

**UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
(UNHCR)**

**BACKGROUND NOTE ON THE PROTECTION OF ASYLUM-SEEKERS AND REFUGEES
RESCUED AT SEA**

I. Introduction

1. The phenomenon of people taking to the seas in search of safety, refuge, or simply better economic conditions is not new. The mass exodus of Vietnamese boat people throughout the 1980s was followed in the 1990s by large-scale departures from places such as Albania, Cuba and Haiti. The term “boat people” has now entered into common parlance, with asylum-seekers and migrants trying to reach the closest destination by boat, in the Mediterranean, the Caribbean and the Pacific regions. Since the vessels used are often overcrowded and un-seaworthy, rescue-at-sea, disembarkation and processing of those rescued has re-emerged as an important but difficult issue for States, international organisations, the shipping industry and, of course, the vulnerable boat people themselves. In an effort to stem the flow of boat people, destination States have increasingly resorted to interception measures within the broader context of migratory control measures, albeit that in some instances adequate protection safeguards have not been evident.
2. This paper examines provisions from different strands of international law that bear on the rescue-at-sea of asylum-seekers and refugees. It focuses on relevant norms, and highlights areas of law which require clarification. It also looks at institutional collective efforts to tackle this issue in the past and suggests elements that could be explored further to address the current situation more effectively within an international co-operative framework.

II. General legal framework

3. The legal framework governing rescue-at-sea and the treatment of asylum-seekers and refugees rests on the applicable provisions of international maritime law, in interaction with international refugee law. Aspects of international human rights law and the emerging regime for combating transnational crime are also relevant. The following paragraphs set out the more pertinent legal provisions and offer an interpretation, which would, though, benefit from analysis and further elaboration.

A. International maritime law

4. Aiding those in peril at sea is one of the oldest of maritime obligations. Its importance is attested by numerous references in the codified system of international maritime law as set out in several conventions, namely:
 - the United Nations Convention on the Law of the Sea of 1982, (UNCLOS);
 - the International Convention for the Safety of Life at Sea of 1974, as amended, (SOLAS);
 - the International Convention on Maritime Search and Rescue of 1979, as amended, (SAR);
 - the 1958 Convention on the High Seas (to the extent that it has not been superseded by UNCLOS).

Responsibilities of different actors

5. These conventions explicitly contain the obligation to come to the assistance of persons in distress at sea.¹ This obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved. The legal framework also foresees different sets of responsibilities that need to be considered both independently and to the degree to which they inter-relate.
6. The responsibility of the ship master² – The ship master is responsible for providing assistance and/or rescue. International maritime law does, however, not elaborate on any continuing responsibility of the master once a rescue has been effected. Indicative of the nature of the responsibility assumed by the master is the fact that he or she may be criminally liable under national law for failing to uphold the duty to render assistance whilst commanding a vessel under the flag of certain States.³ In addition, the master bears responsibilities not only to those rescued but also for the general safety of his vessel. Effecting a rescue may, under certain circumstances, result in danger to both, as for example when the number of persons rescued outnumbers those legally permitted to be aboard and exceeds the availability of lifejackets and other essential safety equipment.
7. The responsibility of coastal States - This is stipulated as the obligation to develop adequate search and rescue services. The relevant instruments do not expand on the responsibility of coastal States for disembarkation or landing of those rescued nor any consequent follow up actions.⁴ Obviously, coastal States with particularly long coastlines, those with a large coverage area for search and rescue operations and those located on major shipping routes, would be otherwise particularly affected.

¹ See for example, paragraph 2.1.10 of Chapter 2 of the Annex to SAR, 1979, which states, "*Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found*". Regulation 15 of Chapter V of the Annex to SOLAS, obliges each State to "*ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea around its coasts*." Article 98(1) of UNCLOS, 1982, states that every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers, *inter alia*, to render assistance to any person found at sea and in danger of becoming lost. Some of these provisions have become so universally recognised as to be considered customary international law.

² The obligation of ship masters to provide assistance is repeatedly articulated in international maritime law. First codified in 1910, it is incorporated in Article 98 of UNCLOS and Article 10 of the 1989 Salvage Convention. It is also explicitly mentioned in SOLAS (V/7). All three conventions require the master of a ship, so far as he can do without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea and to proceed with all possible speed to the rescue of persons in distress. It is again specifically mentioned in SOLAS (V/33) but is not referred to in SAR, the emphasis of which is more on the responsibilities of States Parties to that Convention.

³ This is the case in the UK and in Germany, for example.

⁴ The obligation of States to render assistance to persons in distress at sea is an enshrined principle of maritime law. Article 98 of UNCLOS requires every coastal State to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements, to co-operate with neighbouring states for this purpose. The detail of search and rescue obligations is to be found in SAR, which defines rescue as involving not only the retrieving of persons in distress and the provision of initial medical care but also their delivery to a place of safety. The SAR Convention expands further on the technical obligations of States vis-à-vis rescue operations but without specifically mentioning the question of disembarkation or landing of those rescued.

