

**The UNHCR and its Role in the Debate on the *Refoulement*
and Interception of Refugees on the High Seas**

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ABSTRACT

In May 2009, the issue of interdiction and *refoulement* of refugees on international waters was once again brought to light after a number of Libyan refugees were forcibly returned following a series Italian interception measures.¹ These asylum seekers and refugees were returned to their Country of Origin, Libya, without the obligatory screening process required by International Law. Italy very clearly violated its international duty to respect the principle of *non-refoulement* by returning these refugees to a State with no asylum law or procedures.² The question then remains, where was the United Nations High Commissioner for Refugees (UNHCR), the supposed refugee protection agency, while people were being sent back into a situation with potentially fatal risks?

This thesis will examine the role of the UNHCR in the debate surrounded the *refoulement* and interception of refugees on the High Seas. Through the analysis of relevant legal instruments, past practices of the UNHCR and a deeper look at its inner-workings, I provide evidence that this organization is heavily weighed down by its financial, political, legal and organizational constraints, to the point where it is no longer able to move forward in its goals. Instead, it is caught at a crossroads between loyalty to its donors and loyalty to those who need it most.

¹ Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 2009,

<http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0> (accessed June 13, 2011), 4.

² *Ibid*, 7.

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INTRODUCTION

In May 2009, the issue of interdiction and *refoulement* of refugees on international waters was once again brought to light after a number of Libyan refugees were forcibly returned following a series Italian interception measures.³ These asylum seekers and refugees were then returned to their Country of Origin without the obligatory screening process required by International Law. Italy clearly violated its international duty to respect the principle of *non-refoulement* by returning these refugees to a State with no asylum law or procedures.⁴ The question then remains, where was the United Nations High Commissioner for Refugees (UNHCR) while people were being sent back into a situation with potentially fatal risks.

The UNHCR has declared that the principle of *Non-Refoulement* has no strict geographical limitations and therefore, its obligations extend to all government agents acting in an official capacity, within or outside national territory. In order to maintain an International refugee protection regime, the Agency believes that there shall be no derogation from this principle.⁵ In reality however, the UNHCR is severely constrained in the amount of enthusiasm with which it can truly push forward its views and accomplish its goals.

Existing literature, such as Gil Loescher's book, *The UNHCR and World Politics: a Perilous Path* and Michael Barutciski's article "A Critical View on UNHCR's Mandate Dilemmas," examine the UNHCR's role since its creation, within the sphere of International Refugee Law. Additionally, there exists numerous articles outlining the international refugee protection regime, its fallbacks and successes, such as *Problems of Protection: The UNHCR, Refugees, and Human Rights*, edited by Niklaus Steiner, Mark Gibney and Gil Loescher,

³ Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 2009, <http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0> (accessed June 13, 2011), 4.

⁴ Ibid, 7.

⁵ Ibid, 29.

David A. Martin's "Refugees and Migration," Urzula Lisson and Ruth Weinzierl study for the German Institute for Human Rights, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea*, Seline Trevisnaut's, "The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection," and Guy S. Goodwin-Gill's, *The Refugee in International Law* among others. There also exist numerous sources which outline the role of the United Nations and its subsidiary organizations within the realm of International Law in general, for example, Linda M. Fasulo's, and *An Insider's Guide to the UN* and *The United Nations at Work*, edited by Martin Ira Glassner.

There are also countless legal documents including Conventions, Regulations, Conclusions and Treaties, among others, which detail the very minute details surrounding International Law, International Refugee Law and International Law of the Sea. The principal instruments examined this thesis include the *1951 Convention and 1967 Protocol Relating to the Status of Refugees*, the *Charter of the United Nations*, the *1982 United Nations Convention on the Law of the Sea*, as well as innumerable documents issued by the UNHCR itself, the International Maritime Organization (IMO) and the International Organization for Migration (IOM).

This thesis finds its place among the existing literature by collecting the information from these various sources and fields of law, and investigating the precise role of the UNHCR in the debate regarding the *refoulement* and interception of refugees on the High Seas, the direction it would like the debate to develop and whether or not it is able to do so. My research suggests that although the UNHCR has every intention of protecting refugees in this scenario, it is severely constrained financially, politically, legally and organizationally, to the extent that it is unable to fully carry out its mandate in this field.

CHAPTER 1 - BACKGROUND OF THE UNHCR

1.1 General Information – History, Logistics and Mandate

1.1.1 Historical

The United Nations High Commissioner for Refugees (UNHCR) was established by the United Nations General Assembly (UNGA) Resolution 319 of December 3, 1949 and came into being on December 14th, 1950, with an original three-year mandate. It emerged post-World War II to aid Europeans displaced by the conflict and with a mandate to “...lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide.”⁶ Par. 1 of its Statute states that the organization’s function should be

...[To provide]...international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and...[to seek]...permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.⁷

According to Par. 8(a) of the Statute, International Protection is understood to entail (1) Promoting the conclusion and ratification of international conventions to protect refugees, supervising their application and proposing amendments; (2) Promoting the execution of measures to improve the refugee situation and to reduce the number of those requiring protection through special agreements; (3) Assisting governmental and private efforts to promote voluntary repatriation and/or assimilation into new communities; and (4) Promoting the admission of refugees to States.⁸

Par. 2 of the Statute affirms its non-political, humanitarian and social character,

⁶ “About Us,” UNHCR, <http://www.unhcr.org/pages/49c3646c2.html> (accessed June 6, 2011).

⁷ UNHCR, *Statute of the Office of the United Nations High Commissioner for Refugees*, 1950, <http://www.unhcr.org/3b66c39e1.html> (accessed June 6, 2011)

⁸ Mark Gibney and Erik Roxström, “The Legal and Ethical Obligations of the UNHCR: The Case of Temporary Protection in Western Europe,” in *Problems of Protection: The UNHCR, Refugees, and Human Rights*, ed. Niklaus Steiner, Mark Gibney and Gil Loescher (New York: Routledge, 2003), 38.

intended to allow the organization to work in all countries and secure donors.⁹ Par. 8 notes in regard to its protection activities that

In carrying out this mandate at a national level, UNHCR seeks to ensure a better understanding and a more uniform interpretation of recognized international principles governing the treatment of refugees. The development of appropriate registration, reception, determination and integration structures and procedures is therefore not only in the national interest of the countries concerned, but also in the interest of the international community, as it helps stabilize population movements and provide a meaningful life for those who are deprived of effective protection. In creating this mandate for UNHCR, the international community recognized that a multilateral response to the refugee problem would ensure a coordinated approach in a spirit of international cooperation.¹⁰

As can be discerned from this statement, the UNHCR is often regarded as the “guardian of international refugee norms.”¹¹ On July 28th, 1951, the creation of the UNHCR was followed by the adoption of the 1951 Geneva Convention Relating to the Status of Refugees, a fundamental document in the international protection regime of refugees.¹² In 1956, the organisation encountered its first major emergency with an upsurge in refugees fleeing the Soviets who crushed the Hungarian revolution. This was followed in the 1960s by refugee crisis produced in Africa through decolonization.¹³ In 2003, the UNGA extended the UNHCR mandate until the “refugee problem is solved.”¹⁴

1.1.2 Logistical

The UNHCR office today is based in Geneva, Switzerland and maintains its work with the continuing and ever-increasing refugee outflows, with more than 43 million displaced people worldwide. From an original office of 34 employees, the UNHCR has expanded to 7,190 staff members internationally, including approximately 700 at its

⁹ Gil Loescher, “Toward the Future: the UNHCR in the Twenty-First Century,” in *The UNHCR and World Politics: a Perilous Path*, (New York: Oxford University Press, 2001), 349.

¹⁰ Walter Kälin, “Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond” in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed. E. Feller, V. Turk, and F. Nicholson (Cambridge: Cambridge University Press, 2003), 5.

¹¹ Gil Loescher, *The UNHCR and World Politics: a Perilous Path*, 347.

¹² “History of UNHCR,” <http://www.unhcr.org/pages/49c3646cbc.html> UNHCR, (accessed June 6, 2011).

¹³ *Ibid.*

¹⁴ “Governance and Organization,” UNHCR, <http://www.unhcr.org/pages/49c3646c80.html> (accessed June 6, 2011).

headquarters. The agency works in 123 countries, with staff in 124 main office locations and 272 sub-offices manage the UNHCR's core work. The UNHCR budget is funded in part by the mandatory UN budget, however most of its funding comes from voluntary contributions,¹⁵ and has grown from \$300,000 US dollars in 1950 to over \$3.32 billion US dollars in 2011. It currently works with 36.4 million people of concern, including 15.6 million internally displaced people, 10.4 million refugees, 2.5 million returnees, 6.5 million stateless people, upwards of 980,000 asylum seekers and more than 400,000 other people of concern.¹⁶

The UNHCR is governed by both the UNGA and the Economic and Social Council (ECOSOC). Its Executive Committee (Excom) is composed of 85 members responsible for the adoption and approval of the agency's biennial programmes and budget, which are then presented by the High Commissioner (HC). Excom also provides an advisory role in the adoption of 'Conclusions' on international protection,¹⁷ which are not formally binding, but relevant to the interpretation of the international protection regime.¹⁸ The Excom is not however, a governing body. Its role is not a substitute for the policy-making functions of the UNGA and ECOSOC.¹⁹

The HC – currently António Guterres – is appointed by the UNGA and is responsible for preparing annual reports on the UNHCR's work to both the UNGA and ECOSOC. The HC also directs and controls the UNHCR with the assistance of a Deputy and Assistant HC for Protection and Operations. In addition, HC representatives head operations in countries and regions where the UNHCR works.²⁰ The UNHCR Statute sets firm restrictions on the HC

¹⁵ David A. Martin, "Refugees and Migration," in *The United Nations and International Law*, ed. Christopher C. Joyner (Cambridge: Cambridge University Press, 1997), 156.

¹⁶ "History of UNHCR," UNHCR, <http://www.unhcr.org/pages/49c3646cbc.html> (accessed June 6, 2011).

¹⁷ David A. Martin, "Refugees and Migration," 159.

¹⁸ United Nations High Commissioner For Refugees (UNHCR), *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final Version, Including Annexes)*, 2002, Annex 1, 2.

¹⁹ Ibid.

²⁰ "Governance and Organization," UNHCR, <http://www.unhcr.org/pages/49c3646c80.html>

functions, including Par. 2, which states that "...the work of the High Commissioner shall be of an entirely non-political character, it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees."²¹ The election of an HC is carried out by the UNGA upon a nomination by the United Nations Secretary General (UNSG). They serve a term of three to five years with the possibility of re-election.²²

In 2006, UNHCR was responsible for 12% of all refugee status application decisions in seventy countries, meaning that it was responsible for the fate of over 80,000 individuals worldwide, making them the biggest Refugee Status Decision maker in the world. In fact, between 2003 and 2006, while the number of refugee applications submitted worldwide decreased by 38%, the number of submissions to the UNHCR increased by 48%.²³

The UNHCR, as a subsidiary UN organization, does not work alone. Because its Statute forbids the solicitation of any voluntary contributions without first gaining UNGA approval,²⁴ and through its attempt to remain non-political as well as avoid conflict with its donor members,²⁵ it often depends on the help of Non-Governmental Organizations (NGOs). These organizations help to build constituencies for its policies and programs, by using their ability to campaign more freely. This process demonstrates the UNHCR's recognition that support for refugees often depends on the attitude of citizens at the local level.²⁶

1.1.3 UNHCR Mandate

The UNHCR mandate stems from UNGA Resolution 428 (V) of December 14, 1980 which also contains an annexed UNHCR statute.²⁷ Its authorization comes from the UNGA

²¹ David A. Martin, "Refugees and Migration," 156.

²² Ibid.

²³ Maja Smrkolj, "International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination," *German Law Journal* 9, no. 11 (2008), 1781.

²⁴ David A. Martin, "Refugees and Migration," 157.

²⁵ Thomas G. Weiss and Peter Uvin, "The United Nations and NGOs: Global Civil Society and Institutional Change," in *The United Nations at Work*, ed. Martin Ira Glassner (Westport: Praeger Publishers, 1998), 216.

²⁶ Ibid.

²⁷ UNHCR, *Background Note*, Annex 1, 1.

as specified in the Statute, and the GC. It has been entrusted with the international protection of refugees, and in exchange, States are asked to cooperate with the UNHCR “...in the exercise its functions, and shall in particular facilitate its duty of supervising the applications of the provisions of the 1951 Convention/1967 Protocol.”²⁸ The UNHCR is in no way mandated to be a government for refugees; it works instead as an umbrella organization through which national governments collaborate to develop an increasingly detailed and concrete refugee protection regime.²⁹ It is also not considered to be a norm-creating organization, but instead promotes the already-established norms in the field of refugee protection.³⁰

Its worldwide field operations are incredibly complex, involving everything from hiring staff, ensuring their safety from and in dangerous situations and the acquirement of medical and food supplies as well as methods of transportation.³¹ However, its mandate and function today are the result of a long period of development, change and adjustment. The organization has gone through various changes since its inception and continues to develop and adapt. The office’s original mandate has proven to be unrealistic in practice, and it has gained increased competence in many areas.³² The international perception of the work of the UNHCR and its legal framework do not always match, as is often the case for organizations participating in unexpected crises.³³

Nicholas Morris, UNHCR Special Envoy to the former Yugoslavia from 1993-1994, described the organization’s expanded mandate approach as ‘instrumental

²⁸ Guy S. Goodwin-Gill “Asylum: Non-Refoulement,” in *The Refugee in International Law*, (New York: Oxford University Press, 1996), 145.

