist for the interview of Cubans. In the case of Haitians, the interview is usually conducted on board the Coast Guard cutters, conditions permitting. Screenings have also occurred in Mexico, Guatemala, the Bahamas, and Tinian Island, as well as Guantanamo.

Many asylum seekers do not understand what information is being sought at this interview. The asylum official does not make the decision: an assessment sheet is faxed to headquarters in Washington where the decision is made.

If the answer is no, the person is sent back home or to the nearest port. If the person is found to meet the credible fear test, they are eligible for a well-founded fear determination.

III. Refugee Determination: Well Founded Fear Interview

This usually takes place at Guantanamo Bay. Again there is no right to legal counsel and the determination falls outside the terms of the Immigration and Naturalization Act, meaning that there are no due process rights. Those who are refused are repatriated. If they are Cuban, they are simply taken to the gate and returned.

If they are are found to meet the standard of a well-founded fear of persecution, they are often resettled to third countries such as Guatemala and Nicaragua. The US tried to negotiate with Australia to have them accept some of these refugees, and one family was resettled from Guantanamo to Australia. Under the side deal related to Article 9 of the US-Canada Safe Third Country Agreement, signed December 2002, Canada will accept 200 Haitians from Guantanamo each year.

C. *Developments Under the Bush Administration*

The events of September 11 have deeply affected US policies regarding interdiction. Two boatloads of Haitians managed to get past the cordon. In December 2001, a boat carrying 167 Haitians arrived. Whereas previously nearly all Haitian asylum seekers in Miami were granted parole pending the outcome of their immigration hearing (many of them have family ties in the US), 97% of the applicants from the December 2001 boat were denied parole. Several months later, it became evident that this was as a result of directives from Washington. The applicants were given fast-track immigration court hearings and to date, more than half have been deported. Some of the applicants have not been given the chance to apply as families. This disadvantages some women, who may have more difficulty articulating their claim.[8] Hearings have not been conducted with concern for gender. For example,

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[7] It is unclear whether the same standard is used as in expedited removal.

[8] Amnesty International did an Urgent Action on Jesiclaire Clairmont, a woman who arrived along with her six children and husband. The family was split up, with the husband and older sons sent to Krome detention centre. The husband's claim was accepted, while the woman's was refused. She was deported along with the youngest children.

some women who had been raped had hearings before male decision makers before whom they were reluctant to discuss their claim.[9]

In October 2002, the arrival of a second boat in Key Biscayne, Florida, was broadcast live, ensuring that it got a lot of attention. Neither of the two boat arrivals were subject to expedited removal because they had not arrived at a port of entry. They were able to go before judges (on a fast-track hearing calendar) and some were granted bonds. The INS however immediately sought a stay and appealed the bond decisions. Fifteen days later, on November 13, the INS published a notice saying that henceforward undocumented migrants arriving by sea (except Cubans) would be subject to expedited removal. There would be no parole from detention thoughout immigration proceedings. The rationale given was that these individuals "threatened national security by diverting valuable Coast Guard and other resources from counter terrorism and homeland security responsibilities."

Two days later, on November 15, 2002, President Bush signed an Executive Order giving the Attorney General complete discretion to keep in extraterritorial custody any persons interdicted in the Caribbean, and absolved him of any requirement to screen for refugees.

Administrative judges have not completely followed the lead of the government. Immigration judges had granted bond to some applicants from the October 2002 boat. The Board of Immigration Appeals (BIA) dismissed a Department of Homeland Security (DHS) (which replaced the INS 20 days previously) appeal of one of these decisions (In re D-J-, involving a 18-year-old Haitian, David Joseph, who an immigration judge had ordered could be released to his uncle if he posted a $2,500 bond). The BIA ruled that the immigration judge was correct to focus on the merits of the individual case (specifically (1) the likelihood of an individual attending his/her hearing and (2) the individual rather than collective threat to national security which s/he posed). On April 17, 2003 the Attorney General responded with a legally binding opinion that David Joseph and other "similarly situated aliens" do not have a right to an individualized bond hearing, and that bond should be denied not on the basis of any showing of an individualized threat, but to prevent "surges" of boat people that might threaten national security.

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[9] The Women's Commission for Refugee Women and Children has produced a report, *Refugee Policy Adrift: The United States and Dominican Republic Deny Haitians Protection* (January 2003). The report relates how a woman who had been raped declined to talk about it before a male asylum officer and male interpreter. Later, when she did speak of it before an immigration judge, the judge rejected her testimony based on credibility because she had not referred to the rape in her first account before the male asylum officer. (The story appears on p. 28 of *Refugee Policy Adrift*.) The report also documents abuse that some of the women experienced on return to Haiti (pages 29 and 30). (www.womenscommission.org)

2. **The Pacific Solution, Ophelia Field, Consultant**[10]

Ophelia based her comments on the research she had done on Australian asylum policy on behalf of Human Rights Watch. Research was conducted in Australia and Indonesia. The report, *By invitation only*, should be consulted for full information on the findings.[11]

The refugee applicants subject to recent interdiction practices by Australia came predominantly from Afghanistan, Iraq and Iran. They travelled overland through the Middle East and South-East Asia, with the last leg of the journey generally being by boat from Indonesia to Australia. In the year 2000-2001, the number of arrivals in Australia was 4,141. While this number was not particularly high, there was a sharp month on month increase in the arrivals of asylum-seekers, leading to projections of 13,000 arrivals in the following year.

The Australian government's reaction was severe. They defended their actions on the basis that they were responding to "mixed flows". Given that most of the asylum-seekers were Iraqis, Iranians and Afghans, it was obvious that they had likely fled persecution in their country of origin. However, the Australian government characterized the arrivals as "mixed flows" on the grounds that they were secondary migrations. It is likely that if the asylum seekers had come directly from the country of origin (e.g. Indonesians), Australian public opinion would not have allowed the government to do what it did.[12]

Before August 2001, individuals arriving by boat were brought to shore and pre-screened. Those screened out (on the grounds that they supposedly did not want asylum) had no access to legal representation or help from NGOs, but all, whether screened in or out, were placed in detention in Australia.

This procedure changed after the Tampa incident of August 2001, when Australia started to refuse to allow the applicants onto Australian territory at all. The government contracted with third countries in the Pacific (Nauru and Papua New Guinea) to hold the applicants pending a decision as to their status (known as the "Pacific Solution"). While there was no explicit connection between the events of September 11 and these developments, a habeas corpus application on behalf of the asylum seekers came before a judge on September 11 and the response to the boats got caught up in anti-terrorism rhetoric.

In September, Australia adopted legislation that retrospectively justified the actions taken in response to the Tampa. The new legislation excised certain areas from Australian territory for immigration purposes.

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[10] The following text is based on notes taken during the workshop.

[11] See *"By invitation only:" Australian Asylum Policy*, Human Rights Watch, December 2002.

[12] There were in fact some Sri Lankans who came directly to Australia, but they were not generally talked about.

In October 2001, under "Operation Relex", Australia returned boats directly to Indonesia, where the vessel was deemed to be seaworthy.

For its research into the "Pacific Solution", Human Rights Watch had hoped to visit Papua New Guinea. However, permission was refused and instead asylum seekers in Indonesia were interviewed to find out about refugees' motivations for secondary migration. The Australian government's position was that refugees were simply seeking a better life in the West.

Since the publication of the Human Rights Watch report, the law has been amended to expand the powers of excision of territory so that soil can be designated as not being Australian soil for the purposes of immigration. The Attorney General can now excise the beach where a boat lands.