8. The responsibility of flag States – Flag States are of course bound by the dictates of international maritime law, but in practice responsibilities can be difficult to locate given the distinction between those vessels that have a clear relationship to the flag under which they sail and those operating under the open registry system - so called *flags of convenience*.⁵ Flag State responsibility has been invoked partly on the basis of the vessel being considered a “floating extension” of the State in question, which is problematic as regards *flags of convenience*. While this position may not have a firm legal grounding, it seems to have contributed to the practice of attributing certain responsibilities to flag States and/or the commercial vessels operating under their authority. For example, with regard to the treatment of stowaways, a practice has evolved which holds ship owners largely responsible for any stowaways found aboard their vessels.⁶
9. The nature of flag State responsibility is also affected by the distinction between commercial vessels and vessels owned or operated by a government and used only on government non-commercial service. Such *State vessels* include, *inter alia*, naval vessels, coast guard vessels and national lifeboats specifically tasked with search and rescue operations. Where such vessels engage in rescue operations within territorial waters, the responsibility for those rescued would devolve on that State. This may arguably be the case even where such scenarios occur on the high seas, particularly if the rescue occurs in the context of interception measures.
10. The roles and responsibilities of international agencies and the international community as a whole – International agencies, such as the International Maritime Organisation (IMO), UNHCR and the International Organisation for Migration (IOM) have specific but differing responsibilities towards persons rescued-at-sea. IMO has the widest and most direct set of responsibilities. It oversees the development of international maritime law, with emphasis on safety aspects, providing technical advice and assistance to States to ensure that they respect their obligations. UNHCR has a specific responsibility to guide and assist states and other actors on the treatment of asylum-seekers and refugees found at sea and to monitor compliance with refugee protection responsibilities in such scenarios.⁷ IOM plays a specific role regarding the needs of migrants at sea, as part of its broader mandate to address issues related to migration. The international community as a whole has a responsibility in terms of developing appropriate responsibility-sharing mechanisms involving States and other actors in order to ensure appropriate responses to the

⁵ In relation to flag States, Article 6 of the Convention on the High Seas, 1958, states: “*Ships shall sail under the flag of one State only and save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.*” In addition and more specifically on the point of non-commercial vessels, Article 9 of the same Convention states that, “*Ships owned or operated by a State and used only on government non commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.*”

⁶ Despite efforts to promote shared responsibilities for resolving the problem of stowaways, as exemplified by the development of IMO *Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases* (under the auspices of the FAL Committee/Convention of the Facilitation of Maritime Traffic), practice continues to focus on the responsibilities of the shipping companies, including to the extent of obliging them to re-assume responsibility for those stowaways disembarked and considered under national asylum systems but whose cases are ultimately rejected. It is worth noting that the Guidelines were developed to fill the gaps resulting from the fact that the 1957 International Convention Relating to Stowaways has yet to enter into force.

⁷ For further detail on the competence of UNHCR please refer to Annex 1, *Background Note; Concerning the Competence of the United Nations High Commissioner for Refugees (UNHCR), in relation to rescue-at-sea matters*, as distributed to the participants in COMSAR 6, Working Group 1, during the Committee session held in London, 18 to 20 February 2002.

array of scenarios involving migrants, asylum-seekers, refugees and others facing difficulties at sea. Responsibilities assumed by the international community extend not only to response measures but also include preventative actions.⁸

Delivery to a place of safety

11. The obligation to come to the aid of those in peril at sea is beyond doubt. There is however, a lack of clarity, and possibly lacunae, in international maritime law when it comes to determining the steps that follow once a vessel has taken people on board.
12. The SAR definition of rescue⁹ implies disembarkation since the requirement of delivery to a place of safety cannot be considered to be met by maintaining people on board the rescuing vessel indefinitely. Neither SAR nor other international instruments elaborate, however, on the criteria for disembarkation. Recent discussions at IMO fora have also highlighted the lack of clarity on this issue. Faced with this gap in the law, UNHCR has consistently argued for prompt disembarkation at the next port of call.¹⁰
13. The effectiveness of the international search and rescue regime rests on the swift and predictable action of all actors. This however, poses a particular challenge where it transpires that there are asylum-seekers and refugees among those rescued. In such instances, States have questioned the extent of their responsibilities and have delayed, and even blocked, disembarkation, arguing that this would result in a strain on their asylum systems, encourage irregular movement and even contribute to smuggling operations. These concerns are valid and need to be fully reflected in the design of an international co-operative framework to deal with the situation of asylum-seekers rescued at sea.
14. From the perspective of the master, the security of his vessel and the health and safety of those aboard are of paramount concern. Existing guidelines and procedures rarely take sufficient account of the potential for danger if the ship were prevented from proceeding immediately to the first appropriate port of call.

Health and safety concerns include:

- insufficient water and provisions for the number of people on board;
- insufficient medical care for the number of people on board;
- medical emergencies at sea;
- exceeding the number of persons legally permitted to be on board;
- insufficient life-saving equipment for the number of people on board;
- insufficient accommodation for the number of people on board;
- risk to the safety of both crew and passengers if the persons taken on board display aggressive or violent behaviour or threaten to do so.

15. From UNHCR's perspective, the pressing humanitarian challenge in any rescue situation is to ensure an immediate life-saving solution for the plight of severely traumatised persons, without an over-emphasis on legal and practical barriers. It is

⁸ See for example the Preamble to the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, 2000*, which acknowledges the need to strengthen international co-operation in order to address the root causes of migration.

⁹ Described in the Annex, Chapter 1, paragraph 1.3.2 as, "an operation to retrieve persons in distress, provide for their medical or other needs, and deliver them to a place of safety".

¹⁰ The term "next port of call" is nowhere mentioned in international maritime law in connection with rescue-at-sea but has been used in this context by UNHCR's Executive Committee in a number of its Conclusions on the subject.

crucial that ship masters are actively facilitated in their efforts to save lives, confident that safe and timely disembarkation will be guaranteed.

16. In consequence, there are a number of factors, which come into play when considering the question of disembarkation or landing of rescued persons and in particular of asylum-seekers and refugees. These include; i) legal obligations; ii) practical, security and humanitarian concerns; and iii) commercial interests. On occasion, these differing considerations may be perceived as competing or conflicting interests and there is a need for a deeper analysis of the interplay between them. UNHCR believes that guidance on formulating the most appropriate responses can be found in an analysis of the interface between international maritime law and other relevant bodies of international law and practice, and in particular the dictates of international refugee law.