²⁹ David A. Martin, “Refugees and Migration,” 156.

³⁰ Mark Gibney and Erik Roxström, “The Legal and Ethical Obligations of the UNHCR,” 40.

³¹ “Governance and Organization,” UNHCR, <http://www.unhcr.org/pages/49c3646c80.html>

³² David A. Martin, “Refugees and Migration,” 156.

³³ Maja Smrkolj, “International Institutions and Individualized Decision-Making,” 1780.

humanitarianism.³⁴ He argued that the fundamental reason behind this is that in order to be efficient, protection policies inevitably must be adapted with regard to political realities. He concludes that this leads to unrealistic expectations of the UNHCR given its constrained circumstances.³⁵ Michael Barutciski, in his article *A Critical View on UNHCR's Mandate Dilemma*, explains that the UNHCR mandate expansion is not in tandem with the actual protection of refugees, since he believes the agency does not give enough thought to its creation of difficult refugee policies.³⁶ In his view, the UNHCR should cease its ambitions for an expanded mandate and aim for a more modest role in order to thwart efforts of external manipulation as has been seen in the past.³⁷ He believes that there is a realist and effective approach to refugee problems in the UNHCR mandate and that the organization should focus on the outflow of refugees, versus the prevention of disasters producing refugees.³⁸

Its actions are fundamentally based on the principle of human rights, as it states in Art. 1 of its Charter its commitment to “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.³⁹ It still works today with the principal goal to enhance the legal protection of refugees, which was designated to be its original and principal function.⁴⁰

³⁴ Michael Barutciski, “Opinion: A Critical View on UNHCR’s Mandate Dilemmas,” *Max International Journal of Refugee Law* 14, No. 2/3 (2002), 365

³⁵ *Ibid.*

³⁶ *Ibid.*, 366.

³⁷ *Ibid.*, 367

³⁸ *Ibid.*, 379-80.

³⁹ “Charter of the United Nations,” <http://www.un.org/en/documents/charter/chapter1.shtml> (accessed June 18, 2011)

⁴⁰ David A. Martin, “Refugees and Migration,” 156.

CHAPTER 2 – INTERNATIONAL REFUGEE LAW AND LAW OF THE SEAS

2.1 Introduction

The field of international refugee law has long been in the process of development. Following the increase in refugee movements and the change in their patterns after the Second World War, the creation of the United Nations and specifically of the UNHCR to deal with the safety and protection of refugees, the field of International Refugee Law took off and truly began to develop into the vast regime we see today. This chapter will explore the fields of International Refugee Law, Refugee Law at Sea as well as the legal background of the UNHCR mandate.

2.2 International Refugee Law – General

Throughout International Law (IL), the notion of state sovereignty plays an extremely important role in the application and implementation of treaties, conventions and other legal instruments. State sovereignty and equality is a fundamental principle of IL, gaining importance through several sources, most importantly the Charter of the United Nations and the Declaration on Principles of International Law, Friendly Relations and Cooperation Among States. The latter states that “All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.”⁴¹ Within the rights listed, lies the inviolability of territorial integrity and political independence of each equal and sovereign state as well as the duty to for each state to comply fully and in good faith with its international obligations. The intersection of public IL and International Refugee Law creates a slight conflict however, as it is difficult to determine where the former ends and the latter begins.

⁴¹ UN General Assembly, *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, 1970, <http://www.unhcr.org/refworld/docid/3dda1f104.html> (accessed June 6, 2011)

During the years of 1949 and 1950, the UN attempted to create a new institution which would work towards the adoption of a treaty to deal specifically with refugees. Eventually, as described in the preceding chapter, the UNHCR was created to deal with the question of refugees under the generalized concept of statelessness.⁴² Eventually, the organization began to distinguish between *de jure* statelessness and refugees, recognizing that someone could fall into both categories. By the time the final work had begun on the new treaties concerning refugees, the two categories were much more distinct. The international community chose to focus firstly on the 1951 Geneva Convention Relating to the Status of Refugees (GC), followed by the less recognized 1954 Convention Relating to the Status of Stateless Persons.⁴³

The GC, together with the UNHCR statute aim to promote and protect the human rights of refugees and to prevent refugee situations from occurring in the first place. The GC focuses on the status of refugees, versus the actual act of admission or asylum on behalf of a state. It outlines the requirement for various social, legal and economic protections afforded to refugees, generally using the domestic law of nationals and aliens, or the most-favoured nation standard.⁴⁴

Article 1(2) of the GC describes a refugee as any person who

As a result of events occurring before 1 January 1951 and owing to *well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*, is *outside the country of his nationality* and is *unable or*, owing to such fear, is *unwilling to avail himself of the protection of that country*; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴⁵

This definition has become the principal source for the interpretation of the criteria necessary to qualify as a GC refugee, and differentiates between those who are awarded GC rights in

⁴² David A. Martin, "Refugees and Migration," 162.

⁴³ Ibid, 163.

⁴⁴ Ibid.

⁴⁵ Author's emphasis: UNHCR, 1951 *Convention and 1967 Protocol Relating to the Status of Refugees*, 1951, <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (accessed June 5, 2011)

their host states and those who are not.

2.2.1 The Principle of Non-Refoulement

One of the most important provisions of IRL is found in Article 33(1) GC, which outlines the principle of *non-refoulement* (NR). As noted by David Martin in his article *Refugees and Migration*, "...[*Non-Refoulement*]...is probably the single most important provision of international refugee law. Its centrality is underscored by the Convention's ban on reservations to the *non-refoulement* provision (Article 42)."⁴⁶ It states that

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁴⁷

Paragraph 2 of the provision permits limited exceptions from this principle when there are 'reasonable grounds' to believe the refugee constitutes a danger to the security of the destination State or has been convicted of a particularly serious crime and is therefore a danger to the community of the State.⁴⁸

The difficulty with this concept is the different ways in which it has been interpreted by states and refugee organizations. The most frequently debated issue is that of where the 'frontiers' of a state actually begin. Although Art. 33(1) GC would seem to preclude return of an Asylum-Seeker (AS) from the border, the *travaux préparatoires* seem to indicate that NR only applies for those "...who[have] gained admission to the territory, even if illegally."⁴⁹ However, through state practice, there appears to be a clear trend of non-rejection at the territorial frontiers and of NR as customary law binding on all states.⁵⁰

Since 1985, many states have stressed that NR does not apply to non-GC refugees, but

⁴⁶ David A. Martin, "Refugees and Migration," 165.

⁴⁷ UNHCR, 1951 *Convention and 1967 Protocol Relating to the Status of Refugees*

⁴⁸ David A. Martin, "Refugees and Migration," 165.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

they accept that protection needs are still necessary.⁵¹ However, in the early 1990s, many states still did not accept the existence of a legal right to NR for non-GC refugees. One American delegate even expressed that the U.S. did not believe States were under a legal obligation to admit persons seeking asylum.⁵² The UNHCR Executive Committee (Excom), however, has continuously stressed the importance of NR regardless of whether or not the individual has been recognized as a refugee⁵³ and went as far as to declare NR as a peremptory norm in a 1982 Conclusion. In 1991, they emphasized the primary importance of NR and asylum as cardinal principles of IRL.⁵⁴ Excom has also declared the irrelevance of the AS's legal status, migration status or the method of entry into a State's territory and instead emphasizes the consequences of a States' actions or inaction.⁵⁵ Through IL, every state enjoys *prima facie* exclusive authority over its territory and the persons within its territory. In 1988, Swiss Representative Mr. Hadorn affirmed that "While others might be allowed to remain for humanitarian reasons, this would not be based on a Convention obligations, so much as on 'considerations of humanitarian law' or international solidarity, in other words, on a free decision by the State concerned."⁵⁶

2.2.2 The Role of the State in Granting Asylum

What matters most in relation to AS and refugees is the treatment they are accorded after their arrival.⁵⁷ It is vital for states to remain wary that with the right to sovereignty comes a certain and expected level of responsibility. The role of the state in the destiny of AS is, as noted, incredibly important, since granting asylum is the right of states, not individuals. This means that states can provide asylum to only those they choose to, and in doing so, do

⁵¹ Guy S. Goodwin-Gill, *The Refugee in International Law*, (New York: Oxford University Press, 1996),130.

⁵² *Ibid*, 132-33.

⁵³ *Ibid*, 137

⁵⁴ *Ibid*, 128.

⁵⁵ *Ibid*, 137.

⁵⁶ *Ibid*, 130.

⁵⁷ *Ibid*, 145.

not wrong any other state.⁵⁸ In fact, no international treaty actually guarantees the right to asylum.⁵⁹ The drafters of the GC were especially careful not to include a right to asylum, a fact further complemented by other instruments of IL, such as the Universal Declaration of Human Rights Art. 14, which clarifies that the right of State sovereignty over the control of the entry of aliens should not be disturbed.⁶⁰ Determination of State responsibility depends then, on whether actions to the individual are imputable to the state and whether they can result in harm to an internationally protected interest. This means that States can decide *how* to implement their obligations. The application of different standards and procedures in different zones does not always constitute a breach of an international obligation, but these differing standards must still be in compliance with IL.⁶¹

In Niklaus Steiner's article *Arguing About Asylum* he claims that IRL in Europe is based partly on state interest and partly on compassion. He argues that asylum is a configuration of national interests, international norms and morality in reality. He finds that national asylum policies are a result of a tug-of-war between international norms and morality (which loosen policies) and national interests (which tighten policies).⁶² He questions the very existence of asylum policies because they cause a large amount of controversy and he ultimately determines that it is a State's national identity, and not its parliamentarians, that maintains asylum in contemporary Europe. He concludes that European States hold onto their asylum policies because of the way they see themselves and the way they believe they are perceived by other states. Thus, they will never abandon the principle no matter how controversial it becomes.⁶³

Respect for this right becomes increasingly difficult however, when attempting to

⁵⁸ David A. Martin, "Refugees and Migration," 166.

⁵⁹ *Ibid*, 168.

⁶⁰ *Ibid*, 169.

⁶¹ International Chamber of Shipping, IMO and the UNHCR, *Rescue at Sea*, 147.

⁶² Niklaus Steiner, "Arguing about Asylum: The Complexity of Refugee Debates in Europe," in *The United Nations and International Law*, ed. Christopher C. Joyner (Cambridge: Cambridge University Press, 1997), 181.

⁶³ *Ibid*, 195.

declare whether a refugee is ‘physically present’ in the territory of a contracting state. Some of the GC protections apply to *all* refugees who are physically present in a territory, but many of the GC’s substantive articles are limited due to their use of the terms ‘lawfully in’ or ‘lawfully staying in.’ the host state.⁶⁴ This means that Full Convention rights are not automatically bestowed upon those physically present on the territory of the contracting state, since they must first prove that they also fit the GC definition of a refugee.⁶⁵

This leads into the following subsection which will summarize the relevant IRL in relation to AS who travel by sea to arrive at their destination country.

2.3 International Law of the Sea (ILOS)

2.3.1 Introduction

The principle of NR has become a serious issue in relation to refugees who arrive in a host country by boat. Where the true frontier of a State exists is still highly debated and there is insufficient state practice and *opinio juris* to spur customary law on the matter. In this section I will outline the relevant laws which dictate and demarcate the various water zones of *Coastal States* (CS).

2.3.2 General Law and Key Maritime Zones⁶⁶

The first term to clarify is that of a state’s *Internal Waters* (IW). Art. 8 United Nations Convention on Law of the Sea (UNCLOS) describes a State’s IW as any water on the ‘landward side of the baseline of the territorial sea...’⁶⁷ Within its IW, the Coastal State (CS) enjoys (1) Full jurisdiction; (2) Full rights of control over vessels that enter this zone; (3) Permission to exercise migration and border control; and (4) The right to control, intercept

⁶⁴ David A. Martin, “Refugees and Migration,” 165.

⁶⁵ *Ibid*, 167.

⁶⁶ Diagram of relevant zones provided in Appendix A

⁶⁷ UN Division for Ocean Affairs and Law of the Sea, *UN Convention on the Law of the Sea*, 1982, http://www.un.org/Depts/los/convention_agreements/texts/unclos/part2.htm (accessed June 3, 2011)

and if necessary, the turn back foreign vessels.⁶⁸

The first zone one encounters off the coast of the relevant state is the *Territorial Sea* (TS) of the state. The TS is considered as part of the State's sovereign territory and extends up to and no further than 12 nautical miles (NM) measured from the baseline⁶⁹ and falls under state sovereignty.⁷⁰ The border between the TS and the *High Seas* (HS) is also the dividing line between the jurisdiction of the CS legal order and the jurisdiction of International Law of the Seas (ILOS) that apply in the absence of state jurisdiction.⁷¹ So the area of the TS and the people in it are subject to the CS jurisdiction which is *only* limited by the right of *Innocent Passage* (IP) in accordance with Arts. 2(3) and 17 UNCLOS.⁷²

According to Art. 19 UNCLOS, passage of a vessel is considered innocent when it does not prejudice the peace, order or security of a CS.⁷³ IP must be continuous and expeditious except to stop or anchor 'incidental to ordinary navigation or rendered necessary by force majeure or distress.'⁷⁴ The right to IP belongs only to the *Flag State* (FS), meaning the State to which the vessel is registered and whose flag is flown by the vessel itself. A vessel without a flag, therefore, does not enjoy this right, and without prejudice to human rights obligations under ILOS, these boats can be stopped, controlled and possibly diverted out of the TS.⁷⁵ If a vessel seeks IP in the TS outside the IW, the CS cannot exercise any jurisdictional measures, including controls of the vessel or the prevention of the vessel's passage. However, these rights are reinstated if the vessel's passage is non-innocent, meaning that it is engaging in the listed in Art. 19(2) including but not limited to

⁶⁸ Urzula Lisson and Ruth Weinzierl study for the German Institute for Human Rights, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea*, 2007, <http://www.unhcr.org/refworld/docid/47b1b0212.html> (accessed June 2, 2011), 33.