The Australian government is claiming that its policies have been very successful because the numbers of arrivals have sharply declined.

The Indonesian government has not followed Australia's directions entirely. The most recent boat to arrive in Australia carried mainly Vietnamese. The boat had been restocked in Indonesia and had been allowed to enter Australian waters. However, Australia forced Indonesia to take the boat back. Another boat has apparently disappeared. Given the amount of surveillance in the area, it seems extraordinary that there should be no information on its fate.

There are several important characteristics of the Australian government's new approach to interdiction:

1. The government has not denied that it has obligations to the asylum seekers pursuant to the 1951 Convention. Rather, it has transferred its obligations to third countries in exchange for financial compensation. Put another way, it has "sold" its international protection obligations to other Pacific states.
2. A new departure is the role of the International Organization for Migration (IOM), which has been contracted to run the detention centres in the Pacific states.
3. There has been no readmission agreement with Indonesia: boats have simply been turned back with no guarantee that they will be accepted back.
4. There is no promise that the granting of refugee status will guarantee resettlement in Australia.

The Pacific Solution has led to significant losses of rights for asylum seekers sent for screening to locations outside Australia:

1. Applicants have no right of appeal except to another official of the same rank. They are not given access to independent legal advice and are not able to access independent country of origin information before their hearing.
2. The responsibility for screening is shared between UNHCR and Australia, but in an ad hoc imitation of UNHCR procedures, rather than in accordance with Australian law. As a result, procedural protections are lost.
3. There is automatic detention for asylum seekers.
4. Families are often separated during the determination process.

3. **Interdiction Practice in Europe, Areti Sianni, European Council on Refugees and Exiles**[13]

The dilemma of reconciling migration control functions and State obligations for the protection of refugees has characterized much of the debate on immigration and asylum policy in Europe. In recent years, numerous measures have been introduced to block access to refugee status determination. These have included mechanisms that either operate as barriers for asylum seekers to access the territory of a European country where they could seek and find protection, or alternatively, for those who manage to reach the shores of potential asylum states, the application of admissibility criteria which allow states to push back asylum seekers without offering them an effective possibility of examination of their application for asylum in substance. This paper will focus on policies of non-entrée (or non arrival) as they relate to the interception of individuals en route to Europe.

Interception has been defined by UNHCR as "encompassing all measures applied by a State outside its national territory in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea and making their way to the country of prospective destination". In the context of the European Union, interception practices need to be considered within the broader process of harmonisation of asylum and migration measures. In this process, the prevention of and combating of illegal migration and trafficking in human beings have for long been considered the top priorities of EU Member States.

On 15 November 2001, the European Commission adopted a Communication on a common policy on illegal immigration setting out a comprehensive Action Plan to prevent and combat irregular immigration and trafficking of human beings in the European Union. The Action Plan was approved by the Justice and Home Affairs Council on 28 February 2002. This provides that "measures relating to the fight against illegal immigration have to balance the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection". The Plan also calls for the fight against illegal migration to be conducted in a balanced way…with Member States exploring the possibilities of offering rapid access to protection so that refugees do not need to resort to illegal immigration or people smugglers.

The search for balance has not been the top priority in reconciling migration controls with asylum obligations in the European Union. On the contrary, a number of migration control measures have had the effect of undermining the right to seek asylum and effectively blocking access to Europe.

Firstly, visa policies. On 15 March 2001, a Council Regulation was adopted listing third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.[14] The Regulation includes a common list of approximately 130 countries, among them being a considerable number of refugee producing countries such as Afghanistan, Somalia, Sudan and Iraq. A visa policy is a legitimate tool for controlling immigration. When however it is directed against asylum seekers with the purpose of blocking access, it is in

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[13] The following text was provided by Areti Sianni.

[14] A review of the list of third countries whose nationals require visas and are exempt from that requirement was completed in March 2003 with the adoption of the Council Regulation 453/2003

flagrant contradiction with the principle of asylum and international human rights and refugee norms. To date, ECRE has called for the introduction of exemptions from visa requirements for persons fleeing countries suffering civil wars or systematic abuses of human rights in order to enable them to gain access to Europe legally. Although this was not taken up by Member States in the recent review of the Regulation on visas, it is encouraging that some of the current debate is shifting towards the development of an EU system of protected entry procedures. Under such system, persons in need of international protection could approach diplomatic missions of EU Member States and following a pre-screening procedure, be granted access to a Member State by means of a visa or entry permit to pursue an asylum claim. Although fraught with a number of difficulties such system could provide a protection solution for a small number of refugees.

Secondly, sanctions have been imposed on transport carriers for bringing into the territory of Member States passengers who are not in possession of travel documents and visas required by national or international regulations. An EU Directive on carriers sanctions was formally adopted on 28 June 2001. This has had the effect of engaging private companies in the exercise of immigration control functions or otherwise risking penalties of EURO 3000 minimum for each person carried. The weakest of safeguards for refugee protection is provided in Article 4,2 of the Directive where it is stated that action taken should be "without prejudice to Member States obligations in cases where a third country national seeks international protection" - little consolation to a survivor of torture who has been refused permission to board a carrier because she is travelling on a forged passport. To date, Member States have either transposed the Directive on carriers sanctions or are in the process of doing so as part of a reform of their national legislations on asylum. Not without problems though, it should be stressed. In Austria, a recent ruling by a court of appeal of the Land of Lower Austria has overturned a decision reached in the first instance to fine an airline a total of EURO 36,000 for transporting 12 insufficiently documented passengers to Austria.[15] The judgement considered that carriers could not be expected to detect forged travel documents as they were often difficult to distinguish from genuine ones. This follows a landmark decision by the Austrian Constitutional Court in October 2001 to declare relevant provisions of the 1997 Austrian Aliens Act null and void on the basis that they did not inter alia specify whether and how in fulfilling their obligations carriers needed to take into consideration Austrian commitments under the Refugee Convention.[16]

Thirdly, measures have been introduced to externalise immigration controls. These have taken the form of posting of immigration officers at diplomatic missions in countries from which EU Member States

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[15] 20 November 2002

[16] See also British High Court decision of 5 December 2001 where it was ruled that holding lorry drivers responsible for transporting stowaways is "unworkable in practice and unfair in law" and the fine of £2,000 per stowaway is "ruinous for many persons of ordinary means" and could amount to violations of the European Convention on Human Rights (Article 6 on the right to a fair trial) and Article 1, Protocol No 1 on the protection of property (since a driver risks having his vehicle confiscated if he cannot pay the fine immediately) (Roth International GmbH et al. V. Home Office) Ruling partially upheld in Court of Appeal which led to changes in legislation on carriers liability. New law requires that authorities take into account efforts made by lorry drivers to prevent their vehicles being misused by irregular migrants when determining fines for abuse.

want to reduce population movements towards their borders. They have also involved the placement of immigration and airline liaison officers at major international airports and seaports in countries of origin and transit with the task of preventing the embarkation of undocumented and improperly documented travellers. In 2001 for example, the UK and Italy announced a joint initiative on South Eastern Europe to send immigration officers to countries of origin and transit to train local officials and gather intelligence on trafficking and smuggling networks. A conclusion to create an EU network of national immigration liaison officers to help control illegal migration flows through the Western Balkans region was adopted in May 2001 with work starting in December 2001. There are plans to use the experience gained in the Balkans to extend to other regions of strategic interest to the European Union. In terms of national measures, the UK has been particularly active in this field. Since June 2001, it has stationed immigration officers at Prague airport for the purpose of interviewing passengers to check, even if they hold valid passports and visas, that they are genuinely travelling to the UK for the stated purpose. In this process, it is fair to assume that claiming asylum would hardly be deemed a valid purpose for travelling to the UK independently of the merits of individual cases.[17] Further, under a specific agreement between France and the UK, British immigration staff now have the power to exercise full immigration controls on passengers on Eurostar trains and those embarking in French ports. Under the 2002 National Immigration and Asylum Act, this power is to be extended to any port in the European Economic Area.