B. International refugee law¹¹

17. International maritime law assumes that the nationality and status of the individual are of no relevance vis-à-vis the obligation to rescue.¹² By contrast, international refugee law is premised on the understanding that a person has a well founded fear of persecution, on specific grounds, before he or she can avail of international protection. Clarification of status is therefore crucial in the refugee context to determine obligations owed to the refugee. It is clear that a ship master is not the competent authority to determine the status of those who fall under his temporary care after a rescue operation. Ensuring prompt access to fair and efficient asylum procedures is therefore key to ensuring the adequate protection of asylum-seekers and refugees amongst those rescued.
18. State responsibility under international refugee law, and in particular the 1951 Convention relating to the Status of Refugees, is activated once it becomes clear that there are asylum-seekers among those rescued. Consistent with the object and purpose of the 1951 Convention and its underlying regime, the responsibilities of States to ensure admission, at least on a temporary basis, and to provide for access to asylum procedures have been elaborated upon in a number of Executive Committee Conclusions of UNHCR's Programme (EXCOM Conclusions).

Whilst not exhaustive, these include:

- EXCOM Conclusion No. 22 (1981), Part II A, para. 2 states: "In all cases the fundamental principle of *non-refoulement*, including - non-rejection at the frontier - must be scrupulously observed."
- EXCOM Conclusion No. 82 (1997), para. d, (iii) reiterates: "The need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs"

¹¹ The main body of international refugee law, comprised of the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and numerous Conclusions of the Executive Committee of UNHCR (EXCOM Conclusions), is further complemented by international human rights law. Much of the emphasis of international refugee law is placed on the identification of those who meet the definition of a refugee contained in Article 1 A(2) of the 1951 Convention and thus benefit from international protection. Please note that Article 11 of the 1951 Convention makes explicit reference to refugee seamen. See p. 82 of *Convention Relating to the Status of Refugees; Its History, Contents, and Interpretation, a Commentary by Nehemiah Robinson*, republished by UNHCR in 1997, for further information on the rationale behind this provision and the obligations it imposes on flag States. The 1957 Hague Agreement Relating to Refugee Seamen further elaborates on these specific obligations.

¹² As specified for example in the Annex, Chapter 2, paragraph 2.1.10 of the SAR Convention.

- EXCOM Conclusion No. 85 (1998), para. q: "... reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining status and protection needs."
19. The 1951 Convention defines those on whom it confers protection and establishes key principles such as non-penalisation for illegal entry and *non-refoulement*.¹³ It does not, however, set out specific procedures for the determination of refugee status as such. Despite this it is clearly understood and accepted by States that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention.¹⁴ States require such procedures to identify those who should benefit from international protection under the 1951 Convention, and those who should not.
 20. The principle of access to fair and efficient procedures is equally applicable in the case of asylum-seekers and refugees rescued at sea. The reasons motivating their flight and the circumstances of their rescue frequently result in severe trauma for the persons concerned. In UNHCR's view, this provides added impetus for prompt disembarkation followed by access to procedures to determine their status. Achieving this objective requires clarity on a number of key issues, including: i) the identification of asylum-seekers among those rescued, as well as, ii) the determination of the State responsible under international refugee law for admission and processing of the asylum-seekers.

The identification of asylum-seekers

21. As regards the first question, at a land border, the identification of an asylum-seeker usually occurs through the lodging of an asylum request with the competent State authorities. This may be done by a formal written application or verbally, to the border authorities at the point of entry. In the case of rescue-at-sea, the mechanism of lodging an asylum application is unclear.
22. While the legal regime applicable on board ship is that of the flag State, this does not mean that all administrative procedures of the flag State would be available and applicable in such situations. The master will not be aware of the nationality or status of the persons in distress and cannot reasonably be expected to assume any responsibilities beyond rescue. The identification of asylum-seekers and the determination of their status is the responsibility of State officials adequately trained for that task.
23. In UNHCR's view, the identification and subsequent processing of asylum-seekers is an activity most appropriately carried out on dry land. Onboard processing, both in the form of initial screening and more comprehensive determination, has been attempted in past refugee crises. It proved problematic in various respects, including *inter alia*, ensuring adequate access to translators, safeguarding the privacy of the interviews carried out under difficult conditions on board ship, ensuring access to appropriate counsel and providing appropriate appeal mechanisms.
24. Onboard processing may be appropriate in some limited instances depending on the number and conditions of the persons involved, the facilities on the vessel and its

¹³ 1951 Convention Relating to the Status of Refugees, Articles, 1, 31 and 33.

¹⁴ See, EXCOM Conclusion No. 81 (XLVII) 1997, para. (F) (A/AC.96/895, para 18); EXCOM Conclusion No. 82 (XLVIII) 1997 para. (d)(iii) (A/AC/96/895); EXCOM Conclusion No 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3). It should be noted that in mass influx situations, access to individual procedures may not prove practicable and other responses may be required.

physical location. It would, however, be impractical for situations involving large numbers of people or where their physical and mental state is not conducive to immediate processing. Onboard processing is inappropriate where the rescued persons are aboard a commercial vessel. The first priority in most instances remains prompt and safe disembarkation followed by access to fair and efficient asylum procedures. An effective response to the challenge of properly identifying asylum-seekers should therefore acknowledge that the status of the rescued persons is best determined by the appropriate authorities after disembarkation.