⁶⁹ The baseline generally follows the sea shore line and coincides with the low tide (minimum of the sea).

⁷⁰ Richard Barnes, "Refugee Law at Sea," *The International and Comparative Law Quarterly* 53, no. 1 (2004), in JSTOR, <http://www.jstor.org/stable/3663136> (accessed June 1, 2011), 55

⁷¹ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 33.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Richard Barnes, "Refugee Law at Sea," 55

⁷⁵ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 33.

- (a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) ...Any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (c) ...The launching, landing or taking on board of any aircraft or military device;
- (d) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (e) any act of willful and serious pollution contrary to this Convention;
- (f) any fishing activities;
- (g) the carrying out of research or survey activities;⁷⁶

A vessel participating in any of the above-listed activities can have their passage denied.

Even when passage is considered innocent, it can be temporarily suspended in accordance with Art. 25(3) UNCLOS when it is essential to the protection of the security of the CS. This suspension may only take place after the CS has publicized the laws and regulations affecting passage within their TS, in order to alert foreign vessels to which activities they consider non-innocent. However what constitutes ‘due publicity’ is left to the discretion of the CS.⁷⁷ It is vital to remember that IP is not a *right* and that it is in fact a privilege to enter the territory of a CS.

The zone adjacent to the States’ TS is called the *Contiguous Zone (CZ)*. The CZ must be clearly expressed by the CS and according to Art. 33(2) UNCLOS and may extend up to and no further than 24 NM from the same baseline used to measure the TS.⁷⁸ In the event that the CZ of two states are less than 48 nautical miles apart, they are given concurrent powers, however this can sometimes cause a conflict of jurisdiction.⁷⁹

The CZ is a part of the *High Seas (HS)* in which the freedom of navigation applies

⁷⁶ UN Division for Ocean Affairs and Law of the Sea, *UN Convention on the Law of the Sea*, 1982, http://www.un.org/Depts/los/convention_agreements/texts/unclos/part2.htm (accessed June 3, 2011)

⁷⁷ Richard Barnes, “Refugee Law at Sea,” 56.

⁷⁸ UN Division for Ocean Affairs and Law of the Sea, *UN Convention on the Law of the Sea*, 1982

⁷⁹ Seline Trevisanaut, “The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection,” *Max Planck Yearbook of United Nations Law* 12 (2008), http://www.mpil.de/shared/data/pdf/pdfmpunyb/05_trevisanut_12.pdf (accessed June 2, 2011), 231.

which means that the CS does not enjoy sovereignty in this area.⁸⁰ However, in accordance with Art. 33(1) UNCLOS, the CS may exercise the controls necessary to enforce its domestic customs, fiscal, immigration and sanitary laws and to punish violations of these national laws. The CS is still limited in this respect, since a vessel in the CZ is not considered as being in the TS of a state. Thereby, in regards to a foreign vessel in the CZ, CS only have the right to approach, examine and prevent their entry into their TS. The exercise of any further measures is considered unnecessary and is prohibited according to Art. 33 UNCLOS. States conducting controls are also expected to adhere to the duties arising from NR under IL. In addition, controls in the CZ that aim to prevent the foreign vessel from leaving the TS towards the CZ and HS, rather than to prevent entry into the TS, can be considered a violation of the human right to leave.⁸¹

The only exception to the above-mentioned restrictions on controls is the right to *Hot Pursuit* (HP). According to Art. 111(1) UNCLOS, HP of a foreign ship can be undertaken when the CS has good reason to believe the ship has violated its domestic laws and regulations.⁸² This pursuit needs to begin while the violating vessel is in the IW, the TS or CZ of the CS and may not continue into the HS, unless the pursuit has been uninterrupted. The right of HP ceases if the vessel being pursued enters the TS of its own State or of a Third State.⁸³ The only exceptions under which coercive measures can be used against foreign vessels on the HS include a vessel's lack of nationality, doubts of its nationality, or the consent of the FS and HP.⁸⁴

The final zone to be defined is the *High Seas*. Art. 86 UNCLOS defines the HS as "...all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic

⁸⁰ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 33.

⁸¹ *Ibid*, 34.

⁸² UN Division for Ocean Affairs and Law of the Sea, *UN Convention on the Law of the Sea*, 1982

⁸³ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 35.

⁸⁴ *Ibid*.

State...”⁸⁵ In the HS, freedom of navigation reigns, meaning that every State has an equal right to sail vessels under its flag on the HS.⁸⁶ Coercive measures in this area are forbidden, as vessels on the HS are subject only to the FS jurisdiction. Prohibited activities include migration and immigration controls and the stopping, boarding, turning around or escorting back of a vessels sailing under a flag.⁸⁷ However, ships without a flag may be stopped and controlled on the HS. Now that the key terms have been defined, the next section will now describe the process of rescue and interception at sea.

2.3.3 International Law of the Sea: Key Terms

Within the law of the sea rests a moral and legal obligation to aid those in distress at sea. The obligation to aid is imposed on states and is to be carried out without exception or discrimination based on the legal status of those being rescued.⁸⁸ Although this is believed to be a necessary part of international law, the definition of its relevant terms are vague, the extent of this duty is unclear and its enforcement is difficult. In this section, I will further detail the reasons behind these three setbacks.⁸⁹

The most relevant legal documents related to the duty to rescue and are the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1974 International Convention on Maritime Search and Rescue (SAR).⁹⁰ The principal organizations involved in discerning maritime rescue law are the (1) International Maritime Organization (IMO); responsible for overseeing the development of international maritime law with an emphasis on safety; (2) United Nations High Commissioner for Refugees (UNHCR) which guides and assists states and other actors on the treatment of AS and refugees found at sea as well as monitors

⁸⁵ UN Division for Ocean Affairs and Law of the Sea, *UN Convention on the Law of the Sea*, 1982

⁸⁶ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 34.

⁸⁷ *Ibid.*

⁸⁸ Richard Barnes, “Refugee Law at Sea,” 50

⁸⁹ *Ibid.*

⁹⁰ International Chamber of Shipping, IMO and the UNHCR, *Rescue at Sea*, 5

compliance with the refugee protocol; (3) International Organization for Migration (IOM) which addresses migrant-related issues; and (4) International Community (IC) which develops responsibility-sharing mechanisms involving states and other actors in regards to various scenarios involving refugees, AS, migrants and others facing difficulty at sea.⁹¹

2.3.3.1 Distress

Together these entities help to direct and shape International Maritime Law (IML) in relation to refugees and AS. ILOS provides a duty to intervene in the case of distress at sea,⁹² defined by Par. 1.13 of the Search and Rescue (SAR) Amendments as “a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.”⁹³ The International Law Commission (ILC) defines distress as including

...a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved may admittedly represent an interest that is capable of severely restricting an individual’s freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State.⁹⁴

As can be evidenced through the various definitions of the word itself, the true explanation of distress is not entirely clear. There do remain small distinctions however, like the fact that the discovery of an unseaworthy vessel carrying passengers does not constitute a situation of distress unless there is a serious threat to human life. The severity of a situation of distress can be illustrated through IL, which allows a CS to deny entry to a vessel if its own vital interests are threatened *except* if the vessel is in distress. This is deemed as necessary under the pretense of considerations for general humanitarianism and with the idea that mariners

⁹¹ UNHCR, *Background Note*, 3

⁹² Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 35

⁹³ Maritime Safety Committee, Amendments to the International Convention on Maritime Search and Rescue, 1979, <http://www.admiraltylawguide.com/conven/amendsearch1998.html> (accessed June 4, 2011)

⁹⁴ Richard Barnes, “Refugee Law at Sea,” 60.

may be placed in situations beyond their control.⁹⁵

In the case that there is no distress, there is no duty to rescue, but there is also no right to board or to escort a vessel through other controlling procedures. This would constitute a violation of IL through the seizure of a vessel on the HS that is not in distress.⁹⁶

2.3.3.2 Rescue

One of the oldest maritime obligations relevant to distress is the duty to aid or rescue those in peril⁹⁷ and to ensure the safety of life at sea.⁹⁸ According to Par. 1.3.2 of the Amendments to the SAR of 27 April 1979, rescue is defined as a “...operation to retrieve persons in distress, provide for their initial medical or other needs, and to deliver them to a place of safety.”⁹⁹ However, due to the vague nature of this definition, it is often questioned whether the obligation to rescue extends to an obligation to allow passengers to disembark at the CS. States are thus permitted wide discretion on rescue activities, and this leads to a rather subjective view of rescue, rather than the preferable objective view.¹⁰⁰

The duty to *Rescue at Sea* (RaS) is anchored in Art. 98(1) UNCLOS, which provides that every State must obligate the master of each vessel flying its flag to assist every person encountered in distress at sea and help them to safety as soon as possible.¹⁰¹ This duty falls mostly to Flag States, but also to Ship Masters or private vessels and government ships. This duty is also reflected in SOLAS, SAR and the International Convention on Salvage¹⁰² and in addition, the UNHCR has drafted many resolutions and recommendations with regard to RaS

⁹⁵ Ibid, 58.

⁹⁶ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 59.

⁹⁷ UNHCR, *Background Note*, 1.

⁹⁸ United Nations High Commissioner For Refugees (UNHCR), *Conclusion on Protection Safeguards in Interception Measures*, 2003, No. 97 (LIV), 1.

⁹⁹ Richard Barnes, “Refugee Law at Sea,” 51.

¹⁰⁰ Ibid, 53.

¹⁰¹ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 36.

¹⁰² Ibid, 37.

and other persons in need of protection.¹⁰³ In order to be able to provide these resources and to guarantee safety at sea, States are obligated to establish and maintain Search and Rescue facilities in designated regions. The aforementioned Conventions provide that a State must also reach agreements and undertake the necessary monitoring, communication and operational measures to guarantee RaS near its coasts.¹⁰⁴

The scope of this responsibility is not limited to the TS however and the IMO, together with contracted States, provided a framework to demarcate global Search and Rescue Zones, which determine how far each State's 'area of responsibility' extends.¹⁰⁵ As mentioned above, the specific arrangement and forms of Search and Rescue obligations in zones designated for this purpose are left to the discretion of the State, and there is no legal obligation which explicitly describes the conduct to be used in RaS. Although the State does choose its method of RaS, it is limited by the legal obligation to launch a rescue mission if it receives knowledge of distress at sea within its Search and Rescue Zone.¹⁰⁶

The first rescuers of a vessel are expected to provide first aid and to meet any basic needs, guaranteed to all people in distress. This is emphasized through the inclusion of a prohibition of discrimination in the relevant tools dictating maritime law. According to Chapter 2, Par. 2.1.10 SAR, "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."¹⁰⁷ This also means that there shall be no discrimination based on the Country of Origin (CoO) of the individual, on the reason for flight or migration or whether or not they are presumed to have entry papers.¹⁰⁸

Although States are legally bound to this obligation, it also exists for private persons,

¹⁰³ Ibid.

¹⁰⁴ Ibid, 35.

¹⁰⁵ Ibid, 36.

¹⁰⁶ Ibid.

¹⁰⁷ Maritime Safety Committee, Amendments to the International Convention on Maritime SaR

¹⁰⁸ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 37

unless the rescue vessel and its crew would be endangered by the rescue.¹⁰⁹ The UNCLOS has no specific guidelines for enforcing this responsibility and it has been suggested that they clarify that crews and vessels rescuing individuals at sea will not risk facing criminal consequences, such as the imposition of carrier sanctions, when undertaking rescue operations.¹¹⁰ In fact, it has even been suggested that States should provide financial support for vessel owners and insurance companies who carry the burden of RaS. This was attempted through a UNHCR programme in the 1980s which created a financial compensation per person rescued by Ship Masters.¹¹¹

The issue with rescue is seen through practice, which shows that there is a general failure of private vessels and government ships to undertake RaS, coupled with frequent CS denial of permission for rescue vessels to enter safe harbours. These issues are mainly the result the poor implementation of an even more poorly defined obligation under ILOS.¹¹²

2.3.3.3 Place of Safety (PoC)

The question still remains as to what precisely to do with those rescued at sea after they have been rescued. Within the definition of rescue lies the term *Place of Safety* (PoS), a term of ambiguous meaning and one undefined by the relevant treaties.¹¹³ According to the IMO's Maritime Safety Committee (MSC) Resolution MSC.167(78) Annex 34, Par. 6.12,

A place of safety (as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.¹¹⁴

Under SOLAS and SAR, several duties regarding delivery to a place of safety were

¹⁰⁹ Ibid.

¹¹⁰ Ibid, 41.

¹¹¹ Ibid.

¹¹² Ibid, 37.

¹¹³ Ibid, 38.