A final area that needs to be considered relates to the incorporation of asylum and migration concerns into the external dimension of Community action. In late 1998, in an attempt to integrate asylum and immigration concerns into all areas of EU external policy, the High Level Working Group on Migration and Asylum was established with the task of preparing cross-pillar action plans integrating EU foreign and security policies, trade and aid relations, social policies and immigration and asylum policies. The task of this Group until 2002 was to design so-called EU Action Plans for six target areas and develop practical and operational proposals to increase cooperation with countries of origin and transit and enhance the capacity of the EU to manage migration flows. Parallel to this process, since 1999, the EU has sought to incorporate the issue of immigration and in particular the fight against illegal immigration into all the association/cooperation and partnership agreements with candidate countries for EU membership and third countries in the Mediterranean basin, central Asia, the Balkans and the ACP countries. During negotiations last year on justice and home affairs issues as part of the process of accession to the EU for example, Poland agreed to hire 5,300 extra border guards by 2006, build 10 more border posts and buy new equipment such as helicopters and infra red detection devices. Beyond the borders of Europe, a programme to combat illegal immigration by supporting improvements to the management of border checks has been adopted in cooperation with Morocco for the period 2002-04 with a budget of EURO 40 million. The money will be used to improve surveillance measures on Moroccan sea and land borders and to set up an information centre to advise potential candidates of illegal immigration on how to seek entry into the EU by legal means. Likewise, negotiations are currently under way upon the request of the Italian government for the EU to ease restrictions on the purchase of military equipment by Libya (introduced in compliance with Resolutions number 748 and

[17] These checks are periodic and can last for a number of days. In May 2002, checks resulted in denials of the right to board flights to the UK for 47 people. Those prevented from boarding are believed to be essentially of Romany origin. The British government has been accused of practising discrimination.

883 of the Security Council) so that it can increase its coastguard capacity to prevent the clandestine departure of vessels carrying irregular migrants to Europe.

A new momentum in the debate on the integration of immigration policy into the European Union's relations with third countries can be found following the meeting of EU Heads of State in Seville on 21-22 June 2002. The Seville European Council urged that "any future cooperation, association or equivalent agreement which the European Union concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration." Work on this issue is under way with regard to the inclusion of such a clause in future Community agreements with Syria, Iran, Mercosur and the Andean Community. The Council further reaffirmed in Seville the necessity of carrying out a systematic assessment of relations with third countries which do not cooperate in combating illegal immigration concluding that "inadequate cooperation by a country could hamper the establishment of closer relations between that country and the European Union". To date, five countries have been identified for intensifying cooperation on the management of migration flows: Albania, China, Morocco, Russia and Turkey. Cooperation with these countries is not only seen as desirable but also essential given that they represent key source and transit countries for irregular migration.

What has been the cumulative effect on asylum seekers of visa policies, sanctions and pressure on countries of transit to intercept irregular migrants heading for Europe? In a few words, they have effectively prevented people with protection needs from accessing EU territory. Without any other option, people in need of international protection are forced to rely on smugglers and traffickers: the result being the *de facto* although not necessarily *de jure* criminalization of the act of seeking asylum. In 2002 for example, 16,504 boat migrants were apprehended for trying to reach Spain illegally by sea; an average of 46 people per day. During the same period, 35 bodies were discovered at sea; a figure concerning the number of bodies found in Spanish territorial waters and not those who drowned while attempting to reach Spain by sea. Similarly, 3,766 stowaways were found in lorries and containers crossing to the UK from Belgian ports, an increase of 40% from figures in 1999. As the human costs increase, the physical barriers to entry to Europe have become higher and methods of interception more sophisticated. For example, during the last six months of last year, 17 joint operations, pilot projects and ad hoc centres on illegal migration were approved under intriguing names such as Ulysses, Triton, Orca, RIO IV and Deniz sea.[18] In the same period, the European Commission together with the European Space Agency has drawn up extensive plans to use satellites originally designed for tracking coastal erosion, air pollution and climate change for security and policing operations. Known as the Global Monitoring for Environment and Security programme, the new initiative will involve the use of satellites to take detailed pictures from space that show objects less than three metres in size. More recently, the UK government has introduced a number of proposals on new approaches to international protection which include among others the development of transit processing centres where persons arriving in the EU and claiming asylum could be transferred to have their claims processed. Such centres might be on transit routes to the EU. This is a grim picture but one where the reality of human suffering in Europe's coastal and border areas has become almost banal in its scale. It is also a picture that is far from being unique to Europe.

[18] One of these programmes is Ulysses which is a naval surveillance operation that started on 28 January 2003 involving Spain, France, Italy, Portugal and the UK.

DISCUSSION

A. Domestic Courts: To date, most courts have upheld interdiction measures. There is a need to examine how due process requirements may be applied to the increased used of discretionary procedures, as opposed to the rule of law, and to individuals who are outside of a nation's territory. It may be worth looking at the legal obligations of subcontractors. There has been some interesting European court decisions regarding carrier sanctions. One commentator felt that there has been a complete failure of our domestic human rights protection systems. A category of human beings without human rights is being created.

B. Challenge to the Manner rather than Practice of Interdiction: Court challenges might focus upon the manner and actors involved in interdiction. Are private companies the appropriate body to be enforcing interdiction procedures?

C. International Recourses: International courts have been somewhat better than national courts (for example, the Inter-American Commission on Human Rights disagreed with the US Supreme Court on the question of interdiction). The European Court on Human Rights has also rendered some important decisions. Might NGOs apply to the Inter American Court or the UN Committee on Human Rights for an advisory opinion? How can the cause be packaged so as to gain support within the international human rights system?

D. Political/Diplomatic Measures: A champion nation might be found to express concern, etc. However, it must be noted that there is severe pressure on nations within the EU who have attempted to do so. In addition, it is unlikely that an intergovernmental body will champion the cause as both the IOM and UNHCR appear to have been largely co-opted into support for current practices.

E. Link with broader migration issue: UNHCR seems to be deferring to IOM in many of the issues. There are no guidelines at IOM for assessing people before return. Many countries in Europe are reluctant to see themselves as multicultural societies. In this context, having people present in the countries without any status is actually seen as an advantage in that it means they have no basis on which to ask the country in which they live to make changes in order to accommodate them.

F. Changing Public Approval for Interdiction Practices: To date, the public has sanctioned the new laws. Language such as "legal" versus "illegal" status likely impacts the public. There is a need to get out the message that repressive policies are in place.

G. The Use of Civil Disobedience: In the 1990s Amnesty International rented a Greenpeace vessel in order to accompany a Haitian boat headed for the United States. In addition, in Australia, many people have taken dramatic actions to show support for the applicants such as breaking asylum seekers out of prison and allowing them to hide in private homes.

H. Getting Access to those being Interdicted: Having a presence at airports could be useful. NGOs could also attempt to intervene with private companies. New means and opportunities might be found for these types of activities.