Determination of the State responsible under international refugee law

25. This raises the question of determining the State responsible under international refugee law for admitting the asylum-seekers (at least on a temporary basis) and ensuring access to asylum procedures. International refugee law, read in conjunction with international maritime law, suggests that this is generally the State where disembarkation or landing occurs. This will normally be a coastal State in the immediate vicinity of the rescue.
26. The flag State could also have primary responsibility under certain circumstances. Where it is clear that those rescued intended to request asylum from the flag State, that State could be said to be responsible for responding to the request and providing access to its national asylum procedure. In the event that the number of persons rescued is small, it might be reasonable for them to remain on the vessel until they can be disembarked on the territory of the flag State. Alternatively, circumstances might necessitate disembarkation in a third State as a transitional measure without that State assuming any responsibility to receive and process applications. Arguably, and even on the high seas, the responsibility accruing to the flag State would be stronger still, where the rescue operation occurs in the context of interception measures. The cumulative effect of the original intended destination and the deliberate intervention of the State to prevent the asylum-seeker from reaching the final destination underpins such an argument.¹⁵
27. The Executive Committee of UNHCR has formulated a number of Conclusions in relation to rescue-at-sea emphasising the question of disembarkation and admission. These Conclusions reflect the experience of the 1980s, which was characterised by serious concerns that refusals to permit disembarkation, especially if only requested on a temporary basis, would have the effect of discouraging rescue-at-sea and undermining other international obligations. Whilst the current situation is not as acute as that faced during the 1980s, there are similarities and now, as then, lives are at risk. The underlying need to uphold the obligation to rescue in full compliance with the consequent obligations that arise under international refugee law remains paramount.
28. The most salient guidance from EXCOM Conclusions includes the following:
 - EXCOM Conclusion No. 14 (1979), para. c, notes as a matter of concern: "...that refugees had been rejected at the frontier... in disregard of the principle of *non-refoulement* and that refugees, arriving by sea had been refused even temporary asylum with resulting danger to their lives...."

¹⁵ EXCOM Conclusion No. 15 (XXX) of 1979 states, *inter alia*, "The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account." This does not imply an unfettered right of asylum-seekers to pick and choose at will the country in which they intend to request asylum. Rather the reference is framed in the context of situations involving individual asylum-seekers and is but one of a number of criteria. It does, however, provide guidance as to how to address the problem of refugees without an asylum country.

- EXCOM Conclusion No. 15, (1979) para. c, states: "It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."
- EXCOM Conclusion No.23, (1981) para. 3 states "In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities."

29. In summary, the Executive Committee pronouncements, taken in conjunction with the obligation under international maritime law to ensure delivery to a place of safety, call upon coastal States to allow disembarkation of rescued asylum-seekers at the *next port of call*.¹⁶

"Next port of call"

30. Since the *"next port of call"* with reference to the disembarkation of rescued persons is nowhere clearly defined, there are a number of possibilities, which would need to be further explored to clarify this concept. In many instances, especially when large numbers of rescued persons are involved, it will in effect be the nearest port in terms of geographical proximity given the overriding safety concerns. Under certain circumstances, it is also possible to conceive the port of embarkation as the appropriate place to effect disembarkation, arising from the responsibility of the country of embarkation to prevent un-seaworthy vessels from leaving its territory. Another option would be the next scheduled port of call. This would be appropriate, for instance, in cases where the number of people rescued is small and the safety of the vessel and those on board is not endangered nor likely to necessitate a deviation from its intended course. There may be instances where the next port of call may not be the closest one but rather the one best equipped for the purposes of receiving traumatised and injured victims and subsequently processing any asylum applications. In other situations, involving State vessels intercepting illegal migrants, the nearest port of that State could be regarded as the most appropriate port for disembarkation purposes. From a safety and humanitarian perspective, ensuring the safety and dignity of those rescued and of the crew, must be the overriding consideration in determining the point of disembarkation.

31. With due regard to all of these considerations the development of criteria that help to define the *most appropriate port for disembarkation purposes* will be informed by the following factors:

- the legal obligations of States under international maritime law and international refugee law;
- the pressing safety and humanitarian concerns of those rescued;
- the safety concerns of the rescuing vessel and the crew;
- the number of persons rescued and the consequent need to ensure prompt disembarkation;
- the technical suitability of the port in question to allow for disembarkation;

¹⁶ As previously noted, the term "next port of call" in connection with disembarkation or landing of rescued persons is unknown as such to maritime law but rather results from EXCOM Conclusions.

- the need to avoid disembarkation in the country of origin for those alleging a well founded fear of persecution;
- the financial implications and liability of shipping companies engaged in undertaking rescue operations.

C. International human rights law

32. International human rights law also contains important standards in relation to those in distress and rescued at sea. The safe and humane treatment of all persons rescued regardless of their legal status or the circumstances in which they were rescued is of paramount importance. Basic principles such as the protection of the right to life, freedom from cruel, inhuman or degrading treatment and respect for family unity by not separating those rescued must be upheld at all times.¹⁷

D. International criminal law

33. Questions of international criminal law arise where the rescue operation is necessitated as a consequence of smuggling operations. People smuggling may indeed be a factor when large numbers of persons are found on poorly equipped and un-seaworthy vessels, flouting the basic standards of maritime safety. Combating this crime is a matter of concern for States world-wide, alarmed by its scale and scope and the huge profits generated from it.

34. The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, while not yet in force, constitutes the most comprehensive legal instrument, to date, covering smuggling of persons.¹⁸ Under the Protocol, the fact that migrants, including asylum-seekers and refugees, were smuggled does not deprive them of any rights as regards access to protection and assistance measures. In the context of rescue-at-sea, it is crucial that the rights of those rescued are not unduly restricted as a result of actions designed to tackle the crime of people smuggling. Criminal liability falls squarely upon the smugglers and not on the unwitting users of their services.

35. With respect to the special circumstances of asylum-seekers and refugees, it should be noted that the Protocol contains a general saving clause in its Article 19 to ensure compatibility with obligations under international refugee law.¹⁹ It is clear from the formulation of Article 19 that there is no inherent conflict between the standards set by the international law to combat crimes and those contained in international refugee law. Combating crime does not mean a diminution of the rights of asylum-seekers and refugees.

¹⁷ For further discussion of the applicable human rights standards please see *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/O1/17, the contents of which can be considered to apply *mutatis mutandis* in rescue situations.