¹¹⁴ International Maritime Organization (IMO), *Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea*, 2004, <http://www.unhcr.org/refworld/docid/432acb464.html> (accessed June 3, 2011)

codified including (1) A legal obligation to coordinate and cooperate with the goal of finding a place of safety with the least possible divergence from the planned route; (2) The establishment of the primary responsibility of States in the Search and Rescue Zone and the goal to disembark passengers as quickly as possible; (3) The duty to guarantee disembarkation as soon as possible; and (4) The obligation of states to observe guidelines developed by the IMO framework.¹¹⁵ The duty to disembark as soon as reasonably possible is in effect to ensure the obligation outlined in Art. 3.1.9 SAR to guarantee that Ship Masters disembarking passengers are released from duty.¹¹⁶ The PoS can be located in the FS, the rescuing vessel's next regular port of call or the port most quickly reachable.¹¹⁷ The issue still lies in the imprecise definition of the next port of call, especially in the case of a large number of rescued people. The UNHCR considers it to be "...the nearest port in terms of geographical proximity given the overriding safety concerns..."¹¹⁸ They also claim that in certain circumstances, the port of embarkation can be designated as the place of safety because of the responsibility of a State not to allow an unsafe vessel to depart from its territory.¹¹⁹ Excom has taken up the question of the criteria which should be used to determine a PoS in many of its Conclusions. They affirm that it should normally be the next port of call, however if refugees and others in need of protection are among those rescued, they should not be brought into a country where they face possible human rights violations or deportation.¹²⁰

Although the term itself remains slightly unclear, the discretion on the determination of a PoS is limited by a narrow legal framework which amended the SOLAS and SAR conventions and interprets them to mean that States should be obligated to allow mooring by

¹¹⁵ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 40.

¹¹⁶ UNHCR, *Selected Reference Materials: Rescue at Sea, Maritime Interception and Stowaways*, 2006, <http://www.unhcr.org/cgi-bin/txis/vtx/search/opendocPDF.pdf?docid=4aa0dd139> (accessed June 13, 2011)

¹¹⁷ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 38.

¹¹⁸ UNHCR, *Background Note*, 8.

¹¹⁹ Ibid.

¹²⁰ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 38.

their captains without delay.¹²¹ The UNHCR view is that there is a strong duty to disembark boats at the next port of call and an additional duty on the part of the CS to allow them to disembark.¹²² The UNHCR's greatest concern is to "ensure an immediate life-saving solution for the plight of severely traumatized people, without an over-emphasis on legal and practical barriers."¹²³ Decisions and amendments regarding IML clearly have a significant affect on the lives of AS and refugees arriving by sea. The next section will discuss IRL and it fits together with ILOS.

2.4 Perceptions of Refugees and Refugee Law at Sea

This section will describe the way in which the various laws and principles described above tie into the actual treatment of refugees at sea. The first important point to acknowledge is why people risk their lives at sea in the first place.¹²⁴ The UNHCR provides four main reasons in their *General Guidelines for Disembarking Vessels at Sea*, the first being for work opportunities, the second for better living conditions, the third for educational opportunities and lastly for international protection. Although in the past, many of those escaping their countries via the sea were *prima facie* refugees, contemporary movements are often much more complex and require careful determination of refugee status.¹²⁵

2.4.1 Perception of Refugees

Even though the risk of taking to the sea in often unsafe vessels illustrates a situation of serious desperation, there is still a negative perception of refugees at sea which plays a large role in the treatment they are afforded by the governments of various CS, as well as by the international community as a whole. Michael Pugh further explores this concept in his article *Drowning not Waving: Boat People and Humanitarianism at Sea*. He describes the

¹²¹ Ibid, 40.

¹²² Ibid, 70.

¹²³ UNHCR, *Background Note*, 4.

¹²⁴ International Chamber of Shipping, IMO and the UNHCR, *Rescue at Sea*, 2

¹²⁵ Ibid, 10.

sea as a global commons where the right to be assisted is universal.¹²⁶ He uses the phrase ‘boat people’¹²⁷ to identify refugees at sea, and describes them as AS who have travelled vast distances on the HS, but who greatly varied in their points of origin and their voyage experiences.¹²⁸ He claims that there has been a securitization process by which these issues are identified, labelled and declared as a threat to a community, an image worsened by belligerent elite leaders and the media.¹²⁹

Among these images he lists that of boat people as apocalyptic, stateless wanderers and ‘gypsies of the sea’.¹³⁰ One also often hears references to the water-like qualities of refugees during a period of mass influx, such as a ‘flood, tide, flow or wave’.¹³¹ Pugh also describes the way in which politicians strategically blend the categories of AS and terrorist and perpetuate the idea of using the sea as a means of invasion.¹³² He says that in response to this perception, some States even send out war ships to confront the vessels carrying refugees.

Despite the perpetuation of a fear of refugees by the media, Pugh argues that this securitization of refugees at sea inverts the risk to the host or destination country, when in fact it is the refugees that are exposed to real risk.¹³³ In fact, approximately one third of all boat people fail to arrive at their destination.¹³⁴ The European Union is an excellent example of an entity which has begun to use securitization in relation to boat people.

¹²⁶ Michael Pugh, “Drowning not Waving: Boat People and Humanitarianism at Sea,” *Journal of Refugee Studies* 17, no. 1 (2004), <http://jrs.oxfordjournals.org/content/17/1/50.full.pdf>, (accessed June 13, 2011), 51.

¹²⁷ This term was coined during the mass exodus of Indonesian refugees in the 1970s. During this period, thousands fled from Indochina post-Vietnam and many died at sea as a result, but regional states still refused to allow disembarkation. In 1978, all boat people were granted refugee status by the UNHCR and resettled over the next ten years.

¹²⁸ Michael Pugh, “Drowning not Waving: Boat People and Humanitarianism at Sea,” 51.

¹²⁹ Ibid.

¹³⁰ Ibid, 53.

¹³¹ Ibid, 54.

¹³² Ibid, 56.

¹³³ Ibid, 55.

¹³⁴ Ibid, 57.

2.4.2 The Case of the EU

In recent years, border control measures in the European Union (EU) have shifted into the HS or the sovereign area of third states, in an effort to keep out illegal immigrants.¹³⁵ The tool used to carry out these practices is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) established by Council Regulation (EC) 2007/2004 with the goal to detect and intercept persons arriving in the MS territory which will in turn ensure the saving of lives at sea as well as to provide an overview of the people entering and leaving the area.¹³⁶ Despite the existence of a united organization such as FRONTEX, there still remain differences of opinion between EU Member States (MS), over the human rights obligations in regards to RaS. Problems with these exclusionary practices from a human rights perspective stem from the possible endangerment of the life and health of migrants, as well as the increased difficulty to access international protection in the EU.¹³⁷

There are multiple reasons behind the reluctance to allow entry of AS and migrants into the EU, one of which is the lack of an effective burden-sharing system within its common borders.¹³⁸ Although Council Regulation (EC) No 343/2003, also known as the Dublin II Regulation, aimed to create a more efficient system of determining MS responsibility for AS as well as burden-sharing, it has not been implemented as smoothly as planned. Some of the legislation recommended to facilitate the entry of AS into the EU have been to grant criminal immunity to rescuers, to create larger obligations to human rights law and refugee law and to further develop international burden-sharing.¹³⁹ However, it has been suggested that burden-sharing should not be the priority of the EU; rather, it should focus on support for human rights and refugee protection in both the Countries of Origin and of

¹³⁵ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 5.

¹³⁶ *Ibid*, 23.

¹³⁷ *Ibid*, 12.

¹³⁸ *Ibid*, 13.

¹³⁹ *Ibid*.

Transit.¹⁴⁰ In addition, there is a lack of coordination between Member States, which was evidenced through a failed EU plan to designate common ‘ports of safety’.¹⁴¹

The issue with the legislation being created by the European Commission and the European Council is that they lack binding legal character at the EU level.¹⁴²

The EU has also been accused of various human rights violations in regards to its treatment of refugees at sea. For example, there is a large EU practice of refusing vessels entry into its TS and the escort of vessels back to their ports of departure.¹⁴³ For example, in 2006, Operation Hera II was coordinated by FRONTEX to implement joint observation of the area between the West African coast and the Canary Island and to divert vessels on the migration route. The goal was to detect vessels departing towards the Canary Islands and to divert them back in order to reduce the number of lives lost at sea.¹⁴⁴

2.4.3 State Responsibility

While the EU presents one form of treatment of refugees at sea, there do exist general international expectations of state responsibility event of a rescue or interception of refugees at sea. The responsibilities fall to both the CS and the FS depending on the specific situation at play. Determination of the State responsible for admitting and conducting the RSD process for AS under IRL is outlined in the *UNHCR Background Note on the Protection of AS and Refugees Rescued at Sea*. According to this document, the responsibility, in accordance with both IRL and IML, generally falls to the State where disembarkation occurs.¹⁴⁵

The duty to rescue was generally considered to be divided between the FS, CS and resettlement states, but which was responsible for exactly what, proved difficult to determine.

¹⁴⁰ Ibid, 17.

¹⁴¹ Ibid, 13.

¹⁴² Ibid, 15.

¹⁴³ Ibid, 23.

¹⁴⁴ Ibid.

¹⁴⁵ UNHCR, *Background Note*, 7.

¹⁴⁶ In the case that this is the CS, it holds exclusive competence over access to its territory, but this right is limited. It must take into account humanitarian obligations including allowing entry to the port for vessels in distress and for those sailing through the TS to find assistance.¹⁴⁷ Entry by irregular migrants also falls under CS competence. The CS will evaluate the interests at stake, including the protection needed by the individuals on board, the security of its own State and any unwillingness it has to allow the vessel to enter.¹⁴⁸

The responsibility of the FS is even less clear than that of the CS and it can be said that there is no customary IL by which it is defined.¹⁴⁹ The FS usually holds primary responsibility under specific circumstances. This includes (1) A clear situation in which those rescued had intended to request asylum from the FS; (2) When only a small number of persons is rescued and therefore it is reasonable for them to remain on the vessel until they can be disembarked in the FS; (3) When circumstances make it necessary to disembark in a third State, without requiring them to assume any responsibility towards the AS; (4) When the rescue operation occurs in the context of interception, especially on the HS. The original destination, coupled with the deliberate intervention of the State to prevent the AS from reaching their final destination further strengthens this obligation.¹⁵⁰

In practice, there is a serious danger that shipwrecked people who are not refugees are often more likely to receive permission to disembark, because the CS does not want the burden of RSD or protection.¹⁵¹ States also frequently impose fines or carrier sanctions on agents for failing to prevent the landing of unauthorized aliens.¹⁵² In addition, non-disembarkation does not qualify as a violation of NR and refusal of entry is not *necessarily*

¹⁴⁶ Ibid, 160.

¹⁴⁷ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 37.

¹⁴⁸ Seline Trevisnaut, "The Principle of *Non-Refoulement* at Sea," 228.

¹⁴⁹ Ibid.

¹⁵⁰ UNHCR, *Background Note*, 7.

¹⁵¹ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 39.

¹⁵² Michael Pugh, "Drowning not Waving: Boat People and Humanitarianism at Sea," 63.

NR, as demonstrated by Art. 33(2) GC.¹⁵³

2.4.4 Responsibility of Ship Masters

If a private or government ship rescues a vessel containing refugees or AS, the duties of Ship Masters are as follows. The UNHCR and the IMO give Ship Masters a list of practical information that should be noted as soon as a shipwrecked person applies for asylum. UNHCR also suggests that RaS should be immediately followed by disembarkation and access to the RSD procedure, which should occur on dry land, since this process can be problematic on board a vessel.¹⁵⁴ The Ship Master should then inform the next Rescue Coordination Center and the UNHCR. Ship Masters should not return these individuals to the CoO from which they fled and they should not give any personal information about them to the destination state or to people who could pass along this information.¹⁵⁵ The Ship Master as a private person is neither competent nor responsible for the processing of applications for protection; they are only obligated to bring the individual(s) to a place of safety with respect to the obligations listed above. After they have disembarked their passengers they are considered unburdened of their responsibility towards those rescued.¹⁵⁶ In the case of a government ship rescuing refugees or AS, the Ship Master still lacks the competence to conduct a RSD process, but must assume the obligations arising from human rights law and IRL.¹⁵⁷

The State in which the rescued passengers arrive has two options on how to further proceed without violating the principle of NR.¹⁵⁸ They may refuse disembarkation completely and require the Ship Masters to remove them from their jurisdiction, or they can make disembarkation conditional on resettlement guarantees, care and maintenance provided by the

¹⁵³ Richard Barnes, "Refugee Law at Sea," 64.

¹⁵⁴ UNHCR, *Background Note*, 6.

¹⁵⁵ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 36.

¹⁵⁶ *Ibid*, 38.

¹⁵⁷ *Ibid*, 39.

¹⁵⁸ Guy S. Goodwin-Gill, *The Refugee in International Law*, 155.