I. Linking Interdiction to Gender Issues: There is little recognition of the gendered impact of interdiction practices in national guidelines and official procedures. (One exception is the introduction of new visa categories in the EU for victims of human trafficking based upon cooperation with the police.) There is a clear gendered impact to interdiction: for example, women are often separated from their male head of household and are unable to clearly articulate the basis to their claims. Before Australia slammed its doors shut, it already had legislation excluding family reunification for people recognized as Convention refugees. A high proportion of the people arriving by boat were women and children trying to reunite with their family members in Australia.

J. Issue of discrimination: When the issue of discrimination was brought up in the US with respect to the treatment of Haitians, the response was to treat everyone equally badly (except Cubans).

Session III : REVIEWING SAFEGUARDS CURRENTLY IN PLACE AND THEIR LIMITS

1. Eleanor Acer, Lawyers Committee for Human Rights[19]

LCHR is currently working with Yale University on a study on interdiction practices in the US. The following remarks will look in more detail at the US measures to protect asylum seekers, mentioned above by Bill Frelick. The word "safeguard" is problematic, since it exists in name only.

The US is engaged in the direct return of migrants, including to countries with grave human rights records (e.g. China, Cuba, Haiti). Procedures for protecting refugees are very deficient. Of particular concern is the different treatment of different groups. As mentioned above, the biggest difference is in access to screening, where Haitians are most discriminated against. Once screened in, Chinese are brought to the US, while Cubans and Haitians are processed in Guantanamo Bay (and cannot enter the US even if found to be refugees).

A key deficiency in the existing procedures is that not all migrants are screened, only those who come forward or recognized as potential asylum seekers. Often there are no interpreters available[20], and even where there are, the migrants are not necessarily asked a direct question about fear of return.[21] For Haitians, there is only the "shout" test (i.e. if you shout, you will get a screening interview). For Chinese migrants, there is no interpreter present, only a written questionnaire, which assumes literacy and a certain level of education. The questions asked in the questionnaire are very general and ask why they left, but not if they fear return.

Information provided to the migrants is inadequate. In fact, no information is given, except to Cubans who are read a statement which refers to possible "concerns" with being returned (there is no mention of "fear").

A boat is an inappropriate context in which to conduct interviews. People are likely tired, scared and hungry. There is no privacy: people may be worried about others hearing them speak, especially if they have already been told they will be sent back.

The screening standard used is exceedingly high (higher than both the "credible fear" standard used on US soil and the UNHCR "manifestedly unfounded" standard). Women in particular might be at risk, since gender is not always recognized as a basis of persecution.[22]

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19 The following text is based on notes taken during the workshop.

20 There is no requirement to have interpreters on every boat.

21 One of the focuses of the research conducted by Yale has been on access to translation.

22 Lawyers Committee for Human Rights was involved in one case where a woman was told in the expedited removal process that she couldn't make a claim based on gender.

There is very little statistical information available on what happens in cases of interdiction (e.g. how many people pass the screening interview or where they are sent to). There is no outside monitoring.

For those who pass the pre-screening, there are none of the basic procedural safeguards (such as legal representation, right to appeal) at the screening and eventual refugee determination interviews. There are no guidelines for dealing with children (except possibly for Cubans). For migrants returned to their country of origin, there is no monitoring, except in the case of Cubans.

Those found to be refugees may be resettled in other countries even if they have families in the USA. Those interdicted may also be subject to detention at Guantanamo without access to legal counsel, for indefinite periods.

2. Warren Everson, Air Transport Association of Canada[23]

From the perspective of air carriers, immigrants help them make money, but refugees cost them money. While carriers are expected to act for Canada, they are not Canada. The Canadian refugee determination process is slow and expensive for the state and the state is therefore trying to limit access. Since the Singh decision[24], once travellers are in Canada, they have access to the Canadian Charter of Rights and Freedoms.

The border is therefore transported to the embarkation point. Carriers play an extraordinary role in screening people's documentation. They face a twin threat: they may be fined by the Canadian government or conversely sued by someone who has the right to enter Canada (although this is rare).

In order to screen people trying to embark, Canadian carriers typically contract with locally engaged staff. If an improperly documented passenger is brought to Canada, the carrier will be fined and if their refugee claim is refused, they have to remove them to the home country (including covering costs of transportation within Canada, care in points of transit and escort if required). The cost to the carrier of a passenger who enters illegally may therefore easily rise to $50,000 or $60,000.

Policing entry requires equipment and human resources. Because of their role in passenger screening, carriers are involved in extensive consultations with Citizenship and Immigration Canada.

The current security environment in which they now work adds costs and complexity. The refugee process is getting tied up with security issues. In the past, the government used to show some sympathy towards carriers, but this is no longer the case because of the security dimension.

Removals are difficult. Often people don't have proper travel documents. The number of people being removed per aircraft is limited. Sometimes this may mean that families have to be split up. Stateless

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[23] The following text is based on notes taken during the workshop.

[24] Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

people can be bounced back and forth when no country will accept them. The pilot is entitled to order a person off the aircraft, so some people facing removal create a fuss so that they will be disembarked.

People claiming asylum while in transit presents a problem, as states get annoyed. Carriers therefore try to stop passengers from getting access.

The people smuggling business is increasing in sophistication. Even where governments invest in new high-tech secure documents, it is not long before smugglers find a way to forge them.

Carriers also have to deal with state corruption, both in the form of shake downs and state-sponsored people smuggling operations.

The carriers' role is probably going to decline in the future. Large carriers are going bankrupt; discount carriers are reluctant to travel across international borders because of the problems associated with immigration rules and carrier sanctions.

Carriers would like a system of advance passenger processing (for example, where the carrier puts the passport in a machine and the passenger is either cleared for boarding or rejected).[25]

Also helpful are the immigration officers posted abroad, especially if various countries cooperate (at Bangkok airport, five or six states are working to put in place combined representation).

In concluding, security issues are a key context. Comments that seem to be scornful of security concerns are misplaced, especially from refugee advocates. Americans can't be mocked or shamed out of their concerns. Terrorists are targetting refugees. Immigration and refugee programs are going to have to work in a stricter security environment for some time to come.

3. Erica Usher, International Organization for Migration[26]

There have been numerous discussions on interdiction in recent years – the pros and cons, "how to" and "how not to"…. This workshop, looking at ways to incorporate refugee protection safeguards into interception measures, is a welcome addition to these discussions.

IOM works at a number of different levels – at the global and regional levels in facilitating discussion, cooperation and understanding among governments, international organizations and NGOs, as well as at the national and community levels in capacity building, technical cooperation and other migration related activities.

Before going further, I would like to take a minute to provide some context.

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25 Australia is developing such a system.

26 The following text was provided by Erica Usher.

Current data shows that there are 175 million people living outside of their country of birth which is about 3% of the world's population. The number of migrants has more than doubled since 1970. Sixty percent of the world's migrants currently reside in the world's more developed regions and 40 per cent in less developed regions. Most of the world's migrants live in Europe (56 million), Asia (50 million) and North America (41 million). Almost one of every 10 persons living in the more developed regions is a migrant. In contrast, nearly one of every 70 persons in developing countries is a migrant.

I am providing these statistics primarily to illustrate the extent of migration and the magnitude of the number of people on the move today. The fact that almost one of every 10 persons in more developed regions is a migrant is an enormous pull factor for others, even for those just contemplating a move. The power of networks in todays globalized world is very strong.

The huge number of people moving in today's world brings with it enormous challenges for governments, International Organizations and NGO partners:

- Mixed flows – making it difficult to distinguish between the various groups on the move
- Security concerns (which have only been exacerbated since Sept. 11)
- Increase in irregular migration, inter alia because channels for meeting labour demands with the available supply are not adequate.