¹⁸ Article 16(1) obliges States to take "*all appropriate measures ... to preserve and protect the rights of persons*" who have been the object of smuggling, "*in particular the right to life and the right not to be subjected to torture or other cruel, inhuman, or degrading treatment, or punishment.*" In addition, according to Article 16(3), States should "*afford appropriate assistance to migrants whose lives and safety are endangered*" by reason of being smuggled. In applying the provisions of Article 16, States are required in its paragraph 4 to take into account the special needs of women and children.

¹⁹ Article 19 states that "*nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.*"

III. The international co-operative framework

36. Given the complexity of rescue-at-sea situations, not least due to the involvement of different actors and sets of responsibilities, there is a need for an effective international co-operative framework in this area. The overriding objective of such a framework is to develop responses defining responsibilities in a manner that can be activated without undue delay.

A. Past practice and current challenges

37. A brief examination of past practices provides some guidance as to the type of arrangements, which may be required to face current challenges.

- The crisis of the Vietnamese boat people prompted specialised response mechanisms to support rescue efforts and the subsequent search for durable solutions. The most important of these were the Disembarkation Resettlement Offers Scheme (DISERO) and the Rescue-at-Sea Resettlement Offers Scheme (RASRO).²⁰ Both schemes provide an indication of the level of State co-operation required to secure effective response mechanisms
- The constituent elements of both schemes included:
 - agreement of the coastal States to allow disembarkation
 - agreement of the coastal States to provide temporary refuge
 - open-ended guarantees from contributing third States that those rescued would be resettled elsewhere.

38. Eventually however, both DISERO and RASRO were terminated as the guarantee that any Vietnamese rescued at sea would be resettled within 90 days did not square with the 1989 Comprehensive Plan of Action guidelines. These required that all new arrivals undergo screening to determine their status. Countries in the region became increasingly unwilling to disembark rescued boat people, fearing that resettlement guarantees would not be forthcoming.

39. Any consideration of mechanisms akin to DISERO and RASRO in the current context will need to take account of the fact that the vast majority of those rescued were considered *prima facie* refugees, in direct flight from their place of origin. Today's situation is characterised by complex movements and mixed flows where the refugee status of those involved must be carefully determined.²¹ The composite nature of today's movements, coupled with more restrictive asylum practices generally, compounds the difficulty of agreeing on policies and standards for the processing of asylum applications of persons rescued at sea.

²⁰ Both schemes were developed during the 1980s as part of broad-based co-operation between UNHCR and States. Further detailed information on the operation of the DISERO and RASRO schemes can be found in the attached Annex 2, comprised of documentation of the Sub-Committee on the Whole on International Protection, Sessions 32 to 36 inclusive, dating from 1981 to 1985.

²¹ Most of the migratory flows which have given rise to the current debate on rescue-at-sea are characterised as mixed. This should not, however, be taken to exclude the possibility of *prima facie* recognition in the event of a massive outflow by sea directly from a country of origin, similar to that of the Vietnamese in the 1980s. In such a scenario individual refugee status determination would be impractical and response mechanisms would need to be tailored accordingly.

B. Elements of an international framework

40. Against this background, it is suggested here to explore an international framework, the goals of which would generally be the following:

- Support for the international search and rescue regime;
- Easing the burden on States of disembarkation;
- An equitable responsibility sharing approach to the determination of refugee status and international protection needs of those rescued;²²
- An equitable responsibility sharing approach to the realisation of durable solutions to meet international protection needs;²³
- Agreed re-admission and strengthened assistance, financial and otherwise, to first countries of asylum;
- Agreement by countries of origin to accept the return of their nationals determined, after access to fair and efficient asylum procedures, not to be in need of international protection.

41. In order to ensure the effectiveness of an international framework the roles and responsibilities of numerous actors would have to be clarified. The principal actors involved would include:

- The asylum-seekers and refugees;
- Countries of origin;
- Countries of first asylum;
- Countries of transit;
- Countries of embarkation;
- Countries of disembarkation;
- Flag States;
- Coastal States;
- Resettlement countries;
- The donor community;
- International organisations, notably UNHCR, IMO and IOM.

42. From UNHCR's perspective the main concerns at stake which involve issues of refugee law, include:

- The right to seek and enjoy asylum;
- *Non-refoulement*;
- Access to fair and efficient asylum procedures;
- Conditions of treatment;
- Appropriate balance between State responsibilities and that of international organisations;
- Safe return to first countries of asylum;
- Durable solutions for those recognised as refugees;
- Orderly and humane return of persons determined not to be in need of international protection.

²² This could, for instance, include stand-by arrangements to assist states in processing asylum applications, when the number of rescued asylum-seekers overwhelms the capacity of the individual asylum system at the point of disembarkation. This could mean the dispatch of additional asylum officers from third countries, transfer arrangements for the processing of cases and capacity-building measures to strengthen protection and assistance. Potential distribution mechanisms in the immediately affected region, based on pre-arranged quotas and criteria, could play a positive role in facilitating such arrangements.

²³ Specific resettlement pools for rescue-at-sea situations could, for instance, be created. This would require the activation of emergency mechanisms to deal with especially pressing cases.

43. A workable framework will also need to take due account of the broader context, including the following factors:

- The impact on smuggling and irregular movement;
- Interception practices;
- The adverse impact of exporting condoned practices;
- Appropriate responsibility sharing vs. individual State responsibility;
- The impact on resettlement policy;
- The challenge of dealing with cases found not to be in need of international protection.

44. In addition, the importance of preventative measures should not be overlooked. Many concrete steps can be taken to discourage people from risking dangerous sea voyages. Public information campaigns, actions to prevent the departure of un-seaworthy vessels, and stringent criminal law enforcement measures directed against smugglers are features of such measures.