FS, other States or international organizations.¹⁵⁹

2.4.5 Non-Refoulement at Sea

The biggest concern in relation to refugees at sea is to enforce State respect for the principle of NR. NR still applies on the HS and in the TS of third countries.¹⁶⁰ The peremptory nature of the principle is illustrated in Excom Conclusion No. 79 (XLVII), Par. (i) which states that

Distressed at the widespread violations of the principle of *non-refoulement* and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and Asylum Seekers have been *refouled* and expelled in highly dangerous situations; recalls that the principle of *non-refoulement* is not subject to derogation.¹⁶¹

Regardless of the Excom view of NR, It is still a question whether the decision of states to refuse entry into their maritime territory is legally limited and the core of AS protection does not guarantee access to a destination territory. The use of the word ‘territories’ in Art. 33 GC versus using the terms ‘state’ or ‘nation’, demonstrates that the formal status of the part of the territory concerned and the jurisdiction actually being exercised by the state where the refugee or AS is endangered is irrelevant.¹⁶² Often, as I demonstrated above, States use what are referred to as ‘non-entrée mechanisms’ to prevent access to their waters and to the RSD process.¹⁶³ As stated by Seline Trevisanut *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, “an ever-expanding array of *non-entrée* policies...rely on law to deny entry to refugees.”¹⁶⁴ “It is not uncommon for States to use the façade of distress to escort vessels back to their ports of departure or for unseaworthy vessels to be refused rescue by certain governments known for

¹⁵⁹ Ibid.

¹⁶⁰ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 15.

¹⁶¹ Seline Trevisnaut, “The Principle of *Non-Refoulement* at Sea,” 216

¹⁶² Ibid, 222.

¹⁶³ Ibid, 207.

¹⁶⁴ Ibid, 244.

their harsh treatment of refugees.¹⁶⁵ Anyone at a frontier port is considered to be within a state, so states have devised ways to make refugees physically, but not legally present.¹⁶⁶ States then attempt to find ways to bypass violating NR while still denying admission.

However, two of the most well recognized violations of NR in ILOS are the refusal of entry into the TS and denial of disembarkation or of access to the CS port. Unfortunately, because the First State of Asylum has a duty to host refugees temporarily, and possibly long-term, in practice many of them will refuse access of vessels into their TS and claim a lack of proof that there are refugees on board.¹⁶⁷ One clear example of this is the case of the *Tampa*. On August 26, 2001, the *Tampa*, a Norwegian merchant ship on the HS, rescued an Indonesian fishing boat with 433 passengers on board and allowed them onto their own ship, even though it had a 50 person maximum for its carrying capabilities. At 13.5 nautical miles from the Australian island of Christmas, the Australian authorities denied the *Tampa* access to its TS. The Ship Master decided to proceed at any rate due to the poor health of the Indonesian refugees. Australian authorities responded by sending medics to the *Tampa* in order to avoid disembarkation. The *Tampa* still refused to leave their TS however, due to unsafe conditions and finally on September 1, the Australian government reached an agreement with New Zealand to transfer the passengers to New Zealander military bases. The *Tampa* later claimed that the Australian government violated the right of IP, while Australia countered that Norway violated their right of IP by disregarding their domestic law on migration, which therefore rendered their passage non-innocent.¹⁶⁸

It was found that there is no straightforward decision on whether violation of a CS' domestic laws can be equivalent to a threat to their peace, good order or security. However,

¹⁶⁵ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 35.

¹⁶⁶ Guy S. Goodwin-Gill, *The Refugee in International Law*, 123.

¹⁶⁷ Seline Trevisnaut, "The Principle of *Non-Refoulement* at Sea," 223.

¹⁶⁸ *Ibid*, 224.

it was decided that Australia had a right to arrest the *Tampa* within their IW because of a fear that it would breach its admission conditions. The issue in this case is that Australia violated NR by redirecting the ship without first screening its passengers. In addition, although it is the right of the CS to repulse a vessel in its TS if that vessel is believed to have breached domestic immigration laws and conditions of IP, this right is limited to compliance with IL and NR. Because Australia was the First Country of Asylum, it therefore had the responsibility to temporary refuge as well as of first screening of asylum requests. Only after this process had been carried out, would it have been permitted to transfer these passengers elsewhere.¹⁶⁹

2.4.6 Interception

This duty and the other international obligations listed above, including that of NR, are clear to exclude a right to ‘intercept’ ships at sea. There is no clear definition of the term, but, through state practice it is commonly understood to mean “the catching, turning back, diversion and escorting back of vessels before they reach the coastal waters...”¹⁷⁰ The practice of interception consists of the actions of one or more states, undertaken on the basis of an international agreement, with an aim to exercise the right of visit in relation to the criminal activities not listed in Art. 110 UNCLOS and performed by ships without nationality or by vessels sailing the flag of a State or a group of States.¹⁷¹ It is important to distinguish however, between RaS and interception, as the UNHCR Excom has done in Conclusion No. 97 (LIV), which confirms that vessels responding to distress at sea are *not* engaged in interception. In the same Conclusion, Excom states that

- ... Interception is one of the measures employed by States to:
- I. prevent embarkation of persons on an international journey;
 - II. prevent further onward international travel by persons who have commenced

¹⁶⁹ Ibid, 225.

¹⁷⁰ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 22.

¹⁷¹ Seline Trevisnaut, “The Principle of *Non-Refoulement* at Sea,” 240.

- their journey; or
- III. assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law...¹⁷²

An exception to this is the Palermo Convention on Organized Crime (2000), which allows FS to authorize vessels in government service of another state to board, inspect and take authorized action on the HS and within TW¹⁷³, however only in accordance with Maritime Law and IRL.¹⁷⁴ The real problem with interception arises on the HS, where it becomes a possible violation of NR.¹⁷⁵ If there are AS on board a vessel, interception measures should be guided by specific considerations listed within Conclusion No. 97 Excom.¹⁷⁶

Regardless of the violation this action constitutes to ILOS, governments have increasingly turned to interception at sea as a method of restricting vessels from entering their TS¹⁷⁷, the most renowned example of this being the United States Haitian Interdiction program. On September 23rd, 1981, the United States concluded an agreement with then Haitian President Duvalier, with which they established a cooperative program of selective interdiction and return to Haiti of Haitian migrants and vessels involved in the illegal transport of people coming from Haiti. On September 29th, U.S. President Reagan issued Executive Order 12,324 which suspended the entry of irregular aliens entering from the HS and ordered the U.S. Coast Guard to intercept vessels and redirect them to the port of origin. The screening was conducted on board of the ships and those considered ineligible were sent back, which amounted to 25,000 Haitians over ten years. After a September 1991 coup against Haitian President Aristide, arrivals from Haiti increased and the U.S. suspended

¹⁷² UNHCR, *Conclusion on Protection Safeguards*, 2003

¹⁷³ Michael Pugh, "Drowning not Waving: Boat People and Humanitarianism at Sea," 57.

¹⁷⁴ Ibid, 59.

¹⁷⁵ Boldizsár Nagy, "From the National Border to the National Eleven: A (Partial and Partisan) Appraisal of the State Systems' Performance Since the End of the Cold War" (paper presented at the Fourth Biennial Conference of the European Society of International Law (ESIL), Cambridge, England, September 2-4, 2010), 11.

¹⁷⁶ UNHCR, *Conclusion on Protection Safeguards*, 2003, 2.

¹⁷⁷ Michael Pugh, "Drowning not Waving: Boat People and Humanitarianism at Sea," 59.

interdiction for several weeks before restarting it in November. In 1992, President Bush adopted Executive Order 12.807, known as the Konnebunkport Order which suspended the screening process and ordered the Coast guard to immediately redirect intercepted Haitians.¹⁷⁸

This last Order was used by two non-profit organizations to bring the U.S. administration before the U.S. courts. The case progressed to the U.S. Supreme Court, which, in 1993, judged the actions of the Coast Guard as not being illegal. The Court claimed that the U.S. authorized forcibly diverting intercepted vessels to prevent the possibility of refuge in other countries of the region. They also excluded the application of NR by claiming that if Art. 33(1) does not apply to the HS, then no nation can invoke Art. 33(2) in respect to an alien there. They also added that if Art. 33(1) can be applied extraterritorially, since an alien on the HS is in no country, Art. 33(2) would mean that dangerous aliens on the HS could be entitled to the benefits of Art. 33(1) while those in the country that sought to expel them could not.¹⁷⁹ In this way, they used a very narrow definition of *refoulement* so that return comes to mean a defensive act of resistance at the border versus the actual act of transporting someone to a specific destination. This can be interpreted to mean that a State cannot ‘repulse’ an individual before they enter sovereign territory.¹⁸⁰

The UNHCR expressed its concern that in its view, NR applies everywhere, “...irrespective of whether the governments are acting within or outside their borders. UNHCR bases its position on the language and structure of the treaties’ overriding humanitarian purpose, which is to protect especially vulnerable individuals from persecution...”¹⁸¹ It affirmed that the fact that NR applies to the HS does not mean that the interdicting state has to necessarily host the migrants it has intercepted, it just cannot stop

¹⁷⁸ Seline Trevisnaut, “The Principle of *Non-Refoulement* at Sea,” 241.

¹⁷⁹ *Ibid*, 242-3.

¹⁸⁰ *Ibid*, 243.

¹⁸¹ *Ibid*, 244.

them from seeking asylum elsewhere. Thus, the return of intercepted refugee vessels to the HS does not necessarily imply a violation of NR.¹⁸²

¹⁸² Ibid.

CHAPTER 3 – THE UNHCR’S ROLE, ITS ABILITIES AND ITS CONSTRAINTS

3.1 On a Local Level

The UNHCR is an international organization with a legal mandate, a statute and a standing as a guardian of refugee rights. Its main concern is to ensure the immediate life-saving solutions for the plight of traumatized people without an emphasis on legal or practical barriers.¹⁸³ Its work has been discussed in detail in chapters one and two, however in order to present a more concrete vision of its activities, this section will outline several initiatives of the UNHCR Regional Representation for Central Europe Office.

On the national Hungarian level, as shared by Agnes Ambrus¹⁸⁴, Director of the Hungarian Unit within the office, the Central European office has five main priorities: (1) It verifies and supervises the implementation of the GC; (2) It monitors the RSD process; (3) It monitors national reception conditions; (4) It works to resettle refugees within the European Union; and (5) It works to advance the rights of Stateless people. I will discuss the first four objectives.

Firstly, it supervises the implementation of the GC through accessing the procedures and territories relevant to refugees. In Hungary for example, there is a project arrangement between the Hungarian police force and the Hungarian Helsinki Committee, a non-profit organization which monitors the enforcement of international human rights, through which they carry out announced checks in the external border area to certify the sanctity of NR. In addition, resident lawyers visit the border and report on the short-term detention facilities where the AS apprehended are kept. They also follow up on any asylum seekers or refugees sent back from Hungary to the Ukraine or Serbia, in order to speak with them about their experiences.

¹⁸³ UNHCR, *Background Note*, 4.

¹⁸⁴ Agnes Ambrus, Interview by author, 24 June 2011, Budapest, Hungary typed.

Second, it monitors the RSD procedure. In Hungary, national law dictates that the UNHCR must receive documentation of every decision on AS. However, the office is unable to read through all of them due to limited staff. They have instead created a project in the region to establish quality assurance mechanisms in the surrounding countries and to hire on a consultant to check for procedural gaps – including in the interviews, interpretations, and the making and communicating of application decisions – and to look for solutions. Using the information they receive from these sources, they then establish a quality assurance manual which contains the parameters for a ‘good’ interview and ‘good’ decision. In addition, Hungarian staffers sometimes sit in on selected cases, interviews and court hearings, however this is not a systematic process. The Helsinki Committee generally identifies several cases of precedence in which they can participate. For example, a new development in Hungary is the participation of the UNHCR Central European Office in three Palestinian cases which have been referred to the European Court of Justice (ECJ) for a preliminary ruling on how to interpret Art. 1(d) GC¹⁸⁵ in the context of EU law. This is only the second case in the history of the UNHCR in which the organization will act as a third party intervener before the ECJ.

The third priority for the organization is monitoring reception conditions. This includes how refugees and AS are accommodated and what sorts of services are provided to them. The agency then makes regular visits to reception and detention facilities to speak directly to AS and refugees to hear about their views on what it means to be a refugee.

The fourth priority is to look at how to resettle refugees from outside the EU to Hungary or how to relocate them within the EU. The expectation is that within the EU, each Member State will share responsibility for refugees, as clarified through various EU legislation, including the Dublin II Regulation. Hungary is currently participating in the Intra

¹⁸⁵ Art. 1(d) GC states “This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.”

EU Relocation from Malta (EUREMA) pilot project, which was designed to help Malta with the influx of refugees from North Africa and uses the European Refugee Fund to move these refugees to other States.

In order to achieve its initiatives, the UNHCR also plays a large role in the field of advocacy. I was informed of some of their main advocacy activities in speaking with Zoltan Toth of the Central European Office, a member of the Public Information (PI) unit. This unit is responsible for assisting in the effort to formulate messages that can influence decision-making authorities. They deal directly with national authorities and encourage them to change anti-refugee policies and to act in a manner that can be perceived as optimal towards the protection of refugees. If this position does not work however, they often resort, the public, or to think tanks, research institutions, opinion shapers and community or religious leaders, who in turn may influence the authorities. The biggest obstacle for this initiative is a lack of resources and general manpower. For example, Mr. Toth noted that after a conference, a typical reaction is to say “...wow we had a nice conference let's make a nice book. But the book is costly and doesn't make sense to anyone but those who were at the conference. Nobody reads the book except maybe the relatives of the authors.”¹⁸⁶ Rather than taking advantage of available resources, he expressed that the general attitude is one of inaction.

The UNHCR also works to create a two-way conversation between the organization and the refugees it serves. One Hungarian publication is the ‘Being a Refugee’ booklet. Mr. Toth explains that refugees generally do not have the opportunity to express their opinion, so this booklet is the publication of an annual team of experts and authorities – including immigration officials, national authorities and ministry staff – who visit facilities and speak with refugees directly. This allows these staff members to see that the decisions they make in

¹⁸⁶ Zoltan Toth, Interview by author, 24 June 2011, Budapest, Hungary typed.

their offices have real consequences on the lives of refugees. This way people from within their own office are reporting on what they have seen instead of an NGO ‘squeaking’ at them. The results are also publicized, distributed to the media and published on the website.