Managing these ever-increasing flows is no easy task. Unrestricted access to borders is not the answer, as it would bring with it its own set of problems. It is a sovereign right of a State to determine who is permitted to enter and remain on a State's territory. Similarly, it is a sovereign duty of the State to ensure that those persons it permits to enter do not constitute a threat to the community.

As it is recognized by the theme of this workshop, governments are not going to stop controlling their borders – interdiction is here to stay. Controlling borders does not need to be incompatible with respect for the rights and dignity of migrants. What is needed, then, (and this is why we are here, and I congratulate CCR for putting such a workshop together) are more international cooperative efforts to better manage migratory flows to ensure that the basic rights of migrants are protected and that refugees seeking asylum will nonetheless benefit from effective protection.
This workshop should ask us to challenge the assumption that refugees should need to travel so far to find effective protection. We need to take a fresh look at the international system that is in place for refugee protection. It should not just be a question of improving access to asylum procedures and easing up on border controls, but also of facilitating and promoting reception and protection within the region of origin.

There are few, if any, countries in the world today which do not experience immigration, emigration and transit migration. This is important to understand when considering approaches to ensuring the effective protection of refugees. Increasingly, countries of all migration perspectives in developed and developing countries are recognizing the value of entering into dialogue on international migration and are genuinely interested in entering partnerships in order to better manage migration more cooperatively. Regional consultative processes on migration are emerging in all corners of the world, and IOM is very active in encouraging and facilitating these fora.

For instance, the Terms of Implementation for the Return of Extra-regional Migrants, developed as part of the Puebla Process, and the Australian Regional Cooperation Model for interceptions by Indonesia of Australia-bound irregular migrants are important examples of cooperative approaches to address the challenge of protecting refugees in the context of interception programmes. These instances of State cooperation to combat irregular migration and smuggling of persons, with due regard for the respective roles of UNHCR and IOM, warrant further consideration as part of a comprehensive package of migration management mechanisms.

Many of these regional processes are not only looking at strategies for cooperation on interdiction – many are also looking at ways to promote effective protection of refugees in the region of origin.

Increasingly the need for active NGO participation and partnership is being recognized in these regional processes, and NGO's are being invited to participate in many (although not yet all). NGO's are a key partner and have an important role to play both as a watchdog for governments and international organizations, but also as an active partner in implementing programmes and activities.

Does IOM have a role in interceptions ?

IOM's role with respect to intercepted migrants is limited to facilitating their voluntary return. IOM does not undertake or become involved in the interceptions, which are carried out by governments – and IOM does not conduct refugee status determinations – which are carried out by UNHCR or by government authorities. Nor is IOM involved in deportations or forcible returns. Let me be very clear about a fundamental point. IOM respects the protection obligations of States and of UNHCR. Therefore, to the extent that IOM encounters asylum-seekers in IOM operations, they are referred to relevant authorities – whether national or UNHCR – for appropriate consideration.

IOM **does** become involved in helping to ensure that governments and other agencies have the capacity to manage irregular migration in an humane and efficient way. This involves capacity building of immigration officials, law enforcement agencies, NGOs and others involved with migrants to ensure that the appropriate policy, legislative and operational systems to achieve this are in place. A critical element of such a comprehensive approach is to assist the voluntary returns of persons unable to remain in the host country.

IOM's mandate to deal with the voluntary return of migrants is based on its Constitution, which, in Article 1.1(a) and (b) states that the purpose and functions of the Organization shall be to concern itself with the organized transfer of "migrants…, refugees, displaced persons and other individuals in need of international migration services." Article 1.1 (d) further states that migration services – listed in Article 1.1(c) – can also be provided for voluntary return migration.

For a better understanding of IOM's role, the following points from IOM's general policies on assisted voluntary return should be highlighted:

· IOM's assistance is given in situations where there is a special interest of States to involve an international organization for the provision of voluntary return arrangements.

· IOM's assistance in the physical return movement is limited to returnees who volunteer to accept return under IOM auspices. Deportation movements cannot be undertaken by IOM and will be handled by States directly concerned.
· IOM is prepared to undertake specific counseling with each individual for the purpose of outlining the options available to that individual
· IOM expects to be given assurances by the country of origin that the migrants returning under its auspices will be readmitted and, according to circumstances, that they will not be exposed to punitive measures for having left their country irregularly.
· IOM would seek authorization from the country of origin to follow up on the assurances given, through passive or active monitoring as warranted by the circumstances.
· IOM generally acknowledges the right of countries of destination or transit to forbid entry into their territory of migrants in an irregular situation, without prejudice to the need for a refugee status evaluation process by the UNHCR or governmental authorities in specific situations.

IOM's involvement may also cover the following areas:
· Identification and documentation of migrants;
· Negotiations with countries of origin for readmission
· Short-term care and maintenance, including food assistance and medical screening, prior to return; transport arrangements; post-return assistance, including reception and monitoring.

The effectiveness of assisted voluntary return programs is greatly enhanced through migrant counselling. IOM makes every attempt to provide reliable and neutral information on the available options and, if at all possible, the potential outcomes for each of the options. It must be emphasized that IOM does not create the choices.

During the counselling process, IOM takes care to ensure that special needs of women (especially those travelling alone) and unaccompanied minors are considered.

As a proactive measure, IOM is also very active in a number of countries with mass information campaigns – awareness campaigns on the dangers of trafficking and smuggling, the availability of legal immigration channels, as well as campaigns aimed at discouraging clandestine departures of those who are not in need of international protection.

Cooperation with International Organizations

One of IOM's prime objectives is to work "towards effective respect of the human dignity and well-being of migrants". IOM does not function on the basis of an international convention as does the UNHCR. It strives to assist migrants, and States, in a manner which is safe, and respectful of the dignity of the migrant. Directly or indirectly, IOM works towards the respect of human dignity through its action. IOM's objective is not to become a monitoring agency, one that would be in charge of controlling the application of international standards: other organizations fulfill this function. IOM aims at developing a better synergy between its own work and that of others, in order to facilitate the translation into reality of the rights enumerated in international conventions and to ensure effective protection of refugees and of the rights of migrants.

International cooperation is key in this regard. IOM's Constitution calls on IOM to "co-operate closely with international organizations, governmental and non-governmental, concerned with migration, refugees and human resources in order, among other things, to facilitate the co-ordination of international activities in these fields. Such co-operation shall be carried out in the mutual respect of the competences of the organization concerned." In May 1997, IOM and UNHCR signed a memorandum of understanding on joint cooperation. An important part of the memorandum and of the first review of the resulting cooperation focused on the return of rejected asylum seekers and irregular migrants.

Early this year a letter jointly signed by IOM Director General, Mr Brunson McKinley and the High Commissioner for Refugees, Mr Ruud Lubbers, was sent to all employees of both organizations clarifying the roles of the two organizations particularly in the area of Assisted Voluntary Return.

IOM is also part of a newly formed Inter-Agency group on Rescue at Sea, chaired by the International Maritime Organization, and including as participants the UNHCR, the UN Office of Legal Affairs, the UN Office for Drug Control and Crime Prevention and the Office of the UN High Commissioner for Human Rights. One of the objectives of this inter-agency group is to enhance cooperative efforts of international organizations when responding to situations involving rescue at sea.

IOM is also working to develop more regular consultations with NGOs. A number of NGO groups are registered observers of IOM and still others participate in our NGO consultations where common interests are discussed.