45. Finally, certain information needs need to be met. These include: i) measures to fill existing information gaps on the scale and scope of the problem; ii) measures to compile and analyse the existing legislative norms in a more detailed fashion, including recommendations for amendments where these prove necessary; iii) an open and transparent exchange of information on current practices in order to identify good state practice, and; iv) the development of a comprehensive information strategy designed to inform public opinion on problems related to rescue-at-sea, especially on the rights and obligations of those involved.

IV. Concluding observations

46. It is hoped that this Background Note helps to stimulate a discussion on how to address complex rescue-at-sea situations involving asylum-seekers and refugees.

Office of the United Nations High Commissioner for Refugees (UNHCR)
18 March 2002²⁴

²⁴ Final version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, held in Lisbon, Portugal on 25-26 March, 2002.

Annex 1

Background Note

Concerning the competence of the United Nations High Commissioner for Refugees (UNHCR), in relation to rescue at sea matters

Prepared for COMSAR 6, Working Group 1

I. The competence of UNHCR

1. UNHCR's competence with regard to persons rescued at sea relates to the fact that they may include asylum-seekers in need of international refugee protection. UNHCR's mandate stems from the United Nations General Assembly in the form of Resolution 428 (V) of 14 December 1950, to which the UNHCR Statute is annexed.

2. Paragraph 6B of chapter II of the UNHCR Statute defines the Office's competence *rationae personae* in the following terms:

"6. The competence of the High Commissioner [for Refugees] shall extend to:

...

B. Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."

3. The term "asylum-seeker" has been employed by the General Assembly in general resolutions relating to UNHCR since 1981. Historically, this concept is closely related to Executive Committee Conclusion No. 22.¹ The term can refer either to an individual whose refugee status has not yet been determined by the authorities but whose claim to asylum entitles him or her to a certain protective status on the basis that he or she could be a refugee, or to large-scale influxes of mixed groups in a situation where individual refugee status determination is impractical. Clearly, asylum-seekers form part of UNHCR's competence *rationae personae*.

II. Treaty and non-treaty instruments for which UNHCR has responsibility and which may contain relevant provisions

4. According to paragraph 8(a) of the UNHCR Statute, UNHCR should provide for the protection of refugees by promoting, supervising and developing international conventions for the protection of refugees.

5. The central instruments in this regard are the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. While the Convention does not directly refer to rescue at

¹ Executive Committee Conclusion No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-scale Influx; endorsed by General Assembly Resolution 36/125.

sea, the principle that refugees, including asylum-seekers whose status has not been determined and may be refugees, may not be refouled or returned to persecution, as set out in Article 33 of the Convention, applies to those who were rescued at sea as to other asylum-seekers.

6. It should also be noted that the Executive Committee of the High Commissioner's Programme (hereinafter referred to as "the Committee") was established by Economic and Social Council (ECOSOC) at the request of the General Assembly. It currently consists of representatives 61 States, elected by ECOSOC on the widest possible geographical basis from those States with a demonstrated interest in and devotion to the solution of refugee problems. The Committee is not, in the full sense of the word, a governing body. It does not substitute for the policy making functions of the General Assembly and ECOSOC (vis-à-vis the High Commissioner as provided in UNHCR's Statute) but it has its own slate of executive and advisory functions.

7. In the exercise of its mandate, the Committee adopts Conclusions on International Protection (hereinafter referred to as "the Conclusions") addressing particular aspects of international protection. While the Conclusions are not formally binding, regard may properly be had to them as elements relevant to the interpretation of the international refugee protection regime. Conclusions of the Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of the Committee and the fact that its Conclusions are taken by consensus add further weight.

8. The Committee has formulated standards in relation to rescue at sea, which are formed by an analysis of the interface between international refugee law and international maritime law. They reflect in particular the experience of the 1980s which led to the conclusion that refusal to permit disembarkation, especially if only requested on a temporary basis, might have the adverse effect of discouraging rescue at sea and undermining other international obligations. The relevant Committee Conclusions dealing with rescue at sea are annexed to this Note.

9. The most salient observations/guidelines are the following:

- Conclusion No. 14, para. (c) notes it as a matter of concern: *"...that refugees had been rejected at the frontier...in disregard of the principle of non-refoulement and that refugees arriving by sea had been refused even temporary asylum with resulting danger to their lives..."*.
- Conclusion No. 15, para. (c) states: *"It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."*
- Conclusion No. 23, para. 3 states *"In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum-seekers rescued at sea. In cases of large-scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities."*

Concluding remarks

10. The international refugee protection regime is based on a number of common core understandings, which are interwoven and which ensure in their entirety a predictable and reliable international co-operative framework for the protection of refugees. These common understandings have evolved over time and proved their resilience in the face of a rapidly changing global environment. They are based primarily on international refugee law, international human rights law and fundamental humanitarian principles. They have been carefully crafted, not least in the context of the Executive Committee, and have responded to varying scenarios and complex refugee situations, including as regards the rescue of asylum-seekers at sea.

11. In the present context, as outlined in this preliminary note, these core understandings include principles designed to ensure:

- Rescue of people in distress at sea, irrespective of their status;
- Disembarkation;
- Respect for the principle of non-refoulement, including non-rejection at the frontier;
- Admission of asylum-seekers, at least on a temporary basis;
- Access to fair and effective asylum procedures;

12. UNHCR recognises that issues relating to rescue at sea have acquired a new importance in the current world environment. In this regard, the UN High Commissioner for Refugees welcomes the initiative of the Secretary-General of the IMO to establish an inter-agency group for the purpose of contributing to efforts currently underway within the IMO.