Another project attempted by the Central European office at this level was a blog space for refugees to express their complaints, comments and criticisms on the experience of being a refugee. The creators encountered difficulties in deciding which language to post the blog in, as several national offices are housed under one roof and English is always considered as an additional option. The refugees entering the asylum system however, often have their own native languages with a limited knowledge of other languages and the majority of them do not speak English. In addition, without overtly shaping what refugees should blog about, the blog can only be effective if used as a forum for constructive criticism. General complaints or commentary about the conditions of a facility or about life as a refugee are not useful to those who can campaign to implement changes. A hope for the future is to have those involved in refugee protection in these countries also express their views on the blog, perhaps in response to the blogging of refugees. In doing so, the blog would create a tiered system in which the personal feelings of refugees could be recounted and responded to by an RSD officer for example, who can express their own frustrations or difficulties with the asylum process.

3.2 Views of the UNHCR on Non-Refoulement and Interception of Refugees on the High Seas

Through its advocacy work and field operations on an international scale, the UNHCR has the opportunity to express its stance on contemporary asylum policy and developments in IRL. In relation to ILOS, the agency puts a strong emphasis on the role of cooperation and framework for refugees at sea. It recommends support for the international SAR regime, an equitable responsibility-sharing approach to RSD and the international

protection needs of those rescued, an equitable responsibility-sharing approach to the creation and implementation of durable solutions to meet international protection needs, agreed readmission and strengthened support –financial or otherwise – to First Countries of Asylum, and finally, an agreement by Countries of Origin to accept the return of their nationals, who are determined, after access to a fair and efficient asylum process, to not be in need of international protection.¹⁸⁷

The UNHCR Excom appealed to states to grant asylum to refugees and displaced persons rescued at sea and to offer resettlement to those who had been unable to obtain permanent residence in their First Country of Asylum. The organization holds the view that the “...Article 33 obligations of *non-refoulement* apply ‘whenever a State acts’, which includes acts in territorial and extraterritorial waters.”¹⁸⁸ In Conclusion No. 14 (1979) Par. c, the UNHCR noted with 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...”¹⁸⁹

Rather than disregarding NR, the UNHCR strongly supports the Temporary Protection of refugees until they are relocated or resettled.¹⁹⁰ In Conclusion No. 15 (1979) Par. c, the UNHCR states that “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.”¹⁹¹ In Par. 3 of Conclusion No. 23 (1981) UNHCR further expresses its support for the disembarkation of AS at the next POC and in the case of mass influx, they should be granted at least temporary protection.¹⁹² Excom has appealed to states to observe the legal instruments relating to RAS in the Brussels Convention of 1910

¹⁸⁷ Richard Barnes, “Refugee Law at Sea,” 74.

¹⁸⁸ *Ibid.*, 70.

¹⁸⁹ UNHCR, *Background Note*, 7.

¹⁹⁰ Richard Barnes, “Refugee Law at Sea,” 72.

¹⁹¹ UNHCR, *Background Note*, 8.

¹⁹² *Ibid.*

and the UN Convention on the HS of 1958 and urged states to encourage Ship Masters to respect them under all circumstances. They further appealed to grant asylum to refugees and displaced person rescued at sea and to offer resettlement to those who have been unable to obtain permanent residence in the country of first asylum.¹⁹³ They claim it is the humanitarian obligations of all CS to allow temporary refuge to asylum seekers.¹⁹⁴ Excom Conclusion No. 79 par. (i) states

...distressed at the widespread violations of the principle of *non-refoulement* and of the rights of refugees, in some cases resulting in the loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been refouled and expelled in high dangerous situations; recalls that the principle of *non-refoulement* is not subject to derogation.¹⁹⁵

The UNHCR has also laid out its goals for an international framework. These include

1. Support for the international search and rescue regime;
2. Easing the burden on States of disembarkation;
3. An equitable responsibility sharing approach to the determination of refugee status and international protection needs of those rescued;
4. An equitable responsibility sharing approach to the realization of durable solutions to meet international protection needs;
5. Agreed re-admission and strengthened assistance, financial and otherwise to first countries of asylum;
6. 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.¹⁹⁶

In order to accomplish this, they recommend that the principal actors would be: 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 and international organizations, notably UNHCR, IMO and IOM. The main concerns at stake would involve issues of IRL including: the right to seek and enjoy asylum, NR, access to fair and efficient asylum procedures, conditions of treatment, appropriate balance between State responsibilities and that of international

¹⁹³ Ibid, Annex 2, 4.

¹⁹⁴ Seline Trevisnaut, "The Principle of *Non-Refoulement* at Sea," 244.

¹⁹⁵ Ibid, 216.

¹⁹⁶ UNHCR, *Background Note*, 11.

organizations, safe return to first countries of asylum, durable solutions for those recognized as refugees, orderly and human return of persons determined not to be in need of international protection.¹⁹⁷ This background is supposed to stimulate discussion on complex rescue-at-sea situations involving asylum-seekers and refugees.¹⁹⁸ The problem with this framework is that it remains incredibly vague. The role of the UNHCR within it is ambiguous at best, without much attention given to how these measures will be implemented.

3.3 What the UNHCR can Currently Achieve

Currently the UNHCR does hold certain legally mandated powers to achieve its goals. As mentioned in Chapter 1, among its current practices generally accepted by States is the power (1) to monitor, report and follow up interventions with governments regarding the situation of refugees; (2) to make representations to governments and other relevant actors on protection concerns; (3) to be granted at least a minimum advisory role in national asylum or RSD – including but not limited to the right to be notified of applications for asylum, informed of the course of procedures taken, guaranteed access to files and decisions that may be taken up with the authorities; and (4) to intervene and submit observations on any case at any stage of the procedure.¹⁹⁹ It is also allowed to intervene and make submissions to quasi-judicial institutions or courts, such as the *amicus curiae* it submitted in the *Sale v. Haitian Centers Council* case, statements and letters. Asylum-Seekers are granted access to the UNHCR and vice versa by law and administrative practice. It can ensure conformity with IRL and standards and advise governments and parliaments on legislation and administrative decrees that affect asylum seekers and refugees during all stages of the RSD process. It is permitted to provide comments and technical input into draft refugee legislation and related administrative decrees. The organization also maintains an advocacy role by issuing public

¹⁹⁷ Ibid.

¹⁹⁸ Ibid, 12.

¹⁹⁹ Walter Kälin, “Supervising the 1951 Convention on the Status of Refugees”, 7

statements which is necessary for its supervisory responsibility. It is also privy to asylum seeker and refugee data and information.²⁰⁰

3.4 Constraints on the UNHCR

3.4.1 Introduction

The UNHCR began as and continues to be an extremely resilient organization, despite obvious political pressures and attempts to restrict its work, an indication of its necessity and adaptive qualities. Although the UNHCR must sometimes contend with the unwillingness of its members to cooperate, there have been many occasions where these same States have been obliging towards the UNHCR in order to legitimize their behaviour domestically and internationally. Regardless of the person in the position of HC, the organization has always had a relevant role in policy debates and has at times played a very important part in the development of world politics.²⁰¹ However, in the debate surrounding NR and interception on the HS, the UNHCR is still incredibly restricted in its ability to discourage States from violating this fundamental principle.

3.4.2 Financial

Although the organization appears to have goals and the tools with which to achieve them, the UNHCR faces many constraints politically, financially and organizationally. The biggest constraint on the UNHCR is the way in which it is financed. The organization is intergovernmental and is therefore dependent on the states which fund and advise it.²⁰² The budget for 2010 further demonstrates this, with the UN only providing 4% of its budget, whereas the U.S. stood out as contributing 37% of the UNHCR total budget, followed by

²⁰⁰ Ibid, 8.

²⁰¹ Gil Loescher, *The UNHCR and World Politics: a Perilous Path*, 349.

²⁰² Ibid.

Japan at 8% and the European Commission at 6%.²⁰³ Thus, the budget is mostly funded by a small number of industrialized states which therefore hold a disproportionately higher level of influence on the organization than their less superfluous counterparts.²⁰⁴ This high level of sway allows these governments to earmark money towards the programs that best suit their national interests, which thereby neglects the funding of lesser-known issues. For example, African programmes are vastly under-funded in comparison with European programmes.²⁰⁵

This disproportional power also translates into the Excom, which is made up of member States and oversees the agency's budget while advising it on policy issues. To continue receiving funding, sometimes the UNHCR must be silent on certain issues it would otherwise advocate against.²⁰⁶ Interestingly, it is often the individual donor governments within Excom, versus the Committee as a whole, which establish the priorities that guide the UNHCR's programmes' directions.²⁰⁷ The problem is that the UNHCR *needs* funding in order to continue to exist, but there is a fine balance between maintaining its donors and expressing its sincere views on issues involving refugees. Therefore, the agency makes bold moves in the short-term in order to please its donors, which often leads to disappointed donors and may create resentment within the governments of less affluent States.²⁰⁸

The argument for a more regular UNHCR budget has been proposed in the past, however this would mean convincing large donor governments to reduce some of the power they hold over the organization, a step many of them may be unwilling to take. The end

²⁰³ UNHCR, *Funding UNHCR Programmes*, 2010, <http://www.unhcr.org/4dfdbf3915.html> (accessed June 15, 2011).

²⁰⁴ Gil Loescher, *The UNHCR and World Politics: a Perilous Path*, 349.

²⁰⁵ Ibid, 350.

²⁰⁶ Ibid.

²⁰⁷ Ibid, 376.

²⁰⁸ Ibid, 379.

result of this funding scheme is an unreliable and unsteady annual budget, which calls into question the UNHCR's future as a principal protector of refugees.²⁰⁹

3.4.3 Political

Politically, the UNHCR is constantly faced with obstacles and barriers to its work. As discussed in the section on the background of the UNHCR, the organization is expected to maintain a non-political nature. However, this requirement tends to be more lax in practice.

In Gil Loescher's book, *The UNHCR and World politics: A Perilous Path*, he states

In spite of the UNHCR's characterization of its activities as non-political, the Office is a highly political actor and is clearly shaped by the interests of major governments...the UNHCR is often at the mercy of its donors and host governments. The agency can only carry out its ...programmes if it receives funding from the industrialized states. It can only operate in the countries into which refugees move if host governments give it permission to be there. Thus, the UNHCR is in a weak position to challenge the policies of its funders and hosts, even if those policies fail to respond adequately to refugee problems.²¹⁰

Similarly, in David A. Martin's book entitled *Refugees and Migration*, he refers to the non-political nature of the office as 'fictional'.²¹¹ He states that in a world of sovereign states, no HC is capable of securing protection for refugees without some amount of political tact and skill. An example of how this non-political nature can hamper their work can be illustrated by a conflict during the 1980s between the UNHCR and several Western European countries. During an upsurge in the amount of arriving AS, western European countries were not as willing to abide by the UNHCR policy and even made it a general practice to limit the number of admitted AS by implementing policies to prevent their arrival in the first place. The UNHCR responded to these by writing and publicizing critical reports, which only led to increased tensions between the conflicting parties. This culminated in serious friction in the mid-1980s over the contested refugee status and treatment of Tamil asylum seekers fleeing

²⁰⁹ Arthur C. Helton, "What is Refugee Protection?: A Question Revisited," in *Problems of Protection: The UNHCR, Refugees, and Human Rights*, ed. Niklaus Steiner, Mark Gibney and Gil Loescher (New York: Routledge, 2003), 33

²¹⁰ Gil Loescher, *The UNHCR and World Politics: a Perilous Path*, 350.

²¹¹ David A. Martin, "Refugees and Migration," 158

the civil war in Sri Lanka²¹² Fearing a serious backlash from European governments, the UNHCR declared that they would consider them to be extra-Conventional refugees, which did little to soothe the already angered European governments. The UNHCR was accused of attacking the sovereign right of States to decide whether to grant asylum to non-GC refugees, as well as their right to normal functions of immigration control.²¹³

The differing interests of both parties further widened the gap between them, the UNHCR was no longer considered an authority on IRL, and states attempted to reclaim their sole authority over their own borders by excluding the UNHCR from intra-state discussions.²¹⁴ Finally, with the creation of a ‘Single Europe’, the EU allowed these states to act collectively and gain legitimacy for policies which would have otherwise been criticized. By the late 1980s, following more severe criticisms of the Western European governments, the UNHCR was almost fully left out from all European discussions related to IRL and its legitimacy sank lower than ever before.²¹⁵ Clearly, its lack of political power can be detrimental to is objective, but as David Martin notes, this fiction can also be useful to the organization, firstly, in situations where openly political bodies would not be welcome and secondly, in providing them a reason to remain relatively neutral in conflicts between States.²¹⁶

3.4.4 Legal

Legally, the UNHCR lacks certain legal and enforcement mechanisms, even as a subsidiary organization to the UN. It is limited by the fact that it is not legally permitted to intervene in obvious human rights violations, it is often with political and security issues that it has neither the resources nor mandate to handle, as a subsidiary of the UN, it needs

²¹² Gil Loescher, “The New Cold War and the UNHCR Under Poul Hartling,” in *The UNHCR and World Politics: a Perilous Path*, (New York: Oxford University Press, 2001), 236-7.

