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**“THE PROTECTION OF THE FUNDAMENTAL RIGHTS
OF IRREGULAR MIGRANTS”**

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REPORT

**GUARANTEES FOR EFFECTIVE ACCESS
TO ASYLUM REQUESTS
OR TO RECOGNITION OF REFUGEE STATUS
IN THE CONTEXT OF MIXED MIGRATORY FLOWS**

by

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1. In the contemporary world, more and more people are moving not only from one country to another, but also from one continent to another. Some move from choice, some because they are forced to, and others for reasons that include elements both of choice and coercion.

2. In the circumstances, the distinction between the refugee in need of international protection and the migrant in search of better economic opportunities is not always as clear and definite as may appear to be. This is not to say that the immediate causes of refugee flows are not readily identifiable; they are largely serious human rights violations, persecution, violent political, ethnic or religious conflict or international armed conflict. However, these causes often overlap with, or may themselves be provoked or aggravated by, such factors as economic marginalization and poverty, massive unemployment, environmental degradation, population pressure and poor governance. Thus what seems at first sight to be primarily an economic motive for a person's flight from his or her home country may in reality also involve refugee-related elements.

3. This said, we have to be very careful about not mixing up refugees and migrants. Refugees and migrants are not one and the same. Where the line between "migrant" and "refugee" blurs, so does the distinction between migration control and refugee protection. Where refugees are subsumed into the broader class of "migrants," the control of their movement is likely to take precedence over meeting their protection needs. Confusing refugees and migrants is not only dangerous, it is also legally unsound.

4. The refugee problem is quintessentially an issue of rights – of rights which have been violated and of resulting rights, set out in international law. A refugee, as defined by international law, is a persecuted person, denied of his/her security of person, unable to exercise in safety her/his right to freedom of expression, to freedom of association, to freedom of belief, to pursue his/her political convictions, or just even to be who the person is born to be. More broadly defined, a refugee is also someone unable to continue to live in safety where he/she is, due to the discriminate or even indiscriminate dangers of war or serious civil disturbances. Fleeing and seeking asylum is the only realistic option for the individual and his/her family, in order to protect their right to life or security and freedom of person.

5. The right to seek and to enjoy asylum is firmly entrenched in international human rights law, in particular by way of Article 14 of the Universal Declaration of Human Rights. Because they lack the protection of their own governments, refugees have been made the beneficiaries of certain, clearly articulated set of rights embodied in the 1951 Convention relating to the Status of Refugees. The Convention, together with its Protocol, was a landmark in the setting of universal standards for the treatment of refugees by States Parties found to be necessary additions to the general human rights instruments. These include:

- The right not to be returned to persecution or the threat of persecution (the cardinal principle of *non-refoulement*);
- The right not to be discriminated against in the grant of protection;
- The right not to be penalized for unlawful entry into or presence in the country where asylum is sought, given that persons escaping persecution cannot be expected to always leave their country and enter another country in a regular manner;
- The right not to be expelled, except in specified, exceptional circumstances to protect national security or public order;
- The right to minimum, acceptable conditions of stay, which would include: freedom of movement, the right to education and to gainful employment or self-employment, access to public relief and assistance including health facilities, the possibility of acquiring and disposing of property and the right to obtain travel and identity documents. Contracting States to the

Convention are also expected to facilitate naturalization of refugees by reducing legal and administrative barriers to citizenship and to actively support refugees' family reunification.

6. Over the decades, States parties to the 1951 Convention have respected these rights to a remarkable degree. In recent times, however, we have seen in many parts of the world increasingly restrictive trends. In Europe, fears of "uncontrolled" irregular migration have prompted States, individually and collectively, to employ a repertoire of devices intended as they are to obstruct or dissuade people from gaining access to their territory. These include mandatory visa requirements, sanctions on carriers transporting undocumented or insufficiently documented passengers, pre-embarkation immigration controls at airports and seaports in countries of origin and transit, and physical interception or interdiction on the high seas vessels suspected of carrying undocumented travelers.

7. While these entry barriers and deterrence measures are aimed principally at combating irregular immigration, they nonetheless also pose formidable obstacles for asylum-seekers to access a jurisdiction where they could seek protection. They are blunt instruments which do not differentiate between the various categories of people "on the move." And the less they differentiate, the fewer refugees and asylum-seekers will overcome them.