UNHCR
18 February 2002

Annex 2 follows

Annex 2

UNHCR Executive Committee Conclusions concerning Asylum seekers at sea – Rescue at sea

The Executive Committee,

No. 2 (XXVII) – 1976

- (f) Was deeply concerned at the fate of asylum-seekers who had left their country in small boats and were in need of rescue or admission to a country of first asylum and eventually of final settlement;
- (g) Appealed to States scrupulously to observe the legal provisions relating to the rescue of persons at sea, as contained in the Brussels Convention of 1910 and the United Nations Convention on the High Seas of 1958, and urged States to make every possible effort to ensure that the provisions of these legal instruments be respected by ship masters under all circumstances;
- (h) Further appealed to States:
- (i) To grant first asylum to refugees and displaced persons rescued at sea or who had come directly by sea; and
 - (ii) To offer resettlement opportunities to those who had been unable to obtain permanent residence in the State of first asylum;

No. 14 (XXX) – 1979

- (c) Noted with concern that refugees had been rejected at the frontier or had been returned to territories where they had reasons to fear persecution in disregard of the principle of non-refoulement and that refugees arriving by sea had been refused even temporary asylum with resulting danger to their lives and had in many cases perished on the high seas;
- (d) Called upon all States to ensure that masters of vessels sailing under their flag scrupulously observed established rules regarding rescue at sea, and to take all necessary action to rescue refugees and displaced persons leaving their country of origin on boats in order to seek asylum and who are in distress;

No. 15 (XXX) – 1979

Considered that States should be guided by the following considerations:

- (c) It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum;

No. 20 (XXXI) – 1980 – Protection of Asylum-Seekers at Sea

- (a) Noted with grave concern the continuing incidence of criminal attacks on refugees and asylum-seekers in different areas of the world, including military attacks on refugee camps and on asylum-seekers at sea;
- (b) Expressed particular concern regarding criminal attacks on asylum-seekers at sea in the South China Sea involving extreme violence and indescribable acts of physical and moral degradation, including rape, abduction and murder;
- (c) Addressed an urgent call to all interested Governments to take appropriate action to prevent such criminal attacks whether occurring on the high seas or in their territorial waters;
- (d) Stressed the desirability for the following measures to be taken by Governments with a view to preventing the recurrence of such criminal attacks:
 - (i) increased governmental action in the region to prevent attacks on boats carrying asylum-seekers, including increased sea and air patrols over areas where such attacks occur;
 - (ii) adoption of all necessary measures to ensure that those responsible for such criminal attacks are severely punished;
 - (iii) increased efforts to detect land bases from which such attacks on asylum-seekers originate and to identify persons known to have taken part in such attacks and to ensure that they are prosecuted;
 - (iv) establishment of procedures for the routine exchange of information concerning attacks on asylum-seekers at sea and for the apprehension of those responsible, and cooperation between Governments for the regular exchange of general information on the matter;
- (e) Called upon Governments to give full effect to the rules of general international law -- as expressed in the Geneva Convention on the High Seas of 1958 -- relating to the suppression of piracy;
- (f) Urged Governments to co-operate with each other and with UNHCR to ensure that all necessary assistance is provided to the victims of such criminal attacks;
- (g) Called upon the United Nations High Commissioner for Refugees in co-operation with the International Committee of the Red Cross and other interested organizations actively to seek the co-operation of the international community to intensify efforts aimed at protecting refugees who are victims of acts of violence, particularly those at sea.

No. 21 (XXXII) – 1981

- (g) Expressed its serious preoccupation that while a certain measure of progress had been achieved in this matter, asylum seekers at sea continued to be the victims of piracy attacks

and called upon the High Commissioner, in co-operation with the International Committee of the Red Cross and other interested organizations and Governments to seek the support of the international community for the continuation and intensification of efforts to protect refugees from acts of violence at sea and to assist the victims;

No. 23 (XXXII) – 1981 – Problems Related to the Rescue of Asylum-Seekers in Distress at Sea

1. It is recalled that there is a fundamental obligation under international law for ships' masters to rescue any persons in distress at sea, including asylum seekers, and to render them all necessary assistance. Seafaring States should take all appropriate measures to ensure that masters of vessels observe this obligation strictly.

2. Rescue of asylum seekers in distress at sea has been facilitated by the willingness of the flag States of rescuing ships to provide guarantees of resettlement required by certain coastal States as a condition for disembarkation. It has also been facilitated by the agreement of these and other States to contribute to a pool of resettlement guarantees under the DISERO scheme which should be further encouraged. All countries should continue to provide durable solutions for asylum seekers rescued at sea.

3. In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum seekers rescued at sea. In cases of large-scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities.

4. As a result of concerted efforts by many countries, large numbers of resettlement opportunities have been, and continue to be, provided for boat people. In view of this development, the question arises as to whether the first port of call countries might wish to examine their present policy of requiring resettlement guarantees as a precondition for disembarkation. Pending a review of practice by coastal States, it is of course desirable that present arrangements for facilitating disembarkation be continued.

5. In view of the complexity of the problems arising from the rescue, disembarkation and resettlement of asylum seekers at sea, the High Commissioner is requested to convene at an early opportunity a working group comprising representatives of the maritime States and the coastal States most concerned, potential countries of resettlement, and representatives of international bodies competent in this field. The working group should study the various problems mentioned and elaborate principles and measures which would provide a solution and should submit a report on the matter to the Executive Committee at its thirty-third session.