This panel is considering specifically the safeguards currently in place and their limitations. I have already mentioned a number of safeguards that IOM has built into its policies and procedures. In addition IOM pursues a number of policy and operational strategies to ensure the humane and orderly handling of interception situations. These include, but are by no means limited to:

· At the global level: encouraging international and regional cooperation to better manage migration, and to develop new approaches to ensure the effective protection of refugees either through enhanced burden-sharing or protection in the region
· Encouraging and facilitating cooperative regional approaches with due regard for the protection of refugees and the rights of migrants
· At the programme level – our constitutional requirement of voluntariness prior to becoming involved
· Capacity building activities with governments
· Our strategic alliance with the UNHCR and other organizations as well as our partnerships with NGOs
· Migrant counselling to enable informed decisions about the options available to the migrant
· Assurances by the country of origin that migrants returning voluntarily will not be subject to detention or punitivemeasures upon return
· Improved (and improving) guidelines and training for staff
· Proactive and targetted information campaigns.

Each of the safeguards in place can have limitations. For example, the options available to the migrants can be a limiting factor. Again, IOM does not make the choices, but discusses with migrants those that are available. At the very least having available a mechanism for asylum-seekers to have their refugee

claim heard, as well as a burden-sharing approach to providing effective protection for those determined to be refugees would serve to a certain extent as a safeguard.

IOM is convinced that an international approach involving cooperation between governments and organizations, burden-sharing, increased access to regular immigration programmes and effective protection for refugees in their region of origin is required to better manage migration flows, and to discourage the mass irregular movements that we are seeing today.

DISCUSSION

A. Numbers of "people on the move": Referring to all people living outside their country of birth as "people on the move" is misleading. Numbers are used to scare people. People settled (maybe even citizens) in another country should not be described as "on the move". It was noted that statistics on people without documents are hard to obtain precisely because these people are not documented. IOM is working closely with governments to develop methods to collect data.

B. Security concerns: Security is an issue, but the concerns have been misplaced, and used against the wrong people. We need to look at how the policies of the Bush Administration are causing insecurity. Muslims and Arabs have been particularly targetted. Security concerns are being used to justify various measures that are not needed to counter terrorism. An example is the US-Canada Safe Third Country agreement, which has been packaged as a security measure. The US Department of State however testified before Congress that the agreement is not needed to protect security. Recently Haitian interdiction has been justified as necessary on the grounds of national security. Another example is Operation Liberty Shield, announced on the eve of war against Iraq. Asylum seekers from 33 unidentified countries faced detention for the duration of their claims. This was clearly discriminatory based on their nationality. The security argument is being stretched. Because they are voiceless, refugees have been unduly impacted by post-September 11 measures. With respect to US-Canadian relations, the US doesn't care whether Canada joins them in the war or not. What the US can't tolerate is the perception that Canada's refugee system is lax. Canada needs to respond to US concerns. If people have the perception that refugees advocates are not concerned about security issues, there may be a need to rethink how the message is getting out.

C. Role of IOM: To some, there seems to be a dichotomy within the IOM. On the one hand, there are sensitive people working on policy analysis (e.g. in the area of trafficking), on the other hand, there seems to be a mercenary approach to operations, with IOM ready to undertake operations wherever the resources are available. A participant said that IOM speaks of wanting to respect the rights and dignity of the people, and yet the organization is engaged in what appear to be some highly dubious activities. An example was cited of running detention centres in Nauru and Papua New Guinea for Australia, despite the fact that the context is no better than that of detention in Australia, which the UN Human Rights Committee has condemned. IOM is seen to be cooperating with states' agenda of containment in its participation in anti-smuggling, anti-trafficking programs. When states label people as migrants in transit, IOM appears to simply take states' word instead of asking themselves whether they might not actually be people fleeing persecution. In response, it was noted that IOM doesn't consider that it is managing detention centres: rather it sees its role as providing care and maintenance (health care, counselling, etc). There is internal discussion within IOM about whether or not to be involved. IOM works both with governments and with migrants. It tries to maintain a certain sense of balance in what

they are doing. While they need money to provide services, they have in some cases pulled out of activities (e.g. in a situation where half of the migrants would return voluntarily and the other half were being forced to return). IOM has no problem with setting up anti-smuggling, anti-trafficking programs, as long as there is a process so that people who want to claim asylum are provided with an opportunity to do so.

D. Carrier sanctions: Carriers are increasingly contracting out screening to security companies, who are better qualified to do the job (and it is not worth paying to have someone permanently stationed at an airport when the carrier only has a few flights going out). Carriers pay millions (but not tens of millions) of dollars in fines. If airlines invest enough in efforts to prevent undocumented people from arriving, they can negotiate the fines down. There have been judicial challenges by carriers, but they seem to be pretty universally unsuccessful.[27] Immigration control officers are useful to carriers, especially if they are good. They support Canada strengthening its network of immigration control officers.

E. Role of privatization: We are seeing an increasing privatization of what used to be government roles. Private carriers are doing immigration screening. Security in detention centres is being subcontracted. US travel agencies abroad are issuing tourist visas.

[27] See presentation by Areti Sianni above re. cases involving carrier sanctions.

Session IV: EXPLORING OPTIONS FOR THE FUTURE

1. Grainne O'Hara, Legal Officer, Protection Policy and Legal Advice Section, Department of International Protection, UNHCR Geneva[28]

The UNHCR has engaged in discussions on interception as part of the broader discussion on the nexus between asylum and migration. The topic was addressed during the Global Consultations process and is now the subject of a proposed EXCOM Conclusion, following up on the issues raised during the Global Consultations. The focus of the EXCOM Conclusion is to look to the future and to see how protection safeguards can be better incorporated into interception activities.

However it is necessary to have a quick look at past discussions to put UNHCR's current activities into context. The main points of reference in the recent debate on interception include:

- A 2000, Standing Committee paper on Interception of Asylum-Seekers and Refugees (EC/50/SC/CRP.17 of 09/06/00)
- A regional workshop held in Ottawa 14-15 May 2001
- The Agenda for Protection, adopted by the Executive Committee in 2002 (in particular Goal 2 activities linked to the protection of refugees within broader migration movements); and its related workplan which foresees an EXCOM Conclusion on Protection Safeguards in Interception Measures.

Recalling Bill Frelick's comments earlier in the day to the effect that UNHCR has accepted interception, I would say that this is not entirely accurate. UNHCR recognises the reality of interception as a tool of migration control but at the same time stands ready to question the appropriateness of its application and the manner in which is it used where this could have negative impact on the protection needs of persons of our concern. For example UNHCR has been involved in the litigation concerning practices in Prague airport, earlier described by the colleague from ECRE.

UNHCR is currently in the process of drafting this ExCom Conclusion on protection safeguards in the context of interception measures. The first round of consultations with members of the Executive Committee will take place on 17th June on the basis of a draft text to be prepared by UNHCR.[29] The text of the Conclusion is in the late stages of drafting. The main focus of the Conclusion is on protection safeguards, with an obvious emphasis on international protection as contemplated by the international refugee regime. We are conscious however of general protection requirements which may arise with respect to migrants regardless of, or even on account of their specific status, for example the case of victims of trafficking. For this reason the text builds upon existing global discussions and draws in references to the Palermo Protocols and other relevant international instruments. In the draft Conclusion, UNHCR proposes a working definition of interception that encompasses all measures applied by a state outside of its territory to stop irregular migrants from traveling to the intended

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[28] The following text was provided by Grainne O'Hara.