8. In some cases, these measures are also self-defeating in that would-be migrants, asylum-seekers and refugees have been turning to increasingly more sophisticated human smuggling networks that are able to circumvent the immigration controls. A vicious circle then sets in motion, with States continually in search of more and more restrictive measures while the smugglers find new ways to get around them. The victims are invariably the migrants, asylum-seekers and refugees.

9. UNHCR shares the concerns of States that the organized smuggling of migrants and asylum-seekers is increasingly in the hands of transnational criminal organizations. Precisely because many refugees have no viable option to reach safety but to resort to the services of human smugglers, immigration control concerns – however legitimate – should not overshadow the need to protect the victims or the commitment to uphold the right to seek asylum from persecution as declared in Article 14 of the Universal Declaration of Human Rights.

10. Through the adoption of the Palermo Protocol against Smuggling supplementing the United Nations Convention against Transnational Organized Crime, the international community has made a significant contribution towards preserving this delicate balance between the repression of crime and the protection of humanitarian interests. It is abundantly clear from the Smuggling Protocol that asylum-seekers and refugees smuggled by land, sea or air are not in any way deprived of any rights as regards access to territory and to asylum procedures (see Article 19). Furthermore, the Smuggling Protocol expressly exempts from criminal liability migrants who have been the object of any of the smuggling offences set out in the Protocol (see Article 5). Similarly, the Protocol provides for appropriate measures to be taken by States Parties to preserve and protect the rights of smuggled persons (see Article 16).

11. Let me also make some points of a general nature on the question of trafficking in human beings in so far as it has a bearing on the protection of refugees. Trafficking in persons, the primary objective of which is to gain profit through the exploitation of human beings, is prohibited by international law and criminalized in the national legislation of a growing number of States. The Trafficking Protocol of the United Nations Convention against Transnational Organized Crime provides an international definition of trafficking, and sets out the basic obligations of protection and assistance to victims and to witnesses of trafficking.

12. Being a victim of human trafficking does not alone suffice to establish a valid claim for refugee status under the 1951 Convention. There will, nevertheless, be individual victims or potential victims of trafficking whose protection needs can and should be addressed through

the grant of asylum and to whom, therefore, access to asylum procedures must be ensured. At the same time, it is essential that anti-trafficking policies and strategies be accompanied by specific protection and assistance measures for victims and witnesses of trafficking. Putting in place such measures would also ensure that national asylum procedures are not inappropriately used.

13. I want now to return to the theme of my opening remark: The crucial need to disentangle refugees from the broader and usually very political issue of immigration control. It is vital to ensure that persons seeking asylum have access to the territory of States where protection can be sought, even where they arrive in an irregular manner with or without the aid of smugglers. Refugees are not acting unlawfully by arriving to seek protection in a State which has not pre-authorized their entry. Article 31 of the 1951 Convention recognizes that there are good reasons justifying a refugee's unauthorized entry or presence in an asylum country. I should also add that international law does not require refugees to seek protection in their own region.

14. It is, therefore, imperative that any national immigration control system allows asylum-seekers access to territory and the opportunity to have their refugee claims assessed in a fair and effective procedure for the determination of refugee claims.

15. It is only when a State knows who is and who is not a refugee that it can be certain of its compliance with the principle of *non-refoulement* and respect for the refugees' rights that the State has, as matter of international law, the duty to uphold. The principal objective of refugee status determination is, therefore, to provide a fair and expeditious decision-making process that will best ensure the observance of international legal obligations deriving from refugee and human rights instruments such as the European Convention on Human Rights. At the same time as facilitating the task of States in fulfilling their international obligations to refugees, an effective and expeditious procedure for refugee status determination also serves to address the legitimate interests of States in controlling immigration by screening out and returning to their home country those who do not need or deserve international protection.

16. Obviously States have the choice of means in the type and form of refugee status determination procedures they have to operate as may help them best implement the 1951 Convention and relevant international and regional human rights instruments. Yet, to meet the standards of international protection, a system for determining refugee status should satisfy certain basic procedural requirements which address the special situation of the refugee applicant and which ensure that the applicant is provided with some essential guarantees. Let me mention some of these key requirements:

(i) All asylum-seekers, in whatever manner they arrive within the jurisdiction of a State, must have access to a procedure for the determination of refugee claims.