²¹³ Ibid, 238.

²¹⁴ Ibid, 239.

²¹⁵ Ibid, 240.

²¹⁶ David A. Martin, “Refugees and Migration,” 158

authorization of the UNGA to enter into legal relationships with States²¹⁷ and lastly and most importantly, it is greatly limited by the principle of state sovereignty, specifically the norms precluding intervention in the domestic affairs of States²¹⁸ As demonstrated above, states themselves are only willing to allow an organization such as the UNHCR limited liberties within their sovereign borders.

Due to its weakened position, the organization lacks strong enforcement mechanisms. As demonstrated, even in a scenario where Western European States were outright ignoring their legally binding obligations, the UNHCR could not do much more than publicize several critical reports, which ended with it being ostracized by its major donors. For example, the duty to rescue is a universally held obligation, however many choose not to in order to avoid a situation in which their State may become responsible for the fate of asylum-seekers. Presently, there is no real threat to ships who do not rescue, unless there is clear and undeniable proof that a shore rescue center was fully aware of a distress call.²¹⁹ It has been proposed that control instruments could be installed in vessels so that an intentional failure to rescue could be proven²²⁰, however this tactic still relies on the enforcement of States' themselves, and many ships are registered to States of Convenience who do not enforce the obligation to assist.²²¹

3.4.5 Organizational

In terms of its organization, the UNHCR does have its own culture, the positives of which are the central role played by the themes of refugee assistance and humanitarian aid. On the other hand, its culture has become self-contained, focused on preserving and protecting its reputation from criticism, which, in turn, has distanced it from the population it

²¹⁷ Maja Smrkolj, "International Institutions," 1789

²¹⁸ Gil Loescher, *The UNHCR and World Politics: a Perilous Path*, 349.

²¹⁹ Richard Barnes, "Refugee Law at Sea," 50.

²²⁰ Urzula Lisson and Ruth Weinzierl, *Border Management and Human Rights*, 41.

²²¹ Richard Barnes, "Refugee Law at Sea," 51.

serves and lowered its accountability and transparency.²²² The fact that the agency chooses to repel criticism, lends to a vicious cycle of repeatedly making the same mistakes. Its main goal is to protect its reputation so as to maintain a fresh image for its donors. In order to do so, it operates through a method of 'pragmatic idealism,' which constantly maintains the 'rightness' of its cause and neglects to incorporate outside opinions.²²³

The organization truly lacks the ability to reflect on its own actions, and has been criticized for focusing its energies on its field and preventative operations rather than on research in the field of IRL.²²⁴ In response to these criticisms, the UNHCR recently created an Evaluation and Policy Analysis Unit which aims to give a feedback of information into the policy process, and to produce an independent and transparent assessment of operations. This is similar to Kofi Annan's initiative to write self-critical reports, but these lacked any individual accountability, and instead recommended general changes to the UN.²²⁵ The real challenge however, will be for UNHCR to prove that they will transform these critiques from recommendations into actual and visible changes.²²⁶

Aside from its deficit in the area of self-reflection, the office has also encountered the problem of an exclusive attitude among its staff. Although it is clearly a diverse organization in terms of languages, nationalities and educational backgrounds, it is in many ways a closed and homogenous organization. Many of the staff have bonded through common experiences in the field, which can only be shared by those who have participated in the same operations. There also lies the problem of diversity within the actual regional offices, which often hire nationals from within that region, rather than from elsewhere. Another area which could be improved is the lack of female staffers in managerial positions.²²⁷ In addition, the UNHCR

²²² Gil Loescher, *The UNHCR and World Politics: a Perilous Path*, 358.

²²³ Ibid.

²²⁴ Ibid, 359.

²²⁵ Ibid, 375.

²²⁶ Ibid, 359.

²²⁷ Agnes Ambrus, Interview by author, 24 June 2011, Budapest, Hungary typed.

has been found to be far from a meritocracy, and appointments are highly influenced by member governments and personal connections rather than actual competence in the area.²²⁸

The staff itself is oft changing, as the jobs are generally highly stressful and low paying, which makes for extremely transient positions. The agency also has a rotation policy which rotates staff members to new positions every few years for political considerations. Because of its non-political nature, there is a fear that staff members may become too close or too engaged with local governments if they remain in one region for too long. The length of these rotations generally depends on the difficulty of the region in which they are placed. For example, Geneva is considered a relatively easy placement and is designated a two-year term. The same can be said for a very difficult placement. A somewhat difficult placement generally runs for approximately four years.²²⁹ The downside of this policy is that staff are often sent to places where they have no prior experience and must start from scratch.²³⁰ Additionally, staff lack stability in their own personal lives and this can put a serious strain on their work and their families. The UNHCR has even created a unit of psychologists to help families cope with this constant instability.²³¹

Due to the high rate of staff turnover, there are a very small number of senior staff members to take the leadership positions in refugee emergencies, or to offer a wealth of information on past experiences.²³² It has been noted that very few staff today know about the organization's pre-1990s history.²³³ In addition, many of the staff are on short-term contracts due to the unreliable funding scheme, which results in both a lack of proper training and a low level of criticism regarding the organization for fear that their contracts will not be

²²⁸ Ibid, 360.

²²⁹ Ibid.

²³⁰ Gil Loescher, *The UNHCR and World Politics: a Perilous Path*, 361.

²³¹ Agnes Ambrus, Interview by author, 24 June 2011, Budapest, Hungary typed.

²³² Gil Loescher, *The UNHCR and World Politics: a Perilous Path*, 361.

²³³ Ibid, 363

renewed.²³⁴ Thus, the issues above have created a harmful cycle of non-reflection, low intra-organizational diversity and low staff retention.

Another area of the organization that could use improvement is the functioning of Excom, which is currently both large and somewhat dysfunctional. The candidates for HC are selected in a non-transparent and unadvertised manner, with no job description as to what the HC actually does. Powerful governments within Excom also frequently veto candidates because they are not nationals of a donor state, rather than focusing on who would be best for the organization.²³⁵ A possibility would be for Excom to become more assertive in the area of organizational guidance. It could create an ombudsman to watch state activities in relation to refugees, such as assessing donor earmarking of programs, pushing for a more regular UNHCR budget to eliminate financial insecurity and suggest longer-term donations rather than programme per programme funding.²³⁶ Its members' inability to dissociate themselves from their own States' national interests has stifled their ability to act as a guidance tool and has perhaps rendered the Committee a somewhat untrustworthy role within the organization.

As expressed through this section it is most obvious that the UNHCR does hold strong views and desires on the debate surrounding NR and interception on the HS, however its failure to free itself from its constraints has diminished its power to tip the scales in favour of refugees. Its position as mediator between its wealthy donors, which provide the support it needs to exist, and the refugees for whom it works is seriously faltering. Although it has had time to develop its strength in the prevention of *refoulement* and interception on the High Seas, it is as of yet, unable to halt the increasingly anti-immigrant sentiments developing in many of its major member States. In realizing that its current methods of 'strong recommendations,' participation in policy debates and Conclusions on behalf of Excom do

²³⁴ Ibid, 361.

²³⁵ Ibid, 378

²³⁶ Ibid, 376.

not seem to be working, the UNHCR must overcome its inability to self-reflect and begin to change the course of its actions.

CONCLUSION

This thesis aimed to examine the role of the UNHCR in the ongoing debate regarding the *refoulement* and interception of refugees on the High Seas. Through analysis of relevant books, articles and legal instruments, I have found that the desired role that the UNHCR wishes to play within this debate is unattainable at the present time due to its numerous and severely detrimental constraints. Its fundamental organization has resulted in a semi-functional entity with dreams and visions bigger than its capabilities. Although it has played a large role in the past, its relevance and legitimacy continue to decline as the violations, whether publicized or not, of NR on the HS continue to increase.

This thesis contributes to the existing literature by bringing together the fields of Law of the Sea, Refugee Law and general International Law and examining the role occupied by the UNHCR in one area of intersection between the three regimes. I would recommend that this area be studied in further detail, using specific and recent case studies as well as in-person interviews with UNHCR staff in regions affected by this debate and former ‘boat people’ themselves to explore how they, as the benefactors of the UNHCR’s work, picture this Agency within the grand scheme of international organizations.

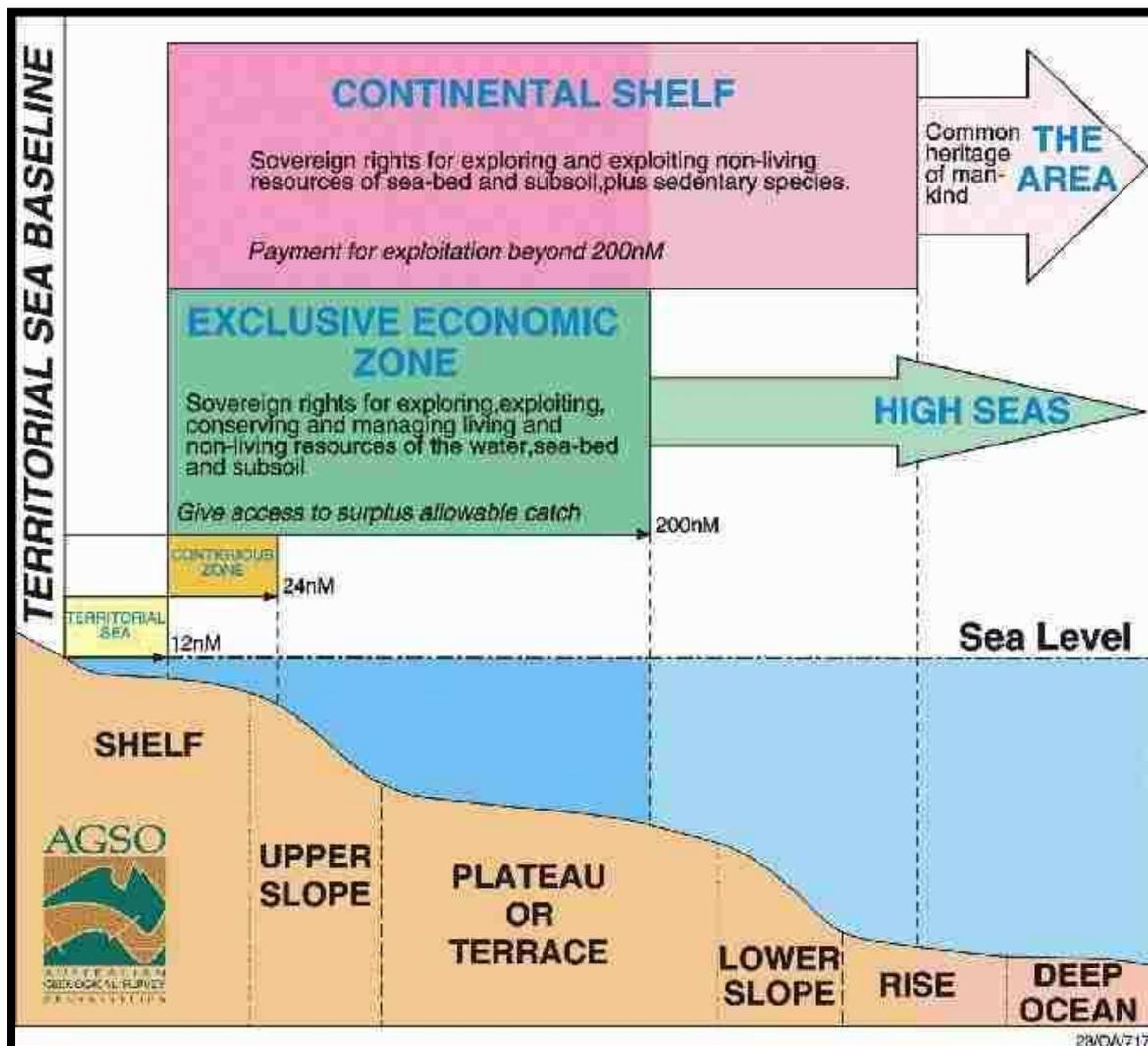
This thesis presents a good starting point for a much larger project, with the possibility to collect both subjective and objective views on the current and future role of the UNHCR in the very controversial area of Non-Refoulement on the High Seas.

APPENDICES

Appendix A

Diagram of relevant Maritime zones.

Source: Nagy, Boldiszár. "Territory, Watercourses – Law of the Sea" Presentation at Central European University, Budapest, Hungary, October 26, 2010.



Appendix B

Literal transcript from interviews with Agnes Ambrus and Zoltan Toth, UNHCR Central European Office, June 24, 2011.

Agnes Ambrus

Checking and supervising implementation of the GC access to the procedure and territory - project arrangement. Work with Hungarian police and Hungarian Helsinki Committee and there are checks announced in the border area *external) where people are allowed to have access and the territory. check refoulement from...not so regular...contract out to NGOs

Resident lawyers that go to the border and check this short-term detention facilities where people apprehended are kept. Check those sent back to Ukraine or Serbia
For e.g. coming Monday going to the Ukrainian border and will meet with police patrolling that area and meet with people in detention facility and so they can speak about their experience
Many people actually sent back several times and try and come back

Second priority is the refugee status determination procedure quality. by Hungarian national law they receive every decision, but don't have capacity to read them all. Set up major project in the region to establish quality assurance mechanism in the countries and they had a consultant for 36 months to check gaps of procedure -- interviewing, interpretation, decisions communicated and made, mapping the gaps, what other solutions can be found and establish a quality assurance manual which contains parameters of a good interview and good decision. Join auditing of interviews and decisions according to these parameters

Also sit and select some cases and sit in interviews and go to the court hearing e.g. Iranian female blogger AS, but these aren't systematic, try to work with Helsinki committee, id some of the precedence and then to participate in those cases and for e.g. new development that a case 3 Palestinian cases are referred by capitol court to ECJ for preliminary ruling about how to interpret in context of EU law art. 1 d of the GC and we actually participate in that procedure. This is the second case of UNHCR in which UNHCR is a third party intervener before the ECJ.