[29] This consultation was subsequently rescheduled for 7th July with others to follow in the lead up to EXCOM in late September.

destination country by land, air or sea.[30] The proposed definition is a broad one and could conceivably cover interception practices at places of origin, places of transit or places of destination.[31]

The proposed protection safeguards draw heavily on human rights standards, notably the principle of non-discrimination. The Conclusion will also look at the issues of information and data collection as tools which can help in a greater understanding of the impact of interception measures on the provision of protection. Another issue covered in the draft conclusion is the issue of training for officials.[32]

With respect to protection needs, there is a need to distinguish refugees and asylum seekers from other migrants and identify their protection needs accordingly. In the context of interception measures this presents particular challenges. A basic question is: who should be responsible for doing the distinguishing? Airport liaison officers? Private security staff? Carriers? The answer may depend on the location (for example, at sea UNHCR, lawyers, NGOs are not present). The location can also render the availability of services difficult (e.g. access to translation).

EXCOM conclusions articulate standard and in doing so guide State practice but they do not determine practice. The Conclusion itself is thus a step in a broader process. Once adopted it will express the consensus of States. In isolation the Conclusion by itself will not bring effective safeguards into existence. It can however serve as the basis for strategies between States, UNHCR and other actors, including NGOs as to how best to respond to protection needs in interception situation.

The UNHCR has engaged in discussions on interception as part of the nexus between asylum and migration. The topic is an important focus for the UNHCR and was addressed in the Global Consultations process.

UNHCR is now in the process of drafting an ExCom Conclusion on protection safeguards in the context of interception measures. The first formal consultation of members of the Executive Committee will take place after a draft is sent out (due 17 June).

The text of the Conclusion is in the late stages of drafting. It builds upon existing global discussions. The UNHCR accepts the existence of interception measures, as a reality related to migration control. However, UNHCR is willing to challenge the appropriateness of measures as well as how they are applied. For example, UNHCR is involved in the litigation around practices at Prague Airport. On the surface, they are migration control measures but one group (i.e. the Roma) is disproportionately affected.

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[30] The working definition proposed by UNHCR is drawn from the Standing Committee paper of 2000 and uses the term interception inclusively as opposed to using the separate term, interdiction for measures occurring at sea.

[31] Actions undertaken at place of origin however would primarily affect nationals of that location who would by definition not be refugees.

[32] The Agenda for Protection refers to conclusion and UNHCR making available training package for states, NGOs etc.

In the draft Conclusion, UNHCR is trying to present a working definition of interception as all measures applied by a state outside of its territory to stop irregular migrants from travelling to the country by land, air or sea.[33] These measures may have greatest impact in the country of origin, en route or in country of destination.

The proposed protection safeguards draw heavily on human rights standards, notably the principle of non-discrimination. The UNHCR would argue that only where non-discrimination standards are strictly upheld can one achieve migration control measures without impacting on asylum seekers.

The Conclusion will also look at the issues of information and data collection.

With respect to protection needs, there is a need to distinguish refugees and asylum seekers from other migrants and identify their protection needs. This is easier said than done. A basic question is: who should be responsible for doing the distinguishing? Airport liaison officers? Private security staff? Carriers? The answer may depend on the location (for example, at sea UNHCR, lawyers, NGOs are not present). The location can also render the availability of services difficult (e.g. access to translation).

Another issue covered in the draft conclusion is the issue of training for officials.[34]

EXCOM conclusions articulate theory but do not determine practice. The Conclusion itself is thus only a small step. It expresses the consensus of states and can help in identifying strategies to be pursued. However, the Conclusion by itself won't bring safeguards into existence.

2. Bruce Scoffield, Citizenship and Immigration Canada[35]

I am pleased to have a chance to participate in this discussion. It is certainly topical, since members of UNHCR's Executive Committee will be turning their attention to the question of how best to integrate protection safeguards in interception through the adoption of an EXCOM Conclusion this Fall.

I would address two issues in my remarks this afternoon. First, I will recall Canada's engagement with the work that has gone on over the past few years on this subject, leading us to the point that EXCOM is seized with the issue. I will then outline for you the present thinking within the government on what we hope to see dealt with in the Conclusion that will be presented to EXCOM.

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[33] From Standing Committee paper, 2000.

[34] The Agenda for Protection refers to conclusion and UNHCR making available training package for states, NGOs etc.

[35] The following text was provided by Bruce Scoffield.

I should emphasize that at this point we in government are still thinking through the issues that will be addressed in EXCOM conclusions this year. So the results of the discussions today will certainly be of interest and I hope they can be made available sooner rather than later.

In October 2000 the 51st session of the Executive Committee endorsed UNHCR's proposal to commence a process on Global Consultations on International Protection. Members of EXCOM agreed on the need to seek ways to revitalize the international protection regime and address contemporary challenges to refugee protection.

Among the contemporary challenges identified by UNHCR and EXCOM members is what came to be known as the "**asylum-migration nexus**", and more specifically the phenomenon of complex **mixed flows** of persons through irregular channels.

Put simply, the notion of mixed flows recognizes that there are a great many people on the move who make use of irregular migration channels. Some are migrants who turn to smugglers in order to access economic opportunity. Others are persons with genuine protection needs – some of whom may also make use of smugglers in their search for protection. There may be refugees who had found protection but who are making a secondary movement. There may be persons, often women or children, who are being exploited by traffickers. And there may also be criminals, human rights violators, persons responsible for persecution or crimes against humanity or terrorists that make use of these irregular channels.

Governments must grapple with all of these different facets of contemporary movements of persons, and must balance different responsibilities and obligations in developing policy and operational responses. Interception is one tool that many governments use as part of their efforts to manage international migration.

The Global Consultations proceeded on three tracks, with meetings taking place throughout 2001 and into 2002. The first track led to a Ministerial level meeting of States Party to the 1951 Convention which was held in December 2001 to celebrate the 50th anniversary of the Convention and to reaffirm the international community's commitment to the Convention and refugee protection generally. The second track consisted of a series of experts meetings on different protection topics. The third track was an inter-governmental process that sought to identify specific actions or initiatives to revitalize the international protection regime and respond to contemporary challenges.

The migration-asylum nexus was addressed in the third track of the Global Consultations. In May 2001 a regional Global Consultations meeting was held in Ottawa on the subject of incorporating refugee protection standards in interception measures. This meeting brought together UNHCR, the governments of Canada and the United States, IOM and a number of representatives from civil society including NGOs and academics, including members of CCR.

Building on the useful discussions in Ottawa, a formal track three meeting was held in Geneva in June 2001 that addressed, among other topics, migration control and refugee protection. Among the results of that meeting was broad agreement on the need for EXCOM to provide guidance in the form of a Conclusion. Canada certainly agreed with that recommendation and was subsequently pleased to see that advice included in the Agenda for Protection endorsed by the Executive Committee in 2002.

The Agenda for Protection builds on the Declaration adopted by States Parties in December 2001 and the recommendations flowing from meetings of the Global Consultations, to set out a programme of action that is intended to guide efforts to progressively reinforce refugee protection over a number of years. The Agenda does not itself impose obligations, but it provides a "road-map" for governments, UNHCR and other partners including NGO's.

The Agenda for Protection sets out six broad goals, the second of which is "**Protecting Refugees within broader migration movements**". One objective set out under this goal is to better identify and respond to the needs of asylum seekers and refugees with the broader context of migration management. As a very concrete first step, the Executive Committee has set itself the objective of adopting a Conclusion on protection safeguards in interception measures in 2002.

What would the Canadian government wish to see included in an EXCOM Conclusion on this topic? Bearing in mind once more that our thinking and discussions are still very preliminary, there are a number of principles that we consider important.