No. 25 (XXXIII) – 1982

(c) Expressed concern that the problems arising in the field of international protection had increased in seriousness since the Committee's thirty-second session and that the basic

rights of refugees and asylum seekers had been violated in different areas of the world, inter alia, through military attacks on refugee camps and settlements, acts of piracy and forcible return of refugees and asylum-seekers to their countries of origin;

No. 26 (XXXIII) – 1982 – Report of the Working Group on Problems related to the Rescue of Asylum-Seekers in Distress at Sea

- (a) Noted the report of the Working Group of Experts on the Rescue of Asylum-Seekers at Sea (EC/SCP/21);
- (b) Reiterated the fundamental character of the obligation to rescue asylum-seekers in distress at sea;
- (c) Stressed the importance for coastal States, flag States, countries of resettlement and the international community as a whole to take appropriate steps to facilitate the fulfilment of this obligation in its various aspects;
- (d) Considered that solution of the problems connected with the rescue of asylum-seekers at sea should not only be sought in the context of legal norms but also through practical arrangements aimed at removing as far as possible the difficulties which have been encountered;
- (e) Noted that the report of the Working Group of Experts contained a number of suggestions aimed at achieving such arrangements and called upon UNHCR to examine the feasibility of these suggestions;
- (f) Noted the preliminary report submitted by the High Commissioner (EC/SCP/24) and requested UNHCR to continue its study of the matter and to submit a report to the Executive Committee at its thirty-fourth session, through its Sub-Committee on International Protection.

No. 29 (XXXIV) – 1983

- (d) Noted, however, with particular concern that in various regions the physical safety of refugees and asylum-seekers has been seriously violated through military or armed attacks, acts of piracy and other forms of brutality and the failure to rescue asylum-seekers in distress at sea;

No. 31 (XXXIV) – 1983 – Rescue of Asylum-Seekers in Distress at Sea

- (a) Noted with concern that, according to available statistics as contained in document (EC/SCP/30), significantly fewer numbers of asylum-seekers in distress at sea are being rescued;
- (b) Welcomed the initiatives undertaken by UNHCR to meet this grave problem by promoting measures to facilitate the rescue of asylum seekers in distress at sea and expressed the hope that those initiatives would receive the widest possible support of governments;

- (c) Recommended that States seriously consider supporting the efforts of UNHCR to promote the Rescue at Sea Resettlement Offers (RASRO) scheme, as described in document (EC/SCP/30), and providing the necessary quotas and other undertakings to enable UNHCR to initiate the scheme on a trial basis;
- (d) Welcomed the support given by States to the DISERO scheme;
- (e) Commended the initiatives undertaken by UNHCR in co-operation with the International Maritime Organization aimed at identifying joint action for facilitating the rescue of asylum-seekers in distress at sea.

No. 33 (XXXV) – 1984

- (e) Noted with particularly grave concern the continuing serious violations or disregard of the physical safety of refugees and asylum seekers in various regions of the world, including military or armed attacks, acts of piracy and the failure to rescue asylum-seekers in distress at sea;

No. 34 (XXXV) – 1984

- (a) Noted with concern that rescue of asylum-seekers in distress at sea has decreased significantly in 1983 and again in 1984;
- (b) Recalled the Conclusion on the Rescue of Asylum-Seekers at Sea adopted by the Executive Committee at its thirty-fourth session recognizing the need for promoting measures for facilitating the rescue of asylum-seekers in distress at sea;
- (c) Welcomed the actions taken by UNHCR to draw attention to the continued need to rescue asylum-seekers in distress at sea and expressed the hope that these actions would receive the widest possible support of Governments;
- (d) Strongly recommended that the Rescue at Sea Resettlement Offers (RASRO) Scheme be implemented on a trial basis as soon as possible and that additional resettlement places be provided as a matter of urgency;
- (e) Recognized the need for continued support for the DISERO (Disembarkation Resettlement Offers) Scheme and recommended that States renew their contributions to this scheme.

No. 36 (XXXVI) - 1985

- (f) Noted with serious concern that despite the development and further strengthening of established standards for the treatment of refugees, the basic rights of refugees in different areas of the world had continued to be disregarded and that in particular refugees are being exposed to pirate attacks, other acts of violence, military and armed attacks, arbitrary detention and refoulement;

No. 38 (XXXVI) – 1985 – Rescue of Asylum-Seekers in Distress at Sea

- (a) Reaffirmed the fundamental obligation under international law for shipmasters to rescue all persons, including asylum-seekers, in distress at sea;
- (b) Recalled the conclusions adopted by the Executive Committee at previous sessions recognizing the need to promote measures to facilitate the rescue of asylum-seekers in distress at sea [No. 20, No. 23, No. 26, No. 31, No. 34];
- (c) Expressed satisfaction that the rescue of asylum-seekers in distress at sea has increased significantly in 1985 but at the same time expressed concern that many ships continued to ignore asylum-seekers in distress at sea;
- (d) Welcomed the fact that the provision of an appropriate number of resettlement places had made it possible for the Rescue at Sea Resettlement Offers (RASRO) scheme to commence on a trial basis as from May 1985;
- (e) Welcomed the wide-ranging initiatives undertaken by UNHCR to promote the rescue of asylum-seekers in distress at sea and the support given to these initiatives by States;
- (f) Strongly recommended that States maintain their support of UNHCR action in this area and, in particular, that they:
 - (i) join or renew contributions to the DISERO (Disembarkation Resettlement Offers) and to the RASRO (Rescue at Sea Resettlement Offers) schemes, or to either of them, as soon as possible;
 - (ii) request shipowners to inform all shipmasters in the South China Sea of their responsibility to rescue all asylum-seekers in distress at sea.

No. 41 (XXXVII) – 1986

- (j) Noted with concern that in different areas of the world, the basic rights of refugees and asylum-seekers have been seriously violated and that refugees and asylum-seekers have been exposed to physical violence, acts of piracy and forcible return to their country of origin in disregard of the principle of non-refoulement;

No. 46 (XXXVIII) – 1987

- (f) Reiterated the High Commissioner's leading role in respect of the protection of refugees and called on him in particular to continue to take, alone or in co-operation with concerned States and agencies, all possible measures to ensure their physical security, inter alia, with respect to physical violence, piracy, military and armed attacks, and arbitrary detention;

No. 47 (XXXVIII) – 1987

(e) Condemned the exposure of refugee children to physical violence and other violations of their basic rights, including through sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention, and called for national and international action to prevent such violations and assist the victims