(ii) The body responsible for examining and deciding on applications for refugee status in the first instance should be a central, specialized authority. The overall success of a refugee status determination process is largely contingent on the effective functioning of such body, with coherent rules, criteria and authoritative sources of information in place.

(iii) A fair and efficient procedure requires qualified, trained and impartial decision-makers. The decision-makers should have sufficient expertise in refugee and asylum matters, adequate knowledge of the human rights situation in asylum-seekers' countries of origin, and skills in cross-cultural communication.

(iv) At all stages of the procedure, applicants for refugee status should have access to legal counsel and, if required, qualified and impartial interpreters. They should also have the right to contact UNHCR or organizations acting on behalf of UNHCR.

(v) Applications for refugee status should be examined at first instance based on a personal interview of the applicant that would allow him or her to present evidence and to challenge that submitted against him or her. The interview and examination of the claim should be oriented towards cooperative inquiry, and not an adversarial contest.

(vi) All applicants must receive written reasons if their claim has been rejected. The reasoned decisions should show that the decision-maker has taken into account all material facts, assessed credibility, identified and interpreted the relevant law, and applied the law to the established facts judiciously.

(vii) Applicants must have the right to effective review or appeal against a negative decision. Such review or appeal should normally have a suspensive effect.

(viii) The procedures must ensure the confidentiality of the proceedings and the protection of personal data.

(ix) The procedures should have sufficient flexibility when assessing claims involving persons whose experiences and circumstances may inhibit their ability to present evidence in support of their claims. More particularly, there should be special procedures for properly handling claims involving victims of torture or of sexual violence and cases of unaccompanied minors.

17. Promoting national asylum procedures that meet these minimum standards is one of the main functions of UNHCR, as a United Nations organization mandated to protect refugees. Protection is first and foremost about people; it is about men, women and children driven from their homes by persecution and violence. In this sense refugees are victims. But they also have aspirations and hope for the future. Hope can be nurtured – and realized – if refugees are accepted for who they are, are seen as equals and given the chance to engage fully in all aspects of community life.

18. It is not enough, therefore, only to extend to refugees territorial protection that allows them to enter and remain on the territory of the asylum country. Passive tolerance of refugees – in the sense of just putting-up with them – is not what asylum is about. Asylum is about opening the doors to greater understanding and active tolerance by outreach to the refugees. It is about the societies we want to live in, about our belief in values. Asylum is about fostering a positive and respectful attitude towards refugees and facilitating their self-reliance and integration. It is about recognizing that refugees are capable – if provided with the tools of language, skills development and employment opportunities – of assuming responsibility for their own affairs and contributing to their host society, economically, socially and culturally.

19. Evidently, the availability of comprehensive integration programmes and services varies as a function of the economic wealth and social organization of the host country. However, not all integration programmes and services require a large injection of financial resources. This is especially the case with what I call "soft" or "preparatory" integration programmes: language training, social and cultural orientation, vocational training and employment counseling. It is likewise with the granting of citizenship. "Hard" integration programmes, such as housing support and credit schemes for small business development, may put more demands on the State's budget.

20. Where, therefore, the grant of asylum and active facilitation of integration would place unduly heavy burdens on certain countries, more equitable burden-sharing arrangements may be necessary to ameliorate the resulting costs. But the existence or otherwise of burden-sharing schemes must not be made a pre-condition for meeting the State's freely assumed international legal obligations.

21. Let me, in conclusion, sum up this presentation. The protection needs of asylum-seekers and refugees are increasingly intermingled with broader migration concerns. And Governments, alarmed by what they perceive to be unprecedented and potentially uncontrollable levels of irregular migration, adopt ever more restrictive measures to limit access to their territories.

22. Clearly, States have the right to regulate the entry and residence of non-nationals. But States have also assumed protection responsibilities for refugees under international instruments which it is in their collective interest to honour. They would need, therefore, to effectively ensure that their legislation and policies aimed at inhibiting irregular migration do not interfere with the ability of asylum-seekers to gain access to their territory and to asylum procedures. The challenge is not to prevent movements but to better manage the many sensitive issues at stake, including national security, social harmony and economic progress, in a manner which protects States interests and individual rights, promotes a proper sharing of responsibilities, and maximizes the benefits migration of all sorts can bring to host societies.