It would certainly be helpful to reach a common understanding of what we mean by the term, "**interception**". We feel that the definition that has been put forward for discussion by UNHCR is a good starting point. This defines interception as

> "Encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination."

It will be important for EXCOM to firmly ground its advice in the international legal framework. Certainly a key element in this context is respect for the principle of **non-refoulement**, and recognition that it is part of customary international law binding on all states, not just signatories to the Convention of Protocol.

There are other important international instruments that EXCOM will also need to consider, including the 2000 Convention against Trans-national Organized Crime and its two Protocols. As another example, there are various Conventions and other instruments dealing with security of air and maritime transportation and the safety of persons being transported.

Many of the principles discussed at the Ottawa meeting will be important for the Executive Committee's deliberations. Examples include:

- The need for training for persons who are involved with interception and clear procedures to provide access to competent decision-makers.
- The treatment of intercepted persons in a safe and humane manner.
- And the particular needs of women and children.

No doubt there are other issues that have come up in the course of today's discussions or that will be raised this afternoon. As I said when I began, there is certainly an interest within the government to hear more from groups like CCR and I look forward to your comments.

3. Bill Frelick, Amnesty International USA[36]

In the US, NGOs have hit a dead end in terms of legal and political advocacy. On the legal side, the US Supreme Court has soundly defeated the case against interdiction, basically permitting refoulement in the context of maritime interdiction.

With regard to a draft UNHCR Executive Committee (ExCom) Conclusion on interception, the key principle of non-refoulement should be central. However, one of the challenges faced by the UNHCR is states, notably the US, are bound to block elements that contradict their own legal interpretations. With respect to maritime interdiction, it would also be helpful to include in the Conclusion standards for screening on board a ship.

On the political side, four successive US administrations, both Democrat and Republican, have issued Executive Orders permitting interdiction. The invoking of national security poses a tremendous challenge to the advocacy community. National security is used to justify detention, expedited removal, interdiction, etc. Refugee advocates need to address the issue, but should call for individual assessments (and not measures based on religion, nationality or colour of the skin).

Another challenge relates to the nexus between asylum and migration. "Managed migration" is the phrase used to refer to stopping irregular migration. States are engaged in "managing" access to the borders in order to prevent "spontaneous arrivals". It is becoming increasingly difficult to cross international borders irregularly to claim asylum anymore. Refugees must therefore put themselves into the hands of traffickers and smugglers in order to escape. Stopping smuggling, in effect, often means stopping asylum by blocking access to procedures. Before consideration of the issue of non-refoulement, advocates first must contend with non-entrée. This creates a dilemma for advocates, who are naturally concerned about the exploitation of those who are smuggled or trafficked.

Some argue that the solution is to provide legal options so that people are not forced to seek illegal means to escape persecution. An example is advocacy for in-country processing in Haiti. The risk, however, is that you create a narrow legal channel, through which people in need of protection must pass—and only a select few will be able to make it, leaving the rest unprotected. In-country processing is already in place in Cuba, with the result that Cubans taking rafts to seek asylum in the United States are told to return to Cuba, an absurdity from the perspectiveof the non-refoulement principle. Processing in Cuba involves all the problems and barriers of immigration procedures. The model also switches obligations: the responsibility is no longer with the state not to refoule, but rather with the individual seeking protection.

The shifting of legal responsibilities is seen in regional containment strategies, such as that being promoted by the UK. The proposal involves warehousing people outside Europe, while the state replaces obligations with discretionary choices about who to resettle and how many.

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[36] The following text was drafted from notes taken during the workshop, and has been reviewed and corrected by Bill Frelick.

Recently the High Commissioner for Refugees, Ruud Lubbers, was in Washington, promoting comprehensive regional solutions through special agreements to be negotiated as part of the Convention Plus initiative. Disturbingly, his proposal didn't sound too far from the UK model, with a list of safe countries and accelerated procedures.[37]

NGOs are of course in favour of increased humanitarian assistance, development aid and resettlement, all things promised under Convention Plus. However, there is a real danger when states have one refugee quota, where asylum numbers are subtracted from resettlement places. Under the sort of model being proposed, resettlement becomes the handmaiden of enforcement overseas.

The notion of protection in the country of first asylum used to be clear (EXCOM Conclusion 58), but new discussions of "effective protection" appear to erode the standards of protection that may lead to transfers of asylum seekers on spurious "safe" third country grounds, with the UNHCR endorsing the transfer of responsibility to states without capacity.

Orderly departure programs are another example of a measure that, while seeming to offer protection, can actually be used to prevent others from leaving.

We need to be careful of refugee programs and policies that are so only in name, while in fact they are immigration programs. Refugee protection needs to be kept distinct from immigration programs. Refugee movements are, by their very nature chaotic. Refugees cannot be reshaped into immigrants.

DISCUSSION

A. Human rights standards: Other UN human rights bodies should be involved in the discussion. We should have a strategy of cooperation.

B. Principle of non-refoulement: The US government consistently objects to the assertion that non-refoulement is a norm of customary international law. The UNHCR does not accept the position taken by the US Supreme Court with respect to non-refoulement: the UNHCR maintains the same position it took in the amicus brief it filed in that case and believes that the principle of non-refoulement does have extra-territorial consequences. Canada accepts that the principle of non-refoulement is part of customary international law, but believes that a state's obligations only go up to the border with another state. If a state intercepts a person in another country, the non-refoulement obligation lies with the other country. The intercepting state should however have guidelines to ensure that a proper referral takes place. Canada has been working on this in the context of fora such as the G8 and IATA.

C. Non-discrimination: There is a danger in putting too much emphasis on non-discrimination. A practice that is unacceptable is not made acceptable just because it is applied in a non-discriminatory way.

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[37] NGOs were shocked to hear him allege that 90% of asylum seekers are manifestly unfounded. He did not respond to questions about what he meant by "manifestly unfounded."

D. Communicating impact of interdiction: Advocates are passionate about the issue of interdiction but we are not successful in engaging the wider public. There is little in the media about interdiction. We are not able to tell the stories of what happens to people interdicted (although some organizations have reported cases, e.g. the Women's Commission for Refugee Women and Children). Perhaps we need more partnerships with people in the field.

E. Avoiding trade-offs of migration management: Advocates face a dilemma because it makes sense to advocate for increasing legal channels, in the context of states' ever-increasing efforts at migration control. It is important to recognize that increased resettlement will not necessarily lead to a significant reduction in irregular migration. There should be more resettlement (notably by European countries) not as a means to an end, but as an end in itself. Resettlement itself is positive, but like other elements in Convention Plus, the problem is the way in which it is packaged. Strategies of containment or blocking the borders are very dangerous: regional solutions must be analysed from this perspective.

F. Interdiction at sea: The UNHCR is engaged with the question of standards for migrants interdicted on the high seas. Among the questions being looked at are the definition of place of safety and where disembarkation should take place.

G. Regional solutions and the UNHCR: The UNHCR is only at a preliminary stage in developing its response to the UK proposal. With respect to transit centres for processing, the UNHCR's preference would be for them to be within the European Union. NGOs can play a major role in giving feedback on Convenion Plus.

Possible strategies for follow up

- direct action
- presence at airports
- working with allies
- protected visas
- legal challenges
- increase access to regular migration
- increase access to refugee protection in country of origin
- increase the cooperation of governments and NGOs
- strategic and cooperative use of litigation
- consider the role of privatization (carriers and detention centres)
- public education regarding security and refugee protection
- making use of journalism and media (sharing stories of human rights abuses and interdiction stories)
- tracing the lives of refugees who have been interdicted