Third priority is the reception conditions -- how people are accommodated, what sorts of services are provided for them, visit reception and detention fact ileitis systematically and have Age Gender Diversity participatory and directly talk to AS and refs to hear about their views on what it would mean to be an AS in Hungary. This is mainly conducted in September and then there are follow up activities

Fourth priority is the Europe Solution -- integration in the context of the EU and resettlement from outside of EU to Hungary and also relocation within the EU...expectation within the EU that each MS share responsibility for refs, Hungary is participating in the project to help Malta with refugees from North Africa...community action of the European refugee fund to move these refs to other states. Hungary also made commitment to resettle refugees from N. Africa...small numbers because no mechanism for resettlement.

Fourth priority is about stateless people.... in the region of CE, HU is a the best practiced country because exceeded all int'l legal tools on stateless people.... but also has an operational mechanism to actually determine the status of stateless people. Similar to RSD but only for

stateless people and with the application in July 2007 and now there four years of practice now. Also, HU is quite active in prevention of statelessness and there are Hungarian interlocutors...e.g. the parliamentary commissioner for human rights (*ombudsman office) in field of prevention and reduction...so cooperate with all those agencies and because of these practices, there is a great interest all over the world for Hungarian experts who share the lessons Hungary learned on the proc, prevention and reduction. These people are invited for e.g. to Ecuador in an expert roundtable, another just came back from Senegal about children rights and statelessness, and the Hungarian ombudsman's office had inquiries about these issues and milestone steps were taken.... Going to Turkmenistan which is not party to any of these conventions.... design visits etc. programs on statelessness.... almost every month there is a study visit

Always there -- national legislation because under art. 35, UNHCR has to actually check national leg and interpretation and in all CE there is an amendment to the legislation almost every year. These days, these amendments are about compliance, transposition of the EU norms into national leg, but it has to be done in a way that the new norms are also in compliance in the GC which is part of EU acquis, whenever there is a draft amendment, check draft, share comments, then the amendment is final and enforced, then check interpretation of the new law.

CONSTRAINTS

Financial -- in CE, or the countries that are states that are members of the EU, there is no longer the large project that we used to have before. With accession to EU, the budget that we get for the country gets smaller and smaller because the assumption is that this country belongs to a developed club and therefore IC shouldn't really continue to support that country in that sense.

In CE, although there are some differences, e.g. Romania and Bulgaria there are still legacy projects...care and maintenance of AS etc.; for the rest of the region, don't do that any longer. Main project is advocacy with small budget and what we do with budget is to have overarching regional projects and policy is to phase out the interlocutors in the countries are mature enough...government, civil society, etc. can do their job without you and UNHCR is just there to monitor, or even not there at all. E.g. Slovenia, office closed. Policy is that in the countries there is a small national team which is then supervised and coordinated from regional center (Hungary) and this team is also quite small...15 people permanently.... all admin and HR, IT works from Budapest for all the regional offices.... so there is an effort to make it cost effective and of course there are lessons learned...e.g. not a good decision to close down Slovene office because much better to have small team of two to be present because government is tough and it's not cost-effective to run the show from Budapest. Difficult to travel to Slovenia and also costly.

Political - although the org is non political, humanitarian, but run by Excom, so definitely political decisions.... one example:

Hungary now considers Serbia as a STC in the context of refugees...most of the AS arrive in Hungary through Serbia, Greece, Macedonia, Serbia, Hungary...this year the Hungarians started to screen out AS from Serbia saying that it was a STC...so AS trying to get to HU (85-90%) of all cases don't have access to RSD in Hungary and sent back. Started looking at

whether Serbia can actually be STC.... asked colleagues in Brussels and Geneva I f they have a position on Serbia.... have to inject some sort of a view on this. Everyone agrees that efficient protection of AS in Serbia is an illusion at the moment...but neither the HQ but the bureau for Europe is ready to issue a public statement on that...political because...many considerations

What can Agnes do in this situation? She puts together some sort of a paper, which doesn't say anything about if we don't qualify whether it's a STC or not, just explain the factual circumstances and then it's up to the Hungarian court to decide based on that. It's the same with china...china is a very complex and very difficult country but you will never see a UNHCR statement on china. This is for example how politics come into the actual and everyday work. There are also many other aspects, how you achieve your goal in a country.... also related to politics and of course the most difficult.... Hungary not so difficult yet.... can be soon...politics not very promising.... but the fact that we have UNHCR has this global service center here in Budapest is due to this relatively good relationship with the government respecting.... where there are problems is apparently Ukraine, Russia, China etc. closed countries and she doesn't know much about Iran etc.

Ukraine is very important for Hungary because its very difficult to find good professional NGO which has access to AS in Ukrainian AS sent back from Hungary there...even UNHCR doesn't always have access to the AS

Organizational -- heavy organizational culture. There is a lot of effort to make /strike a good balance at how many people are abroad from certain states to have this equitable coverage of countries and continents, but still some countries are better represented and others are less. There is also a constant policy and efforts have gender policy to have female staff represented in managerial positions. There is still a way to go.

Earmarking is actually an issue...here in Hungary really cannot say a lot about this and would have a colleague who could speak about this have scheduled activities but also have unscheduled demands that we have to meet.

Organization/politics -- not every UN agency has this rotation policy, which is that the int'l staff is supposed to rotate from place to place. So they have a duty station for the length of the appointment...if it is a hardship or easy to work place. E.g. in Geneva only work for two years or so.... difficult 2 years.... medium is for four years...supposed to rotate because of political considerations...don't get too close or too engaged in local politics. For a long time. I'm in the national office...we have int'l national and the national positions wasn't created for long...was only created in mid 89s because suspicions that national officers wouldn't be trustworthy.... what happens is that all the heads of the field offices are national officers...only in Bulgaria and Romania there are national officers. International staff by the office then supervises national heads. IOM doesn't have the same rotational policy. This is also has all sorts of consequences the rotation because to have a rotation system means that you don't have the stability. For e.g. for your family, because many people are hosted in non family duty stations and even if you have a family duty station...for a family with children switching ever four years is difficult. Within the UNHCR there is a unit where there are psychologists etc. to help families cope with this rotation.

Argument about whether to engage in individual cases because according to national law, asylum seekers and refugees are free to contact them...there is a lot of contact through various methods, and so there is this policy because of the capacity.... in Hungary she is the only one to work in Hungary. She has a consultant to work with and Zoltan is working on PI things. If I engage in individual cases, then she doesn't have capacity for all the other priorities. Requirement to select ...good to have direct contact with beneficiaries...but there are so many. It's not really administrative things...it's more advocacy...a lot of meetings, communications, engagements, bodies...she's also sitting in the selection and evaluation band monitoring board of the European refugee fund in Hungary...consists of ministry people and UNHCR and so they select and discuss each and every submission of projects financed by different European funds in Hungary...this is also important then you see what the dynamics are...very time consuming. Always have to balance if it makes sense to sit in this body or to rather to go on a mission

What zoltan does with other people in the unit is that they are now redesigning the website. This isn't very typical that a regional or national office has a website...the way we started is that the big org has a website...but the thing is that there is a lot of initiatives in the region are very unique and best practices beyond even Europe and we produce lots of publications on border monitoring etc. so there is a big demand all over the place (Africa, Latin am) to have access to this e documents so created this regional webs tie and now have country website.... and now working to make it even user friendly

Zoltan Toth-Heinamann

PI is basically trying to change the attitude towards refugees. This is the main aim...try to help out colleagues who are focusing on protection and communicating with authorities and with some partner organizations...NGOs etc.

Trying to assist them to formulate messages that can influence decision-makers...a trek to approach. Have to deal directly with authorities and try to make them change or to act in a manner that we perceive as correct, or optimal. But when this attempt of advocacy with the authorities isn't working then we have to take parallel routes and approach addressing the public which may then have feedback on the authorities, directly or through the media. TO use kind of a favorable debate with think tans, research institutions, opinion shapers, and community/religious leaders.

Lack of resources and man power doesn't allow for all this to have it...some inertia within the organization which is still on public information level which says wow we have a nice conference let's make a nice book...but the book is costly and doesn't make sense to anyone but those at the conference. And the relatives of the authors. Idea without any system or structure to put it out. We implement the campaigns which are shaped and formed in our HQ and try to do something locally in this respect.

Not an issue to have backlash from Hungarian authorities. Authorities in this country can't afford it and they don't have political agenda which would lead them to confrontation with legal issues. With authorities it is protection which is leading the debate.... always try to focus on advocacy. For this we, select a couple of means...the website and to have it exactly ...if you visit the national websites for Hungary, Poland, Slovakia, Romania, Bulgaria, then you will see a website which is very much different from the website from the Geneva office.

If you visit the Czech website, you'll see again a third version of design solutions because they're one stop beyond, because their website was changed over the years...now Hungary is trying visually to implement and to adapt a little bit. English language version for CE is already up for a week and there you can see what else will be there.

Also very keen on having good social media appearance....started a year ago (14 months)...have a colleague in Slovenia working mainly on social media...mostly on facebook and flickr...of course we are doing twitter and also sometimes youtube, but we still don't have enough material for that.

Doing some publications which are meant to be distributed to authorities, decision-makers, or those who are somehow involved in ref protection...e.g. police officers, custom officers, RSD officers.... set of produces in this range.... mainly explaining our role...and then we have general publications explaining basic terminology legal framework for refugee protection

Only training PI does is training for our colleagues...

One more publication is the Being a Refugee booklet.... don't have the opportunity to express their opinion, so there is an annual exercise where teams of experts and authorities (office for immigration and national authority, ministries etc. involved in decision-making that have consequences on ref life...education, social affairs, right to work) from these ministries we also involve their staff to be able to see that the decision made at the table in a ministry has consequences and that they hit real people. The primary targets are the authorities....we basically collect of the refugees on how the system is function and since the authorities are involved in this, it is verified for them. It's not an NGO squeaking t them...what is written is exactly what has been said. In this respect, this is good. We go public with the results as well. This is a public document as well. Some countries it's going on for 6-7 years, now it's in all the seven countries covered from Budapest and there are some discussion on how to continue and improve on the methodology...one of the challenges was always to have it on time. Data collection is done late in the year, sot there's a long turnaround...now it's our task to somehow do it quicker...since so many people are involved, and it is a challenge. Also, perhaps to have little follow-ups...so to have some publication between the two annual reports reflecting on particular cases

Conversation of refugees back to UNHCR

Tried to create a blog space for refugees because they knew the website was changing over...but the views in the blog aren't UNHCR views....but that was to a certain extent a disappointment. There are a lot of challenges....language...which? Not so simple, so there are seven languages to start this....eighth language...English and then refugees entering the system have their own tongues with limited knowledge of other languages. If you look at the population of the UNHCR and the NGOs cooperating.... granted that an English language blog is interesting for everyone, but the majority doesn't speak English.

Another disappointment was that it didn't really take off because we made initial efforts in most of the countries to find refs who wanted to express their thoughts...but to do it regularly is another, to do it in English and to do it in a constructive way. That's again an ethical dilemma whether I have the right to tell the refugee what to write about and call it a blog. On the other hand, when a refugee says that a whole system is terrible, long, not working, it's not helpful in a way. I am happy if they say food is bad because blahblah because that's nice for

me. But these generalized things are pointless. We'll have another try this year and see if a second attempt based on experience is better.

I am also hoping that people who are involved in refugee protection in these countries express their point of view. It's also very personal or not taking into account because of course I'm not suggesting that refugees should take into account the high politics or the financial constraints of the country, but to have the personal feelings of the refugees, and then have explanation on the other side. I'd like to see a blog from a RSD officer who for the 36th time talking to the ref and having problems establishing if their story is true or not.

GLOSSARY OF ABBREVIATIONS

Areas of Law

- IL = International Law
- ILOS = International Law of the Sea
- IML = International Maritime Law
- IRL = International Refugee Law

Relevant Organizations

- ECOSOC = Economic and Social Council
- Excom = UNHCR Executive Committee
- IMO = International Maritime Organization
- IOM = International Organization for Migration
- UN = United Nations
- UNGA = United Nations General Assembly
- UNHCR = United Nations High Commissioner for Refugees
- UNSG = United Nations Secretary General

Legal Instruments

- GC = 1951 Geneva Convention and 1967 Protocol Relating to the Status of Refugees
- SAR = International Convention on Maritime Search and Rescue, 1979
- SOLAS = International Convention on the Safety of Life at Sea
- UNCLOS = United Nations Convention on the Law of the Sea, 1982

Maritime Zones and Responsible States

- CS = Coastal State
- CZ = Contiguous Zone
- FS = Flag State
- HP = Hot Pursuit
- HS = High Seas
- IP = Innocent Passage
- IW = Internal Waters
- TS = Territorial Sea

Miscellaneous Terms

- AS = Asylum Seeker
- CoO = Country of Origin
- HC = High Commissioner
- PoS = Place of Safety
- RaS = Rescue at Sea

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